IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937

Crl.Rev.Pet.No. 1213 of 2006 ( )

AGAINST THE JUDGMENT IN CRL. APPEAL 138/2002 of ADDITIONAL SESSIONS COURT (ADHOC-I), PATHANAMTHITTA

AGAINST THE JUDGMENT IN CC 320/1998 of J.M.F.C.,THIRUVALLA

REVISION PETITIONER(S)/APPELLANT/ACCUSED.:

T.A.BASHEER, THAZHATHEVEETTIL,
KUTTAPPUZHA, THIRUVALLA.

BY ADV. SRI.P.HARIDAS

RESPONDENT(S)/COMPLAINANT.:

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

2. GEORGE VARKEY, SANKARAMANGALAM,
PALIEKKARA, THIRUVALLA.

R1 BY PUBLIC PROSECUTOR SRI. N. SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 18-11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

STK

P.D. RAJAN, J.

Crl.R.P.1213 of 2006

Dated this the 18th of November, 2015

ORDER

Revision petitioner, who is the appellant in Crl. Appeal 138/2002 on the file of the Addl. Sessions Judge, Adhoc-1, Pathanamthitta challenges the conviction under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'N.I. Act'). He was accused in C.C.320/98 on the file of the Judicial First Class Magistrate Court, Thiruvalla for offence punishable under Section 138 of the N.I. Act. The accused was convicted and sentenced to imprisonment for 6 months and fine of Rs.5000/-, in default, to undergo simple imprisonment for 3 months and Rs.50,000/- as compensation. Against that he preferred the above appeal in which sentence was modified to imprisonment till rising of court and to pay compensation of Rs.4,00,000/-, in default, simple imprisonment for 4 months. Being aggrieved by that he preferred this revision petition.

2. The second respondent in this revision petition is the complainant in the trial court. The complainant's case in the trial court is that, the accused borrowed a sum of Rs.2,50,000/- from him and in discharge of that liability he issued a cheque drawn on State Bank of Travancore, M.G.M. High School branch, Thiruvalla. 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. The notice was returned to the sender without accepting it. Even after that notice, there was no repayment. In the circumstance, a complaint was filed in the trial court.

3. During trial, complainant was examined as PW1 and marked Exts. P1 to P8 as documentary evidence. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. He examined DW1 and marked Ext.D1 to D3. 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 Ext.P1 was issued as a security in another financial transaction and there was no debt or liability existing between revision petitioner and first respondent. The evidence in Ext.D1 to D3 were not properly considered by the trial court. Hence revisional jurisdiction is to be invoked to rectify that error.

5. The notice sent to second respondent was returned stating that second respondent is in Bangalore and present address is not available. Hence, notice to second respondent is dispensed with. I heard the learned Public Prosecutor appearing for the first respondent.

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. To prove the allegation, complainant was examined as PW1. The evidence of PW1 shows 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. Ext.P4 is the postal receipt. Ext.P5 is the returned cover. Ext.P6 is the copy of the ledger. Ext.P7 is the returned register. Ext.P8 is the returned statement. A perusal of Ext.P2 shows that when Ext.P1 was presented for encashment, it was dishonoured for the reason of

funds insufficient. When cheque is dishonoured for the reason of funds insufficient, 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, the presumption under Section 139 of the N.I. 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 **Beena v. Muniappan (AIR 2001 SC 2995) and Narayana Menon v. State of Kerala 2006 (3) KLT 404 (SC)** it is held that, presumption under Section of 139 of the N.I. Act is rebuttable. Revision petitioner examined DW1 and marked Exts.D1, D2 and D3. Ext.D1 is the copy of the complaint. Ext.D2 is the compromise petition and Ext.D3 is the copy of execution petition. Even though, Exts.D1 to D3 were marked, no evidence has been adduced by the revision petitioner to show that Ext.P1 was issued as a security. In the absence of such rebuttal evidence, trial court rejected the claim of the petitioner. The trial court convicted the revision petitioner and appellate court confirmed the conviction and modified the sentence. I find no illegality in the findings of the courts below.

9. The appellate court modified the sentence to imprisonment till rising of court and to pay compensation of Rs.4,00,000/-under section 357(3) Cr.P.C. The learned counsel appearing for the revision petitioner contended that the sentence imposed by the appellate court is too harsh and hence needs modification. Considering the the nature of transaction, the sentence is modified as follows;

The Revision petitioner is sentenced to imprisonment till rising of court and to pay compensation of Rs.2,50,000/-under section 357(3) Cr.P.C., in default, simple imprisonment for 3 months. 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 forthwith. He shall pay the amount within two months from today. This revision petition is disposed of accordingly.

Sd/-
P.D. RAJAN,
JUDGE

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P.A. TO JUDGE