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. 1652 of 2006 ( )

AGAINST THE JUDGMENT IN CRL.APPEAL 91/2003 of ADDL. SESSIONS COURT (ADHOC)-I, KALPETTA DATED 26-11-2005
AGAINST THE JUDGMENT IN STC 183/2001 of J.M.F.C, KALPETTA DATED 15-03-2003

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

T.M.MUHAMMED, S/O. MOIDEEN,
SHAMEER MANZIL, KALPETTA P.O., VYTHIRI TALUK.

BY ADV. SRI.A.RAJASIMHAN

RESPONDENT(S)/RESPONDENTS/COMPLAINANT:

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1. M.SIDDIQUE
   NENTHALA HOUSE, PANTHEERANKAVU P.O.
   KOZHIKODE DISTRICT.

2. STATE OF KERALA, REPRESENTED BY
   PUBLIC 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.1652 of 2006

Dated this the 18th day of August, 2015

ORDER

The revision petitioner challenges the judgment in Crl.Appeal No.91/2003 of Additional Sessions (Adhoc-I), Kalpetta for offence u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the N.I.Act). He was the accused in S.T.C.No.183/2001 of Judicial First Class Magistrate Court, Kalpetta and sentenced to undergo imprisonment for three months and to pay compensation of ₹40,000/- u/s.357(3) Cr.P.C., in default, simple imprisonment for 10 days. Against that judgment, he preferred the above Criminal Appeal in the appellate Court.

2. The facts necessary for the indictment were that

the revision petitioner issued Ext.P2 cheque to the 1st respondent in discharge of a liability. When the cheque ws presented for encashment, it was dishonoured for the reason of 'funds insufficient'. After that, the 1st respondent demanded the due amount by issuing a lawyer notice. In spite of demand by the 1st respondent, there was no payment from the side of the revision petitioner. In the circumstances, he filed the complaint in the trial Court.

3. To prove the offence, the complainant examined PW1 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 did not adduce any defence evidence. The trial Court convicted the revision petitioner, which was confirmed by the appellate Court. After filing this revision petition, this

Court directed the revision petitioner to give notice to the 1st respondent. Even after specific direction, there was no response from the side of the revision petitioner. On 13.8.215, there was no representation from the side of the revision petitioner, hence the case was posted for disposal on 17.8.2015. Today also there was no representation from the side of the revision petitioner.

4. The power of the revisional jurisdiction of the High Court in criminal cases is narrower and limited than its appellate power, which is discretionary and it cannot be invoked as of right as in the case of appellate jurisdiction. The object of conferring revisional power is to clothe the High Court with a jurisdiction of the general supervision in order to correct grave miscarriage or failure of justice arising from erroneous or defective orders. While exercising this power, it is justified only to set right

grave failure of justice and not merely to rectify every error. The fact that the lower court has taken a wrong view of law or misapprehended the evidence on record cannot be a reason to interfere unless it has resulted in grave justice.

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. I have perused the judgment of the Courts below. To prove the offence, the Power of Attorney holder of the complainant was examined as PW1. Ext.P2 is the cheque. When Ext.P2 was presented for encashment, it was dishonoured for the reason of 'funds insufficient'. Ext.P3 is the return memo, Ext.P4 is the memorandum, Ext.P5 is copy of lawyer's notice. Ext.P6 is the acknowledgment card, Ext.P7 is the receipt of Indian Post, Ext.P8 is the bank ledge and Ext.P9 is the bank cheque return register.

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.

When there is no rebuttal evidence, the trial Court was of the view that Ext.P2 was issued in discharge of a debt and a presumption u/s. 139 of the N.I. Act can be drawn in favour of the holder of the cheque. Appellate Court in its judgment modified the sentence and the revision petitioner was sentenced to imprisonment till rising of the Court and to pay a compensation of ₹50,000/-, in default of payment of compensation, simple imprisonment for two months. I do not find any illegality in the above conviction of the appellate Court, but the sentence imposed by the appellate Court needs interference.

Accordingly, the revision petitioner is sentenced to imprisonment till rising of the Court and to pay a compensation of ₹40,000/- under Section 357(3) Cr.P.C., in default of payment of compensation, simple imprisonment for three months. If the above compensation is realised, it shall be disbursed to the defacto complainant. The revision petitioner is directed to surrender in the trial Court and undergo the above sentence within thirty days from today, failing which the learned Judicial First Class Magistrate, Kalpetta shall issue Non Bailable Warrant against the revision petitioner.

P.D. RAJAN, JUDGE.

acd