IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 11TH DAY OF NOVEMBER 2015/20TH KARTHIKA, 1937

Crl.Rev.Pet.No. 1529 of 2008 ( )

AGAINST THE JUDGMENT IN CRL.APPEAL NO.411/2006 of SESSIONS COURT,PATHANAMTHITTA DATED 13-12-2007
AGAINST THE JUDGMENT IN ST 684/2005 of J.M.F.C.-II,PATHANAMTHITTA DATED 13-10-2006

REVISION PETITIONER(S)/APPELLANT/ACCUSED::

ASHOKAN,
HIGHLIGHT CHITTY FUND, ELIYIRACKAL, KONNY.

BY ADV. SRI.M.T.SURESHKUMAR

RESPONDENT(S)/RESPONDENT/COMPLAINANT::

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1. MRS. ROSAMMA ABRAHAM,
   VILAYIL HOUSE, KONNAPPARA, PAYYANAMON P.O.
   KONNY.

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

BY PUBLIC PROSECUTOR SRI. DHANESH MATHEW MANJOORAN.

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

acd

P.D. RAJAN, J.

Crl.R.P.No.1529 of 2008

Dated this the 11th day of November, 2015

ORDER

Revision petitioner, who is the appellant in Crl.Appeal No.411/2005 on the file of Sessions Judge, Pathanamthitta, challenges the concurrent conviction u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the N.I. Act). He was the accused in S.T.No.684/2005 of Judicial First Class Magistrate Court-II, Pathanamthitta. He was convicted and sentenced to undergo simple imprisonment for three months and to pay compensation of ₹22,000/- u/s.357(3) Cr.P.C., in default simple imprisonment for one month. Against that, he preferred the above appeal, in which the sentence was modified. Being aggrieved by that, he preferred this revision.

2. The complainant is the 1st respondent in this revision petition. Her case in the trial Court is that the accused borrowed a sum of ₹18,000/- from her 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 amount by giving a notice in writing. Even after receipt of notice, there was no payment. In the circumstances, a complaint was filed in the trial Court.

3. To prove the offence, the complainant was examined as PW1 and her documents were marked as Exts.P1 to P6. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. He examined DW1 and marked Exts.D1 to D4. The trial Court convicted the accused.

4. Heard the learned counsel for the revision petitioner and the 2nd respondent. There was no appearance from the side of the 1st respondent.

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 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 offence, the complainant was examined as PW1 in the trial Court. 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. Exts.P2 and P3 are the dishonour memos. She issued a lawyer notice. Ext.P6 is the copy of the demand notice. Ext.P4 is the postal receipt. Ext.P5 is the acknowledgment card. A perusal of Exts.P1 to P6 shows that when cheque is presented for

encashement, it was dishonoured for the reason of funds insufficient and all the formalities provided u/s.138 of the N.I. Act have been properly complied by the 1st respondent.

7. When cheque is dishonoured for the reason of funds insufficient as 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.

8. 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. 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. **<u>Sri</u>**

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".

Apex Court in **T. Vasanthakumar** 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.

9. For rebutting the evidence adduced by the revision petitioner, he examined DW1, the Bank Manager and marked Exts.D1 to D4. The trial Court, after analysing the oral evidence of DW1 to DW4, concluded that, that evidence itself is not sufficient to rebut the presumption. In the circumstances, the trial Court convicted him, which was upheld by the appellate Court. The appellate Court sentenced the revision petitioner to undergo simple imprisonment till rising of the Court and to pay a fine of ₹18,000/- to the complainant u/s.357(3) Cr.P.C., in default of payment of fine, simple imprisonment for one month. I do not find any illegality in the above finding. Therefore, there is no merit in this revision petition and it is dismissed accordingly.

The revision petitioner is directed to surrender in the Judicial First Class Magistrate-II, Pathanamthitta for receiving sentence, failing which the learned Magistrate shall issue non bailable warrant against the revision petitioner.

P.D. RAJAN, JUDGE.

acd