IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 2ND DAY OF DECEMBER 2015/11TH AGRAHAYANA, 1937

Crl.Rev.Pet.No. 4633 of 2006 ( )

AGAINST THE JUDGMENT IN CRL. APPEAL 236/2004 of ADDL. SESSIONS COURT FAST TRACK, (ADHOC)-IV, TRIVANDRUM

AGAINST THE JUDGMENT IN CC 315/1998 of J.M.F.C.-II,TRIVANDRUM

REVISION PETITIONER(S)/APPELLANT/ACCUSED::
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SUSEEL KUMAR,
T.C.7/1538(2), SANTHI VIHAR, THIRUMALA P.O.,
THIRUVANANTHAPURAM.

BY ADV. SRI.K.B.PRADEEP

RESPONDENT(S)/RESPONDENT/COMPLAINANT & NO PARTY::
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1. **JAYAKUMARI, D/O. DEVAKIYAMMA,**
   G.5, POLICE QUARTERS, POONTHURA,
   THIRUVANANTHAPURAM.

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

R2 BY PUBLIC PROSECUTOR SRI. N. SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 02-12-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

STK

P.D. RAJAN, J.

Crl.R.P.4633 of 2006

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Dated this the 2nd of December, 2015

ORDER

The revision petitioner, who is the accused in C.C.315/99 on the file of the Judicial First Class Magistrate, Thiruvananthapuram challenges the concurrent conviction under Section 138 of the Negotiable Instruments Act (hereinafter referred to as N.I. Act). The complainant's case is that, accused borrowed a sum of Rs.50,000/- from him and in discharge of that debt he issued Ext.P1 cheque. When it 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. There was no repayment. In the circumstance, the above complaint was filed in the trial court.

2. During trial, complainant examined PW1 and her documents were marked as Exts.P1 to P7. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. The accused examined DW1 and produced Ext.D1 to D7. The

trial court convicted the accused under Section 138 of the N.I. Act and sentenced to undergo simple imprisonment for one year and compensation of Rs.50,000/- under Section 357 (3) Cr.P.C. He was also directed to pay cost of Rs.1000/- to the complainant. Against that he preferred Crl. Appeal 238/04 at the Addl. Sessions Court, Fast Track (Adhoc)-IV, Thiruvananthapuram, where the conviction was confirmed and modified the sentence to imprisonment till rising of court and compensation of Rs.50,000/- under Section 357(3) Cr.P.C., in default, simple imprisonment for 3 months. Being aggrieved by that, the accused preferred this revision petition.

3. Heard both sides. The learned counsel appearing for the revision petitioner contended that there is illegality in the notice at the time of demanding the amount. The trial court and appellate court never considered those points. Notice to first respondent was dispensed with.

4. I heard the learned Public Prosecutor also.

5. 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 and non-payment of due amount after receipt of notice by the drawer of the cheque.

6. PW1 is the defacto complainant. Her evidence shows that when cheque was presented for encashment, it was dishonoured for the reason of funds insufficient.

Ext.P2 and Ext.P3 are the memos issued from the bank. He demanded the due amount by giving a notice in writing. Ext.P4 is the copy of the lawyer notice, Ext.P5 is the reply notice, Ext.P6 is the extract of the ledger and Ext.P7 is the cheque return register. A close scrutiny of the evidence of Ext.P1 to Ext.P7 shows that the cheque 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. 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 N.I. 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".

In **Beena v. Muniappan (AIR 2001 SC 2995)** it was held that the presumption is rebuttable. Revision petitioner examined DW1 in support of his defence evidence and marked Ext.D1 to Ext.D7. Even though those documents were marked, the same is not sufficient to rebut the presumption under Section 139 of the N.I. Act. The trial court considered that aspect and convicted the accused, which was upheld by the appellate court. I find no illegality in the findings of the courts below. There is no merit in this revision petition and it is dismissed accordingly.

The revision petitioner is directed to surrender in the trial court within 3 weeks from the date receipt of a copy of this order to undergo the sentence, failing which, the trial Magistrate shall issue non-bailable warrant.

Sd/-
P.D. RAJAN,
JUDGE

STK

//TRUE COPY//

P.A. TO JUDGE