

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 1ST DAY OF DECEMBER 2015/10TH AGRAHAYANA, 1937

Crl.Rev.Pet.No. 1785 of 2005 ()

AGAINST THE JUDGMENT IN CRL.APPEAL 961/2004 of VTH ADDITIONAL
SESSINS COURT, ERNAKULAM DATED 11-05-2005.

AGAINST THE JUDGMENT IN CC 442/2000 of JUDICIAL FIRST CLASS
MAGISTRATE COURT-I, ERNAKULAM
DATED 15-09-2004

REVISION PETITIONER(S)/RESPONDENT/COMPLAINAT:

GIRIJA SIVARAMAKRISHNAN,
H.NO.C.C.39/542, (IMPLEADED AS LEGAL HEIR OF
V.SUBRAMANIAN) .

BY ADVS.SRI.S.P.ARAVINDAKSHAN PILLAY
SMT.N.SANTHA
SRI.K.A.BALAN
SRI.PETER JOSE CHRISTO

RESPONDENT(S)/APPELLANTS/ACCUSED:

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1. D.THULASI BHAI, W/O.BLASID P.A.,
POZHATHUPARAMBIL HOUSE, ELAMKULAM, KALOOR P.O.
KOCHI.
 2. STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. N. SURESH.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 01-12-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No.1785 of 2005

Dated this the 1st day of December, 2015

ORDER

The revisional power conferred under Section 397 and 401 of the Code of Criminal Procedure on the High Court is a supervisory jurisdiction to correct the miscarriage of justice arising from the erroneous orders, which may arise from the misconception of law, irregularity of procedure or misreading of evidence. This revisional power is discretionary one and one cannot claim it as a vested right, when there is vested right in appeal. In an appeal, the appellant has a statutory right to demand adjudication upon a question of law or question of fact or of both. While exercising revisional jurisdiction, the petitioner has no such right, but he has the

right to bring the case to the notice of the court and it is for the court to interfere in exceptional cases when it feels that substantial injustice has been done.

2. The fundamental rule in a criminal case is that one person is presumed as innocent till he is proved to be guilty. This rule actually means that a person accused of a crime is not bound to make a statement or offer any explanation about the circumstances which throws suspicion upon him. It is the duty of the prosecution to prove the guilt beyond reasonable doubt. There may be exception where the rules of presumption applies in certain cases. In such case, a statutory presumption with regard to the proved facts and circumstances may arise which will help in reaching a conclusion about the guilt of the accused. In an offence u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the N.I. Act)

a presumption u/s.139 of the N.I. Act is available and it is rebuttable presumption. When a cheque issued was dishonoured, it is not sufficient to attract the offence u/s.138 of the N.I. Act. In such cases , the complainant has to prove that there is legally enforceable debt and cheque was issued from the account of the bank for discharging in whole or in part of any debt or other liability, which presupposes the legally enforceable debt and the cheque issued had been returned due to insufficient fund.

3. The revision petitioner is the legal heir of the complainant in C.C.No.442/2000 on the file of Judicial First Class Magistrate-I, Ernakulam for offence punishable u/s.138 of the N.I. Act. Complainant's case is that the accused borrowed a sum of ₹50,000/- from him and in discharge of that debt, she issued Ext.P2 cheque. When it

was presented for encashment, it was dishonoured for the reason of funds insufficient. The complainant demanded the amount by giving a notice in writing. Even after notice, there was no repayment. To prove the offence, the complainant was examined as PW1 and his documents were marked as Exts.P1 to P8. The accused examined DW1 and marked Ext.D1 in support of his defence. The trial Court convicted the accused and sentenced to simple imprisonment for one year and to pay compensation of ₹1 lakh u/s.357(3) Cr.P.C. with default sentence of three months. Against that, she preferred Crl.Appeal No.961/2004 on the file of Vth Sessions Judge, Ernakulam, in which the conviction was confirmed and the sentence was modified to undergo simple imprisonment till rising of the Court and to pay compensation of ₹45,000/- u/s.357(3) Cr.P.C. Being aggrieved by that, the legal heir

of the complainant preferred this revision petition.

4. I have heard the learned counsel appearing for the revision petitioner and the learned Public Prosecutor and perused the oral and documentary evidence in this case. It appears that the trial Court granted double the cheque amount as compensation, which was modified by the appellate Court.

5. The learned counsel for the revision petitioner contended that without mentioning the specific reasons, the appellate Court modified the sentence of the trial Court, which is to be restored. But, the learned Public Prosecutor submits that, since the notice was not served on the 1st respondent, without hearing her, the enhancement of compensation amount is illegal.

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 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.

7. PW1 is the defacto complainant, who deposed that Ext.P2 cheque 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. He sent a lawyer notice. Ext.P5 is the copy of the lawyer notice. Ext.P6 is the postal receipt. Ext.P7 is the postal acknowledgment card. Ext.P8 is the extract of the bank account. Analysing the evidence of PW1 and Exts.P1 to P8, it is clear that the cheque was dishonoured for the reason of funds insufficient. When cheque is dishonoured for the reasons stated u/s.138 of the N.I. Act, a presumption u/s.139 can be drawn in favour of the holder of the cheque.

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".

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 liability can be contested. However, there can be no doubt that there is an initial presumption which favours the respondent complainant".

The accused examined DW1 and marked Ext.D1 in support of his defence contention. Even though such contention was raised, that itself is not sufficient to rebut the presumption u/s.139 of the N.I. Act and the trial Court convicted the accused, which was confirmed by the

appellate Court. However, considering the defence version, the appellate Court modified the sentence to imprisonment till rising of the Court and to pay compensation of ₹45,000/- with default sentence of three months simple imprisonment. I do not find any illegality in the above finding of the appellate Court. Therefore, there is no merit in this revision petition and it is dismissed accordingly.

P.D. RAJAN, JUDGE.

acd

