

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

MONDAY, THE 12TH DAY OF OCTOBER 2015/20TH ASWINA, 1937

Crl.Rev.Pet.No. 399 of 2005 (D)

AGAINST THE JUDGMENT IN CRA 380/2003 of SESSIONS COURT, KOZHIKODE

AGAINST THE JUDGMENT IN CC 169/2000 of J.F.M.C.,KUNNAMANGALAM

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

**M.PRABHAKARAN NAIR,
MANATHANATH HOUSE, PERUVAYAL,
KOZHIKODE TALUK.**

**BY ADVS.SRI.P.S.SREEDHARAN PILLAI
SRI.K.B.SAJEESH
SRI.P.GOPINATH
SRI.C.S.SUNIL
SRI.P.R.SREEJITH**

RESPONDENT(S)/RESPONDENTS/COMPLAINANTS:

**1. P.SUBRAMANIAN,
S/O. KRISHNAN NAMBOOTHIRI, PULPARAMBIL HOUSE,
P.O.CHEROOPPA, MAVOOR.**

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

R1 BY PUBLIC PROSECUTOR SRI. N. SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 12-10-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

STK

P.D. RAJAN, J.

Crl.R.P.399 of 2005

Dated this the 12th of October, 2015

ORDER

The Revision petitioner, who is the appellant in Criminal Appeal 380/2003 on the file of Sessions Court, Kozhikode challenges the concurrent findings of conviction under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the 'Act'. He was accused in C.C.169/2000 of Judicial First Class Magistrate, Kunnamangalam under Section 138 of the Negotiable Instruments Act and he was sentenced to simple imprisonment for 6 months and to pay compensation of Rs.35,000/- under Section 357(3) Cr.P.C., in default of payment of compensation, simple imprisonment for two months.

2. The complainant's case in the trial court is that, the accused borrowed a sum of Rs.45,000/- from the complainant and in discharge of that debt, he issued Ext.P1 cheque. When it was presented for encashment, it was dishonoured for the reason of funds insufficient.

Complainant demanded the due amount by issuing a lawyer notice to the accused. Even after receipt of that notice, there was no repayment. In the circumstance, he filed a complaint in the trial court.

3. To prove the allegation, complainant examined PW1 and PW2 and marked Exts.P1 to P6. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. His reply notice was marked as Ext.D1. The trial court after analyzing the evidence, convicted the accused. Against that he preferred appeal, in which the sentence was modified by the appellate court. Being aggrieved by that, he preferred this revision petition.

4. The learned counsel appearing for revision petitioner submitted that the sentence imposed by the trial court and appellate court was too harsh, hence modify the sentence. The Public Prosecutor has no objection with regard to that argument.

5. 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. 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. PW1, who is the complainant deposed that, Ext.P1 was issued in discharge of a debt. When it was presented

for encashment, it was dishonoured for the reason of funds insufficient. Ext.P2 is the dishonour memo. He demanded the money by issuing a lawyer notice. Ext.P3 is the copy of the lawyer notice. Ext.P4 is the postal receipt. Ext.P5 is the acknowledgment card and Ext.P6 is the extract of the ledger. PW2 is the Secretary of Peruvayal Service Co-operative Bank. He deposed that when Ext.P1 was presented for encasement, it was dishonoured for the reason of funds insufficient. Analysing the evidence of PW1 and PW2 and Exts.P1 to P6, it is clear 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 under Section 138, a presumption is available under Section 139 of the Negotiable Instruments Act.

7. When complainant proves that, cheque was received for the reasons stated under Section 138 of the N.I. Act, 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 Apex Court in Mandvi Co-operative Bank Ltd. V. Nimesh B.Thakore, AIR 2010 SC 1402 held that, a rebuttal presumption is created under Section 139 that cheque was issued by the drawer in discharge of any debt or liability owed by him to its owner. Though it is the responsibility of the revision petitioner to rebut the presumption. In the absence of any rebuttal evidence, the trial court convicted the accused and which was also confirmed by the appellate court. I find no illegality in the findings of the court below. In the circumstance, the conviction under Section 138 of the Negotiable Instruments Act is confirmed.

8. The appellate court sentenced the revision

petitioner to simple imprisonment for one month and directed to pay compensation of Rs.35,000/-, which needs interference. Considering the nature of offence and character of the offender, I modify the sentence as follows.

Revision petitioner is sentenced to imprisonment till rising of court and pay a compensation of Rs.35,000/- under Section 357(3) Cr.P.C., in default of payment of compensation, simple imprisonment for 3 months. If the 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 learned Magistrate is directed to issue Non-bailable Warrant. This revision petition is disposed of as sentence modified.

STK

//TRUE COPY//

P.A. TO JUDGE

Sd/-
P.D. RAJAN,
JUDGE