

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. 1018 of 2005 ()

**AGAINST THE JUDGMENT IN CRL. APPEAL 425/2004 of VI ADDL. SESSIONS COURT,
ERNAKULAM**

AGAINST THE JUDGMENT IN CC 120/2000 of JUDL.M.F.C.- I, ERNAKULAM

REVISION PETITIONER(S)/APPELLANT/ACCUSED::

**E.K. THOMAS, EXCISE INSPECTOR,
MAMALA EXCISE RANGE OFFICE,
MAMALA POST, THIRVANKULAM.**

BY ADV. SRI.SUNNY XAVIER

RESPONDENT(S)/COMPLAINANT::

**1. M/S. GREEN LEAVES INVESTMENTS PVT. LTD.,
DOOR NO.36/1121, MUHAMMED KUNJU VAIDIYAR LANE
JUDGES AVENUE, KOCHI-17, REP. BY ITS
MANAGER AND ATTORNEY A.P. KURIAKOSE.**

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

R2 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.1018 of 2005

Dated this the 18th of November, 2015

ORDER

The revision petitioner, who is the appellant in Crl. Appeal 425/04 on the file of the Addl. Sessions Judge-VI, Ernakulam challenges the concurrent conviction under Section 138 of the Negotiable Instalments Act (hereinafter referred to as 'N.I.Act'). He was accused in C.C.120/2000 on the file of the Judicial First Class Magistrate-I, Ernakulam for offence punishable under Section 138 of the N.I. Act. The accused was convicted and sentenced to imprisonment till rising of court and pay compensation of Rs.64,000/- under Section 357(3) Cr.P.C. Against that he preferred an appeal, which was dismissed by the appellate court. Being aggrieved by that, he preferred this revision petition.

2. The complainant is the first respondent in this revision petition. The complainant is a private company conducting chitty business and accused is the subscriber

of the chitty conducted by the company. He received an amount from chitty and failed to pay the monthly instalments and in discharge of that debt of Rs.32,000/-, he issued Ext.P2 cheque. 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 to the accused. The notice was returned as unclaimed. Even after that notice, there was no repayment. In the circumstance, he filed the above complaint in the trial court.

3. During trial, complainant examined PW1, the power of attorney holder and marked Ext.P1 to P8 as documentary evidence. 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 after sifting and weighing the evidence on record convicted the accused.

4. The learned counsel appearing for the revision petitioner contended that there was no debt or liability

existing on the date of issuance of cheque and excess amount was imposed as compensation. Hence, revisional jurisdiction is to be invoked to rectify the irregularity.

5. Notice sent to first respondent was returned stating as 'not known'. In the circumstance, notice to first respondent is dispensed with. I heard the learned Public Prosecutor appeared for the second 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. The evidence of PW1 shows that he is the power of attorney holder of the complainant. Ext.P1 is the power of attorney. PW1 deposes that Ext.P2 was issued in discharge of a debt. When it was presented for encashment, it was dishonoured for the reason of funds insufficient. Ext.P3 is the dishonour memo, Ext.P4 is the intimation, Ext.P5 is the copy of the lawyer notice, Ext.P6 is the postal receipt, Ext.P7 is the returned cover and Ext.P8 is the extract of the bank account. A perusal of Exts.P2 to P8 shows that when Ext.P2 was presented for encashment, it was dishonoured for the reason of funds insufficient. When the cheque is dishonoured for the reasons stated under Section 138 of the N.I. Act, a presumption under Section 139 of the N.I. Act can be

drawn in favour of the holder of the cheque. 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.

8. Section 139 of the N.I. Act 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 **Rangappa V. Sri Mohan (2010(11) SCC 441)** held that the presumption is rebuttable. But no rebuttal evidence has been adduced by the revision petitioner. Even though, he contended that there was no legally enforceable debt, no such evidence has been produced to substantiate his contention. In the absence of such evidence, trial court convicted the revision petitioner, which was upheld by the appellate court.

9. The specific case of the first respondent was that the debt is only for Rs.32,000/-, but the trial court granted Rs.64,000/- as compensation under Section 357(3) Cr.P.C. The appellate court upheld the findings of the trial court. Considering the nature of transaction, the sentence imposed by the trial court is modified as follows;

The revision petitioner is sentenced to imprisonment till rising of court under Section 138 of the N.I. Act. He is also directed to pay compensation of Rs.32,000/- 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 Judicial First Class Magistrate-I, Ernakulam shall issue non-bailable warrant forthwith. This revision petition is disposed of accordingly.

STK

//TRUE COPY//

Sd/-
P.D. RAJAN,
JUDGE

P.A. TO JUDGE