IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 5TH DAY OF AUGUST 2015/14TH SRAVANA, 1937

Crl.Rev.Pet.No. 3536 of 2006 ( )

AGAINST THE JUDGMENT IN CRA 221/2003 of I ADDL.DISTRICT COURT, THIRUVANANTHAPURAM DATED 28-02-2006

AGAINST THE JUDGMENT IN CC 174/1999 of J.M.F.C.-II,NEDUMANGAD DATED 06-03-2003

REVISION PETITIONER(S)/APPELLANT/ACCUSED.:

A.SHARAFUDEEN, THADATHARIKATHU VEEDU,
THEVANPARA, PANGODE VILLAGE, NEDUMANGADU TALUK
THIRUVANANTHAPURAM.

BY ADV. SRI. A.SHARAFUDEEN (PARTY-IN-PERSON)

RESPONDENT(S)/RESPONDENTS/COMPLAINANT AND STATE.:

1. ABDUL KHARIM, CHARUVILA PUTHEN VEEDU,
   MANKODU, ANAKUDI MURI, PANGODE VILLAGE,
   NEELAMANGALAM, THIRUVANANTHAPRUAM.

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

BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 05-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**P.D. RAJAN, J.**

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Crl.R.P.No.3536 of 2006

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Dated this the 5th day of August, 2015

**ORDER**

The revision petitioner challenges the judgment in Crl.Appeal No.221/2003 of I Additional District Court, Thiruvananthapuram, which was filed against the judgment in C.C.No.174/1999 of Judicial First Class Magistrate Court-II, Nedumangad for offence punishable u/s.138 of the N.I. Act. The 1st respondent is the defacto complainant in the above case. His case was that on 2.1.1999, the revision petitioner borrowed a sum of ₹95,000/- and in discharge of that debt, he gave Ext.P1 cheque. When it was presented for encashment, it was dishonoured for the reason of 'funds insufficiency'. The 1st respondent made a demand by issuing a lawyer notice. Even after accepting the notice, there was no repayment from the side of the 1st respondent. In the circumstances, he filed the above complaint in the trial Court.

2. To prove the offence, the 1st respondent examined PW1 to PW3 and marked Exts.P1 to P8. The revision petitioner examined DW1. The trial Court, after analysing the evidence, convicted the revision petitioner and sentenced thereunder. Against that he preferred the above appeal.

3. After filing this revision petition, this Court ordered notice on 9.11.2006, but the process filed by the revision petitioner was defective. Thereafter, no steps were taken. On 24.7.2015, this Court directed to take steps to issue notice by special messenger to the 1st respondent. Even after that direction, no steps were

taken by the revision petitioner.

4. The revisional jurisdiction of the High Court are entirely discretionary and it can be used for the purpose of satisfying the correctness, legality or propriety of the finding and sentence or order of the courts below. For this, I have considered the records of the courts below as to whether they have committed illegality or irregularity while disposing the above case.

5. 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. 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. To prove the offence, the complainant was examined as PW1. His evidence shows that the revision petitioner borrowed a sum of ₹95,000/- from him. In discharge of that debt, he issued Ext.P1 cheque. Ext.P2 is the dishonour memo, Ext.P3 is the return memo, Ext.P4 is the lawyer notice, Ext.P5 is the postal receipt, Ext.P6 is the acknowledgment card, Ext.P7 is the extract of the account of the accused and Ext.P8 is the specimen signature card. PW2 is the Bank Manager. When Ext.P1 was presented for encashement, it was dishonoured for the reason of 'funds insufficient'. Inspite of lawyer notice, there was no repayment from the revision petitioner. The evidence of PWs 1 to 3 shows that the accused had issued Ext.P1 cheque in discharge of liability.

6. 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 have been accepted by the accused, the presumption under Section 139 would operate. Thus, the burden was on the accused to rebut the presumption of the existence of any legally recoverable debt or liability. Therefore, findings of the Courts below regarding the guilt of the revision petitioner is to be confirmed.

In the circumstances, I have gone through the judgment of the Courts below. I do not find any illegality in the above judgment of the appellate Court. Therefore, there is no merit in this revision petition and it is dismissed accordingly.

**P.D. RAJAN, JUDGE.**

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