IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 1ST DAY OF SEPTEMBER 2015/10TH BHADRA, 1937

Crl.Rev.Pet.No. 1409 of 2008 ( )

AGAINST THE JUDGMENT IN CRL.APPEAL NO.36/2006 of ADDL.DISTRICT & SESSIONS COURT (ADHOC) FAST TRACK COURT-II, PATHANAMTHITTA DATED 01-02-2008

AGAINST THE JUDGMENT IN CC 301/1999 of C.J.M.PATHANAMTHITTA DATED 23-12-2005

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

BIJU SAHIB, S/O. SHAHUL HAMEED,
THARAVILAYYATHU PUTHEN VEEDU, KANNAMKODU
ADOOR P.O. PATHANAMTHIITTA.

BY ADV. SRI.V.PHILIP MATHEW

RESPONDENT(S)/RESPONDENTS/COMPLAINANT::

1. N.G.BALAKRISHNAN
   GLASS HOUSE, PULLAD,
   KOIPURAM, REPRESENTED BY POWER OF ATTORNEY HOLDER
   THOMAS.P.RAJAN, CHIRATHALACKAL HOUSE, VALLAMKULAM
   EAST P.O, THIRUVALLA.

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

R,R1 BY ADV. SRI.ABRAHAM SAMSON
BY PUBLIC PROSECUTOR SRI. N. SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 01-09-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl. R.P.No.1409 of 2008

Dated this the 1st day of September, 2015

ORDER

The revision petitioner, who is the appellant in Crl.Appeal No.36/2006 on the file of the Additional District & Sessions Judge (Adhoc) Fast Track-II, Pathanamthitta, challenges the judgment of conviction u/s.138 of the Negotiable Instruments Act (hereinafter referred to as N.I. Act). He was accused in C.C. No.301/1999 of Chief Judicial Magistrate, Pathanamthitta, and convicted u/s.138 of the N.I. Act, sentenced to undergo simple imprisonment for one month and to pay a sum of ₹1,65,000/- as compensation u/s.357(3) Cr.P.C., which was modified by the Appellate Court. Being aggrieved by that judgment, he approached this Court.

2. The facts necessary for the indictment were that the revision petitioner issued three cheques, one for ₹50,000/- dated 12.1.1999, 2nd cheque for ₹50,000/- dated 23.1.1999 and 3rd cheque for ₹65,000/- dated 5.2.1999 to the 1st respondent in discharge of liability of ₹1,65,000/-. When the cheques were presented for encashment, they were dishonoured for the reason of funds insufficient. The 1st respondent demanded the due amount by giving a notice in writing to the revision petitioner, but there was no repayment. Hence, the above complaint was filed in the trial Court.

3. To prove the allegation, the 1st respondent examined his power of attorney holder as PW1 and his documents were marked as Exts.P1 to P11. The incriminating circumstances brought out in evidence were

denied by the accused while questioning him. He denied the transaction and examined Dws 1to 3. The trial Court, after analysing the evidence, convicted the accused.

4. The learned counsel appearing for the revision petitioner contended that there was no evidence to prove that the cheques were issued in discharge of a debt or liability. The power of attorney holder cannot depose in the place of defacto complainant. PW1 had no direct knowledge with regard to the transaction and the evidence of PW1 is only hearsay evidence. The revision petitioner was a Sales Representative under the 1st respondent and Exts.P2 to P4 were given as a security in connection with the business. Hence, the Courts below failed to appreciate that position. Therefore, the interference by invoking the revisional jurisdiction is necessary.

5. The learned counsel appearing for the first

respondent contended that the cheques were issued in discharge of a debt, which is clear from the evidence of PW1. The Power of attorney holder has direct knowledge with regard to the transaction and no interference is necessary, which was appreciated by the Courts below. No evidence has been available to prove that the revision petitioner was the Sales representative of the 1^{st} respondent's firm.

6. In this context, I have considered the reasons for invoking the revisional jurisdiction. The power of the revisional jurisdiction of the High Court in criminal cases is narrower and limited than its appellate power, which is discretionary and it cannot be invoked as of right as in the case of appellate jurisdiction. 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.

7. A reading of Section 138 of the Negotiable Instruments Act shows that, 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 within the statutory period on the date of receipt of information from the bank regarding the return of the cheque as unpaid.

