

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 30TH DAY OF OCTOBER 2015/8TH KARTHIKA, 1937

Cr1.Rev.Pet.No. 1202 of 2003 ()

AGAINST THE JUDGMENT IN CRL.APPEAL 673/2001 of ADDITIONAL SESSIONS
COURT, NORTH PARAVUR DATED 05-02-2003.

AGAINST THE JUDGMENT IN ST 5275/1998 of JUDICIAL FIRST CLASS
MAGISTRATE, NORTH PARAVUR DATED 07-09-2001

REVISION PETITIONER(S)/1ST APPELLANT/1ST ACCUSED:

SASIDHARAN, S/O. SREEDHARAN,
MANAPARAMBIL, NANTHIYATTUKUNNAM,
N. PARUR MANAGING PARTNER,
M/S. LUCKY ELECTRICALS N. PARUR.

BY ADV. SRI.V.A.PRADEEP KUMAR

RESPONDENT(S)/2ND APPELLANT/2ND ACCUSED:

1. STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.
2. THOMAS, S/O. OUSEPH,
VITHAYATHIL HOUSE, AIROOR REPRESENTED BY
POWER OF ATTORNEY HOLDER, FRANCIS XAVIER,
S/O. NICHOLAS, VELLASSERY HOUSE,
MANJUMMEL MURI, PARAVUR TALUM.
3. SALIM, S/O. SREEDHARAN,
MANAPARAMBIL, NANTHIYATTUKUNNAM,
PARUR, MANAGING PARTNER,
M/S.LUCKY ELECTRICALS, N. PARUR.

R1, BY PUBLIC PROSECUTOR SRI. N. SURESH

R2 BY ADV. SRI.DEEPAK JOY.K.

R2 BY ADV. SRI.ALUNKAL GEORGE

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 30-10-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No.1202 of 2003

Dated this the 30th day of October, 2015

ORDER

Revision petitioner, who is the 1st appellant in Crl.Appeal No.673/2001 on the file of Additional Sessions Court, North Paravur, challenges the concurrent conviction u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the N.I. Act). He was 1st accused in S.T.No.5275/1998 of Judicial First Class Magistrate, N. Paravur. The 2nd accused in the above case is the 3rd respondent in this revision petition. Both accused were convicted by the trial Court u/s.138 of the N.I. Act and sentenced to simple imprisonment for three months each u/s.138 of the N.I. Act. Against that, the accused preferred

an appeal, which was dismissed by the appellate Court. Being aggrieved by that, the 1st accused preferred this revision petition.

2. The complainant's case in the trial Court was that the accused borrowed a sum of ₹1,00,000/- from him and in discharge of that debt, the accused issued a cheque for ₹1,53,535/-. When cheque was presented for encashment, it was dishonoured for the reason of funds insufficient. The complainant demanded the amount by giving a notice in writing. Even after receipt of that notice, there was no repayment. In the circumstances, a complaint was filed in the trial Court.

3. During trial, the power attorney holder of the complainant was examined as PW1 and his documents were marked as Exts.P1 to P11. The incriminating circumstances brought out in evidence were denied by the accused, while

questioning them. They examined DW1 and marked Exts.D1 and D2. The trial Court convicted the accused.

4. The learned counsel for the revision petitioner contended that the entire amount was repaid by the revision petitioner in the civil suit and there is a decree to that effect, which was admitted by the 2nd respondent. Now the learned counsel for the revision petitioner submits that the sentence imposed by the trial Court is too harsh and may be modified.

5. The learned Public Prosecutor has no objection in the submission made by the learned counsel for the revision petitioner.

6. According to Section 138 of the N.I. Act, where any cheque drawn by a person on an account maintained by him with a bank for payment of any amount of money to another person from out of that account, for the

discharge in whole or in part of any debt or liability, is returned by the bank, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with a bank, such person shall be deemed to have committed an offence under Section 138 of the Negotiable Instruments Act. This deemed provision is subject to the statutory condition that the cheque has to be presented within the statutory period in which it is drawn or within the period of its validity. Secondly, the payee or holder in due course of the cheque makes a demand for payment of such amount by giving a notice in writing to the drawer of the cheque and non-payment of due amount after receipt of notice by the drawer of the cheque.

7. PW1 deposed that Ext.P2 was issued in discharge of a debt. PW1 is the power of attorney holder and Ext.P1 is the power of attorney. When Ext.P2 was presented for encashment, it was dishonoured for the reason of funds insufficient. Exts.P3 and P4 are the dishonour memos. He demanded the money by giving a lawyer notice in writing. Ext.P8 is the copy of the lawyer notice. Ext.P5 is the copy of O.S.No.4/98. Ext.P6 is the memo issued by the Catholic Syrian bank. Ext.P7 is the memo issued by the SBT, North Paravur. Ext.P9 is the series of postal receipts and Ext.P10 is the series of acknowledgment cards. Ext.P11 is the original of reply notice. A perusal of Exts.P1 to P11 shows that the cheque was dishonoured for the reason of funds insufficient. When cheque is dishonoured for the reason of funds insufficient, a presumption u/s.139 of the NI. Act can be drawn in favour of the holder of the

cheque.

8. A presumption u/s.139 of the N.I. Act is a rebuttable presumption. The principle drawing presumptions has been explained by the Apex Court in Beena v. Muniappan (AIR 2001 SC 2995). Apex Court in three-Judge Bench judgment in Rangappa v. SriMohan [(2010) 11 SCC 441] held as follows:

The presumption mandated by Section 139 includes a presumption that there exists a legally enforceable debt or liability. This is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favour the respondent complainant"

To rebut the presumption, the revision petitioner examined DW1 and marked Exts.D1 and D2. Even though those documents were marked in the trial Court, that evidence is not sufficient and convicted the revision petitioner and other accused, which was upheld by the

appellate Court. There is no illegality in the above finding.

9. The learned counsel appearing for the revision petitioner contended that the amount already paid in the civil suit includes the interest. Therefore, the imprisonment imposed by the trial Court is to be modified. In the circumstances, I modify the sentence as follows:

The revision petitioner and other accused are sentenced to imprisonment till rising of the Court and to pay fine of ₹10,000/- each. The revision petitioner and other accused are directed to surrender in the Judicial First Class Magistrate, N. Paravur forthwith to undergo the modified sentence, failing which the learned Magistrate shall issue non bailable warrant against the accused.

Crl.R.P. is party allowed.

P.D. RAJAN, JUDGE.