IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 10TH DAY OF JULY 2015/19TH ASHADHA, 1937

Crl.Rev.Pet.No. 668 of 2004 (C)

AGAINST THE JUDGMENT IN CRA 190/2000 of ADDL. SESSIONS COURT (ADHOC)-II, PALAKKAD

AGAINST THE JUDGMENT IN CC 93/1998 of J.M.F.C.- III,PALAKKAD

REVISION PETITIONER(S)/APPELLANT/ACCUSED::

P.J.MANI, S/O. JOHN,
RESIDING AT POOLIMOOD, KULATHUR P.O.,
KURAVILANGAD
MEENACHIL TALUK, KOTTAYAM DISTRICT.

BY ADVS.SRI.V.CHITAMBARESH
SRI.T.C.SURESH MENON
SMT.M.R.VALSA
SRI.SREEKANTH.K.R
SMT.G.GEETHISHA

RESPONDENT(S)/RESPONDENTS/NOT PARTY/COMPLAINANT::
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1. THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

2. M/S. IND-TEX,
HOSIERY INDUSTRY, 9/915-A, KUNNACHI P.O.
ELAPULLY, PALAKKAD-678 622.

R1 BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN
R2 BY ADV. SRI.SAJAN VARGHEESE K.
ADV. SRI.LIJU. M.P

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 10-07-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

STK

P.D. RAJAN, J.

Crl.R.P. No.668 of 2004

Dated this the 10th day of July, 2015

ORDER

The Revision Petitioner is the appellant in Crl. Appeal 190/2000 on the file of the Additional Sessions Judge, Fast Track-II Palakkad for offence punishable under Section 138 of the Negotiable Instruments Act. He was accused in CC 93/98 of the Judicial First Class Magistrate-III, Palakkad and convicted under Section 138 of the N.I. Act by the trial court and sentenced thereunder. Against that, he preferred Criminal Appeal 190/2000 of Additional Sessions Judge, Fast Track-II, Palakkad, which is under challenge herein.

2. The facts necessary for indictment were that, in discharge of a debt of Rs.1,10,000/-, on 3.5.97 the revision petitioner issued Ext.P1 cheque to the second respondent drawn on State Bank of Travancore, Ettumanoor branch. When Ext.P1 was presented for encashment on 4.10.97, it was dishonoured for the reason of funds insufficient. The second respondent issued lawyer notice, after dishonour of the cheque.

There was no repayment. In the circumstance, the above complaint was filed in the trial court. To prove the case, PW1 to PW3 were examined in the trial court. His documentary evidence were marked as Ext.P1 to P10. The incriminating circumstances brought out in evidence were denied by the revision petitioner while questioning him. Ext.D1 and D2 were marked on the side of the accused. The Trial Court convicted the accused and sentenced thereunder, in appeal the findings of the trial court was confirmed and dismissed the appeal.

3. The learned counsel appearing for the revision petitioner contended that second respondent failed to prove that there was a legally enforceable debt towards the respondent. The revision petitioner was a sales representative in first respondent firm, at the time of obtaining job, he gave signed blank cheques to the second respondent and misusing one of the cheque leaves, first respondent foisted a false case. Another case C.C.30/98 was also filed by the first respondent on the same set of facts which was acquitted by

the trial court. In this case the learned magistrate misconstrued Ext.P7 and P8 and concluded that the letters sent by the revision petitioner created legal liability and that itself is sufficient to prove presumption under Section 139 of the Negotiable instrument Act. The concurrent findings of the appellate court was on misreading of the evidence which resulted in miscarriage of justice.

4. The object of conferring revisional power to the High Court is with an aim of the general supervision in order to correct grave miscarriage or failure of justice arising from erroneous or defective orders. While exercising this power, it is justified only to correct grave failure of justice and not merely to rectify every error. The fact that the lower court has taken a wrong view of law or misapprehended the evidence on record cannot be a reason to interfere unless it has resulted in grave justice. When there is miscarriage of justice by misreading of evidence, the revisional power vested with the high court can be invoked. Apex court in

Seethalaprasad and Ors. V. Sreekanth and Anr. 2010 SC 1140, which reads thus:-

> "For the purpose of satisfying the correctness, legality or proprietary of the findings and order of the courts below, this court can call for and examine the records of the courts below and make an opinion whether they have committed any illegality, irregularity while disposing the case, which resulted in miscarriage of justice. A three Judge Bench of Apex Court in **Ayodhya Dube and Others V. Ram Sumer Singh AIR 1981 SC 1415** held as follows;
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> "When the Sessions Judge acquitted the accused by ignoring the probative value of F.I.R. and reliable testimony of eye-witnesses and without considering the material evidence on record and his judgment was full of inconsistencies and consisted of faulty reasoning, the order of the High Court in revision directing retrial by setting aside acquittal would be justified."

Therefore, a misreading of evidence resulted in miscarriage of justice, is a sufficient ground for invoking the revisional jurisdiction.

5. In **Pratap V. State of U.P. 1973 SCC (Crl.) 496,** the apex court held that:

> "The object of conferring revisional power on the High Court is to clothe the highest court in a state with a jurisdiction of general supervision and superintendence in order to correct the grave failure or miscarriage of justice arising from the erroneous or defective orders. The error or a defect may arise from the misconception of law, irregularity of procedure, misreading of evidence, misapprehension or misconception about law or facts, mere perversity or undue hardship of leniency."

