IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 6TH DAY OF NOVEMBER 2015/15TH KARTHIKA, 1937

Crl.Rev.Pet.No. 621 of 2006 ( )

AGAINST THE JUDGMENT IN CRL. APPEAL 219/2004 of ADDL. SESSIONS COURT FAST TRACK(ADHOC)-II, ALAPPUZHA

AGAINST THE JUDGMENT IN CC 373/2002 of J.M.F.C., AMBALAPUZHA

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

MUKUND D. KOTHARI, PROPRIETOR
JALARAM COIR CORPORATION, GUJARATHI STREET
SEA VIEW WARD, ALAPPUZHA.

BY ADV. SRI.A.KRISHNAN

RESPONDENT(S)/RESPONDENTS/RESPONDENTS/COMPLAINANT AND :

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1. PIOUS NORONHA KANNITTAYIL HOUSE,
PURAKKAD, AMABLAPUZHA.

2. THE STAE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA
AT ERBAKULAM.

R2 BY PUBLIC PROSECUTOR SRI. N. SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 06-11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

STK

P.D. RAJAN, J.

Crl.R.P.621 of 2006

Dated this the 6th of November, 2015

ORDER

The revision petitioner, who is the appellant in Crl. Appeal 219/04 on the file of the Addl. Sessions Judge, Fast Track-II, Alappuzha challenges the concurrent conviction under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the 'N.I. Act'). He was accused in C.C.373/02 on the file of the Judicial First Class Magistrate, Alappuzha and convicted for offence punishable under Section 138 of the N.I. Act and sentenced to undergo simple imprisonment for 6 months under Section 138 of N.I. Act and compensation of Rs.90,000/- under Section 357(3) Cr.P.C. Against that, he preferred the above appeal, in which the conviction was confirmed. Being aggrieved by that, he preferred this revision petition.

2. Complainant in the trial court is the first respondent in this revision petition. The complainant's case is that, accused borrowed a sum of Rs.90,000/- from

him in February 2002 and in discharge of that debt, he issued Ext.P1 cheque. When the cheque was presented for encashment, it was dishonoured for the reason of funds insufficient. The complainant demanded the due amount by giving a notice in writing to the accused, which was received by the accused and no repayment thereafter. In the circumstance, a complaint was filed in the trial court.

3. During trial, complainant was examined as PW1 and his documents were marked as Exts.P1 to P7. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. He examined DW1 and produced Ext.D1 to D16. The trial court after sifting and weighing the evidence on record convicted the accused.

4. The learned counsel appearing for the revision petitioner contended that the sentence imposed by the trial court is too harsh, which needs interference.

5. I heard the Public Prosecutor also. Notice to first respondent was dispensed with.

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 N.I. 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 revision petitioner is that,

in discharge of a debt, 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 intimation. Ext.P3 is the dishonour memo. He demanded the due amount by giving a notice in writing. Ext.P4 is the copy of the notice. Ext.P5 is the postal receipt. Ext.P6 is the acknowledgment card. Ext.P7 is the extract of the ledger. When cheque is dishonoured for the reason stated under Section 138 of the N.I. Act, a presumption under Section 139 of the N.I. Act can be drawn in favour of the holder of the cheque.

8. When complainant proves that the cheque was received for the reasons stated under Section 138 of the N.I. Act, a presumption under Section 139 of the N.I. Act starts operating and burden shifts to 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".

In **Narayana Menon v. State of Kerala 2006 (3) KLT 404 (SC)** it is held that, the presumption is rebuttable. Revision petitioner examined DW1 and produced Ext.D1 to D16 to rebut the presumption under Section 139 of the N.I. Act. DW1 contended that he had no transaction with the first respondent. He received 3 lawyer notices in the name of Jalaram Coir Corporation and in his name. Even though, such a contention was raised in the trial court, it was not sufficient to rebut the presumption under Section 139 of the N.I. Act. In the circumstance, he was convicted under Section 138 of the N.I. Act, which was upheld by the appellate court. I find no illegality in the above findings. Therefore, the conviction passed by the trial court is confirmed.

9. The learned counsel appearing for the revision petitioner contended that the sentence imposed by the courts below is too harsh, therefore interference is necessary. **In M/s.Target Overseas Exports Pvt. Ltd. V. A.M. Iqbal (2005 Cri.L.J.1931)** this Court held that,

sentence to undergo imprisonment till the rising of the court and compensation under Section 357(3) Cr.P.C. is sufficient to meet the ends of justice. Considering the nature of transaction, I am of the view that the sentence imposed by the trial court can be modified as follows. The revision petitioner is sentenced to imprisonment till rising of court under Section 138 of the N.I. Act and he is also sentenced to pay compensation of Rs.90,000/- under Section 357(3) Cr.P.C., in default, simple imprisonment for 3 months. If compensation amount is realized, it shall be disbursed to the first respondent. The revision petitioner is directed to surrender in the trial court to undergo the modified sentence, failing which, the trial Magistrate shall issue non-bailable warrant.

This revision petition is partly allowed.

Sd/-
P.D. RAJAN,
JUDGE

STK

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P.A. TO JUDGE