

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 18TH DAY OF AUGUST 2015/27TH SRAVANA, 1937

Crl.Rev.Pet.No. 983 of 2008 ()

AGAINST THE JUDGMENT IN CRL. APPEAL 491/2006 of ADDITIONAL SESSIONS
COURT (ADHOC-1), ERNAKULAM DATED 27-12-2007

AGAINST THE JUDGMENT IN CC 852/2003 of JUDL.M.F.C.-I, ERNAKULAM
DATED 20-05-2006

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

ANILKUMAR, PROPRIETOR,
BHARAT INTERNATIONAL EXPORT, NAIKATTY, SULTHAN BATHERY
WAYANAD DT., KERALA.

BY ADVS.SRI.S.SUDHISH KUMAR
SRI.K.B.DAYAL
SRI.SIBI KARUN

RESPONDENT(S)/RESPONDENT/COMPLAINANT AND STATE:

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1. INTERNATIONAL CLEARING & SHIPPING AGENCY,
COASTAL BUILDING, IIND FLOOR
MILNA ROAD, WILLINGTON ISLAND, KOCHI-3
REP. BY UMMAN JACOB.
 2. STATE OF KERALA REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R2 BY PUBLIC PROSECUTOR SMT. SAREENA GEORGE

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 18-08-2015, ALONG WITH CRRP. 1071/2008 & CON.CASE, THE
COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.Nos.983, 1071 & 1072 of 2008

Dated this the 18th day of August, 2015

ORDER

The revision petitioner, who was the appellant in Crl.Appeal Nos.491/2006, 490/2006 and 489/2006 of Additional Sessions Judge (Adhoc-I), Ernakulam, challenges the judgment of conviction u/s.138 of the N.I. Act. The revision petitioner was convicted in C.C.Nos.852/2003, 851/2003 and 824/2003 of the Judicial First Class Magistrate Court-I, Ernakulam and sentenced to undergo simple imprisonment for three months each in each cases and directed to pay compensation of ₹4,80,000/- in C.C.No.824/2003, ₹5,43,680/- in C.C.No.851/2003 and ₹12,00,000/- in C.C.No.852/2003 to the complainant u/s.357

(3) Cr.P.C. In default of payment of compensation, simple imprisonment for three months each in three cases. Against that, the revision petitioner preferred the above Criminal Appeals before the Appellate Court.

2. The brief facts given rise to the indictment in C.C.No.852/2003 were that the revision petitioner is the proprietor of M/s.Bharath International Exports, Naiketty, Sulthan Bathery, Wayanad District. The 1st respondent M/s. International Clearing and Shipping Agency having its branch office at Willington Island represented by its Manager duly authorised by the Company and the Power of Attorney holder. The revision petitioner had availed the services for the export of cargo of fresh vegetables and fruits from Cochin to Damma/K.S.A. and Kuwait on various dates and he was liable to make payment against various invoices towards

freight and other charges. In discharge of that liability, he issued a cheque dated 12.8.2003 for ₹10,00,000/- drawn on Union Bank of India, Sulthan Bathery in favour of the 1st respondent. When cheque was presented for encashment through Centurian Bank, Cochin, it was dishonoured for the reason of funds insufficient. Subsequently, the 1st respondent issued a lawyer notice to the revision petitioner. Even after receipt of notice, there was no payment. He could not account for his failure. Hence, the above complaint.

3. The facts given rise to the indictment in C.C.No.851/2003 were that, in discharge of the liability, the revision petitioner issued a cheque dated 19.8.2003 for ₹4,53,075/- drawn on Union Bank of India, Sulthan Bathery in favour of the 1st respondent. When cheque was presented for encashment through Centurian Bank, Cochin,

it was dishonoured for the reason of funds insufficient. Subsequently, the 1st respondent issued a lawyer notice to the revision petitioner. Even after receipt of notice, there was no payment. He could not account for his failure. Hence, the above complaint.

4. The facts given rise to the indictment in C.C.No.824/2003 were that, in discharge of the liability, the revision petitioner issued a cheque dated 23.7.2003 for ₹4,00,000/- drawn on Union Bank of India, Sulthan Bathery in favour of the 1st respondent. When cheque was presented for encashment through Centurian Bank, Cochin, it was dishonoured for the reason of funds insufficient. Subsequently, the 1st respondent issued a lawyer notice to the revision petitioner. Even after receipt of notice, there was no payment. He could not account for his failure. Hence, the above complaint.

5. In the trial Court, the revision petitioner filed a petition for joint trial, which was allowed and all the above cases were tried jointly. For proving the case, the defacto complainant examined PW1, who is power of attorney holder of the Company and admitted Exts.P1 to P11(a) as documentary evidence. The incriminating circumstances brought out in evidence were denied by the revision petitioner, while questioning him u/s.313 Cr.P.C. He did not adduce any defence evidence. The trial Court convicted the accused. Against that, he preferred the above criminal appeals, which were disposed by the appellate Court by modifying the sentence.

6. After filing the revision petitions, this Court directed the revision petitioner to give notice to the 1st respondent. No steps were taken by the revision petitioner. Even though on 11.8.2012 this Court directed

the revision petitioner to issue notice to the 1st respondent by special messenger, no steps were taken by the revision petitioner till 13.8.2015. Subsequently, this Court called a report from the trial Court as to whether the revision petitioner has complied with the direction in Crl.M.A.No.2963/2008. As per the above direction, Judicial First Class Magistrate-I, Ernakulam submitted that on verification of the case records of CC 852/2003 on the file of that Court, the accused had not executed bail bond of ₹10,000/- and cash deposit of ₹2,00,000/- as directed by this Court on 26.3.2008. On the basis of the direction issued from this Court, the learned Public Prosecutor obtained a report from Inspector of Police, Sulthan Bathery Police Station, which shows that the revision petitioner is an accused in L.P.No.8/2011 of Judicial First Class Magistrate Court-II, Manjeri and

S.T.No.6216/2013 of Judicial First Class Magistrate Court-II, Thiruvananthapuram. Since the revision petitioner is absconding, they could not execute warrant.

7. The learned counsel, Adv. Sri. K.B. Dayal, appearing for the revision petitioner submitted that no instructions have been received from the revision petitioner. Hence, I heard the learned Public Prosecutor and perused the documents of the case.

8. 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. 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.

9. The evidence of PW1 shows that he is the Manager of the 1st respondent and Ext.P2 is the power of attorney. As per Ext.P2, he is authorised to represent the Company. He produced Ext.P3 invoice and Ext.P4 is the extract of statement of shipment. Exts.P5, P5(a) and P5 (b) are the three cheques given to the 1st respondent. Exts.P6, P6(a) and P6(b) are the dishonour memos. Exts.P7, P7(a) and P7(b) are the intimations. Ext.P8, P8(a) and (b) are the demand notices. Ext.P9 series are the acknowledgment cards. Exts.P10 series are the postal receipts. Exts.P11 and P11(a) are the letters received from the revision petitioner. A close scrutiny of the evidence of PW1, it is clear that when Ext.P5 series were presented for encashment, they were dishonoured for the reason of

funds insufficient. 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.

10. 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, since the cheque as well as the signature has 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. No evidence has been adduced by the revision petitioner to rebut the presumption u/s.139 of the N.I. Act. The Courts below analysed the evidence and convicted the revision petitioner. I do not find any illegality in the above findings of the lower Courts. Therefore, there is no merit in these revision petitions and they are dismissed accordingly.

P.D. RAJAN, JUDGE.

acd

