

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 3RD DAY OF NOVEMBER 2015/12TH KARTHIKA, 1937

Crl.Rev.Pet.No. 926 of 2007 ()

IN CRL.A 516/2002 of ADDL.SESIONS COURT (ADHOC)-II, THALASSERY
DATED 16-10-2006

IN CC 359/2002 of ADDL.C.J.M.,THALASSERY DATED 11-09-2002

REVISION PETITIONER(S)/APPELLANT/ACCUSED::

T.SANTHA, W/O KRISHNAN,
AGED 57 YEARS, 'NISHANTHAM', P.O.IRIVERY
KANNUR DISTRICT.

BY ADV. SRI.C.P.PEETHAMBARAN

RESPONDENT(S)/COMPLAINANT AND STATE :

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1. K.P.RAJAN, S/O KRISHNAN
MAVILAKKANDY HOUSE, P.O.PINARAYI, THALASSERY TALUK
KANNUR DISTRICT.
 2. STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HGH COURT OF KERALA, ERNAKULAM.

R1 BY ADV. SRI.K.V.SOHAN
R2 BY PUBLIC PROSECUTOR SRI.N.SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
03-11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

VS

P.D.RAJAN, J.

Crl.R.P.No.926 of 2007

Dated this the 3rd day of November, 2015

ORDER

Revision petitioner is the appellant in Crl.Appeal No.516/2002 on the file of Additional Sessions Court, Adhoc-II, Thalassery, challenges the concurrent conviction under Section 138 of the Negotiable Instruments Act(hereinafter called 'the NI Act'). He was the accused in C.C.No.359/2002 on the files of Additional Chief Judicial Magistrate Court, Thalassery, for offences punishable under Section 138 of the NI Act, convicted and sentenced to undergo simple imprisonment for one year, which was modified by the appellate court. Being aggrieved by that he preferred this revision petition.

2. The complainant is the first respondent in this revision petition. Complainant's case in the trial court is that in discharge of a debt for Rs.65,000/-, accused issued Ext.P1 cheque. When it was presented for encashment, it was

dishonoured for the reason, 'funds insufficient'. Complainant demanded the amount by giving a notice in writing. Even after getting notice, there was no repayment. In the circumstance, the above complaint in the trial court.

3. During trial, the complainant was examined as PW1 and his evidence were marked as Exts.P1 to P7. The incriminating circumstances brought out in evidence were denied by the accused while questioning her. She was examined as DW1 and marked Exts.D1 to 3 in support of her defence. The trial court convicted the accused.

4. The learned counsel appearing for the revision petitioner contended that there is no evidence to show that Ext.P1 was issued in discharge of a debt or liability. When there is no evidence to prove the alleged debt or liability, a conviction under Section 138 is not sustainable in law. He relied the decision of the Apex Court in ***John K. Abraham v. Simon C. Abraham [2014(1) KLT 90(SC)]***.

5. The learned counsel appearing for the first respondent contended that there is no reason to interfere in

the findings of the court below and there is no challenge with regard to the source of income in the trial court. When this matter was not challenged in the trial court, he cannot take a new contention in this revision petition.

6. The Apex Court in **John K. Abraham v. Simon C. Abraham** reported in **2014(1) KLT 90(SC)** held in paragraph 9 as follows :

“Keeping the above factors in mind, when we examine the judgment impugned in this appeal, we find that the High Court committed a serious illegality in reversing the judgment of learned Chief Judicial Magistrate. While reversing the judgment of the trial Court, what weighed with the learned Judge of the High Court was that in the 313 questioning, it was not the case of the appellant that a blank signed cheque was handed over to his son and that even in the cross-examination it was not suggested to PW-1 that a blank cheque was issued. The High Court was also persuaded by the fact that the appellant failed to send any reply to the lawyer's notice, issued by the respondent. Based on the above conclusions, the High Court held that the presumption under Sections 118 and 139 of the Negotiable Instruments Act could be easily drawn and that the appellant failed to rebut the said presumption. On that single factor, the

learned Judge of the High Court reversed the judgment of the trial Judge and convicted the appellant. It has to be stated that in order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant."

7. The specific case of the revision petitioner is that she borrowed an amount of Rs.65,000/- from the complainant and issued Ext.P1 cheque in discharge of that debt. When it was presented for encashment, it was dishonoured for the reason of funds insufficient. Ext.P2 is the dishonour memo, Ext.P3 is the intimation notice, Ext.P4 is the demand notice, Ext.P5 is the acknowledgment card, Ext.P6 is the reply notice and Ext.P7 is the certified copy of the account of the accused. A perusal of Exts.P2 and P3 shows that when Ext.P1 was presented for encashment, it

was dishonoured for the reason 'funds insufficient'. When the cheque is dishonoured for the reason stated under Section 139 of the NI Act, a presumption can be drawn in the favour of the holder of the cheque.

8. 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”.

9. The Apex Court in **Beena v. Muniappan (AIR 2001 SC 2995)** held that the presumption is a rebuttable presumption and this was followed in **Mandvi Co-operative Bank v. Nimesh B.Dhakore** reported in **AIR 2010(SC) 1402**. To rebut the presumption under Section 138 of the NI Act, the revision petitioner was examined as DW1 and marked Exts.D1 to D3 in the trial court. DW1 deposed that Ext.P1 was issued by her to one Hareendran and she produced Ext.D2, which is the copy of the agreement with Hareendran. Even though the above

contention was raised by the revision petitioner, the trial court rejected that contention. Therefore, the trial court had drawn a presumption under Section 139 of the NI Act and convicted the revision petitioner, which was upheld by the appellate court. I find no illegality in the above finding. Therefore the conviction under Section 138 of the NI Act is confirmed.

The trial court sentenced the revision petitioner to imprisonment for one year which was modified by the apex court, by imposing a fine of Rs.65,000/- and in default of payment of fine, simple imprisonment for 3 months. It was directed that if fine is recovered, the same will be given as compensation to the complainant/first respondent under Section 375(1) of the Code of Criminal Procedure. There is no illegality in the order passed by the apex court. Therefore this revision petition is dismissed.

Sd/-
P.D.RAJAN
JUDGE

VS