

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

TUESDAY, THE 26TH DAY OF MAY 2015/5TH JYAISHTA, 193720

CRL.A.No. 388 of 2003 ()

AGAINST THE JUDGMENT IN CC 298/2000 of J.M.F.C.-IV (MOBILE),
THIRUVANANTHAPURAM DATED 25-01-2003

APPELLANT(S)/COMPLAINANT::

B.SIVAPRASAD, S/O. K.BHASKARAN NAIR,
PUTHENKAVU HOUSE, AMBALATHARA, THIRUVANANTHAPURAM.

BY ADVS.DR.K.P.KYLASANATHA PILLAY (SR.)
SRI.ARUN.B.VARGHESE
SMT.SREEDEVI KYLASANATH

RESPONDENT(S)/ACCUSED::

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1. MR.SURESHKUMAR S.,
S/O. GOPALAKRISHNAN NAIR, T.C.29/755, DEVI NIVAS,, D.E.R.A.,
PALKULANGARA, PETTAH P.O., THIRUVANANTHAPURAM,
NOW RESIDING AT :C/O.MR.ASHOKAN, B.S.N.L. QUARTERS,
QUARTER NO.B-2, PARUTHIPPARA, THIRUVANANTHAPURAM
 2. STATE OF KERALA,
REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

R1 BY ADV. SRI.JOHN S.RALPH
R1 BY ADV. SRI.V.V.PRATHEESH KURUP
R2 BY PUBLIC PROSECUTOR SMT.LALIZA T.Y

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-05-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T.RAVIKUMAR, J

Crl.A No. 388 of 2003

Dated this the 26th day of May, 2015

JUDGMENT

The appellant was the complainant in C.C.No.298/2000 on the files of the Court of Judicial First Class Magistrate-IV (Mobile), Thiruvananthapuram. This appeal has been filed challenging the order of acquittal of the respondent who faced the trial for the offence under section 138 of the Negotiable Instruments Act. The case of the appellant was that the first respondent/accused obtained a loan of Rs.4,00,000/- from him on 9.11.1999 and in discharge of the said legally enforceable debt, issued Ext.P1 cheque bearing No. 121888 dated 9.12.1999 drawn on State Bank of Hyderabad, Thiruvananthapuram branch. When the said cheque was presented for encashment, it was bounced owing to the reason 'payment stopped by the drawer.' The further case of the appellant is that the first respondent-accused stopped payment deliberately and with an ulterior motive and no sufficient fund was available in his account to honour the cheque. Upon dishonour of the cheque, the

complainant issued statutory notice informing the first respondent about the dishonour of the cheque and calling upon him to pay the amount due. Subsequent to that a telegram was also sent, according to the appellant, to the first respondent-accused. Though, the first respondent received the notice and the telegram, he had failed to repay the amount and the complaint was filed after complying with the statutory formalities in the said circumstances, raising such allegations. On due process, the first respondent appeared before the court. The particulars of the offence against him were read over and explained to him and he pleaded not guilty and claimed to be tried. To establish the accusation of commission of offence under section 138, N.I.Act against the first respondent/accused, the appellant got himself examined as PW1 and got marked Exts.P1 to P10. Upon closure of the evidence, the first respondent/the accused was examined under section 313, Cr.P.C. The first respondent denied all incriminating circumstances put to him. The first respondent got himself examined as DW1 after putting an application under section 315 of the Cr.P.C and got examined the Branch Manager of State

Bank of Hyderabad, Thiruvananthapuram as DW2. On his side, Exts.D1 to D3 were also marked. After a careful evaluation of the evidence on record, the trial court found that the appellant had failed to prove the execution of Ext.P1 cheque and consequently, the commission of offence under section 138, N.I.Act by the first respondent. Accordingly, the first respondent was acquitted under section 255(1) Cr.P.C.

2.I have heard the learned counsel for the appellant and the learned Public Prosecutor.

3.The learned counsel for the appellant contended that the finding of the trial court that the appellant was not entitled to the presumption available under section 139, N.I.Act is unsustainable. It is contended that the appellant had succeeded in proving the execution of Ext.P1 cheque and therefore, he was entitled to get the benefits of the presumption available under section 139, N.I.Act. It is also contended that since the first respondent has admitted the

signature in Ext.P1 cheque, the appellant was entitled to get the presumption available under sections 118 and 139 of the N.I.Act and further that to dislodge the presumption available under those sections, the first respondent-accused had not adduced any evidence. In short, it is contended that the acquittal of the first respondent of the offence under section 138, N.I.Act as per the impugned judgment is nothing but an outcome of an utter perverse appreciation of evidence. Evidently, in this case, the appellant was examined as PW1. He deposed to the effect that he is conducting money lending business. A scanning of the evidence of PW1 would further reveal that, relating his transaction in question with the accused/the first respondent, there is absolutely no documentary evidence. He has deposed to the effect that apart from the cheque issued, no security was demanded and obtained. According to him, the first respondent borrowed an amount of Rs.4,00,000/- on 9.11.1999 assuring that the amount would be repaid within a period of one month and on that day itself, issued Ext.P1 cheque drawn on State Bank of Hyderabad, Thiruvananthapuram branch. He would

