IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 17TH DAY OF DECEMBER 2015/26TH AGRAHAYANA, 1937

Crl.Rev.Pet.No. 3883 of 2006 ( )

AGAINST THE JUDGMENT IN CRL. APPEAL 385/2005 of
III ADDL. SESSIONS JUDGE, KOLLAM

AGAINST THE JUDGMENT IN CC 664/2003 of J.M.F.C.-I, KOTTARAKKARA

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

SHIBU, SHIBU NIVAS, KARAVALLOOR P.O.,
PUNALUR, PATHANAPURAM TALUK, KOLLAM DISTRICT.

BY ADVS.SRI.V.M.KURIAN
SRI.MATHEW B. KURIAN
SRI.K.T.THOMAS

RESPONDENT(S)/RESPONDENTS/COMPLAINANT:
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1. **K.S.RADHAKRISHNAN NAIR,**
   PATTARAZHIKATHU VEEDU, PADINJATTINKARA MURI
   KOTTARAKKARA TALUK, KOLLAM DISTRICT.

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

BY PUBLIC PROSECUTOR SRI. N. SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 17-12-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

STK

P.D. RAJAN, J.

Crl.R.P.3883 of 2006

Dated this the 17th of December, 2015

ORDER

This revision petition has been preferred against the judgment in Crl.Appeal 385/05 of the Addl. Sessions Judge III, Kollam. The revision petitioner is the accused in C.C.664/03 on the file of Judicial First Class Magistrate-I, Kottarakkara for having committed an offence under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the 'N.I. Act').

2. The complainant's case is that, on 4.2.2003, accused borrowed a sum of Rupees One lakh and in discharge of a debt, accused issued cheque drawn on Federal Bank, Punalur branch. 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, which was received by the accused and no repayment thereafter. In the circumstance, a complaint was filed in the trial court.

3. During trial, complainant was examined as PW1 and his documents were marked as Exts.P1 to P5. The accused examined DW1 to prove his defence. The learned Magistrate found the accused guilty under Section 138 of the N.I. Act and sentenced to undergo simple imprisonment for 10 months and a sum of Rupees One lakh under Section 357(3) Cr.P.C. with a default sentence for ten months. Against that he preferred Crl. Appeal.385/05, before Additional Sessions Judge-III, Kollam and the appellate court dismissed the appeal. Being aggrieved by that he preferred this revision petition.

4. I heard the counsel appearing for the revision petitioner and the learned Public Prosecutor. There was no appearance for the first respondent even after notice.

5. The revision petitioner's case is that both courts did not consider or appreciate the evidence at the time of disposal of the above case. The first respondent is conducting a Finance Company, Kaveri Finance with its Head Office at Madras. Revision petitioner hypothecated his vehicle in the Finance Company by

depositing the R.C. book of his vehicle and gave two signed blank cheques at the time of availing a loan of Rs.80,000/- which was repaid by the revision petitioner. It was admitted by the first respondent that he was the agent of Kaveri Finance, Kottarakkara. For summoning the relevant documents from the custody of first respondent, revision petitioner filed Crl.M.P.2372/05 in the Judicial First Class Magistrate Court-I, Kottarakkara, which was dismissed by the learned Magistrate. It is an illegality, if those documents were summoned, which will be sufficient to rebut the presumption under Section 139 of the N.I. Act.

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 N.I. 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 within thirty days from the date of information from the bank and drawer failed to pay the due amount after receipt of notice. The evidence of PW1 shows that revision petitioner borrowed a sum of Rupees One lakh from him and in discharge of a debt, he gave Ext.P1 cheque drawn on Federal Bank, Punalur. When it was presented for encashment, it was dishonoured for the reason of funds insufficient. Ext.P2 is the dishonour memo. He demanded the amount by giving a notice. Ext.P3 is the lawyer notice. Ext.P4 is the postal receipt. Ext.P5 is the returned postal article. A perusal of Exts.P1 to P5 show that, when Ext.P1 was presented for encashment, it was dishonoured for the reason of funds insufficient. When cheque is dishonoured for the reason stated under Section 138 of the N.I. Act, a presumption under Section 139 of the N.I. Act can be drawn in favour of the holder of the cheque.

7. According to Section 139 of the N.I. Act, a presumption can be drawn in favour of the holder of the cheque. It 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".

