IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 23RD DAY OF DECEMBER 2015/2ND POUSHA, 1937

Crl.Rev.Pet.No. 1794 of 2012 ()

AGAINST THE JUDGMENT IN Crl.Appeal 729/2004 of ADDITIONAL SESSESIONS COURT (ADHOC-1), THALASSERY DATED 26-04-2012

AGAINST THE JUDGMENT IN S.T 2036/2004 of CHIEF JUDICIAL MAGISTRATE, THALASSERY DATED 08-11-2004

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

M.K.SURENDRAN
S/O.M.T.KUNHAMBU, M.K.HOUSE, CHALA
12TH KANDY, THOTTADA P.O., KANNUR DISTRICT.

BY ADVS.SRI.K.C.SANTHOSHKUMAR
SMT.K.K.CHANDRALEKHA

RESPONDENT(S)/RESPONDENT/COMPLAINANT :

1. C.M.SHAJI
S/O.M.VASU, REENA NIVAS, PALAYAD P.O.
THALASSERY, KANNUR DISTRICT.

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

R1 BY ADV. SRI.C.P.PEETHAMBARAN
R BY PUBLIC PROSECUTOR SRI. N. SURESH.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 23-12-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No.1794 of 2012

Dated this the 23rd day of December, 2015

ORDER

This revision petition is preferred against the judgment in Crl. Appeal No.729/2004 of the Additional Sessions Judge, Thalassery. The revision petitioner is the accused in S.T.C.No.2036/2004 on the file of Additional Chief Judicial Magistrate, Thalassery for having committed an offence punishable u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the N.I. Act). The complainant's case is that the accused borrowed a sum of ₹77,000/- from him and in discharge of that debt, he issued Ext.P1 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. Thereafter, there was no repayment. Hence, the above complaint. During trial, the complainant was examined as PW1 and his documents were marked as Exts.P1 to P7. The accused examined DW1 and marked Ext.D1. The learned Additional Chief Judicial Magistrate convicted the accused and sentenced to simple imprisonment for nine months and to pay compensation of ₹85,000/- u/s.357(3) Cr.P.C. Against that, he preferred Crl.Appeal 729/2004 before Additional Sessions Court, Thalassery and the appeal was dismissed. Being aggrieved by that, he preferred this revision petition.

2. Heard both sides. Section 138 of the N.I. Act, says that where a 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 that account, for the

discharge of any debt or liability, is returned by the bank on the ground that 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. For attracting this deemed provision, 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 has to make a demand for payment of such amount by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of information from the bank. If the drawer fails to make the payment of the due amount after receipt of notice, then only the complainant can be proceeded against the accused as per law.

3. The complainant was examined as PW1 in the trial Court and his evidence shows 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 is the dishonour memo. Ext.P3 is the memo issued by Dharmadam Service Co-operative Bank, Palayad. Ext.P4 is the copy of lawyer notice. Ext.P5 is the postal receipt. Ext.P6 is the acknowledgment card and Ext.P7 is the reply notice. A close scrutiny of Exts.P1 to P7 shows that when Ext.P1 was presented for encashment, it was dishonoured for the reason of funds insufficient and there was no repayment of the amount after receipt of notice. When cheque is dishonoured for the reason stated u/s.138 of the N.I. Act, a statutory presumption u/s.139 of the N.I. Act can be drawn in favour of the holder of the

cheque.

4. 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 presumption u/s.139 is a rebuttable presumption. To rebut the presumption u/s.139, the revision petitioner examined DW1 and marked Ext.D1. After analysing the evidence, the trial Court was of the view that, that evidence itself is not sufficient to rebut the presumption u/s.139 of the N.I.Act. The principle drawing presumptions has been explained by the Apex Court in **Beena** v. **Muniappan** (AIR 2001 SC 2995) and in **Rangappa** v. **SriMohan** [(2010) 11 SCC 441], in which it is held as follows:

> The presumption mandated by Section 139 includes a presumption that 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 favour the respondent complainant"

5. Considering the legal principle settled by the Apex Court, the trial Court convicted the appellant and the appellate Court rightly confirmed the conviction. Both Courts observed that presumption u/s.139 was not rebutted in this case. Therefore, the conviction passed by the trial Court and confirmed by the appellate Court is upheld.

6. In **M/s.Target Overseas Exports Pvt. Ltd.** v. **A.M. Iqbal (2005 Cri.L.J.1931)** this Court held that, sentence to undergo imprisonment till the rising of the court and compensation under Section 357(3) Cr.P.C. is sufficient to meet the ends of justice. Considering the nature of transaction, I am of the view that the sentence imposed by the trial court can be modified as follows:

The revision petitioner is sentenced to imprisonment till rising of the Court and to pay compensation of ₹ 85,000/- u/s.357(3) Cr.P.C. The revision petitioner is directed to surrender in the trial Court to undergo the modified sentence, failing which the learned Additional Chief Judicial Magistrate, Thalassery shall issue non bailable warrant against the revision petitioner to undergo the modified sentence. Any amount deposited by the revision petitioner shall be adjusted with the compensation amount.

P.D. RAJAN, JUDGE.

acd