also depose that the said cheque when presented for encashment got dishonoured on the ground 'payment stopped by the drawer' and the dishonour memo was produced as Ext.P2. He would further depose that on 25.1.2000, statutory notice was issued and it was not responded by the accused. It is his further contention that subsequently, he sent Ext.P6 telegram to the accused. He would also depose that it is the failure on the part of the first respondent in effecting repayment of the borrowed amount that constrained him to file the complaint after complying with the formalities. A careful scanning of the evidence of PW1 would reveal that in the chief examination, he deposed that an amount of Rs.4,00,000/- was borrowed by the first respondent. He would depose :-

"പ്രതി എനോട് 4,00,000/- രൂപ കടമായി 9/11/99- ൽ വാങ്ങി. ഒരു മാസത്തിനകം മടക്കിത്തരാം എന്നായിരുന്നു വ്യവസ്ഥ. ഈ പണം തിരികെ തരുന്നതിലേക്കായി അന്നുതന്നെ 9.12.99 തീയതി വെച്ച State Bank of Hyderabad ന്റെ Trivandrum Branch-ലെ cheque തന്നു. ചെക്കിതാണ്. Marked as P1."

However, during the cross examination of the appellant he deposed thus:-

“നിങ്ങളുടെ സ്ഥാപനം പണം കൊടുത്താൽ ഈടോ പണയമോ ആവശ്യപ്പെടുമോ? ഈ കാര്യത്തിൽ അതൊന്നും ചെയ്തിട്ടില്ല. പ്രതിക്ക് എന്നാണ് ചിട്ടി പിടിച്ചിട്ടുള്ളത്? ഓർക്കുന്നില്ല. പിടിച്ച ദിവസം തന്നെ രൂപ കൊടുത്തോ? ഒരാഴ്ച കഴിഞ്ഞാണ് രൂപ കൊടുത്തത്. നിങ്ങളുടെ സ്ഥാപനത്തിൽ വച്ചാണോ രൂപ കൊടുത്തത്? അതെ. ഈ പറഞ്ഞ ഇടപാട് നിങ്ങളുടെ സ്ഥാപനത്തിലെ Register-ൽ രേഖപ്പെടുത്തിയിട്ടുണ്ടോ? അതെ. നിങ്ങളുടെ മുമ്പിൽ വച്ച് ചെക്ക് എഴുതിതന്നതാണോ? Type ചെയ്തുകൊണ്ടുവന്ന ചെക്ക് എന്റെ കൺ മുമ്പിൽ വച്ച് ഒപ്പിട്ട് തന്നു.”

4.Indisputably, in this case, the execution of the cheque was denied by the first respondent/accused. There can be no doubt with respect to the position that when the execution of the cheque is denied to avail the benefit of the presumption under sections 118 and 139 of the N.I.Act, the complainant-appellant was to prove the execution of the cheque. This position is settled by a Division Bench of this Court in **Joseph v. Gladis Sasi** reported in **2010(3) KLT 379**. Yet another contention raised by the appellant is that such presumption available under those sections are available to him in view of the admission of his signature in Ext.P1 by the first respondent. The question whether admission of signature in a cheque would amount to admission of execution of the cheque was

also considered in **Joseph's** case (supra). This Court held that the presumption available under sections 118 and 139 of the N.I.Act could be drawn only when execution of the cheque is admitted or proved. It was further held that admission of signature in a blank cheque would not amount to admission of execution of the cheque. As noticed hereinbefore, the execution of the cheque was denied by the first respondent/accused. When the execution of the cheque was denied to avail the benefit of the presumption available under sections 118 and 139, N.I.Act, the execution of the cheque has to be proved by the complainant/appellant. In the light of the decision in **Joseph's** case (supra), it could be proved by resorting to any of the recognized methods available under law. Certainly, it could have been proved by establishing the original transaction, as well. In this context, as noticed hereinbefore, it is to be noted that while being examined in chief, the appellant deposed that the first accused borrowed an amount of Rs.4,00,000/- and while being cross examined, he virtually deposed that the first respondent bid a chitty and at the same time, admitted that no document whatsoever to

prove that the first respondent has bidden the chitty conducted by him was available with him. Thus, it is obvious that in the chief examination and also in the cross examination, regarding the very nature of the alleged transaction with the first respondent, the appellant had given divergent statements. Be that as it may, the question is whether the appellant had proved the execution of the cheque when its execution was denied by the first respondent. The evidence on record would reveal that the appellant had failed to prove the execution of cheque and, in fact, he had not resorted to any of the recognised methods to prove the execution when the execution of the cheque was denied. In such circumstances, in the light of the decision in **Joseph's** case (supra), I am of the view that the trial court was right in holding that the appellant had failed to prove the execution to get the benefits of presumption available under sections 118 and 139 of the N.I.Act. To canvass the position that admission of signature amounts to admission of execution, the learned counsel for the appellant relied on a decision of the Hon'ble Apex Court in **T.Vasanathakumar v. Vijayakumari** reported in

