IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 4TH DAY OF DECEMBER 2015/13TH AGRAHAYANA, 1937

Crl.Rev.Pet.No. 2285 of 2008 ( )

AGAINST THE JUDGMENT IN CRL.APPEAL 11/2007 of ADDL.SESSIONS COURT (ADHOC)-1, KOTTAYAM DATED 31-03-2008

AGAINST THE JUDGMENT IN CC 1523/2003 of JUDICIAL MAGISTRATE OF FIRST CLASS-1, KOTTAYAM DATED 11-12-2006

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

MATHEWKUNJU MATHEW (GOVT. CONTRACTOR),
PADINJAREPARAMBIL HOUSE, THOTTAKKADUCHIRA, KOTTAYAM.

BY ADV. SRI.SURIN GEORGE IPE

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE:

1. SHIBU V.K., VADAKKEKARA HOUSE, AREEPARAMBUKARA, MANARCADU VILLAGE, KOTTAYAM.

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

R1 BY ADV. SRI.JOSE PALLATTUKARAN.
BY PUBLIC PROSECUTOR SRI. N. SURESH.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 04-12-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No.2285 of 2008

Dated this the 4th day of December, 2015

ORDER

The revision petitioner, who is the accused in C.C.No.1523/2003 of Judicial Magistrate of the First Class-I, Kottayam, challenges the concurrent conviction u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the N.I. Act).

2. The complainant's case in the trial Court is that the accused borrowed a sum of ₹4,30,000/- 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 repayment. In the circumstances, the above complaint was filed in the trial Court. The complainant was examined as PW1 and marked Exts.P1 to P7 as his documentary evidence. The accused denied the transaction and examined DW1 and DW2 and marked Exts.D1 to D3. The learned Magistrate convicted him and sentenced to simple imprisonment for six months. Being aggrieved by that, he preferred Crl.Appeal No.11/2007 of Sessions Judge (Adhoc)-I, Kottayam, where the sentence was modified as till rising of the Court with a fine of ₹4,30,000/- with default sentence of imprisonment for three months. It was directed that fine amount to be paid to the complainant as compensation u/s.357(1) Cr.P.C. Being aggrieved by that, the accused preferred this revision petition.

3. The revisional power conferred under Section

397 and 401 of the Code of Criminal Procedure on the High Court is a supervisory jurisdiction to correct the miscarriage of justice arising from the erroneous orders, which may arise from the misconception of law, irregularity of procedure or order and misreading of evidence. This revisional power is discretionary one and one cannot claim it as a vested right, when there is vested right in appeal. In an appeal, the appellant has a statutory right to demand adjudication upon a question of law or question of fact or of both. While exercising revisional jurisdiction, the petitioner has no such right, but he has the right to bring the case to the notice of the court and it is for the court to interfere in exceptional cases when it feels that substantial injustice has been done.

4. According to Section 138 of the Negotiable Instruments 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. PW1 was examined in the trial Court to prove the offence. The evidence of PW1 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. Ext.P4 is the copy of demand notice. Ext.P5 is the postal receipt. Ext.P6 is the acknowledgment card. Ext.P7 is the copy of ledger folio. Analysing the evidence of PW1 and the oral evidence of Exts.P1 to P7, it is clear that when Ext.P1 was presented for encashment, it 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. The principle drawing presumptions has been explained by the Apex Court in **Beena** v. **Muniappan** (AIR 2001 SC 2995). Apex Court in three-Judge Bench judgment in **Rangappa** v. **SriMohan** [(2010) 11 SCC 441] held as follows:

> The presumption mandated by Section 139 includes a presumption that 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 liability can be contested. However, there can be no doubt that there is an initial presumption which favour the respondent complainant"

To rebut the presumption u/s.139 of the N.I. Act, the revision petitioner examined DW1 and DW2 and marked Exts.D1 to D3 in the trial Court. DW1, who is the father of the complainant, deposed about different transaction made by the accused. He had also hearsay knowledge about payment on interest to the complainant by the accused. DW2 is the accused himself also deposed about the transaction. The trial court analysed the oral evidence of DW1 and DW2 and documentary evidence of Exts.D1 to D3. It is clear that the proper analysis of the evidence was made by the trial Court. From the evidence of DW2, it is seen that he did not borrow any amount from the complainant as stated by him, but that was not proved by him. Even though the accused contended that Ext.P1 cheque has no consideration, which was not admitted by the trial Court. The trial Court also relied the the decision of this Court in **Mohanan** v. **Vibhukumar** [2003 (2) KLT 896] and another decision in **Central Bank of India** v. **M/s.Saxons Firm** [1999 (3) KLT 384]. Analysing the evidence, both oral and documentary evidence, it is found that in the absence of rebuttal evidence, a presumption u/s. 139 can be drawn in favour of the holder of the cheque and the trial Court convicted the revision petitioner. I do not find any illegality in the judgment of the trial Court.

In the result, the conviction and sentence passed by the trial Court u/s.138 of the N.I. Act, which were modified by the appellate Court are confirmed and 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 Court-I, Kottayam within two months from today, to undergo the modified sentence, failing the learned Magistrate shall issue non bailable warrant against the revision petitioner.

P.D. RAJAN, JUDGE.

acd