IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 18TH DAY OF AUGUST 2015/27TH SRAVANA, 1937

Crl.Rev.Pet.No. 1532 of 2006 ( )

AGAINST THE JUDGMENT IN Crl.Appeal 229/2000 of ADDL.SESSIONS COURT,ALAPPUZHA. DATED 22-02-2006

AGAINST THE JUDGMENT IN CC 49/1999 of J.M.F.C., RAMANKARI DATED 16-08-2000

REVISION PETITIONER(S)/APPELLANT/ACCUSED.:

K.C.PHILIP, C& P ELECTRICALS,
HARIS BUILDING, NEAR K.S.R.T. MAIN BUS STAND
CHANGANACHERRY.

BY ADVS.SRI.GEORGE MATHEW
SRI.VIJU JOSE

RESPONDENT(S)/RESPONDENT/COMPLAINANT AND STATE.:

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1. THOMAS JOSEPH, PUTHENPURAYIL,
   KIDANGARA P.O. ALAPPUZHA.

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

R1 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 18-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl. R.P.No.1532 of 2006

Dated this the 18th day of August, 2015

ORDER

The revision petitioner challenges the judgment in Crl.Appeal No.229/2000 of the Additional Sessions Judge, Alappuzha for offence punishable u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the N.I. Act). He was convicted by the Judicial First Class Magistrate, Ramankary under the above Act and sentenced to undergo simple imprisonment for one year and directed to pay a fine of ₹5000/-, in default of payment of fine, simple imprisonment for six months. Against that, he preferred the above Criminal Appeal, where the conviction and sentence passed by the trial Court were confirmed and dismissed the appeal.

2. The facts necessary for the indictment were that on 10.11.1998 the revision petitioner approached the 1st respondent and borrowed a sum of ₹85,000/- and in discharge of that debt, he issued a cheque drawn on South Indian Bank Limited. When the cheque was presented for encashment, it was dishonoured for the reason of 'funds insufficient'. After dishonour of the cheque, even though the 1st respondent issued a lawyer notice to the revision petitioner, there was no repayment. Hence, the complaint filed.

3. To prove the offence, the 1st respondent examined PW1 and PW2 and marked Exts.P1 to P9. The incriminating circumstances brought out in evidence were denied by the revision petitioner, while questioning him u/s.313 Cr.P.C. He examined DW1 and DW2 and marked Exts.D1 to D7 series and D8 series. The trial Court, after

analysing the evidence, convicted the revision petitioner. Hence, he filed the above appeal in the trial Court.

4. After filing this revision, this Court directed to give notice to the 1st respondent. Even after several directions, no steps were taken against him. On 13.8.2015, there was no representation from the side of the revision petitioner. In such circumstance, the case was posted to 17.8.2015 for disposal. Today, the learned counsel for the revision petitioner submitted that he needs only three months' time to repay the amount, therefore, sentence may be modified.

5. A reading of Section 138 of the Negotiable Instruments Act shows that 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. The evidence of PW1 shows that Ext.P1 cheque was issued in discharge of a debt. When it was presented for encashment, it was dishonoured for the reason of 'funds insufficient'. PW2 was examined in the trial Court to prove the service of notice. A close scrutiny of evidence of PW1 and PW2 shows that Ext.P1 cheque was dishonoured for the reason of 'funds insufficient' and proper notice was served on the revision petitioner.

6. When complainant proves the existence of a legally enforceable debt, 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 lliability 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 enforceable debt or liability. The revision petitioner examined DW1 and DW2 in the trial Court to rebut the presumption. The trial Court and the Appellate Court in their detailed discussion opined that evidence of DW1 and DW2 and Exts.D1 to D8 are not sufficient to rebut the presumption u/s.139 of the N.I. Act. On a close scrutiny of the above discussion, I do not find any illegality or irregularity in the findings of the Courts below. Therefore, the conviction passed by the courts below are only to be confirmed, but modification of the sentence is necessary.

7. In the result, the revision petitioner is sentenced to undergo imprisonment till rising of the Court and directed to pay compensation of ₹85,000/- u/s.357(3) Cr.P.C., in default of payment of compensation, simple imprisonment for three months. The learned counsel for the revision petitioner submitted that the revision petitioner had already deposited ₹30,000/- in the trial Court.

Accordingly, the revision petitioner is directed to surrender before the trial Court within 30 days and remit the balance amount of ₹55,000/- in the trial Court, failing which the Judicial First Class Magistrate Court, Ramankaray is directed to issue Non Bailable Warrant against the revision petitioner.

The Crl.R.P. is disposed of as above.

P.D. RAJAN, JUDGE.

acd