IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 30TH DAY OF OCTOBER 2015/8TH KARTHIKA, 1937

Crl.Rev.Pet.No. 3425 of 2003 ( )

AGAINST THE JUDGMENT IN Crl.APPEAL 336/2001 of II ADDL. SESSIONS JUDGE,PALAKKAD DATED 06-11-2003

AGAINST THE JUDGMENT IN ST 26/1999 of CHIEF JUDICIAL MAGISTRATE, PALAKKAD DATED 23-07-2001

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

MUHAMMED SHAFI, PROPRIETOR,
PALAKKAD CEMENT MAHAL,
CHANDRA NAGAR, PALAKKAD.

BY ADVS.SRI.SAJAN VARGHEESE K.
SRI.LIJU. M.P

RESPONDENT(S)/RESPONDENT/COMPLAINANT:
----

1. M/S. NATIONAL CEMENT CORPORATION, DOOR NO.6/595, SAFA BUILDING, PIRIVUSALA, KODUMBU PANCHAYAT, PALAKKAD REP. BY THE SALES ASST. SRI. M.A. ANVAR.

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

BY PUBLIC PROSECUTOR SRI. N. SURESH.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 30-10-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No.3425 of 2003

Dated this the 30th day of October, 2015

ORDER

Revision petitioner, who is the appellant in Crl.Appeal No.336/2001 on the file of II Additional Sessions Court, Palakkad, challenges the concurrent conviction u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the N.I. Act). He was the accused in S.T.No.26/1999 on the file of Chief Judicial Magistrate, Palakkad. He was convicted and sentenced to simple imprisonment for three months u/s.138 of the N.I. Act and to pay a compensation of ₹29,000/- u/s.357(3) Cr.P.C. to the complainant. Against that, he preferred an appeal, in which the conviction was confirmed and the sentence was modified. Being aggrieved by that, he preferred this revision petition.

2. The 1st respondent in this revision petition is the complainant in the trial Court. The complainant's case in the trial Court was that the complainant is a partnership firm carrying the business of cement. The complainant supplied the cement on different dates to the accused, total worth ₹57,400/- and in discharge of that debt, the accused issued two cheques for ₹38,000/- and ₹8,400/-. When the cheques were presented for encashment, those cheques were dishonoured for the reason of funds insufficient. The complainant demanded the amount by giving a notice in writing to the accused. Even after receipt of that notice, there was no payment. In the circumstances, a complaint was filed in the trial Court.

3. During trial, the power of attorney holder of the complainant was examined as PW1. His documents were

marked as Exts.P1 to P13. The incriminating circumstances brought out in evidence were denied by the accused, while questioning him. He did not adduce any defence evidence. The trial Court convicted him.

4. The learned counsel appearing for the revision petitioner contended that there is no proper notice to the revision petitioner and therefore leniency may be shown in sentence.

5. Heard the learned Public Prosecutor also.

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 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 power of attorney holder, deposed that Exts.P6 and P7 are the cheques issued by the accused to the defacto complainant. When those cheques

were presented for encashment, they were dishonoured for the reason of funds insufficient. Exts.P8 and P9 are the dishonour memos. Ext.P1 is the extract of the ledger. PW1 also produced Exts.P3 to P5, credit bills. The 1st respondent issued a lawyer notice. Ext.P10 is the copy of the lawyer notice. Ext.P11 is the acknowledgment card. Ext.P12 is the reply notice. Ext.P13 series are the copies of cash receipts. It is true that PW1 was authorised as per Ext.P2 power of attorney. He has knowledge with regard to the averment in the complaint. He categorically stated that Exts.P6 and P7 were issued in discharge of a debt and when they were presented for encashment, dishonoured for the reason of funds insufficient. When cheque is dishonoured for the reason stated u/s.138 of the N.I. Act, a presumption u/s.139 of the N.I. Act can be drawn in favour of the holder of the cheque. Presumption u/s.139 of the N.I. Act is a rebuttable presumption.

8. Apex Court in **T. Vasanthakumar** v. **Vijayakumari** [(2015) 8 *SCC* 378] held as follows:

> "Therefore, in the present case since the cheque as well as the signature has been accepted by the accused-respondent, the presumption under Section 139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability. To this effect, the accused has come up with a story that the cheque was given to the complainant long back in 1999 as a security to a loan; the loan was repaid but the complainant did not return the security cheque. According to the accused, it was that very cheque used by the complainant to implicate the accused. However, it may be noted that the cheque was dishonoured because the payment was stopped and not for any other reason. This implies that the accused had knowledge of the cheque being presented to the bank, or else how would the accused have instructed her banker to stop the payment. Thus, the story brought out by the accused is unworthy of credit, apart from being unsupported by any evidence.

No evidence has been adduced by the revision petitioner to rebut the presumption u/s.139 of the N.I.Act. Even though he contended that there is no proper notice, from

Ext.P12 reply notice itself is clear that he received proper notice. Therefore, that contention with regard to the non-compliance of Section 138(b) of the N.I. Act is discarded. The trial Court drawn a presumption u/s.139 of the N.I. Act, which was upheld by the appellate Court. I do not find any illegality in the above finding of the court below and accordingly, the conviction u/s.138 of the N.I. Act is confirmed.

9. The appellate Court modified the sentence and observed that compensation of ₹20,000/- u/s.357(3) Cr.P.C. to the complainant is sufficient to meet the ends of justice together with direction to undergo simple imprisonment for a period of forty five days. While imposing the sentence by the trial Court, no reasons are stated for granting compensation of ₹29,000/- since the due amount is more than that. The sentence imposed by

the appellate Court is vague, which needs clarification, therefore, I modify the sentence as follows:

The revision petitioner is sentenced to imprisonment till rising of the Court and directed to pay compensation of ₹46,400/- as claimed by the 1st respondent as per Exts.P6 and P7 cheques. He is directed to surrender in the chief Judicial Magistrate Court, Palakkad forthwith to undergo the modified sentence, failing which the Chief Judicial Magistrate shall issue non bailable warrant against the revision petitioner.

P.D. RAJAN, JUDGE.

acd