

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 3RD DAY OF SEPTEMBER 2015/12TH BHADRA, 1937

CRL.A.No. 1557 of 2003 ()

CrI.L.P. 374/2003 of HIGH COURT OF KERALA

AGAINST THE JUDGMENT IN CC 264/2001 of C.J.M.PATHANAMTHITTA

APPELLANT(S):

**VARGHESE K.MATHEW
S/O K.A MATHEW, KARIMALETH HOUSE
KUMBANAD P.O, PURAMATTOM VILLAGE
MALLAPPALLY TALUK
PATHANAMTHITTA DISTRICT**

BY ADV. SRI.MVS.NAMBOOTHIRY

RESPONDENT(S):

**1. V.K.JOY
VELEPLOKAM HOUSE
VENGGOLLUR P.O, THODUPUZHA**

**2. STATE OF KERALA REP.BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM**

**R1 BY ADV. SRI.K.R.SUNIL
R2 , BY SEENA RAMAKRISHNAN**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-09-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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K. RAMAKRISHNAN, J.

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Crl.Appeal No.1557 of 2015

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Dated this the 3rd day of September, 2015

JUDGMENT

The complainant in C.C No. 264 of 2001 on the file of the Judicial First Class Magistrate Court, Pathanamthitta is the appellant herein.

2. The case was taken on file on the basis of a private complaint filed by the complainant u/s 138 of the Negotiable Instruments Act (herein after called the Act). The case of the complainant in the complaint was that the accused had some vehicle transaction with the complainant and an amount of Rs.5 Lakh was due to him and in discharge of that liability, he had issued Ext.P1 cheque dated 20.12.2000 drawn on Bank of Baroda, Thodupuzha Branch in favour of the complainant. The complainant presented the cheque for collection through the Federal Bank, Pathanamthitta, which was dishonoured by the drawee bank with endorsement 'refer to drawer' and 'account closed' vide Ext.P2 dishonour memo and this was intimated to the complainant by his banker by Ext.P3 intimation letter. The complainant issued Ext.P4 notice on 5.6.2001 evidenced by Ext.P4 postal receipt and the same was returned with

endorsement 'unclaimed'. The accused had not paid the amount. So he had committed the offence punishable u/s 138 of the Act. Hence the complaint.

3. When the accused appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, the complainant himself was examined as PW1 and Exts.P1 to P7 were marked on his side. After closure of the complainant's evidence the accused was questioned u/s 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that he had no transaction with the complainant and he had not issued any cheque to the complainant. In order to prove his case he himself was examined as DW1 and Exts. D1 and D2 were marked on his side. After considering the evidence on record, the court below found that there was no proper service of notice on the accused as contemplated u/s 138 of the Negotiable Instruments Act and acquitted the accused on that ground. Aggrieved by the same, the present appeal has been filed by the appellant/complainant before the court below with leave petition as Crl..L.P 374/2003 which was granted and

appeal was admitted to file.

4. Heard Sri.M.V.S.Nampoothiry, counsel appearing for the appellant and Mr. Renju B.N representing K.R Sunil counsel for the first respondent and Smt.Seena Ramakrishnan, Public Prosecutor appearing for the state and perused the records.

5. The counsel for the appellant submitted that the only ground on which the court below came to the conclusion that there was no proper notice is the address shown in Exts.D1 and D2 are different and then probably of accused to know about the notice. Further, the court below came to the conclusion that the summons was not served on the accused in the address as claimed by the counsel for the complainant and he was produced before the court on the basis of the warrant issued, which is not correct as summons was served on him and since he did not appear, warrant was issued and thereafter he appeared. Further except producing Exts.D1 and D2, he had not produced any other documents to show that he was residing in that address. He had not adduced any accepted evidence to prove that he will not receive notice in that address. He had different addresses as well. In the above circumstances, he had not rebutted the presumption u/s 138 of the Negotiable Instruments Act as well.

So the court below was not justified in acquitting the accused.

6. On the other hand, the counsel for the first respondent submitted that the accused had adduced evidence to prove that he will not receive notice in that address and no notice has been served on him and summons was also not served personally on him. Further, the complainant had filed to prove the execution of the cheque as well. So according to the learned counsel, the court below was perfectly justified in acquitting the accused.

7. Heard the Public Prosecutor as well.

8. It is settled law that in the case of appeal against acquittal, appellate shall not normally interfere with the order of acquittal unless the finding of the court below is perverse. With this principle in mind, the case in hand has to be considered.

9. The case of the complainant in the complaint was that there was some bus transaction in which an amount of 5 lakhs was due to him and in discharge of that liability, the accused had issued Ext.P1 cheque. He had also stated that the cheque was dishonoured for the reason account closed and that shows that there was no sufficient fund in the account and the notice was returned unclaimed after due intimation. Though he was cross examined by the counsel for the accused,

no question was put to him regarding non receipt of the notice or that he will not receive notice in that address, when PW1 was cross examined, though he had categorically stated in his chief affidavit that the notice was sent and it was returned unclaimed. Even in his 313 examination, he had no case that he had not received any notice as well. But even examined as DW1, he had stated that he had not received the notice and he was residing in Karikkode, Velamplackal, Thodupuzha Post and not in Vengalloor. But it will be seen from the summons issued from the lower court that he had received summons in that address. When he was examined as DW1, though the signature in the summons, vakalath and in his 313 examination were shown to him and suggested that all the signatures are similar and identical, he had not denied the same but he had only stated that he did not know. So that shows that he is avoiding questions which are likely to incriminate him in a case like this.

