

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 13TH DAY OF OCTOBER 2015/21ST ASWINA, 1937

Crl.Rev.Pet.No. 3271 of 2008 ()

AGAINST THE JUDGMENT IN CRL.APPEAL 937/2006 of III ADDL. SESSIONS
COURT, ERNAKULAM DATED 24-07-2008

AGAINST THE JUDGMENT IN CC 306/2002 of JUDICIAL FIRST CLASS
MAGISTRATE-II, ERNAKULAM DATED 15-11-2006

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

HARIDAS, AGED 52,
PROP.REAL STAR DISTRIBUTOR, ETTUMANOOR
RESIDING AT.HARIMANDIR, KIADANGOOR, KOTTAYAM.

BY ADVS.SRI.V.RAJENDRAN (PERUMBAVOOR)
SRI.GEORGE VARGHESE KIZHAKKAMBALAM

RESPONDENT(S)/RESPONDENTS/STATE AND COMPLAINANT:

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1. STATE OF KERALA, REP. BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.
 2. M/S.POLAR INTERNATIONAL LTD. CALCUTTA
BRANCH OFFICE, ST.BANEDICT ROAD, COCHIN-18.

R1, BY PUBLIC PROSECUTOR SRI. DHANESH MATHEW MANJOORAN.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 13-10-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

acd

P.D. RAJAN, J.

Crl.R.P.No.3271 of 2008

Dated this the 13th day of October, 2015

ORDER

Revision petitioner, who is the appellant in Crl. Appeal No.937/2006 on the file of III Additional Sessions Judge, Ernakulam, challenges the concurrent finding of 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.306/2002 of Judicial First Class Magistrate-II, Ernakulam, he was convicted and sentenced to simple imprisonment for 1 year u/s.138 of the N.I. Act and to pay compensation of ₹7,90,000/- u/s.357(3) Cr.P.C., in default, simple imprisonment for one month.

2. The complainant's case in the trial Court is that

the accused was having credit business with the complainant and in discharge of that debt, he issued Ext.P1 cheque drawn on ICICI bank for ₹5,87,000/-. When Ext.P1 was presented for encashment, it was dishonoured for the reason of funds insufficient. The complainant issued a lawyer notice and demanded the due amount. Even after receipt of the lawyer notice, there was no repayment. Hence, the above complaint.

3. To prove the offence, the complainant examined PW1 and produced documentary evidence of Exts.P1 to P8. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. He did not adduce any defence evidence. The trial Court convicted him. Against that, he preferred an appeal, where the conviction was confirmed, but modified the sentence. Being aggrieved by that, the accused preferred

this revision.

4. The learned counsel appearing for the revision petitioner contended that the 2nd respondent has not produced any evidence to prove the transaction and the evidence of PW1 is not sufficient for a conviction. He also contended that the sentence imposed by the trial Court is excessive. The learned Public Prosecutor has no objection in modifying the sentence. But, he contended that the evidence of PW1 is sufficient to prove the alleged offence.

5. The specific case of PW1, who is the power of attorney holder of the 2nd respondent, is that as per Ext.P8 power of attorney, he is authorised to represent the 2nd respondent. The 2nd respondent is a Company registered under the Companies Act 1956 and its headquaraters at Kolkatta. The revision petitioner had business transaction with the 2nd respondent and in partial

discharge of a debt, he issued Ext.P1 cheque. When Ext.P1 was presented for encashment, it was dishonoured for the reason of funds insufficient. Ext.P2 is the pay-in-slip of Dhanalakshmi Bank. Exts.P3 and P4 are memos. Ext.P5 is the copy of the notice. Ext.P6 is the postal acknowledgment card. Ext.P7 is the return notice. Ext.P8 is the certified copy of power of attorney. Analysing the evidence of Exts.P1 to P8, it is clear that the cheque was dishonoured for the reason of funds insufficient. When cheque is dishonoured for the reasons 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. 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".

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"

No rebuttal evidence has been adduced by the revision petitioner. Therefore, the trial Court convicted the revision petitioner, which was upheld by the appellate Court. I do not find any illegality in the above conviction.

7. It is clear from the judgment of the trial Court

that the revision petitioner was sentenced to imprisonment for one year u/s.138 of the N.I. Act and directed to pay compensation of ₹7,90,000/- u/s.357(3) Cr.P.C. It is true that the sentence is purely discretion of the trial Court, but that discretion has to be applied in a rational manner. Considering the nature of transaction and the amount due, I am of the opinion that the sentence imposed by the trial Court needs interference. Therefore, I modify the sentence as follows:

1) The revision petitioner is sentenced to imprisonment till rising of Court u/s.138 of the N.I. Act and to pay compensation of 5,87,000/- u/s.357(3) Cr.P.C., in default of payment of compensation, simple imprisonment for three months.

2) If the compensation amount is realised, it shall be disbursed to the 2nd respondent forthwith.

3) The revision petitioner is directed to surrender in the Judicial First Class Magistrate-II, Ernakulam forthwith to undergo the modified sentence, failing which the learned Magistrate shall issue Non Bailable Warrant against him.

The Crl.Revision Petition is disposed of accordingly.

P.D. RAJAN, JUDGE.

acd

