

"CR"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

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

CRL.A.No. 1029 of 2003 ()

AGAINST THE ORDER IN Cr1.L.P. 120/2003 of HIGH COURT OF KERALA DATED
24-06-2003

AGAINST THE JUDGMENT IN ST 2560/2000 of J.M.F.C.-II, THRISSUR DATED
28-02-2003

APPELLANT:

SRI. BALAGOPALAN V.K,
S/O.VALLOOKATTIL KANDUNNY,
P.O. ANTHIKKAD,
THRISSUR.

BY ADV. SRI.P.NARAYANAN

RESPONDENTS/ACCUSED & STATE:

1. BRIGITTY PIOUS,
W/O.THATTIL PIOUS,
P.O.ANTHIKAD,
THRISSUR.
2. STATE OF KERALA REP.BY
THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

R2 BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS
R1 BY ADV. SRI.K.KESAVAN KUTTY (LEGAL AID)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“CR”

K. RAMAKRISHNAN, J.

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Crl.A.No.1029 of 2003
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Dated this the 13th day of October, 2015.

JUDGMENT

The complainant in S.T.No.2560/2000 on the file of the Judicial Magistrate of the First Class, Thrissur is the appellant herein.

2. The case was taken on file on the basis of a private complaint filed by the complainant against the first respondent/accused under section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act'). The case of the complainant in the complaint was that the accused and her husband Pious came and borrowed a sum of Rs.50,000/- and in discharge of that liability, the accused had issued Ext.P1 cheque in favour of the complainant. The complainant presented the cheque for collection and the same was dishonoured for the reason funds insufficient evidenced by Ext.P2 dishonour memo. The complainant issued Ext.P3 notice to the accused intimating dishonour and demanding payment of the amount vide Ext.P4 postal receipt and the same was received by the

accused evidenced by Ext.P5 postal acknowledgment. She had not paid the amount. So she had committed the offence punishable under section 138 of the Act. Hence the complaint.

3. When the accused appeared before the court below, particulars of offence were read over and explained to her and she pleaded not guilty. In order to prove the case of the complainant, complainant himself was examined as PW1 and Exts.P1 to P5 were marked on his side. After closure of the complainant's evidence, the accused was questioned under section 313 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). She denied all the incriminating circumstances brought against her in the complainant's evidence. She had further stated that she had been falsely implicated in the case. No defence evidence was adduced on her side. After considering the evidence on record, the court below found that the complainant had failed to prove the case against the accused beyond reasonable doubt and the cheque was not issued in discharge of any liability by the accused as claimed by the complainant and no offence under section 138 of the Act was established against the accused and acquitted the

accused giving her the benefit of of doubt under section 255(1) of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant with special leave petition, Crl.L.P.No.120/2003. Leave was granted and the appeal was admitted to file.

4. Since the first respondent did not appear, this Court had appointed Sri. Adv.K. Kesavankutty, Ernakulam as legal aid counsel. Heard Sri.P. Narayanan, counsel appearing for the appellant and Sri.K. Kesavankutty, legal aid counsel appointed to represent the first respondent and Sri. Jibu P.Thoms, Public Prosecutor representing the second respondent.

5. Counsel for the appellant submitted that the court below had only on the basis of some mistake in the writing of the name of the accused as Brighty instead of Birtty came to the conclusion that complainant had failed to prove that the cheque was issued by the accused in discharge of any liability. Further the court below also observed that amount was paid to one Pious and not to the accused and so there is no transaction between the accused and the complainant for the purpose of issuing the cheque. But the accused had no case regarding the

identity of the drawee of the cheque and also the person who had given the cheque. Further she had not disputed the fact that notice was issued not in the correct address. Merely because there was some difference in pronunciation of the name and writing the name of the accused in English differently alone is not sufficient to come to the conclusion that persons are different. So court below was not justified in acquitting the accused on that ground. He had relied on the decisions reported in ***Lekha v. Manickan*** (2006 (4) KLT 800), ***M. Sreenivasulu Reddy v. K.S. Raghava Reddy*** (2003 CrL.L.J 4005) and ***Sri.Amol Shripal Sheth v. M/s Hari Om Trading Co.and Others*** (2013 KHC 3253). So according to the learned counsel, the finding arrived at by the court below is not correct and in the absence of any evidence to rebut the presumption, the court below ought to have convicted the accused and sentenced her.

6. On the other hand, the legal aid counsel Sri.K. Kesavankutty argued that there is vast difference in the name Britty and Brighty and there is no evidence adduced on the side of the complainant to prove that they are one and the

same person. So, under the circumstances, the court below was perfectly justified in coming to the conclusion that they are different persons. Further notice also issued to Brighty and not to Britty. So there is no proper notice. So according to him, the court below was perfectly justified in acquitting the accused and no interference is called for.

7. The case of the complainant in the complainant was that the accused came along with her husband Pious and borrowed a sum of Rs.50,000/- and undertaking that liability, she had issued Ext.P1 cheque. The case of the accused was one of total denial. Once execution of the cheque is denied, the burden is on the complainant to prove the execution of the cheque. In order to prove the case of the complainant, the complainant himself was examined as PW1 and deposed in support of his case. He had stated that the accused came along with her husband and he gave money to her husband and accused gave a cheque. It is true that in the evidence, he had stated that the cheque was issued by Britty and not Brighty. It may be mentioned here that name of the accused is Britty whereas in the cheque the name was written as Brighty. There

is no difference in the name as such but it is only difference in the manner in which it was written. Further, the suggestion given to PW1 was that the cheque given as security to some chitty company was misused and the present complaint was filed. The accused had not adduced any evidence to prove that she had any transaction with any chitty company and she had given any cheque and that cheque was misused. Further she had no case that she had not received notice issued as well. Further she had no case that she is not the real accused and summons was issued to a wrong person. So merely because there was some difference in writing the name and pronouncing the name alone is not sufficient to come to the conclusion that drawer of the cheque is a different person as observed by the court below.

