

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

WEDNESDAY, THE 18TH DAY OF DECEMBER 2019 / 27TH AGRAHAYANA,
1941

CRL.A.No.782 OF 2006

AGAINST ST 1026/2004 DATED 30-01-2006 OF JUDICIAL
MAGISTRATE OF FIRST CLASS ,NILAMBUR

APPELLANT/COMPLAINANT:

A.K.BHASKARAN
S/O.KUTTI PARAVAN,
ABILASH NIVAS,
CHUNKATHARA,
MALAPPURAM DISTRICT.

BY ADV. SRI.R.RAMADAS

RESPONDENTS/ACCUSED AND STATE:

- 1 K.G.SHEEBA
TEACHER,A.K.M.L.P.SCHOOL,
PONYALLUR, MAMPAD,
MALAPPURAM DISTRICT.
- 2 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

R1 BY ADV. SRI.K.M.SATHYANATHA MENON

R2 BY SRI. B. JAYASURYA, SR. PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
11-12-2019, THE COURT ON 18-12-2019 DELIVERED THE
FOLLOWING:

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-.2:-

“C.R.”

Dated this the 18th day of December, 2019

JUDGMENT

The order of acquittal in S.T. No.1025 of 2004 on the files of Judicial Magistrate of First Class, Nilambur passed on 30.1.2006 is challenged by the complainant in this appeal.

2. He filed a private complaint against the accused alleging offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the N.I.Act'). His case is that accused, who is the wife of his friend, borrowed from him an amount of Rs.1,30,000/- for her personal needs by the end of November, 2003, agreeing to discharge the debt within a month. Since she failed in her promise, she issued Ext.P1 cheque dated 13.2.2004 in his name drawn on her banker, South Malabar Gramina Bank for the amount borrowed. The cheque on presentment was dishonoured on the ground of want of sufficient funds at the credit of the accused. A notice sent to accused demanding

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discharge of debt was replied by her denying the whole transaction. Therefore, the complainant lodged prosecution against her invoking Section 138 of the N.I.Act.

3. She denied the charge against her when it was read over and explained to her and the appellant thereupon gave evidence in support of his case as PW1 and adduced Exts.P1 to P5 in evidence on his side. The accused in her answers recorded by court under Section 313 of Cr.P.C. submitted that she did neither have any financial transaction nor any acquaintance with the accused. Ext.P1 cheque was not delivered to PW1. She produced Ext.D1 lawyer reply to the demand notice of the appellant. She examined her husband, Anilkumar as DW2 to prove her contention that she did not have any sort of transaction with PW1 and the loan transaction that took place was between PW1 and DW2 and that too, for an amount much lesser than what was claimed in the cheque. The disputed amount was settled at the office of C.I. of Police, Nilambur, and it was later repaid also.

4. The court below after appreciating the contentions of both parties and analysing the evidence, circumstances and probabilities of the case held that complainant failed to prove that accused had any financial transaction with him. It was held that the probabilities of the case indicated that the disputed money transaction was only between PW1 and DW2. Inasmuch as the alleged transaction with accused was not proved, it was held that Ext.P1 cheque cannot be considered as having been issued in discharge of legally enforceable debt incurred by the accused and therefore the prosecution under Section 138 of the N.I.Act cannot sustain against her. On this finding, the impugned order of acquittal was passed.

5. I heard the learned counsel for the appellant and also the learned counsel for the first respondent, accused.

6. It is contended by the learned counsel for the appellant that the court below failed to read the evidence in its correct perspective and came to an erroneous conclusion that the real transaction was between PW1 and DW2. It

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was also argued that even if it was assumed for a moment that the transaction was between PW1 and DW2 also, the prosecution of accused was sustainable since Ext.P1 was nevertheless a cheque executed and issued by her for consideration, no matter it might have been issued in discharge of liability of her husband. It is also contended that accused has not taken a contention anywhere that she did not sign the cheque nor deliver it to the complainant. She did not have a case that the cheque issued was blank. According to the learned counsel, in the above scenario, presumption of consideration under Section 139 of the N.I.Act attaches to Ext.P1 cheque in its full vigour and this is sufficient enough to fasten the accused with criminal liability under Section 138 of the N.I.Act. The learned counsel for the appellant cited decisions in **T.Vasanthakumar v. Vijayakumari** [(2015) 8 SCC 378], **Jyothi Prasad Bhat (Dr.) v. K.Sundara Rajan and Another** (2013 (3) KHC 141), and **Divakaran v. State of Kerala** (2016 (4) KLT 233) to contend for the position that

once delivery of cheque to complainant is proved and he is thereby shown to be a holder, presumption of consideration that issue of cheque was in discharge of legally enforceable debt accrues under Section 139 of the N.I.Act and the drawer of the cheque cannot get rid of the criminal liability under Section 138 of the N.I.Act unless she rebuts the presumption.

7. On the other hand, the learned counsel for the 1st respondent sought to sustain the order of acquittal canvassing the principle of law that in the absence of materials on record indicating that the view taken by the court below is either perverse or absurd, this court may not be justified in taking a different view and reversing an order of acquittal.

8. On re-appreciation of evidence, I also find that the conclusion arrived at by the court below that the debt in discharge of which Ext.P1 cheque was issued, arose out of a transaction between PW1 and DW2. The evidence on record does not prove that accused borrowed any amount from the

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complainant. The evidence given by PW1 that she borrowed Rs.1,30,000/- from him is not convincing. But at the same time, there is reliable evidence to the effect that she delivered Ext.P1 cheque drawn from her account in the name of PW1. PW1 himself admitted that there was a mediation talk with DW2 at the office of C.I. of Police, Nilambur with respect to the transaction covered by Ext.P1 cheque and consequently an agreement was also arrived at between them. He admitted that he also signed the agreement.