8. For ascertaining the illegality, I have considered the contention put forward by both parties. PW1 is the Power of Attorney holder of the defacto complainant. His evidence shows that he has direct knowledge with regard to the transaction. Ext.P1 is the Power of attorney. PW1 deposed that Exts.P2 to P4 were issued in discharge of a debt of ₹1,65,000/-. When the cheques presented for encashment, which were dishonoured for the reason of

funds insufficient. Exts.P5, P5(a) and P5(b) are the dishonour memos. Ext.P6 is the intimation. The 1st respondent issued a lawyer notice. Ext.P7 is the copy of the lawyer notice. Ext.P8 is the postal receipt and Ext.P9 is the acknowledgment card. PW1 also produced Ext.P10, Extract of ledger folio. Ext.P11 is the Extract of cheque returned Register. Perusal of Exts.P5 to P5(b) shows that the cheques were dishonoured for the reason of funds insufficient. Analysing the oral evidence of PW1, it is clear that the cheques were dishonoured for the reason of funds insufficient. PW1 deposed that the cheques were given in discharge of a debt.

9. According to Section 139 of the N.I. Act, when the cheque is dishonoured for the reason of funds insufficient, statutory presumption u/s.139 of the N.I. Act can be drawn in favour of the holder of the cheque.

Section 139 of the N.I. Act 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".

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. 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".

The Courts below considered the decisions of Apex Court reported in **Hiten P. Dalal** v. **Bratindranath Banerjee** (AIR 2001 SC 3879], **Beena** v. **Muniappan** (AIR 2001 SC 2995) and **Narayana Menon** v. **State of Kerala** [2006 (3) KLT 404 (SC)]. Therefore, accepting the law settled by the Apex Court, the initial burden is upon the revision petitioner to rebut that presumption.

10. As discussed above, the presumption u/s.139 of the N.I. Act is a rebuttable presumption. The revision petitioner was examined as DW3, who disputed the transaction and contended that Exts.P2 to P5 were not issued in discharge of a debt or liability. On the other hand, he contended that it was entrusted to the 1st respondent as a security, while he was working with him as a Sales Representative. But, no documents were produced in the trial Court to show that he was appointed as a Sales Representative. He also examined DW1 and DW2 to rebut

the presumption available u/s.139 and 118 of the N.I. Act. DW1 deposed that the revision petitioner visited his firm as per the direction from the business firm of the defacto complainant, informed that the goods ordered would be supplied and the amount would be given to the revision petitioner. But no documents were produced by DW1 to show that he was conducting any business as claimed. DW2 also deposed that he is conducting a glass house at Adoor. For proving that aspect also, no evidence is available. When there is no documentary evidence to prove the business and job, the evidence put forward by the revision petitioner is not sufficient to rebut the presumption available u/s.118 and 139 of the N.I. Act. The trial Court relied the decision of the Apex Court in **Prakashan** v. **Surendran** [2007(2) KLD 477(SC)], **Kamala** v. **Vidyadharan** [2007 (2) KHC 631], **John k. John** v. **Tom**

Varghese [2007 (2) KLD 471(SC), **Gopan** v. **Tonny Varghese** [2008(1) KLD 62] and **M.S. Narayana Menon** v. **State of Kerala** [2006(3) SCC (Crl.30). When the rebuttal evidence is unbelievable, a presumption u/s.139 is available in favour of the holder of the cheque.

11. Another contention was that PW1 is only a power of attorney holder, he has no direct knowledge with regard to the transaction. It is admitted by PW2 in the trial Court that he knew the transaction and he has direct knowledge about the business. On the basis of that direct knowledge, the 1st respondent appointed him as power of attorney holder by executing Ext.P1 power of attorney. Hence, I do not find any infirmity in the evidence of PW1. When there is direct evidence with regard to the transaction, the power of attorney holder is competent to depose about the contents in Exts.P2 to P5. The trial

Court considered that aspect and convicted the accused, but the appellate Court modified the sentence of imprisonment till rising of the court and directed to pay a sum of ₹1,65,000/- to the first respondent under Section 357(3) Cr.P.C. as compensation, in default of payment of compensation, simple imprisonment for 3 months. I do not find any illegality in the above findings.

The revision petitioner is directed to appear before trial court within 30 days from today, for receiving the modified sentence, failing which Chief Judicial Magistrate, Pathanamthitta shall issue Non-bailable Warrant against the revision petitioner. There is no merit in this revision petition and it is dismissed accordingly.

P.D. RAJAN, JUDGE.

acd