8. It is true that in Ext.P5 postal acknowledgment, there is difference in the signature but the accused had no case that she had not received statutory notice or she will not get notice in that address. Further the signature put by her in the vakaath and 313 examination tallies with the signature in Ext.P1 cheque. She had also no case that the signature in

Ext.P1 was not her signature as well. She had no explanation as to how her cheque had reached the hands of the complainant. She had no case that her husband's name is not Pious and he had no transaction with the complainant as well. So under the circumstances, the observation made by the court below that the cheque was given by one Britty where as the transaction was with Britty is not correct and such an inference cannot be possible on the basis of evidence available on record.

9. In the decision reported in ***Lekhas' case*** (cited supra) it has been observed that merely because there was some innocuous and inadvertent error in the description of the name of the accused is of no consequence and does not at all militate or derogate against the validity of the notice issued under section 138 of the Act. The same view has been reiterated in the decision reported in ***M. Sreenivasulu Reddy's Case*** (cited supra) by the Andhra Pradesh High Court and ***Amol Shripal Sheth's case*** (cited supra) by the Bombay High Court. So the finding arrived at the by the court below that the complainant had failed to prove that the accused issued Ext.P1 cheque in

discharge of her liability appeared to be unsustainable in law in view of the discussions made above and also on the basis of the evidence available on record.

10. Further, the court below also came to the conclusion that the complainant had failed to prove that the cheque was issued from the account of the accused. Even accused had no such case, she had no case that she was not maintaining an account in the bank from which the cheque was issued. So, under the circumstances, the finding of the court below that the complainant had failed to prove the case against the accused is unsustainable in law and perverse and against the presumption available under section 139 of the Act which she had not rebutted by adducing proper evidence. So the order of acquittal passed by the court below is liable to be set aside.

11. On the basis of the evidence, it can safely be concluded that the complainant has proved that the accused along with her husband came and borrowed the amount and amount was given to the husband of the accused and she had undertaken the liability of her husband and issued Ext.P1 cheque in discharge of that liability, which when presented was

dishonoured for the reason funds insufficient and in spite of notice issued, she had not paid the amount and thereby she had committed the offence punishable under section 138 of the Act. So the accused is found guilty of the offence under section 138 of the Act and she is convicted thereunder.

12. The case of the complainant was that the cheque was issued in discharge of an amount of Rs.50,000/-. The cheque was of the year 2000. In the decision reported in ***Damodar S. Prabhu v. Sayed Babalal H.*** (JT 2010 (4) SC 457), it has been observed that the amount claimed on the basis of cheque is primarily of civil nature but by virtue of introduction of section 138 in the Act, it has been given a colour of criminal offence and the intention of the legislature was to get the amount from the drawer and pay the same to the payee of the cheque and it is not necessary to put the drawer of the cheque in prison and reducing the substantive sentence till raising of court and by directing the accused to pay the amount to the complainant as compensation will be sufficient.

13. Further in the decision reported in ***Somnath Sarkar v. Utpal Basu Mallick*** (2013 (4) KLT 350(SC), the Supreme

Court has held that under section 138 of the Act there is no provision for payment of compensation but the court has got power to impose double the cheque amount as fine and out of the fine amount, compensation can be fixed and paid to the complainant under section 357(1)(b) of the Code.

14. Considering these aspects, this Court feels that sentencing the accused to undergo imprisonment till the raising of court and sentenced to pay fine of Rs.60,0000/-, in default to undergo simple imprisonment for three months and directing the lower court to pay the fine amount if realized as compensation to the complainant under section 357(1)(b) of the Code will be sufficient and that will meet the ends of justice. So the appellant is sentenced to undergo imprisonment till the rising of court and also sentenced to pay a fine of Rs.60,000/-, in default to undergo simple imprisonment for three months. If fine amount is realized, the same be paid to the complainant as compensation under section 357(1)(b) of the Code.

In the result, the appeal is allowed. The order of acquittal passed by the court below is hereby set aside and she is found guilty under section 138 of the Act and convicted her

thereunder and sentenced her to undergo imprisonment till the rising of court and also to pay a fine of Rs.60,000/- in default to undergo simple imprisonment for three months. If fine amount is realized, the court below is directed to pay the entire fine amount to the complainant as compensation under section 357(1)(b) of the Code. Three months time from today, i.e, till 16.1.2016 is granted to the first respondent/accused to pay the amount and serve the sentence. Till then, execution of the sentence is directed to be kept in abeyance.

This court place on record appreciation for the manner in which the case was argued by Sri. Kesavankutty, legal aid counsel on behalf of the first respondent.

Office is directed to communicate a copy of this judgment to the concerned court immediately.

Sd/-

K. RAMAKRISHNAN, JUDGE.

/true copy/
P.S to Judge

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K. RAMAKRISHNAN, J.

.....
Crl.A.No.1029 of 2003

.....
13th day of October, 2015.

JUDGMENT

