

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 10TH DAY OF SEPTEMBER 2015/19TH BHADRA, 1937

Crl.Rev.Pet.No. 3995 of 2006 (D)

**AGAINST THE JUDGMENT IN CRL. APPEAL 163/2005 of SESIONS COURT,
WAYANAD,KALPETTA**

AGAINST THE JUDGMENT IN ST 829/2004 of J.M.F.C-II, SULTHANBATHERY

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

**FINI C.AUGEN, CHETTAKULANTHINKARA,
MOOLANKAVU P.O., KUPPADY AMSOM,
SULTHAN BATHERY TALUK,
WAYANAD DISTRICT.**

**BY ADVS.SRI.BABU S. NAIR
SRI.P.A.RAJESH**

RESPONDENT(S)/COMPLAINANT AND STATE:

- 1. SHINOJ MATHEW,
S/O.MATHEW, EARATH HOUSE, KABANIGIRI P.O.,
PADICHIRA AMSOM, DESOM, SULTHAN BATHERY TALUK.**
- 2. THE STATE OF KERALA,
REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM, KOCHI-31.**

**R1 BY ADV. SRI.K.RAKESH ROSHAN
R2 BY PUBLIC PROSECUTOR SRI. N. SURESH**

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 10-
09-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl.R.P.3995 of 2006

Dated this the 10th day of September, 2015

ORDER

The revisional power is conferred to the High Court to correct failure of justice arising from erroneous orders. While exercising this power, it is justified only when it rectify the failure of justice and not to rectify every error. The fact that the lower court has taken a wrong view of law or misapprehended the evidence is not a reason to interfere unless it has resulted in miscarriage of justice.

The revision petitioner is the appellant in Crl. Appeal No.163/05 of the Sessions Judge, Kalpetta challenges the concurrent conviction under Section 138 of the Negotiable Instruments Act. He was accused in S.T.829/2004 on the file of Judicial First Class Magistrate-II, Sulthan Bathery for offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'Act'), he was convicted and sentenced to undergo simple imprisonment for 6 months and to pay a compensation of Rupees One lakh under Section 357(3) Cr.P.C, in default of payment of

compensation, simple imprisonment for 3 months. Against that he preferred Crl. Appeal 163/2005 of Sessions Judge, Wayanad, Kalpetta where the conviction was confirmed and sentenced was modified to imprisonment till rising of court and pay compensation of Rs.1,10,000/-, in default of payment of compensation, simple imprisonment for 3 months. Being aggrieved by that, he preferred this revision petition.

3. The first respondent is the complainant in the trial court. The complainant's case in the lower court was that, in discharge of a debt of Rupees One lakh, accused issued Ext.P1 cheque. When the cheque was presented for encashment, it was dishonoured for the reason of funds insufficient. He demanded the due amount by giving a notice in writing to the accused. Even after receipt of that notice, there was no payment. In this circumstance, a complaint was filed in the Judicial First Class Magistrate-II, Sulthan Bathery.

4. To prove the offence, complainant was examined as PW1. He also examined PW2 to PW4 in support of his

contention. His documentary evidence were marked as Exts.P1 to P10. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. Ext.D1 and D2 were marked in support of his defence. The trial court after analyzing the evidence, convicted the accused.

5. The learned counsel appearing for the revision petitioner contended that Ext.P6 reply notice was properly considered by the courts below. Moreover, rebuttable evidence of Exts.D1 and D2 are sufficient to reject the claim of first respondent. Hence the illegality may be rectified invoking revisional jurisdiction.

6. The learned counsel appearing for the first respondent also contended that Ext.P10 was rejected by the trial court, against that no revision was filed by the revision petitioner, which shows that the allegation of the first respondent was properly proved in the trial court and no reason to interfere in the findings of the courts below.

7. The specific case of PW1 is that, Ext.P1 was issued in discharge of a debt. He deposed that on 20.11.03

revision petitioner approached PW1 and as per the request he gave One lakh Rupees to him. When he demanded that amount, the revision petitioner issued Ext.P1 cheque. When it was presented for encashment, it was dishonoured for the reason of funds insufficient. Ext.P2 is the dishonour memo. He send a lawyer notice, Ext.P3 is the copy of the lawyer notice, Ext.P4 is the postal receipt and Ext.P5 is the AD card. Ext.P6 is the reply notice. Ext.P7 is the extract of the account of the revision petitioner. Ext.P8 is the extract of the cheque return register. PW2 is the Manager of the South Malabar Gramin Bank, Mullankolly deposed that, when Ext.P1 was presented for encashment, it was dishonoured for the reason of funds insufficient. Ext.P8, the extract of the cheque return register also discloses about the insufficiency of funds. In the trial court revision petitioner contended that there was difference in the signature in Ext.P1 and Ext.D2. But PW2 admitted that, the signature in Ext.P1 and Ext.P2 are similar, Ext.P1 was dishonoured for the reason of funds insufficient. When Ext.P1 was

dishonoured for the reason of funds insufficient, a presumption under Section 139 can be drawn in favour of the holder of the cheque.

8. 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 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 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 Ext.D1 and D2 were marked to rebut the presumption under Section 139 of the Negotiable Instruments Act. But that evidence is not sufficient and observed that the accused failed to rebut the presumption.

9. The revision petitioner raised a contention in Ext.P6 reply notice that, the car was stolen by somebody and Ext.P1 cheque was also stolen from the car. But, PW1 deposed that, PW3 sold the car to PW4, and the story of stolen car and cheque is a concocted story. It is clear that, Ext.P9 report was obtained from the C.I. of Police, Bathery in connection with CMP.6501/03. Therefore, analyzing the evidence of PW1, PW3 and PW4, the evidence in Exts.D1 and D2 are not sufficient to rebut the presumption under Section 139 of the Negotiable Instrument Act and convicted the revision petitioner. I find no illegality in the above finding.

Appellate court sentenced the revision petitioner to undergo imprisonment till rising of court and

pay compensation of Rs.1,10,000/- under Section 357(3) Cr.P.C., in default simple imprisonment for three months. I find no reason to interfere in that findings and there is no merit in this appeal and it is dismissed accordingly. The revision petitioner is directed to surrender in the trial court within 30 days from the date of receipt of a copy of this order, to undergo the sentence, failing which, Judicial First Class Magistrate II, Sulthan Bathery shall issue non-bailable warrant against the accused.

STK

**P.D. RAJAN,
JUDGE**