

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 13TH DAY OF AUGUST 2015/22ND SRAVANA, 1937

Crl.Rev.Pet.No. 1720 of 2007 ()

**AGAINST THE JUDGMENT IN CRA 431/2006 of ADDL.DISTRICT & SESSIONS COURT,
VADAKARA**

AGAINST THE JUDGMENT IN CC 178/2003 of J.M.F.C.,VADAKARA

REVISION PETITIONER(S)/APPELLANT/ACCUSED NO.1:

**M.S.ANOOP,
S/O.SUKUMARAN, VEENUS HOUSE, MOORIYADU
CHALAPPURAM PO, KOZHIKODE.**

BY ADV. SRI.SUNNY MATHEW

RESPONDENT(S)/COMPLAINANT AND STATE:

**1. JAYADASAN, S/O.NARAYANAN T.,
MANAGING DIRECTOR OF M/S.AQUILA FINANCE PVT. LTD.,
VADAKARA, REPRESENTED BY THE POWER OF ATTORNEY,
HOLDER AND MANAGER K.T. RAMESHAN, KADAYAMTHOTTATHIL,
HOUSE, VADAKARA AMSOM.**

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

R2 BY PUBLIC PROSECUTOR SMT.SAREENA GEORGE

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 13-
08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl. R. P. No.1720 of 2007

Dated this the 13th day of August, 2015

ORDER

The revision petitioner is the first appellant in Crl. Appeal 431/2006 on the file of the Additional Sessions Judge Vadakara challenges the judgment of conviction under Section 138 of Negotiable Instruments Act (hereinafter referred to as the 'Act'). He was accused in CC178/2003 of the Judicial First Class Magistrate, Vadakara and convicted under Section 138 of the Act, sentenced to imprisonment for 3 months and to pay compensation of Rs.23145/- under Section 357(3) Cr.P.C. in default of payment of compensation, simple imprisonment for one month. The revision petitioner is the first accused and first respondent is the de-facto complainant in the trial court.

2. The brief facts necessary for the indictment were that the revision petitioner gave Ext.P2 cheque to the first respondent in discharge of a debt. When it was presented for encashment, it was dishonoured for the reason of

funds insufficient. He demanded the amount by giving a notice in writing to the first respondent. Even after that, there was no repayment. In such a situation, the above complaint was filed in the trial court. To prove the offence, Power of Attorney holder of the de-facto complainant was examined as PW1 and his documents were marked as P1 to P10. The incriminating circumstance brought out in evidence were denied by the revision petitioner while questioning him. He examined DW1 and marked Ext.D1 and D2. The trial court after analyzing the oral and documentary evidence, convicted the revision petitioner.

3. After filing this revision, this court directed the revision petitioner to take steps against the first respondent. Thereafter, no response was there from the side of the revision petitioner. In this circumstance, I have perused the documents.

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.

5. PW1 is the Power of Attorney holder and Ext.P1 is the copy of the Power of Attorney. He deposed that he

has direct knowledge about the transaction. When Ext.P2 cheque was presented for encashment it was dishonoured for the reason of funds insufficient. Ext.P3 is the dishonour memo. Ext.P4 is the intimation of dishonour from bank. Ext.P5 is the copy of lawyer notice. Ext.P6 is the postal receipt. Ext.P8 and Ext.P9 are acknowledgement cards. Ext.P10 is the hire purchase agreement. When cheque was dishonoured for the reason 'funds insufficient' a presumption under Section 139 shall be drawn in favour of the holder of the cheque.

6. Section 139 of the Negotiable Instruments 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”.

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. 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”.

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. The apex court in **Hiten P. Dalal v. Bratindranath Banerjee ((2001) 6 SCC 16)** followed in **Narayana Menon V. State of Kerala (2006 (3) KLT 404)** held that, rebutting the presumption in 139 of the Negotiable Instruments Act accused has to adduce

some evidence showing the reasonable possibility of non-existence of presumed facts.

7. The revision petitioner examined DW1 to rebut the presumption under Section 139 of the Negotiable Instruments Act. He marked Ext.D1 series and Ext.D2. Even though such documents were marked, that itself is not sufficient to rebut the presumption. In this circumstance, the learned Magistrate came to the conclusion that Ext.P2 was dishonoured for the reason of funds insufficient. The appellate court also confirmed the findings and upheld the conclusion reached by the trial court. I find, no illegality in the above judgments and I modify the sentence of the appellant and he is sentenced to an imprisonment till rising of the court and to pay a sum of Rs.23145/- to the first respondent under Section 357(3) Cr.P.C. as compensation, in default of payment of compensation, simple imprisonment for 3 months.

The revision petitioner is directed to appear before trial court within 30 days from today, failing which,

Judicial First Class Magistrate, Vadakara shall issue Non-bailable Warrant against the accused. This Revision Petition is partly allowed and disposed of accordingly.

STK

Sd/-
P.D. RAJAN,
JUDGE

//TRUE COPY//

P.A. TO JUDGE