8. To rebut the above presumption under Section 139 of the Negotiable Instruments Act, the revision petitioner examined DW1 in the trial court and contended that he availed a loan of Rs.80,000/- at the time of purchasing a vehicle by hypothecation of his vehicle KL7N 2556 and gave two signed blank cheque leaves. Even though such a contention was raised, no documentary

evidence has been adduced by the revision petitioner to show that he hypothecated the vehicle KL7N 2556 as claimed. But, PW1 during cross-examination admitted that he was the staff of the Kaveri Financers. The Kaveri Finance availed vehicle loans on the basis of directions issued from its Head Office, Madras. Even though, this contention was raised by the revision petitioner, no documentary evidence has been produced in the trial court to prove the above defence contention.

9. The learned counsel relied the decision in **Vijay V. Laxman and Anr. (2013) 3 SCC 86** which reads as follows:

> "20. The High Court has rightly accepted the version given by the respondent-accused herein. We say so for reasons more than one. In the first place the story of the complainant that he advanced a loan to the respondent-accused is unsupported by any material leave alone any documentary evidence that any such loan transaction had ever taken place. So much so, the complaint does not even indicate the date on which the loan was demanded and advanced. It is blissfully silent about these aspects thereby

making the entire story suspect. We are not unmindful of the fact that there is a presumption that the issue of a cheque is for consideration. Sections 118 and 139 of the Negotiable Instruments Act make that abundantly clear. That presumption is, however, rebuttable in nature. What is most important is that the standard of proof required for rebutting any such presumption is not as high as that required of the prosecution. So long as the accused can make his version reasonably probable, the burden of rebutting the presumption would stand discharged. Whether or not it is so in a given case depends upon the facts and circumstances of that case. It is trite that the courts can take into consideration the circumstances appearing in the evidence to determine whether the presumption should be held to be sufficiently rebutted. The legal position regarding the standard of proof required for rebutting a presumption is fairly well settled by a long line of decisions of this Court."

10. The apex court also discussed the principle of rebuttal evidence under Section 139 of the N.I. Act. In **M.S.Narayana Menon V. State of Kerala (2006) 6 SCC 39** it was held as follows:

"29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words 'proved' and 'disproved' have been denied in Section 3 of the Evidence Act (the interpretation clause).......

30. Applying the said definitions of 'proved' or disproved' to the principle behind Section 118 (a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies."

11. The learned counsel also relied para 24 of the

above decision, in which it is held that,

> "24. Presumptions under Section 118(*a*) and Section 139 were held to be rebuttable on a preponderance of probabilities in *Bharat Barrel & Drum Mfg. Co.* v. *Amin Chand Payrelal* also where the Court observed:
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> > "*11.* ... '*32.* ... Though the evidential burden is initially placed on the defendant by virtue of Section 118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption "disappears". For the purpose of rebutting the initial evidential burden, the defendant can rely on direct evidence or circumstantial evidence or on presumptions of law or fact. Once such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the plaintiff who has also the legal burden.

12. It is the responsibility of the revision petitioner to rebut the presumption under Section 139 of the N.I. Act.

He neither produced details of the loan availed to him nor produced a copy of the relevant R.C.book of the vehicle. The Appellate court also observed the non-production of the documentary evidence with regard to the defence contention. Since the transaction is a personal transaction not connected with the vehicle loan as alleged, I am of the opinion that the defence version put forward by the revision petitioner is unbelievable and that itself is not sufficient to rebut the presumption. The courts below rightly convicted the accused. Therefore, the conviction under Section 138 of the N.I. Act is confirmed.

13. The learned counsel appearing for the revision petitioner contended that the sentence imposed by the courts below is too harsh. 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. In the circumstance, revision petitioner is sentenced to

imprisonment till rising of court under Section 138 of the N.I. Act and he is also sentenced to pay compensation of Rupees one lakh under Section 357(3) Cr.P.C., in default simple imprisonment for six months. The revision petitioner is directed to surrender in the trial court to undergo the modified sentence, failing which, the Judicial First Class Magistrate-I shall issue non-bailable warrant forthwith. If the fine amount is realised, it shall be disbursed to the first respondent. If any amount is deposited in the trial court, that amount can be adjusted with the compensation amount.

This revision petition is partly allowed.

Sd/-
P.D. RAJAN,
JUDGE

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P.A. TO JUDGE