IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 29TH DAY OF SEPTEMBER 2015/7TH ASWINA, 1937

Crl.Rev.Pet.No. 3067 of 2008 ( )

AGAINST THE JUDGMENT IN CRL. APPEAL NO. 170/2007 of SESSIONS COURT,KOZHIKODE DATED 25-07-2008
AGAINST THE JUDGMENT IN CC NO.396/2004 of J.M.F.C.-III,KOZHIKODE DATED 31-01-2007

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

SASIDHARAN KOLATHAI,
S/O.MADHAVAN NAIR, AGED 55 YEARS, KAILAS
GURUVAYOORAPPAN COLLEGE P.O., CALICUT - 14.

BY ADV. SRI.M.M.SHERIFF

RESPONDENT(S)/COMPLAINANT & STATE:
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1. MANOJ KUMAR.M., 22/101-A
   KOMMEDAMPARAMBA, THIRUVANNUR P.O., CALICUT - 29.

2. STATE OF KERALA,
   REP. 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 29-09-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No.3067 of 2008

Dated this the 29th day of September, 2015

ORDER

The revision petitioner, who is the appellant in Crl.Appeal No.170/2007 of the Sessions Court, Kozhikode, 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 C.C. No.396/2004 on the file of Judicial First Class Magistrate Court-III, Kozhikode and convicted and sentenced to pay fine of ₹95,000/- u/s.357(1) Cr.P.C., in default of payment of fine, simple imprisonment for three months. It is also directed that if the fine amount is released, it shall be disbursed to the complainant as compensation. Against that, he preferred an appeal, in which the finding of the trial Court was confirmed. Being aggrieved by that, the revision petitioner preferred this revision.

2. The complainant's case in the trial Court was that on 1.12.1997 the accused issued Ext.P1 cheque for ₹ 95,000/- drawn on Chevayur Service Co-operative Bank. When the cheque was presented for encashment, it was dishonoured for the reason of account closed. The complainant demanded the cheque amount by giving a notice in writing to the accused. Even after that, there was no repayment. Hence, the above complaint in the trial Court. To prove the allegation, PW1 to PW3 were examined and Exts.P1 to P5 were marked in the trial Court. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. He examined DW1 and marked Ext.D1. The trial Court convicted him.

3. The revisional jurisdiction is supervisory jurisdiction to find out the illegality, irregularity in the order or sentence or proceedings of the Court below. The power of the revisional jurisdiction is discretionary and limited than its appellate power, which cannot be invoked as of right as in the case of appellate jurisdiction. While exercising this power, it is justified only to correct the grave failure of justice and not merely to rectify every error.

4. The learned counsel appearing for the revision petitioner contended in the revision petition that the trial Court passed an erroneous judgment, which was confirmed by the appellate Court. The Magistrate cannot impose a fine provided u/s.29(2) of Cr.P.C. The defence evidence adduced by the revision petitioner was not considered by the trial Court. Hence, he prays for interference. But,

the learned Public Prosecutor submitted that the trial Court imposed the fine by violating Section 29(2) of Cr.P.C., which needs interference. The evidence of DW1 is not sufficient to rebut the presumption u/s.139 of the N.I. Act.

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 it 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. The complainant was examined was PW1 in the trial Court to prove the allegation. His evidence shows that Ext.P1 was issued in discharge of a debt of ₹95,000/-. When it was presented for encashment, it was dishonoured for the reason of account closed. Thereafter, he issued a lawyer notice. It was returned as unclaimed. Ext.P3 is the copy of the lawyer notice. Ext.P3(a) is the postal receipt. Ext.P4 is the returned notice with endorsement

'unclaimed'. Ext.P5 is the extract of the account maintained by the accused. A perusal of Exts.P1 to P5 shows that when Ext.P1 was presented for encashment, it was dishonoured for the reason of account closed. When Ext.P1 was 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.

7. 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".

The revision petitioner examined DW1 to rebut the presumption u/s.139 of the N.I. Act. He also produced Ext.D1 extract of the account maintain by the accused in the Chevayur Service Co-operative Bank. The trial Court was of the view that Ext.D1 and the oral testimony of Dw1 are not sufficient to rebut the presumption u/s.139 of the N.I. Act. The principle drawing presumptions has been explained by the Apex Court in **Narayana Menon** v. **State of Kerala** [2006 (3) KLT 404 (SC)], in which it was held as follows:

> "In Hiten P. Dalal v. Bratindranath Banerjee ((2001) 6 SCC 16), a 3-Judge Bench of this Court held that although by reason of Ss.138 and 139 of the Act, the presumption of law as distinguished from presumption of fact is drawn, the court has no other option but to draw the same in every case where the factual basis of raising the presumption is established. Pal. J. speaking for a 3-Judge Bench, however, opined:
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> 'Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.
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> In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the

> presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,
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> 'after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man"

Analysing the evidence in this case, it is found that the revision petitioner failed to discharge his official burden provided u/s.139 of the N.I. Act. The trial Court convicted the revision petitioner, which was upheld by the appellate Court.

8. The learned counsel appearing for the revision petitioner in his petition contended that the sentence imposed by the trial Court is violating Section 29(2) of

Cr.P.C. According to Section 29 (2) Cr.P.C., the Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years or of fine not exceeding ten thousand rupees or of both with effect from 23.6.2006. Before that, the Magistrate may pass a sentence of imprisonment for a term not exceeding three years and fine of ₹5,000/- only. In this case, the learned Magistrate imposed fine of ₹95,000/- u/s. 357(1) Cr.P.C., which needs interference. Therefore, the fine imposed by the trial Court is set aside and the revision petitioner is sentenced to imprisonment till rising of the Court and to pay compensation of ₹95,000/- u/s.357(3) Cr.P.C., in default of payment of compensation, simple imprisonment for three months. The revision petitioner is directed to surrender in the Judicial First Class Magistrate-III, Kozhikode, for receiving the modified sentence, forthwith, failing which the learned Magistrate shall issue Non Bailable Warrant against the revision petitioner.

Crl.R.P. is partly allowed.

P.D. RAJAN, JUDGE.

acd

6. The complainant was examined was PW1 in the trial Court to prove the allegation. His evidence shows that Ext.P1 was issued in discharge of a debt of ₹95,000/-. When it was presented for encashment, it was dishonoured for the reason of account closed. Thereafter, he issued a lawyer notice. It was returned as unclaimed. Ext.P3 is the copy of the lawyer notice. Ext.P3(a) is the postal receipt. Ext.P4 is the returned notice with endorsement 'unclaimed'. Ext.P5 is the extract of the account maintained by the accused. A perusal of Exts.P1 to P5 shows that when Ext.P1 was presented for encashment, it was dishonoured for the reason of account closed. When Ext.P1 was 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.