

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. 3233 of 2003 ()

AGAINST THE JUDGMENT IN CRA 5/2002 of SESSIONS COURT, MANJERI

AGAINST THE JUDGMENT IN ST 1776/1996 of J.M.F.C.-I, PERINTHALMANNA

REVISION PETITIONER(S):

**KUNHIMOIDEEN,
S/O.MUHAMMED,
THURUPPADAN HOUSE,
KUMARAMPUTHUR AMSOM DESOM,
PALLIKKUNNU,
MANNARKKAD TALUK.**

**BY ADVS.SRI.BABU S. NAIR
SMT.SMITHA BABU
SMT.SWAPNA HASSAN**

RESPONDENT(S):

**1. HAMZA,
S/O.KOYA, KOORI HOUSE,
THAZHEKKODE AMSON DESOM,
PERINTHALMANNA.**

**2. THE STATE OF KERALA REPRESENTED BY
THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM, COCHIN-31.**

R2 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:

STK

P.D. RAJAN, J.

Crl.R.P.3233 of 2003

Dated this the 7rd day of September, 2015

ORDER

Revision petitioner is the appellant in Crl. Appeal 5/2002 on the file of Sessions Judge, Manjeri challenges the judgment of concurrent findings of conviction under Section 138 of Negotiable Instruments Act (hereinafter referred to as 'Act'). He was accused in S.T.1776/96 of the First Class Judicial Magistrate-1, Perinthalmanna, in which he was convicted and sentenced to undergo imprisonment for 6 months under Section 138 of N.I. Act. Against that he preferred the above appeal, where the conviction was confirmed and sentence was modified as simple imprisonment for one month. Being aggrieved by that, accused preferred this revision.

2. The facts necessary for indictment in the trial court was that, in discharge of a debt, revision petitioner issued a cheque for Rs.25,000/-. When it was presented for encashment, it was dishonoured for the reason 'funds insufficient'. The first respondent who was the

complainant demanded the amount by issuing a notice in writing. Even after receipt of notice, there was no repayment. In the circumstance, the above complaint was filed in the trial court.

3. During trial, complainant was examined as PW1 and his documents were marked as Exts.P1 to P4. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. He examined DW1. The trial court convicted the accused.

4. After filing this revision petition this court directed the revision petitioner to give notice to first respondent. Accordingly, notice returned stating that first respondent is no more. This court directed to implead the legal representatives of first respondent. Even after earnest efforts, petitioner could not implead the legal heirs. In the circumstance, I heard the counsel appearing for the revision petitioner and the Public Prosecutor.

5. The revisional jurisdiction is supervisory jurisdiction to find out the illegality, irregularity in the order or sentence or proceedings of the Court below. The

object of conferring revisional power to the High Court 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 miscarriage of justice.

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. 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. PW1 who is the de-facto complainant deposed that Ext.P1 cheque was issued in discharge of a debt. When Ext.P1 was presented for encashment, it was dishonoured for 'funds insufficient' Ext.P2 is the dishonour memo. When it was dishonoured, he demanded the amount by giving a notice in writing. Ext.P3 series are postal receipt and acknowledgment card. Ext.P4 is the extract of ledger. A perusal of Ext.P1 to P4 shows that when Ext.P1 was presented for encashment, it was dishonoured for the reason of funds insufficient. When cheque was dishonoured for the reason of funds

insufficient, a statutory presumption under Section 139 of the Negotiable instruments 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, 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”.

A three Judge bench of the Apex Court in **Rangappa V. Sri Mohan (2010(11) SCC 441)** held as follows:-

“The presumption mandated by Section 139 includes a presumption and there exists a legally enforceable debt or liability. This is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the respondent complainant”.

Therefore, in the present case since the cheque as well as the signature has been accepted by the accused, the presumption under Section 139 would operate. Thus, the burden was on the accused to rebut the presumption of the existence of any legally recoverable debt or liability.

9. To rebut the presumption under Section 139 of N.I. Act, revision petitioner examined DW1 who deposed that PW1 filed a complaint before the Mannarkkad Police Station and Ext.P1 cheque was forcibly obtained by the police. Even though such a contention was raised, the evidence of DW1 is not sufficient to rebut the presumption under Section 139 of the N.I. Act. Ext.P1 was signed by the revision petitioner. In the circumstance, the trial court and appellate court observed that the evidence of DW1 is not sufficient to rebut the presumption under Section 139 of the N.I. Act and convicted the revision petitioner. I find no illegality in the above findings of the trial court and appellate court.

10. The learned counsel appearing for the revision petitioner submitted that the sentence imposed by the

trial court is too harsh. I agreed to the argument put forwarded by the revision petitioner. In the circumstance, the revision petitioner is sentenced to imprisonment till rising of court and pay a compensation of Rs.25,000/- in default of payment of fine, simple imprisonment for 2 months. The revision petitioner submitted that he deposited Rs.15,000/- in trial court and that amount has to be adjusted towards the cheque amount. Considering this submission, petitioner is directed to deposit the balance amount of Rs.10,000/- within 30 days from today on such deposit the amount of Rs.25,000/- shall be disbursed to the complainant. The revision petitioner is directed to surrender before trial court within 30 days from today to undergo the sentence, failing which, Judicial First Class Magistrate-I, Perinthalmanna shall issue Non-bailable Warrant against the accused.

The revision petition is partly allowed.

STK

Sd/-
P.D. RAJAN,
JUDGE

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P.A. TO JUDGE