Therefore when the judgment was full of inconsistencies and faulty reasoning and resulted in miscarriage of justice, there is legality in interfering and the power of supervision given under the statute can be used in such a situation.

6. According to Section 138 of the Negotiable Instruments 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. 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 within the statutory period on the date of receipt of information from the bank regarding the return of the cheque as unpaid.

7. For ascertaining the illegality and satisfying the correctness and legality of the findings of the court below, I perused the oral evidence of the de facto complainant, who is the second respondent in this revision. PW1, deposed that he was the Manager of the proprietorship firm and his wife is the proprietor. He is

the Power of Attorney Holder of his wife. Ext.P9 is the Power of Attorney. The revision petitioner was a sales representative of this firm. The revision petitioner purchased articles and for the due amount of ₹1,10,000/-, he issued Ext.P1 cheque and on presentation of the cheque for encashment, it was dishonoured for the reason of funds insufficient. Ext.P2 is the dishonour memo. Ext.P3 is the memo issued from the Nedungady Bank. After dishonour of cheque, second respondent issued a notice and Ext.P5 is the copy of the notice. Ext.P6 is the acknowledgement card. Even after receipt of the notice, Ext.P7 and P8 letters issued by the revision petitioner to the second respondent, in which he admitted that another case is pending before the Judicial First Class Magistrate-II, Palakkad.

8. According to Section 139 of the Negotiable Instruments Act, there is a presumption in favour of the holder of the cheque. 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".

When Ext.P1 cheque is dishonoured for the reason of funds insufficient a presumption under Section 139 of the Negotiable Instruments Act would attract in favour of that holder of the cheque. While cross-examination of PW1, he admitted that the revision petitioner was directly conducting business. He also admitted that as per order, customers are also supplied goods from his company. PW1 categorically stated that the revision petitioner collected money from the customers and remited that amount in the second respondent firm. But he admitted that Ext.D1 series was issued from his firm. As an agent, the name of the revision petitioner is noted in Ext.D1 series. As per Ext.D1 series, if customers failed to pay the amount, he can take legal proceedings against those customers. Another case CC 30/98 is pending before the Judicial First Class Magistrate, Palakkad and Ext.D2 is the copy of that case. Even though, the first respondent contended that there was legally enforceable debt, the account books at the time of purchase or distribution were not produced in the trial court to show that he entrusted consumer articles to the revision petitioner and in discharge of that debt, Ext.P1 cheque was issued. Ext.P7 and P8 are documents in which he stated his personal grievances which was also produced in CC 30/98.

9. In the light of the above evidence, I have examined what is the impact of the presumption available under Section 139 of the N.I. Act. Another presumption available under Section 118 of the N.I. Act is that:

> "118. Presumptions as to negotiable instruments. - Until the contrary is proved, the following presumptions shall be made:-
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> a) **of consideration**- that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorced, negotiated or transferred for consideration;"

Both presumptions are rebuttable in nature. The standard of proof necessary is preponderance of probabilities. In this context the decision of **Narayana Menon v. State of Kerala 2006 (3) KL*T 404*** *by the Apex Court* is relevant. It reads thus:

> “Applying the said definitions of 'proved' or 'disproved' to principle behind S.118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon. The standard of proof evidently is pre-ponderance of probabilities. Inference of pre-ponderance of probabilities can be drawn not only from the materials on records but also by reference to the circumstances upon which he relies. It was for the Appellant only to discharge initial onus of proof. He was not necessarily required to disprove the prosecution case. Whether in the given facts and circumstances of a case, the initial burden has been discharged by an

> accused would be a question of fact. It was matter relating to appreciation of evidence. The High Court in its impugned judgment did not point out any error on the part of the appellate court in that behalf. If for the purpose of a civil litigation, the defendant may not adduce any evidence to discharge the initial burden placed on him, a '*fortiori*' even an accused need not enter into the witness box and examine other witnesses in support of his defence. He, it will bear repetition to state, need not disprove the prosecution case in its entirety as has been held by the High Court."

Therefore, the inference of preponderance of probabilities can be drawn not only from the materials on record but also from the circumstances upon which the party relies. In the absence of any documentary evidence, I am of the opinion that first respondent failed to prove the alleged transaction and the presumptions under Section 118 and 139 of the N.I. Act cannot drawn in favour of the holder of the cheque. The courts below failed to appreciate that position and convicted the revision petitioner.

10. Here, the trial court wrongly brushed aside the material evidence as inadmissible, that itself is a good reason to exercise the revisional jurisdiction, for the correction of manifest illegality or miscarriage of justice. Hence, I am of the view that the conviction by the trial court which was upheld by the Additional Sessions Judge, Fast Track-II Palakkad is to be set aside.

In the result, the conviction and sentence passed under Section 138 of the Negotiable Instrument Act is set aside and the revision petitioner is set at liberty.

This revision petition is allowed.

Sd/-
P.D. RAJAN,
JUDGE

STK

//TRUE COPY//

P.A. TO JUDGE