IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 11TH DAY OF AUGUST 2015/20TH SRAVANA, 1937

Crl.Rev.Pet.No. 2064 of 2006 ( )

AGAINST THE JUDGMENT IN CRA 422/2003 of ADDL.SESSIONS COURT (ADHOC-III),NORTH PARAVUR DATED 27-02-2006

AGAINST THE JUDGMENT IN CC 1721/2000 of JUDICIAL MAGISTRATE OF FIRST CLASS, ALUVA

REVISION PETITIONER(S)/APPELLANT/ACCUSED.:

A.K.BABU, AYANIKKAL HOUSE, KUNDOOR P.O.
MALA.

BY ADVS.SRI.T.A.UNNIKRISHNAN
SRI.K.SATHEESH KUMAR
SMT.RESHMI POULOSE

RESPONDENT(S)/COMPLAINANT.:

1. VIBIN VAZHAPPILLY, KACHAPPILLY HOUSE,
33/1844-C, SHOBHA ROAD, VENNALA P.O.
KOCHI.

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

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 11-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.D.RAJAN, J

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Crl.R.P.No.2064 of 2006

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Dated 11th August 2015

ORDER

This revision petition is preferred against the judgment in Crl.A.No.422 of 2003 of Additional Sessions Court, North Paravur which was filed against the conviction under Section 138 of the N.I.Act. The revision petitioner was convicted in C.C.1721 of 2000 under Section 138 of N.I.Act and sentenced to simple imprisonment for six months and to pay a fine of Rs.2 lakhs under Section 357 (3) Cr.P.C and in default to undergo imprisonment for four months.

2. The facts of the case was that the first respondent who is the complainant in this case was employed in FLI/137 shop at Aluva owned by the revision petitioner. Both of them were in good terms. When there was financial difficulty, the revision petitioner requested the first respondent to arrange Rs.2 lakhs to purchase indian made foreign liquor from the Bewerages Corporation. Accordingly, Rs.2 lakhs was given to the revision petitioner on 18.11.1999 and in discharge of that debt, he gave Ext.P1 cheque. When Ext.P1 was presented for encashment it was dishonoured for reason of funds insufficient. The complainant demanded the amount by giving a notice in writing to the revision petitioner. There was no repayment of the amount by the revision petitioner. In the circumstance, the above case was filed in Judicial Magistrate of First Class-I, Aluva. First respondent examined PW1 and

produced Ext.P1 to P7. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. He examined DW1 to DW3 in support of the defence. Trial court after analysing the evidence, convicted the revision petitioner.

3. After filing this revision petition, this court directed the revision petitioner to issue notice to first respondent. No steps were taken even after several years. Subsequently, this court directed to give notice as per Section 65 C.P.C and notice was affixed where the first respondent last resided. In the circumstance, I heard the learned counsel for the revision petitioner. When the matter came up for hearing today, learned counsel submitted that the matter is being settled out of court. In the light of the submission, I have no objection in compounding the matter.

4. 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. 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 within the statutory period on the date of receipt of information from the bank regarding the return of the cheque as unpaid. PW1 deposed that Ext.P1 was issued in discharge of a debt. When it was presented for encashment, it was dishonoured for the reason of funds insufficient. Ext.P2 and P3 are pay slip and memo, Ext.P4 is notice, Ext.P5 is the postal receipt, Ext.P6 is the intimation and Ext.P7 is the postal cover. Analysing the evidence of PW1 and Ext.P1, it is found that Ext.P1 was dishonoured for the reason of funds insufficient and in discharge of a debt.

5. 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 respondent, the presumption under Section 139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability.

6. The revision petitioner examined DW1 to DW3 to rebut the presumption under Section 139 of N.I.Act. Trial court observed that the oral evidence of DW1 to DW3 is not sufficient to rebut the presumption under Section 139 of N.I.Act. Therefore, the revision petitioner was convicted under Section 138 of N.I.Act which was upheld by the appellate court. There is no illegality in the above order. Appellate court modified the sentence and directed the

appellant to undergo imprisonment till rising of court and to pay compensation of Rs.2 lakhs under Section 357(3) Cr.P.C. I find no illegality in the above order. Since the matter has been pending for long time in this court and no compounding petition is filed, there is no merit in the contention. The conviction and sentence passed by the appellate court is confirmed and this revision petition is dismissed accordingly.

P.D.RAJAN, JUDGE

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