IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

Crl.Rev.Pet.No. 2565 of 2003 (B)

AGAINST THE JUDGMENT IN Crl.APPEAL 328/2002 of VTH ADDL.SESSIONS COURT, ERNAKULAM DATED 17-06-2003

AGAINST THE JUDGMENT IN CC 476/1998 of JUDL.M.F.C.-I,ERNAKULAM DATED 25-04-2002

REVISION PETITIONER(S)/APPELANT/ACCUSED:

VARGHESE, S/O. VARKEY,
PROPRIETOR, M/S. SIJI ELECTRICALS,
C.C.24/420, KONTHURUTHY,
THEVARA, KOCHI- 682 013.

BY ADV. SRI.S.SREEKUMAR

RESPONDENT(S)/RESPONDENTS/COMPLAINANT:

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1. AVATAR SINGH,PROPRIETOR,
M/S.KERALA ELECTRICALS,
MULLASSERY CANAL ROAD,
CHITTOOR ROAD, KOCHI-11.

2. STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY ADV. SRI.KPM.SHERIFF
R1 BY ADV. SRI.P.M.KUNJIMOIDEENKUTTY
R2, BY PUBLIC PROSECUTOR SRI. DHANESH MATHEW MANJOORAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 13-11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No.2565 of 2003

Dated this the 13th day of November, 2015

ORDER

Revision petitioner, who is the appellant in Crl.Appeal No.328/2002 on the file of Vth Additional Sessions Judge, Ernakulam, challenges the concurrent conviction u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the N.I. Act). He was the accused in C.C.No.476/1998 of Judicial Magistrate of First Class-I, Ernakulam, he was convicted and sentenced to simple imprisonment for six months and to pay fine of ₹5000/-, in default simple imprisonment for one month. If fine amount is released, ₹3,000/- shall be released to PW1 towards compensation. Against that, he filed the above appeal, which was dismissed by the appellate Court, but modified the sentence. Being aggrieved by that, he preferred this revision petition.

2. The complainant is the 1st respondent in this revision. The complainant's case in the trial Court was that he was the Proprietor of M/s.Kerala Electrical, doing business of electrical appliances and fittings and the accused is an electrical contractor. He purchased goods from the complainant's firm and in discharge of that liability, he issued cheque dated 14.12.1995 drawn on Syndicate Bank, Perumanoor branch. When Ext.P1 was presented for encashment, it was dishonoured for the reason of funds insufficient. Complainant demanded the amount by giving a notice in writing. Even after receipt of notice, there was no payment. In the circumstances, the above complaint was filed in the trial Court.

3. To prove the case, the complainant was examined as PW1 and his documents were marked as Exts.P1 to P6. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. He examined DW1 and DW2 and marked Exts.D1 to D8 in support of his defence. The trial Court convicted him.

4. The learned counsel for the revision petitioner contended that there was no debt or liability existing when Ext.P1 was issued. As per Ext.D1, the goods supplied by the 1st respondent were defective and the revision petitioner is entitled to get damages. When such transaction is there, it is unbelievable that the revision petitioner had issued a cheque to the 1st respondent in discharge of a debt. Ext.P1 was issued as a security for the purpose of making transaction. If that be the position, illegality committed by the trial Court may be rectified by

invoking the revisional jurisdiction.

5. Heard the learned Public Prosecutor. There was no argument from the side of the 1st respondent.

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. The specific case of the 1st respondent in the trial Court was that in discharge of a debt, the revision petitioner issued Ext.P1 cheque. When it was presented for encashment, it was dishonoured for the reason of funds insufficient. Ext.P2 is the dishonour memo. Ext.P3 is the debit memo. Ext.P4 is the copy of the lawyer notice. Ext.P5 is the acknowledgment card. Ext.P6 is the extract from the account of the accused. Analysing the evidence of PW1 and Exts.P1 to P6, it is true that when Ext.P1 was

presented for encashment, it was dishonoured for the reason of funds insufficient. When cheque is dishonoured for the reason stated u/s.138 of the N.I. Act, a presumption u/s.139 of the N.I. Act can be drawn in favour of the holder of the cheque.

8. When complainant proves the existence of a legally enforceable debt, the presumption under Section 139 of the Negotiable Instruments Act starts operating and burden shifts to the accused. Section 139 reads as follows.

> "139. Presumption in favour of the holder - It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability".

The revision petitioner admitted his signature in Ext.P1. To rebut the presumption u/s.139 of the N.I. Act, he examined Dw1, who is the son of the 1st respondent. The revision petitioner was examined as DW2. He also produced Exts.D1 to D4. Ext.D1 is the copy of the judgment in O.S.No.547/1997 of Principal Munsiff, Ernakulam, which was filed for getting damages from the 1st respondent. Ext.D2 is the counter foil of transaction. Ext.D3 is the certified copy of the details of amended contract. Ext.D4 is the certified copy of the telegram. Ext.D5 and Ext.D6 are the correspondence with regard to the contract. Ext.D8 series are the bills 9 in numbers. Even though DW2 contended that Ext.P1 was issued as a security, the evidence of Dw2 itself is not sufficient to rebut the above contention. It is true that PW1 is the business man and the revision petitioner is the Contractor doing electric work. He admitted the supply of goods. The contention that there was difficulty in supplying the goods to INS Dronacharya and documents in connection with the work in INS Dronacharya is not sufficient to rebut the presumption u/s.139 of the N.I. Act. DW1 categorically stated that Ext.P1 was issued in discharge of a debt. If that be the position, the defence contention put forward by the revision petitioner is only to be discarded. Apex Court in **T. Vasanthakumar** v. **Vijayakumari** [(2015) 8 SCC 378] held as follows:

> "Therefore, in the present case since the cheque as well as the signature has been accepted by the accused-respondent, the presumption under Section 139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability. To this effect, the accused has come up with a story that the cheque was given to the complainant long back in 1999 as a security to a loan; the loan was repaid but the complainant did not return the security cheque. According to the accused, it was that very cheque used by the complainant to implicate the accused. However, it may be noted that the cheque was dishonoured because the payment was stopped and not for any other reason. This implies that the accused had knowledge of the cheque being presented to the bank, or else how would the accused have instructed her banker to stop the payment. Thus, the story brought out by the accused is unworthy of credit, apart from being unsupported by any evidence.

The trial Court analysed the evidence and convicted the revision petitioner. The appellate Court confirmed the finding of the trial Court, but modified the sentence to simple imprisonment for three months and to pay compensation of ₹1 lakh. Considering the nature of offence and business transaction, the sentence is modified as follows:

Revision petitioner is sentenced to imprisonment till rising of the Court u/s.138 of the N.I. Act and to pay compensation of ₹1,25,000/- u/s.357(3) Cr.P.C. , in default of payment of compensation, simple imprisonment for three months. If compensation amount is realised, it shall be disbursed to the 1st respondent. If any amount is deposited as compensation by the revision petitioner, it shall be adjusted towards the compensation amount ordered. The revision petitioner is directed to surrender in the Judicial Magistrate of First Class-I, Ernakulam, failing which the learned Magistrate shall issue non bailable warrant against the revision petitioner.

Crl.R.P. is disposed of as above.

P.D. RAJAN, JUDGE.

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