10. Further in Ext.D1 complaint on the basis of which Ext.D2 final report was filed, the address shown is the same address in which the notice was issued. Though the returned notice was not marked, it was relied on the court below for the purpose of coming to the conclusion that the address shown is not correct. So no prejudice will be caused to the accused,

even if that document was not marked but relied on by the court. Further it is settled law that once a notice has been issued in the correct address and either if it is not returned or returned with endorsement 'unclaimed' unless the contrary is proved it can be presumed to have served on him and contents of the notice can be imputed to him and it will be deemed service on the accused as contemplated u/s 138 of the Negotiable Instruments Act. This was so held in the decision reported in **Alavi Haji, C.C. v. Palapetty Muhammed and others [ILR 2007 (3) Kerala 203]** by the Apex Court”.

11. Further in Ext.P6, the address of the accused shown is Velamplackal house, Njarakutty, Muthalakodam Post, Thodupuzha and that is not the address which was claimed to be the correct address of the accused, when he was examined before the court. The final report was filed later evidenced by Ext.D2. At the time when the final report was filed he may be residing in that address. That may be the reason why the police had shown that address in the final report that does not mean that the accused was not residing in the address shown in Ext.P4, when the said notice was issued. Under the circumstances, the finding of the court below that there was no proper notice on the accused as contemplated u/s 138 of the

Negotiable Instruments Act is unsustainable in law and the same is liable to be set aside. As the notice was sent in the correct address known to the complainant and it was returned with endorsement 'unclaimed' after due intimation. Further it was admitted by DW1 that he will not be always available in the house as well. That there also strengthens the case of the complainant that intimation was given to the accused and in spite of that he had not received the notice. So under the circumstances, the finding of the court below that, there was no proper notice and acquittal of the accused on that ground is unsustainable in law and the same is liable to be set aside and it has to be held that there is proper notice as contemplated u/s 138 of the Negotiable Instruments Act.

12. As regards the merit of the case is concerned, the accused had no case that the signature in Ext.P1 was not his. He had no explanation as to how Ext.P1 cheque has come into the hands of the complainant either when he was examined before the court as DW1 or at the time when he was examined u/s 313 of the Code of Criminal Procedure. Once the complainant had proved that the cheque was issued by the accused and it was signed by him and delivered to him, then the presumption u/s 139 of the Act is attracted and the burden

is an accused to prove the circumstances, under which his cheque had reached the hands of the complainant. This was so held in the decision reported in Vasanthakumar vs. Vijayakumari 2015 ACD 740(SC). So the complainant had proved that the cheque was issued in discharge of a legally enforceable debt and in spite of notice issued he had paid the amount. So the finding of the court below that there is no proper notice and he is entitled to get acquittal is perverse and against the evidence and precedent on this aspect and so the same is liable to be set aside. So the order of acquittal passed by the court below is set aside and he was found guilty for the offence u/s 138 of the Negotiable Instruments Act and he has convicted thereunder.

14. The counsel for the respondent No.1 prays for leniency and also for time for payment of the amount.

9. In the decision reported in **Damodar S. Prabhu vs. Sayed Babalal. H [JT 2010(4) SC 457]** the Hon'ble Supreme Court has held that the offences under the Negotiable Instruments Act are of civil nature though criminal colour has been given by making an offence under the Negotiable Instruments Act. In the decision reported in **Somnad Sarkar vs. Utpal Basu Mallick [2013 (4) KLT 350 (SC)]** the

Hon'ble Supreme Court has held that u/s 138 of the Negotiable Instruments Act, court has no power to award compensation but court has power to impose fine to the extent of double the cheque amount and after quantifying the fine amount, court has no power to quantify the compensation payable u/s 357(1)(b) of the Code of Criminal Procedure.

15. Considering the above principles, this Court feels that sentencing the first respondent to undergo imprisonment till rising of the court and also imposing the cheque amount as fine with default sentence of 4 months simple imprisonment and directing the fine amount if realized payable to the complainant as compensation u/s 357(1)(b) of the Code will be sufficient and that will mark the ends of justice . So the accused is sentenced to undergo imprisonment till rising of the court and also to pay a fine of Rs.5 Lakhs and in default to undergo simple imprisonment for 4 months. If the fine amount is realized, the court below is directed to pay the same to the complainant as compensation u/s 357(1)(b) of the Code. Six months time is granted to the accused to pay the amount. The accused is directed to surrender before the court below on 3.3.2016 to serve the sentence. Till then the execution of the sentence is directed to be kept in abeyance.

16. The appeal is allowed, accordingly. The order of acquittal passed by the court below is set aside and the respondent is found guilty under section 13 of the Act and causing him thereunder and sentenced to undergo imprisonment till raising of the Court and as to pay the fee of Rs.5 Lakh in default to undergo simple imprisonment for 4 months. Time is granted till 3.3.2016 to pay the amount. Till then the execution of sale is directed to be kept in abeyance. The first respondent is directed to surrender before the Court below on 3.3.2016 to serve the sentence. Office is directed to communicate this order to the concerned court immediately.

Sd/-
K. RAMAKRISHNAN, JUDGE

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PA TO JUDGE