9. According to DW2, the agreement was signed by him admitting his liability only to the extent of Rs.30,000/- and he later repaid the amount also. But according to PW1, the agreement was signed for the entire cheque amount of Rs.1,30,000/-. This agreement was not produced in court by either parties. When DW2 was cross-examined, the suggestion put to him was that the agreement was manipulated by him. But I find that this suggestion is against PW1's own evidence that there was an agreement

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and he too signed it in the presence of C.I of Police, Nilambur.

10. DW2's evidence discloses that he had demanded loan from PW1 in the month of September, 2003. But he was given a cheque for Rs.15,500/- after PW1 receiving Rs.500/- as commission and advance interest of Rs.2,000/- each for two months. His total liability to PW1 was quantified as Rs.30,000/- in the presence of C.I of Police, Nilambur and that is how an agreement undertaking to discharge the liability came to be executed. This testimony of DW2 was not challenged by PW1 in the cross-examination. Thus, it is crystal clear, as found by the court below, that the financial transaction that gave rise to issue of Ext.P1 cheque was one that existed only between PW1 and DW2.

11. It is trite law that drawing or execution of a cheque becomes complete only by delivery. Unless there is delivery of cheque, no liability could be fastened on the drawer. This is what Section 46 of the N.I.Act signifies and

is how definition of 'holder' in Section 8 of the said Act becomes significant. So far as the question of delivery of cheque is concerned, there is ample evidence that accused delivered Ext.P1 to PW1. In Ext.D1 reply notice also, there is no specific denial of delivery of Ext.P1 cheque. On the other hand, a different cheque bearing No.840577 which has no bearing in the case seems to have been denied in the reply notice. In all probability, therefore what could be presumed from the totality of evidence and circumstances is that accused had drawn and issued Ext.P1 as a guarantor cheque in favour of PW1 in discharge of liability of her husband.

12. A cheque issued by a guarantor is also a cheque regarded by Section 138 of the N.I.Act as one being issued in discharge of legally enforceable debt. Section 138 of the N.I.Act nowhere provides that cheque drawn should be in discharge of drawer's liability alone. It could be in discharge of **“any debt or other liability”**. In other words, the presumption of consideration under Section 139 of the

N.I.Act accrues to guarantor cheques also.

13. A holder of a cheque is entitled to the benefit of legal presumption under Section 118(g) of the N.I.Act that he came into possession of the instrument in due course unless it is shown to have come to the custody of the possessor by means of an offence, fraud or other unlawful means. In this case, the accused had not even put a suggestion to PW1 that the cheque came to his possession otherwise than by lawful means. When the holder becomes a payee, he could successfully prosecute the drawer of the cheque under Section 138 of the N.I.Act irrespective of whether or not he had direct transaction with the drawer. Section 7 of the N.I.Act defines 'payee' as follows:

"Payee" -The person named in the instrument to whom or to whose order the money is by the instrument directed to be paid is called the "payee".

The definition does not stipulate that he should necessarily be a person having had direct dealing or financial transaction with the drawer. The 'payee' is a person to whom or to whose order money is made payable by the instrument. Payee therefore could be any person whom the

drawer of cheque may, to his choice, refer to his banker, no matter the drawer has not incurred any liability to the person named by him in the cheque. Section 138 of the N.I.Act does not demand that drawer should have had transaction or dealing with the payee in whose name the cheque was drawn. Therefore the accused cannot escape from the prosecution for the offence under Section 138 of the N.I.Act only because the real money transaction was between her husband and complainant. I have already held that the probabilities of the case have indicated that issue of Ext.P1 cheque was in discharge of her husband's liability to PW1.

14. But question that arises is whether she could be charged with criminal liability if she could show by materials on record that the liability of husband undertaken by her was for a much lesser amount than what was shown in the cheque. Taking the testimonies of PW1 and DW2 together, it could be reasonably inferred that liability of DW2 to the complainant was at the most for an amount of Rs.30,000/-.

This is what was recorded in the agreement itself going by the testimony of DW2. The execution of agreement is not denied by PW1 also. In my view, in the absence of complainant producing the agreement and showing that the amount actually settled as per the agreement was Rs.1,30,000/-, the evidence of DW2 alone must be preferred. The burden in this respect is only on PW1 especially because the evidence on record has shown that his alleged financial transaction with accused was untrustworthy. This burden was not discharged by the complainant.

15. In short, what emerges from the entire materials on record is that a blank cheque came to the possession of PW1 which he filled up making it appear that it was delivered for discharge of liability larger than what the accused had undertaken for her husband. If this is the actual position, the presumption of consideration arising under Section 139 of the N.I.Act cannot attach to Ext.P1 blank cheque nor can it help the complainant to contend

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that the issue of cheque was in discharge of entire amount of Rs.1,30,000/-. This is apart from the contention of DW2 that he discharged his debt to complainant through the office of C.I of Police, Nilambur. I hold that the accused is entitled at least to the benefit of reasonable doubt and she is not guilty of offence punishable under Section 139 of the N.I.Act. The finding of the court below that accused was not proved to have issued Ext.P1 cheque in discharge of liability for an amount of Rs.1,30,000/- is perfectly right. There is no reason to interfere with the same as it cannot be rejected as being perverse or absurd. Therefore, the impugned order of acquittal is only to be confirmed.

In the result, the appeal fails and is dismissed.

Sd/-

T.V.ANILKUMAR,JUDGE

vps