IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

SATURDAY, THE 21ST DAY OF NOVEMBER 2015/30TH KARTHIKA, 1937

Crl.Rev.Pet.No. 957 of 2005 ( )

---

AGAINST THE JUDGMENT IN Crl.Appeal 636/2003 of ADDL.SESSIONS JUDGE, N.PARAVUR DATED 03-01-2005

AGAINST THE JUDGMENT IN CC 724/2000 of JUDICIAL FIRST CLASS MAGISTRATE COURT-II, ALUVA DATED 12-06-2003

REVISION PETITIONER(S)/APPELLANT/ACCUSED.:

---

SHAJI VARGHESE, S/O.VARGHESE,
KANICHAI HOUSE, VAINTHALA, CHALAKKUDY.

BY ADV. SRI.GEORGE VARGHESE NARAYANPARAMBIL

RESPONDENT(S)/RESPONDENTS/COMPLAINANT.:

---

1. AHAMED KUNJU, S/O.MUHAMMED,
   KESAVATHUPARAMBIL, VATTEKUNNAM, EDAPPALLY NORTH
   P.O. ERNAKULAM.

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

R LEGAL AID BY ADV. SMT.BINDU A @ BINDU SREEKUMAR
BY PUBLIC PROSECUTOR SRI. N. SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 21-11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

**P.D. RAJAN, J.**

-------------------------------------------

Crl. R.P.No.957 of 2005

---------------------------------------------

Dated this the 21st day of November, 2015

**ORDER**

Revision petitioner was accused in C.C.No.724/2000 of Judicial First Class Magistrate Court-II, Aluva for having committed an offence punishable u/s.138 of the N.I. Act (hereinafter referred to as the N.I. Act). The complainant is the 1st respondent in this revision petition. The complainant's case in the trial Court was that in discharge of a debt, the accused issued cheque for ₹50,000/- drawn on State Bank of Travancore, Nedumkandom branch and when it was presented for collection, it was dishonoured for the reason of funds insufficient. The complainant demanded the amount by giving a notice in writing, but there was no payment. In the circumstances, he filed the above complainant. To prove the offence, the complainant was examined as PW1 and marked Exts.P1 to P7. The incriminating circumstances brought out in evidence were denied by the accused, while questioning him. He examined DW1 and DW2. The trial Court convicted the accused and sentenced to simple imprisonment for six months and to pay compensation of ₹50,000/-, in default of payment of compensation, simple imprisonment for two months. Against that, he filed Crl.Appeal No.636/2003 on the file of Additional Sessions Court, N. Paravur, which was dismissed by the appellate Court. Being aggrieved by that, he preferred this revision petition.

2.. After filing this revision petition, there was no representation for the revision petitioner and no steps were taken against the 1st respondent. In the circumstances, I appointed Adv. Bindu Sreekumar as counsel to provide legal aid to the revision petitioner. She is also not present on the date of hearing. In the circumstances, I have perused the revision petition in which it is contended that the conviction and sentence passed by the Court below are against law, facts and evidence of the case. The plea of discharge was not considered by the lower Court and therefore no presumption can be drawn in this case. Heard the learned Public Prosecutor.

3. 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.

4. 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 account closed. Exts.P2 and P3 are the dishonour memos. He demanded the money by giving a lawyer notice. Ext.P4 is

the copy of the lawyer notice. Ext.P5 is the postal receipt and Ext.P6 is the acknowledgment card. Ext.P7 is the extract of the ledger. Analysing the evidence of PW1, it is true that when Ext.P1 was presented for encashment, it was dishonoured for the reason of account closed. Apex Court in **Japahari** v. **Priya** [1993(2) KLT 141] held that closing of the account is one of the mode by which the drawer can render his account inadequate to honour the cheque issued by him. Apex Court in **G. Venkita Ramai** v. **Sillakollu Venkiteswaralu** [ 1999 (97) Com.Case **13**] held that an offence in terms of Section 138 of the N.I. Act is committed even if the cheque is returned on the ground of account closed. A perusal of Ext.P7, it is clear that there was no sufficient fund at the time of closing the account also.

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. 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 presumptions has been explained by the Apex Court in **Beena** v. **Muniappan** (AIR 2001 SC 2995). But, the evidence of DW1 and DW2 is not sufficient to rebut such presumption, hence the trial Court convicted the accused and sentenced thereunder. To rebut the presumption, the accused was examined as DW1. His case is that subsequently after the issuance of cheque, he had paid ₹35,000/- towards the amount due under the cheque. Therefore, there is no consideration for Ext.P1 cheque. DW2, who is the friend of DW1 supported the case put forward by DW1. Even though DW1 and DW2 contended that a sum of ₹35,000/- has been paid to the complainant towards the amount under Ext.P1 cheque, no documentary evidence has been adduced by them to substantiate that contention. No endorsement was made in Ext.P1 with regard to that aspect. While the accused was questioning u/s.313 Cr.P.C., he admitted that the entire amount accepted in connection with the sale agreement has been paid. In the absence of such documentary evidence, the trial Court and the appellate Court rejected the defence version and drawn presumption u/s.139 of the N.I. Act. I do not find any illegality in the above conviction and therefore, there is no merit in this revision petition and it is dismissed accordingly.

**P.D. RAJAN, JUDGE.**

acd