IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

Crl.Rev.Pet.No. 3633 of 2007 ( )

AGAINST THEJUDGMENT IN Crl.Appeal 42/2007 of ADDITIONAL SESSIONS JUDGE, FAST TRACK COURT-II, ALAPPUZHA DATED 04-06-2007

AGAINST THE JUDGMENT IN CC 1145/2004 of JUDICIAL MAGISTRATE OF FIRST CLASS COURT-I, CHERTHALA DATED 28-12-2006

REVISION PETITIONER(S)/APPELLANT/ACCUSED::

VARGHESE C.KATTUNGAL, S/O. CHACKO,
KATTUNGAL VEEDU, SANATHANAPURAM WARD, ALAPPUZHA.

BY ADVS.SRI.GRASHIOUS KURIAKOSE
SRI.B.PRAMOD

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE::

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1. K.K. BHANUMATHY, AGED 74 YEARS,
   LAKSHMI NIVAS, P.H. WARD, ALAPPUZHA.

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

R, BY PUBLIC PROSECUTOR SRI. N.SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 02-11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No.3633 of 2007

Dated this the 2nd day of November, 2015

ORDER

Revision petitioner, who is the appellant in Crl.Appeal No. 42/2007 of the Additional Sessions Judge, Alappuzha (Fast Track), challenges the concurrent conviction u/s.138 of the Negotiable Instrument Act (hereinafter referred to as the N.I. Act). He was accused in C.C.No.1145/2004 of Judicial First Class Magistrate Court, Cherthala for offence punishable u/s.138 of the N.I. Act. The complainant's case is that the accused borrowed a sum of ₹10 lakh from her and in discharge of that debt, he issued Ext.P1 cheque. When Ext.P1 was presented for encashment, it was dishonoured for the reason of funds insufficient. The complainant demanded the amount by giving a notice in writing to the accused, even after notice, there was no payment. Hence she filed a complaint in the trial Court.

2. During trial, the complainant was examined as PW1 and her documents were marked as Exts.P1 to P9. Accused marked Ext.D1 as defence evidence. The trial Court convicted the accused and sentenced to simple imprisonment for one month and compensation of ₹10 lakh u/s.357(3) Cr.P.C. Against that, he preferred criminal appeal 42/2007 in which the finding of the trial Court was confirmed by the appellate Court. Being aggrieved by that, he preferred this revision petition. .

3. After filing this revision petition, this Court directed the revision petitioner to give notice to the 1st respondent. Even after specific direction, steps were not taken by the revision petitioner. In the circumstances,

notice was issued to R1 through DYSP, Alappuzha. As per the direction, Sub Inspector of Police, North Police Station, Alappuzha reported that the 1st respondent expired in 2014. Thereafter, no steps were taken by the revision petitioner to implead the legal heirs of the 1st respondent. Hence, I heard the learned counsel for the revision petitioner and the learned Public Prosecutor.

4. The revisional jurisdiction u/s.397 and 401 of the Code of Criminal Procedure is vested with the power to examine the proceeding of the inferior Criminal Court situate within its local jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior courts. 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 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.

5. To prove the case, the complainant was examined as PW1. Her 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 intimation. Ext.P4 is the postal envelope. Ext.P5 is the copy of the lawyer notice. Ext.P6 is the postal receipt and Ext.P7 is the acknowledgment card. Exts.P8 and P9 are the copies of the passbooks. Analysing the oral evidence of PW1, it is clear that Ext.P1 cheque was dishonoured for the reason of funds insufficient. When cheque is dishonoured for the reason stated u/s.138 of the N.I. Act, a presumption u/s.139 of the N.I. Act can be drawn in favour of the holder of the cheque.

6. 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 principle drawing presumptions has been explained by the Apex Court in **Beena** v. **Muniappan** (AIR 2001 SC 2995). There is no dispute about the signature in the cheque. When complainant has discharged his initial burden, the revision petitioner produced Ext.D1, which is a letter issued by the first respondent to the revision petitioner to rebut the presumption u/s.139 of the N.I. Act. Ext.D1 is a request to repay the due amount of rupees five lakhs by monthly instalments. The learned counsel appearing for the revision petitioner relied the decisions of Apex Court in **John K Abraham** v. **Symon C Abraham [2014(1) KLT 90 (SC)]**, **Joseph** v. **State of Kerala [2009 (3) KLT (SN)**

28 (Case No.30)] and **Bhaskaran Nair** v. **Mohanan [2009 (2) KLT 897]**. He contended that there is no evidence about the original transaction and first respondent has no capacity to pay such a huge amount. When PW1 was cross examined by the defence counsel, she stated that the actual due amount was ₹15 lakhs and on several occasions he paid ₹5 lakhs and balance is only ₹10 lakhs. While asking about the source of income, she stated that her pensionary benefits, money borrowed from her son, who is working abroad and some amount borrowed from her sister were handed over to the revision petitioner. If that be the position, the contention raised by the revision petitioner that she has no source of income to pay such amount is not sustainable and I cannot rely the above decisions. The trial court has convinced about the consideration and concluded that she had required fund while advancing the money to the accused.

7. Apex Court in **<u>T. Vasanthakumar</u>** v. **Vijayakumari** [(2015) 8 *SCC* 378] held as follows:

> "Therefore, in the present case since the cheque as well as the signature has been accepted by the accused-respondent, the presumption under Section 139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability. To this effect, the accused has come up with a story that the cheque was given to the complainant long back in 1999 as a security to a loan; the loan was repaid but the complainant did not return the security cheque. According to the accused, it was that very cheque used by the complainant to implicate the accused. However, it may be noted that the cheque was dishonoured because the payment was stopped and not for any other reason. This implies that the accused had knowledge of the cheque being presented to the bank, or else how would the accused have instructed her banker to stop the payment. Thus, the story brought out by the accused is unworthy of credit, apart from being unsupported by any evidence."

Therefore the conviction passed by the trial Court is only to be confirmed. In the circumstances, sentence is modified and the revision petitioner is sentenced to imprisonment till rising of court under Section 138 of the

N.I. Act and to pay a sum of Rs.10 lakhs as compensation under Section 357(3) Cr.P.C., in default of payment of compensation, simple imprisonment for 6 months. The revision petitioner shall appear before Judicial First Class Magistrate Court -I, Cherthala forthwith to undergo the modified sentence, failing which the trial Magistrate shall issue non-bailable warrant. The legal heirs of the first respondent are not impleaded in this case, if they come forward and file a petition, the trial court shall disburse the amount to the legal heirs of the first respondent.

P.D. RAJAN, JUDGE.

acd