

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937

Crl.Rev.Pet.No. 2404 of 2005 ()

**AGAINST THE JUDGMENT IN CRL.APPEAL 110/2003 of II ADDL. SESSIONS COURT,
PALAKKAD**

AGAINST THE JUDGMENT IN CC 375/2000 of C.J.M. PALAKKAD

REVISION PETITIONER(S):

**SAMUEL JOHN, 3/1168, ANGAL GUARD,
KACHERI, NADAKKAVU P.O., CALICUT PRESENTLY
AT GOODSHEPPERD RUBBER CO. INDUSTRIAL ESTATE P.O.,
OLAVAKKODE, PALAKKAD.**

**BY ADVS.SRI.SAJEEV KUMAR K.GOPAL
SRI.BINOY VASUDEVAN**

RESPONDENT(S):

- 1. STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.**
- 2. M/S.HOMFIT LEASING LIMITED,
VCM COMPLEX, HOMFIT JUNCTION,
OLAVAKKODE,
PALAKKAD.**

R1 BY PUBLIC PROSECUTOR SRI. N. SURESH

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 18-
11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl.R.P.2404 of 2005

Dated this the 18th of November, 2015

ORDER

The revision petitioner was accused in C.C.375/2000 on the file of the Chief Judicial Magistrate, Palakkad for offence punishable under Section 138 of the Negotiable Instalments Act (hereinafter referred to as 'N.I.Act'). The second respondent in this revision petition is the complainant in the trial court. The complainant is a firm doing Hire Purchase Business represented by the power of attorney holder. The complainant's case is that accused purchased household articles worth Rs.27,752/- and in discharge of that debt, he issued a cheque for Rs.26,610/- . When the cheque was presented for encashment, it was dishonoured for the reason of funds insufficient. The complainant demanded the due amount by giving a notice in writing to the accused. The notice was returned as unclaimed. Even after that notice, there was no repayment. Hence, he filed the above complaint in the

trial court.

2. During trial, complainant's power of attorney holder was examined as PW1 and his documents were marked as Ext.P1 to P8. PW2, who was the field Assistant of complainant was also examined in support of the allegation. The accused did not adduce any defence evidence. The trial court after sifting and weighing the evidence on record convicted the accused and sentenced to imprisonment for one month and pay compensation of Rs.26,610/- under Section 357(3) Cr.P.C., in default, simple imprisonment for a period of 15 days. Against that he preferred Crl. Appeal 110/03 before Addl. Sessions Court, Palakkad, which was dismissed by the appellate court. Being aggrieved by that, he preferred this revision.

3. The learned counsel appearing for the revision petitioner contended that Ext.P2 was issued as a security for a legally enforceable debt between the petitioner and the second respondent. There was no notice, since he was residing in Palakkad.

4. The learned Public Prosecutor, who appeared for the first respondent opposed the above argument.

5. 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 N.I. Act. This 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.

6. To prove the allegation, Power of Attorney holder was examined as PW1 and his evidence shows that he is authorised as per the Ext.P6 Power of Attorney. Ext.P7 is the resolution of the company. Ext.P8 is the higher purchase agreement. The evidence of PW1 shows that Ext.P2 was issued in discharge of a debt. When it was presented for encashment, it was dishonoured for the reason of funds insufficient. Ext.P3 and Ext.P4 are the dishonour memos. Complainant demanded the amount by giving a notice. But notice was returned, Ext.P5 series are the returned postal cover, postal receipt, copy of the lawyer notice and acknowledgment card. PW2, Field Assistant supported the evidence of PW1. Analysing the evidence of PW1 and 2 it is true that, when the cheque was presented, it was dishonoured for the reason of funds insufficient. Even though the revision petitioner contended that Ext.P1 was not issued in discharge of a debt, a perusal of those documents it is clear that Ext.P1 was issued in discharge of a debt.

7. When complainant proves that the cheque was received for the reasons stated under Section 138 of the N.I. Act, the presumption under Section 139 of the N.I. 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”.

The apex court in **Beena v. Muniappan (AIR 2001 SC 2995)** and **Rangappa V. Sri Mohan (2010(11) SCC 441)** it is held that the presumption is rebuttable. Revision petitioner contended that there was no legally enforceable debt, but no evidence has been adduced by him to substantiate that contention. In the absence of any rebuttal evidence, trial court convicted the revision petitioner, which was upheld by the appellate court.

8. The learned counsel appearing for the revision petitioner contended that there was no notice under Section 138 (b) of the N.I. Act. The notice was served in

the Kozhikode address, but no evidence has been adduced by him to show that he is not residing in the Kozhikode address. If that be the position, the allegation of non-compliance of 138(b) is only to be discarded and trial court rightly convicted the accused, which was upheld by the appellate court. The learned counsel submitted that the sentence imposed by the trial court is too harsh, which needs modification. The trial court sentenced the revision petitioner to undergo simple imprisonment for one month and pay cheque amount as compensation. Considering the nature of transaction, the sentence needs modification. Hence, the sentence is modified as follows.

The revision petitioner is sentenced to undergo imprisonment till rising of court under Section 138 of the Negotiable Instruments Act and pay a compensation of Rs.26,610/- under Section 357(3) Cr.P.C., in default payment of compensation, simple imprisonment for one month. The revision petitioner is directed to surrender in the Chief Judicial Magistrate Court, Palakkad to undergo the modified sentence within 2 months from today, failing

which, the trial Magistrate shall issue non-bailable warrant. This revision petition is disposed of accordingly.

STK

//TRUE COPY//

P.A. TO JUDGE

Sd/-
P.D. RAJAN,
JUDGE