IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE GOPINATH P.

TUESDAY, THE 31ST DAY OF AUGUST 2021 / 9TH BHADRA, 1943

CRL.A NO. 1610 OF 2006

AGAINST THE JUDGMENT DATED 30.06.2006 IN C.C.NO.1577/2003 OF JUDICIAL MAGISTRATE OF FIRST CLASS - I MUVATUPUZHA

APPELLANT/PTITIONER:

V.P.ZACHARIA
AGED 59 YEARS
S/O.P.D.PUNNOOSE, VAZHANGATTU HOUSE,
KOOTHATTUKULAM.

BY ADV SRI.PEEYUS A.KOTTAM

RESPONDENT/RESPONDENTS:

1 STATE OF KERALA
REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

2 SAJEEVAN K.S.
SIVALAYAM, KAKKOOR, THIRUMARADI,
ERNAKULAM DISTRICT. (SAJI ENTERPRISES, VYAPAR BHAVAN, KOOTHATTUKULAM)

BY ADVS.

SRI. RANJITH GEORGE, GOVERNMENT PLEADER
SRI.P.V.ELIAS

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 31.08.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

This appeal has been filed by the complainant in C.C No.1577 of 2003 on the file of the Judicial First Class Magistrate Court, Muvattupuzha challenging the acquittal of the 2nd respondent who was accused of an offence under Section 138 of the Negotiable Instruments Act. The complaint was filed alleging that the 2nd respondent herein had in the discharge of a debt, issued cheque No.327388 dated 30.12.2000 drawn on the Catholic Syrian Bank, Koothattukulam branch for a sum of Rs.1,70,000/- and on presentation, the said cheque was returned unpaid on the ground of insufficiency of funds in the account maintained by the 2nd respondent/accused. The complaint was filed after statutory notice and complying with all other formalities.

2. The appellant/complainant was examined as PW1 and Exts.P1 to P11 were marked. From the side of the 2nd respondent/accused, DW's 1 to 3 were examined and D1 to D7 were marked.

3. The learned Magistrate, on a consideration of the matter found that the complainant had failed to prove his case and accordingly, acquitted the 2nd respondent/accused.

4. Sri.Peeyus A. Kottam, the learned counsel appearing for the appellant would submit that the circumstances which led to the finding that the complainant has not proved his case can be seen (in summary) from

paragraph 21 of the impugned judgment. He submits that the finding of the learned Magistrate that cheque No.327388 was issued before 5.6.1995 at the time when the complainant had advanced a loan of Rs.40,000/- to the 2nd respondent/accused is incorrect. According to him, the circumstances taken into account by the learned Magistrate was that there was evidence to show that cheque bearing No.327387 was presented on 23.05.1995, cheque bearing No.327392 was presented on 10.06.1995, cheque bearing No.327393 was presented on 05.06.1995 and cheque bearing No.327397 was presented on 17.07.1995 and that the entire cheque book was exhausted on 07.02.1996. Further, a new cheque book was found to be issued on 29.03.1996 and the accused presented cheque leaf-bearing No.238249 (from the new cheque book) on 29.03.1996. The learned counsel for the appellant/complainant would submit that even according to the case put forth by the 2nd respondent/accused, a cheque bearing No.327387 was presented for encashment on 23.05.1995, whereas the date of the earlier loan admittedly availed by the accused from the complainant is 18.04.1995. From this, according to the learned counsel for the complainant, it is clear that the cheque bearing No.327388 (the subject cheque) could not have been issued for the loan availed on 18.04.1995. He would submit that the learned Magistrate went wrong in assuming that a new loan of Rs.1,70,000/- would not have been granted when the old loan was outstanding and that the amount of loan of Rs.1,70,000/- would not have been given in cash when the earlier loan of Rs.40,000/- was given by way of cheque. He submits that the

learned Magistrate should have accepted the case of the complainant that the loan of Rs.1,70,000/- was given in personal capacity. He submits that there was no warrant for the learned Magistrate to assume that the cheque was a blank cheque given as security for the earlier loan. D2 and D3 documents do not, according to the learned counsel, go against the case of the Complainant. The learned counsel also contends that there was nothing illegal in giving a personal loan just because the business of the complainant is that of money lending. The learned counsel for the appellant would rely on the judgment of the Supreme Court in ***Rohitbhai Jivanlal Patel v. State of Gujarat*, (2019) 18 SCC 106** to contend that the principle that the appellate court would be slow in setting aside a judgment of acquittal that two views are possible could not be applicable in the case of a prosecution under Section 138 of the Negotiable Instruments Act. He would further rely on the judgment of the Supreme Court in ***M. Abbas Haji v. T.N. Channakeshava*, (2019) 9 SCC 606** to contend that failure to explain as to how the cheque in question reached the hands of the complainant is fatal to the defence. He also relies on the judgment of the Supreme Court in ***APS Forex Services (P) Ltd. v. Shakti International Fashion Linkers*, (2020) 12 SCC 724** to contend that where the issuance of the cheque and the signatures are not disputed, the presumptions under the Negotiable Instruments Act will kick in and for the proposition and that it was wrong to shift the burden of proving the existence of a liability to the complainant. In other words, according to the learned Counsel, the presumption under

Section 139 of the Negotiable Instruments Act, though rebuttable, should have operated in favour of the Complainant in the total absence of any acceptable evidence to rebut that presumption from the side of the defence.

