IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

MONDAY, THE 7TH DAY OF SEPTEMBER 2015/16TH BHADRA, 1937

Crl.Rev.Pet.No. 567 of 2006 ( )

AGAINST THE JUDGMENT IN CRL.APPEAL 280/2004 of SESIONS COURT,WAYANAD,KALPETTA DATED 07-12-2005.
AGAINST THE JUDGMENT IN CC 141/2003 of J.M.F.C.-II, SULTHANBATHERY DATED 07-10-2004

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

SADHASIVAN, S/O.MADHAVAN,
THOPPUMKALAYIL HOUSE, MANALVAYAL.P.O, IRULAM
S.BATHERY TALUK.

BY ADVS.SRI.RAJESH NAIR
SRI.BIJOY CHANDRAN

RESPONDENT(S)/RESPONDENTS/STATE AND COMPLAINANT:

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

2. K.C.ANEESH, S/O.CHANDRAN,
KOZHIPURATH HOUSE, IRULAM, IRULAM,
MANALVAYAL POST, SULTHAN BATHERY TALUK.

BY PUBLIC PROSECUTOR SRI. DHANESH MATHEW MANJOORAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 07-09-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl. R.P.No.567 of 2006

Dated this the 7th day of September, 2015

ORDER

The revision petitioner, who was the appellant in Crl.Appeal No.280/2004 of Sessions Court, Wayanad, Kalpetta, challenges the judgment of concurrent conviction u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the N.I. Act). He was convicted in C.C.No.141/2003 of Judicial First Class Magistrate-II, Sulthan Bathery and sentenced to undergo simple imprisonment for a period of three months and to pay compensation of ₹50,000/- to PW1 u/s.357(3) Cr.P.C., in default of payment of compensation, simple imprisonment for one month. Against that, he preferred the above appeal, wherein the conviction was confirmed and the appeal was dismissed.

2. The complainant's case was that the revision petitioner borrowed a sum of ₹50,000/ from him and in discharge of that debt, the revision petitioner issued Ext.P1 cheque dated 27.4.2003. When Ext.P1 was presented for encashment, it was dishonoured for the reason of funds insufficient. He sent a lawyer notice to the revision petitioner and demanded the due amount. There was no repayment from the side of the revision petitioner. In the circumstances, the above complaint was filed in the trial Court.

3. To prove the offence, the complainant was examined as PW1 and his documents were marked Exts.P1 to P5. There was no evidence on the side of the accused. The trial Court, after analysing the evidence, convicted the

accused.

4. The learned counsel appearing for the revision petitioner contended that there was no evidence to prove the debt or liability. When the 2nd respondent fails to prove the legal liability, there is no presumption u/s.139 of the N.I. Act.

5. After filing this revision petition, this Court directed the revision petitioner to issue notice to the 2nd respondent. Notice issued to the 2nd respondent was returned stating that "R2 was not in place and his resident was found locked". After that, this Court again directed to furnish the correct address of the 2nd respondent. Today, the learned counsel appearing for the revision petitioner submitted, even though earnest efforts have been made, he could not trace out the whereabouts of the 2nd respondent. In the light of the above submission, I

heard both sides.

6. The power of the revisional jurisdiction of the High Court in criminal cases is narrower and limited than its appellate power, which is discretionary and it cannot be invoked as of right as in the case of appellate jurisdiction. The object of conferring revisional power to clothe the High Court with a jurisdiction of the general supervision is to correct grave miscarriage or failure of justice arising from erroneous or defective orders. While exercising this power, it is justified only to set right 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 injustice.

7. A close scrutiny of Section 138 of the N.I. Act shows that 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.

8. For satisfying the correctness and legality of the findings of the courts below, I have perused the oral evidence of PW1. The evidence of PW1 shows that Ext.P1 cheque was given in discharge of a debt of ₹50,000/-. 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 copy of lawyer notice. Ext.P4 is the postal receipt and Ext.P5 is postal acknowledgment card. When Ext.P1 was dishonoured for the reasons of funds insufficient, a presumption u/s.139 of the N.I. Act will be attracted in favour of the holder of the cheque. There was no rebuttal evidence from the side of the revision petitioner in the trial Court. The 2nd respondent in the trial Court contended that Ext.P1 was

issued in discharge of a debt. According to Section 118 of the N.I. Act, there is a presumption with regard to the consideration also.

9. 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".

Apex Court in **Anil Hada V. Indian Acrylic Ltd** (AIR 2000 SC 145) held that a rebuttable presumption is created under Section 139 that cheque was issued by the drawer in discharge of any debt or liability owned by him to its holder. The same principle was followed in **Mandvi Co-operative Bank Ltd V. Nimesh B Thakore** (AIR 2010 SC 1402) . In this case, signature in Ext.P1 was admitted by the revision petitioner. In the absence of any rebuttal evidence, the 2nd respondent, who is the holder of the cheque is entitled to get presumption u/s.118 and 139 of the N.I. Act. Both courts were of the opinion that Ext.P1 was issued in discharge of a debt and convicted the revision petitioner. I do not find any illegality in the above findings of the Courts below. Therefore, the conviction passed by the trial Court, which was upheld by the appellate court, is confirmed. However, the sentence imposed by the Courts below needs interference. Hence, I modify the sentence as follows:

10. The revision petitioner is sentenced to

imprisonment till rising of the Court and to pay fine of ₹50,000/- u/s.357(3) Cr.P.C., in default of payment of compensation, simple imprisonment for one month. The revision petitioner is directed to appear in the trial court within 30 days from today to receive the sentence, failing which, Judicial First Class Magistrate-II, Sulthan Bathery shall issue Non-bailable Warrant against the accused.

This Revision Petition is partly allowed.

P.D. RAJAN, JUDGE.

acd