IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 9TH DAY OF SEPTEMBER 2015/18TH BHADRA, 1937

Crl.Rev.Pet.No. 703 of 2006 ( )

AGAINST THE JUDGMENT IN Crl.APPEAL NO. 473/2005 of SESSIONS COURT, ERNAKULAM DATED 11-11-2005
AGAINST THE JUDGMENT IN CC 150/2001 of JUDL.M.F.C.-I,ERNAKULAM DATED 07-05-2005

REVISION PETITIONER(S)/APPELLANT/ACCUSED::

SIJI VARGHESE, PALLIPARAMBIL HOUSE,
MATHA NAGAR, ERNAKULAM, KOCHI.

BY ADVS.SRI.T.I.DANIEL
SRI.DILIP MOHAN

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

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1. **M/S.KALLEL AUTO FINANCE**
   NORTH JANATHA ROAD, PALARIVATTOM.

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

R2 BY PUBLIC PROSECUTOR SRI. N. SURESH

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

acd

P.D. RAJAN, J.

Crl. R.P.No.703 of 2006

Dated this the 9th day of September, 2015

ORDER

The revision petitioner, who is the appellant in Crl.Appeal No.473/2005 on the file of Sessions Court, Ernakulam, 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.150/2001 of Judicial First Class Magistrate-I, Ernakulam and sentenced to simple imprisonment for one month and to pay a sum of ₹28,730/- u/s.357(3) Cr.P.C., in default simple imprisonment for three months which was modified in the appeal as imprisonment till rising of the Court and compensation of ₹28,730/- u/s.357(3) Cr.P.C., in default simple imprisonment for three months. Being aggrieved by that judgment, the revision petitioner has approached this Court with this revision petition.

2. The defacto complainant's case in the trial Court was that it is a partnership firm represented by its Managing Partner. The revision petitioner availed financial assistance from the complainant firm on the basis of a hire purchase agreement in respect of his autorickshaw bearing No.KL-7/F 9271. On the basis of that hire purchase agreement, the revision petitioner availed ₹14,365/- from the complainant with an undertaking to repay the hire amount on monthly instalment. The revision petitioner defaulted the instalments, thereby the complainant demanded due amount, at that time, he issued Ext.P2 cheque dated 20.9.2000 for ₹14,365/-. When it was presented for encahsment, it was dishonoured for the

reason of funds insufficient. The complainant/1st respondent demanded the amount by giving a notice in writing. In spite of the notice, there was no repayment. In the above circumstances, the above complaint was filed.

3. During trial, the authorised officer of the complainant was examined as PW1. Exts.P1 to P8 were marked as documentary evidence. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. DW1 and DW2 were examined on the side of the revision petitioner and Ext.D1 was marked as documentary evidence. The trial Court, after analysing the evidence, convicted the accused.

4. After filing this revision petitioner, this Court directed the revision petitioner to take steps to issue notice to R1. No steps have been taken by the revision petitioner so far. In the circumstances, I have heard the

learned Public Prosecutor and the learned counsel Sri.Kurian Joseph appearing for the 1st respondent.

4. 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. 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.

5. A reading 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.

6. The evidence of PW1 shows that Ext.P2 cheque was issued in discharge of a debt. When it was presented for encashment, it was dishonoured for the reason of funds insufficient. Ext.P4 is the copy of the lawyer notice. Ext.P5 is the postal receipt. Ext.P6 is the returned cover. Ext.P7 is the intimation. Ext.P8 is the power of attorney. Ext.P1 is the authorisation. Analysing the evidence of PW1, it is clear that when Ext.P2 cheque was presented for encashment, it was dishonoured for the reason of funds insufficient. PW1 deposed that Ext.P2 cheque was issued by the revision petitioner for discharging the liability towards the complainant. 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.

7. 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 principle drawing presumption has been explained by the Apex Court in **Hiten P. Dalal** v. **Bratindranath Banerjee** (AIR 2001 SC 3879], **Beena** v. **Muniappan** (AIR 2001 SC 2995) and **Narayana Menon** v. **State of Kerala** [2006 (3) KLT 404 (SC)], it is clear that the initial burden is upon the revision petitioner to rebut that presumption. The revision petitioner admitted his signature in Ext.P2 cheque. When signature is admitted, presumption is in favour of the holder of the cheque with regard to consideration and cheque was issued in discharge of a debt as stated u/s.139 of the N.I.Act. To rebut that presumption, DW1 and DW2 were examined in the trial Court. Even though DW1 and DW2 were examined, the trial Court and the appellate Court were of the view that their evidence is not sufficient to rebut the presumption u/s.139 of the N.I. Act. Therefore, the Court below convicted the revision petitioner. I do not find any illegality in the above judgment. The cheque amount was only ₹14,365/-, but the compensation ordered by the trial Court is ₹28,730/-. PW1 himself admitted that debt was only ₹14,365/-. While invoking the revisional jurisdiction, this Court has the power to rectify any illegality. Accordingly, the conviction passed by the Court below is confirmed. Since the debt is only for ₹14,365/-, the sentence portion is modified as follows:

The revision petitioner is sentenced to imprisonment till rising of the Court and to pay ₹14,365/- as compensation u/s.357(3) Cr.P.C., in default of payment of compensation, simple imprisonment for two months. The revision petitioner is directed to appear before trial court within 30 days from today, failing which, Judicial First Class Magistrate-I, Ernakulam shall issue Non-bailable Warrant against the revision petitioner.

The Revision Petition is partly allowed.

P.D. RAJAN, JUDGE.

acd