5. The learned counsel for the 2nd respondent/accused would rely on the judgment of this Court in ***Joshy P G v. Jose Varghese and Another*, 2019 (4) KHC 753** to contend that where an accused in a prosecution under Section 138 of the Negotiable Instruments Act has fairly and reasonably established that the case put up by the complainant is highly improbable, the complainant cannot rely on the statutory presumption any longer. He would also refer to the Division Bench judgment of this Court in ***Basheer K v. C.K.Usman Koya and Another*, 2021 (2) KHC 432** for the proposition that where the accused has succeeded in rebutting the presumption under the Negotiable Instruments Act, the burden shifts to the complainant to prove consideration and on failure to do so, the accused is entitled to be acquitted.

6. I have considered the contentions raised. The first circumstance taken into account by the learned Magistrate to hold that the 2nd respondent/accused was entitled to an acquittal is the fact that cheque No.327388(the subject cheque) could not have been one which was issued close to the time at which it was stated to have been issued. According to the appellant/complainant, the loan of Rs.1,70,000/- was given on 26.12.2000 and in the discharge of this debt, the subject cheque bearing No.327388 was

issued on 30.12.2000. Based on the evidence tendered by the 2nd respondent/accused, the learned Magistrate found that immediately previous cheque, namely cheque bearing No.327387 was presented for encashment on 23.05.1995, that cheque bearing No.327392 was presented for encashment on 10.06.1995 and cheque bearing No.327397 was presented for encashment on 17.07.1995. The learned Magistrate took note of the fact that the entire cheque book, which also contained the subject cheque bearing No.327388, was exhausted on 07.02.1996 and a new cheque book was issued on 29.03.1996 and further that the 2nd respondent/accused had presented the cheque bearing No.238249 from the new cheque book on 29.03.1996. The aforesaid findings of the learned Magistrate based on Ext.D4 passbook of the accused cannot be faulted. The mere fact the cheque bearing No.327387 (the subject cheque bears the No.327388) was presented for encashment only on 23.05.1995 and the fact that the earlier loan admittedly availed by the accused from the complainant is 18.04.1995 does not, in any manner, suggest that the subject cheque was not issued as a security for the loan availed on 18.4.1995. There may have been many reasons for the earlier cheque having been presented later. Considering the totality of the evidence, I think that the case put forth by the 2nd respondent/accused cannot be disbelieved, as it is the admitted case that there was a transaction between the parties in the year 1995 as is evident from the fact that an amount of Rs.40,000/- was credited to the account of the 2nd respondent/accused through cheques issued by the complainant on 18.04.1995 and 29.04.1995.

The loan of Rs.1,70,000/- was reportedly given on 26.12.2000. It is highly improbable that a cheque leaf from a cheque book that got exhausted on 07.02.1996 would have been used on 30.12.2000 in the discharge of a liability for a loan taken on 26.12.2000. Therefore, I am in complete agreement with the view taken by the learned Magistrate that there is evidence to show that the cheque in question was not issued in discharge of the alleged liability of Rs.1,70,000/-.

7. The learned Magistrate has also found from Exts.D2 and D3 that the earlier loan stood discharged. Though the appellant/complainant disputed the fact that the earlier loan had been discharged, the learned Magistrate found from Exts.D2 and D3 receipts that the signature of the appellant/complainant stood proved. A comparison of the admitted signature of the appellant/complainant with the signatures in Exts. D2 and D3 was clearly an exercise authorized under Section 73 of the Indian Evidence Act.

8. As rightly held by the learned Magistrate there is no admission of repayment of the loan amount of Rs.40,000/- on 26.12.2000. The statement that another loan of Rs.1,70,000/- was given in cash by the appellant/complainant, who was admittedly a money lender at the time when the earlier loan of Rs.40,000/- remained unpaid was clearly a circumstance that could be taken note of in concluding that the 2nd transaction (loan of Rs.1,70,000/-) was quite improbable. The case of

appellant/complainant that the second transaction with the 2nd respondent/accused was in his personal capacity was only to get over the defence of the 2nd respondent/accused that he had discharged the earlier liability and that there was no further liability subsisting to be paid off to the appellant/complainant.

9. The documents produced by the appellant/complainant (Exts.P9 Daybook, P8 DPN register and P10 & P11 Counterfoils of receipts book) were also not accepted by the learned Magistrate, as the details of the earlier loan which was admittedly paid by cheque were also not entered in Ext.P9 Daybook.

10. I think that this is a case where the 2nd respondent/accused has been successful in rebutting the statutory presumption under Section 139 of the Negotiable Instruments Act. The fact that there was an earlier transaction in the year 1995 and that liability had been settled by repayment is a factor which would lend credence to the case of the 2nd respondent/accused that Ext.P1 cheque was one issued as security in the discharge of that liability and such cheque was misused by the appellant/complainant to make it appear that there was a subsequent transaction. In the totality of the facts and circumstance of this case, this Court should not interfere with the findings rendered by the trial court. As held by this Court in ***Basheer K*** (supra) when the accused has succeeded in rebutting the presumption, it is for the complainant to prove the existence of

a debt in the discharge of which the subject cheque was issued. I have found that the 2nd respondent/accused has succeeded in showing that the statutory presumption under Section 139 of the Negotiable Instruments Act should not be applied. In other words the 2nd respondent/accused has been able to rebut the statutory presumption. The appellant/complainant has not thereafter been able to bring in any evidence suggesting the existence of a transaction resulting in a legally enforcible debt payable by 2nd respondent/accused. Therefore, the prosecution of the 2nd respondent/accused under Section 138 of the Negotiable Instruments Act must necessarily fail. The decisions cited at the bar by the learned counsel for the appellant, do not support his case especially when this Court is of the view that the 2nd respondent/accused has succeeded in rebutting the statutory presumption under Section 139 of the Negotiable Instruments Act. Appeal fails and will stand dismissed.

Sd/-

GOPINATH P.

JUDGE

DK