IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 3RD DAY OF SEPTEMBER 2015/12TH BHADRA, 1937

Crl.Rev.Pet.No. 1500 of 2008 ( )

AGAINST THE JUDGMENT IN CRL.APPEAL NO.313/2007 of SESSIONS COURT,KOZHIKODE DATED 21-02-2008
AGAINST THE JUDGMENT IN ST 165/2000 of C.J.M.,KOZHIKODE DATED 22-03-2007.

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

DR.K.V.HAMEED,
PROPRIETOR, COMMUNITY DRUGS SERVICE
KUDUNGHOOKARAN HOUSE, P.O. FEROKE PETTA
KOZHIKODE DISTRICT.

BY ADV. SRI.SUNIL V.MOHAMMED

RESPONDENT(S/RESPONDENTS/STATE/COMPLAINANT:

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1. THE STATE OF KERALA
   PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM

2. V.APPUKUTTAN MASTER,
   RTD. HEAD MASTER, INDU NIVAS, P.O. PULICKAL
   MALAPPURAM DISTRICT.

R,2 BY ADV. SMT.T.RESMI DAMODARAN
BY PUBLIC PROSECUTOR SRI. DHANESH MATHEW MANJOORAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 03-09-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No.1500 of 2008

Dated this the 3rd day of September, 2015

ORDER

The revision petitioner, who is the appellant in Crl.Appeal No.313/2007 on the file of Sessions Court, Kozhikode, challenges the concurrent finding of conviction u/s.138 of the Negotiable Instruments Act (hereinafter referred to as 'N.I.Act'). He was convicted and sentenced in S.T.No.165/2000 on the file of Chief Judicial Magistrate, Kozhikode. The above conviction was confirmed by the appellate Court, but sentence was modified as imprisonment for one month and to pay fine of ₹2,60,000/-, in default of payment of fine, simple imprisonment for three months. It was also directed that if the amount is released, ₹2,55,000/-

shall be paid to PW1 as compensation u/s.357(3) Cr.P.C. Aggrieved by that, the revision petitioner preferred this revision petition.

2. The complainant's case in the trial Court was that in discharge of a debt, the revision petitioner issued a cheque dated 22.2.2000. When it was presented for encsahment, it was dishonoured for the reason of funds insufficient. The 2nd respondent demanded the money by giving a notice in writing to the revision petitioner. Even after that notice, there was no repayment. In the circumstance, the above complaint was filed in the trial Court.

3. To prove the offence, the complainant was examined as PW1 and his documents were marked as Exts.P1 to P5. The incriminating circumstance brought out in evidence were denied by the accused, while questioning

him. The trial Court convicted the accused. Against that, he preferred the above appeal.

4. The learned counsel appearing for the revision petitioner contended that Ext.P1 cheque was issued on 22.2.2000 and in the date portion of the cheque, the year '2000' is added by scoring two digits '19', without any attestation, which means there is material alteration in Ext.P1. The 2nd respondent claimed that he was an income tax assessee, but he had not paid any income tax to the Government of India, thereby he failed to prove the source of income. When the source of income is not proved, there is no presumption about consideration u/s.118 of the N.I. Act. There was no argument from the side of the respondents.

5. A close reading of Section 138 of the N.I. 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.

6. To prove the averment in the complaint, PW1 produced Ext.P1 cheque dated 22.2.2000. It was dishonoured on 29.2.2000 on the ground of funds insufficient. Ext.P2 is the dishonour memo. The 2^{nd} respondent demanded money by giving a lawyer notice. Ext.P3 is the copy of the lawyer notice. Ext.P3(a) is the postal receipt. Ext.P4 is the acknowledgment card. Ext.P5 is the extract of the ledger. A close perusal of Exts.P1 to P5 shows that the cheque was dishonoured for the reasons of funds insufficient. PW1 deposed that Ext.P1 was issued in discharge of a debt. Even though, the revision petitioner contended that there is material alteration in Ext.P1 as per Section u/s.87 of the N.I. Act, it is pertinent to note that Ext.P1 was dishonoured for the reason of

funds insufficient. If the bank dishonoured the cheque on the ground of material alteration, that itself is a good ground for presuming that the cheque was dishonoured for the reason of material alteration. In the absence of any evidence with regard to material alteration, the contention put forward by the revision petitioner is only to be discarded. On the other hand, the cheque was dishonoured for the reason of funds insufficient.

7. When the cheque is dishonoured for the reason of funds insufficient, presumption is in favour of the holder of the cheque. Reading of Section 139 of the N.I. Act shows 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 lliability can be contested. However, there can be no doubt that there is an initial presumption which favours the respondent complainant".

Relied Apex Court decisions 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. No rebuttal evidence has been adduced by the revision petitioner in the trial Court. He took a contention that the revision petitioner is an income tax assessee and he failed to prove the source of income. It is admitted fact that the source of income is not a criteria while analysing

Section 118, 138 and 139 of the N.I. Act. The evidence of PW1 shows that Ext.P1 was issued in discharge of a debt or liability. When this initial burden is discharged, it is the responsibility of the revision petitioner to rebut the presumption available u/s.139 of the N.I. Act. When there is no rebuttal evidence, it is presumed that Ext.P1 was issued in discharge of debt or liability. The Courts below considered this legal point and convicted the revision petitioner. I do not find any reason to interfere in the conviction passed by the trial Court, but I modify the sentence as follows:

8. The revision petitioner is sentenced to imprisonment till rising of the Court and to pay compensation of ₹2,50,000/- u/s.357 (3) Cr.P.C., in default of payment of compensation, simple imprisonment for three months. If the compensation amount is deposited, it

shall be disbursed to the 2nd respondent. The revision petitioner is directed to surrender in the Chief Judicial Magistrate, Kozhikode within 30 days from today for receiving sentence, failing which, Chief Judicial Magistrate, Kozhikode shall issue Non Bailable Warrant against the revision petitioner.

Crl. Revision Petition is disposed accordingly.

P.D. RAJAN, JUDGE.

acd