2015(5) SCC 611. A scrutiny of the said decision with reference to the evidence on record in this case would reveal that in the circumstances, the decision in **T.Vasanthakumar's** case is not applicable to the facts of the case and the decision in **Joseph's** case (supra) is squarely applicable. In the decision in **Sandy v. Mary Sherly (2011 (3) KHC 24)**, this Court considered the question how execution of a cheque could be proved. It was held by this Court that the mere production and marking of a cheque would only prove that the cheque which contained an order in writing and the signature has come into existence. Still, it has to be proved that it is created, drawn or executed by the accused. Ordinarily, execution of a document is established by proving the handwriting and signature in the document under section 67 of the Indian Evidence Act. It can primarily be proved by examining the person who executed or created the document by writing and signing the same. When such examination is not possible, execution could be proved by examining the person who had seen the document being written and signed. In the absence of direct evidence relating to the writing and

signature in the document, execution could be proved by examining a person who is qualified or competent to express his opinion as to the handwriting and signature by acquaintance or otherwise. In the decision in **Gopan v. Tonny Varghese [2008 (1) KLT 257]**, this Court held that the fact that the cheque contained the signature of an accused would not mean that the cheque was drawn by the accused. It was further held thereunder that when the execution is denied by the accused it is for the complainant to establish the same. Where execution is not proved by the complainant, presumption under section 139 is not available to him and in such circumstances, the complainant has to prove the original transaction. The learned counsel for the appellant contended that in this case, the cheque in question was not filled up by writing and in fact, all the entries except the signature were typewritten and the signature was admitted. In the light of the decision of this Court as also a catena of decisions, there cannot be any doubt with respect to the fact that admission of signature would not amount to admission of a cheque. The contention of the appellant is that since the entries were type

written, the decision in **Sandy's** case (supra) or **Gopan's** case (supra) would not be applicable in this case. The decisions referred hereinbefore would reveal the settled position that unless the execution is proved the complainant could not avail the benefit of presumption available under sections 118 and 139 of the N.I Act. In such circumstances, the onus was on the complainant/the appellant to prove the execution. Whether it is typewritten or filled up in writing, it was up to the complainant to prove that it was executed by the first respondent. Going by the decision of the Hon'ble Apex Court in **Krishna Janardhan Bhat v. Dattatraya G. Hegde [(2008) 2 SCC (Crl.) 166]**, the standard of proof required on the part of the accused is different from the standard of proof required on the part of the prosecution. It was held that prosecution must prove the guilt of an accused beyond all reasonable doubt and the standard of proof required on the part of an accused is “preponderance of probabilities”. Inference of preponderance of probabilities can also be drawn not only from the materials brought on record by the parties but also by referring to the circumstances

upon which the accused relies. In this context certain aspects have to be looked into. It is the very case of the appellant that he is involved in the business of money lending. At the same time, he would depose that he had lent an amount of Rs.4,00,000/- without obtaining any security from the accused. There is absolutely no material to show that the first respondent had borrowed such an amount from the complainant apart from the oral testimony of the appellant. While examining in chief, the appellant would depose that on 9.11.1999 the first respondent borrowed an amount of Rs.4,00,000/- from him. At the same time, his testimony during cross examination would indicate that the first respondent bid a chitty and the amount due thereunder was disbursed after a week from the date of bid. No material whatsoever has been produced by the appellant to show that the first respondent was a subscriber to chitty conducted by him and that he bid the chitty or it was priced in his favour and that the cheque in question was issued in relation to that chitty transaction. Taking into account all such aspects I am of the view that there is absolutely no reason to exercise the appellate

jurisdiction to interfere with the conclusions arrived at by the trial court that the appellant herein has failed to establish commission of offence under section 138 of the NI Act by the first respondent/accused. I am of the view that conclusions and findings of the trial court are perfectly in tune with the evidence on record. It is very well settled that a judgment of acquittal should not be interfered with unless the assessment of evidence and the conclusion arrived at by the trial court are unreasonable, erroneous or perverse. Reversal of a judgment would not be possible merely because on appreciation of the evidence the appellate court found that different view could be taken on the same set of evidence. This was so settled in the decision in **State of Orissa v. Nirupama Panda [1989 Crl.L.J 621]**. For all these reasons, I do not find any legal infirmity which calls for an appellate interference. In short, this appeal is liable to fail and accordingly, it is dismissed.

Sd/-

C.T. RAVIKUMAR
(JUDGE)

dlk/spc

