IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 10TH DAY OF SEPTEMBER 2015/19TH BHADRA, 1937

CRL.A.No.1055 of 2006 (F)

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AGAINST THE JUDGMENT IN CC 632/2003 of CHIEF JUDICIAL MAGISTRATE, MUTTOM, THODUPUZHA DATED 07-06-2005

APPELLANT/COMPLAINANT:

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NAGARJUNA HERBAL CONCENTRATES LTD.,
REPRESENTED BY SRI.BINU JOSE, LEGAL OFFICER,
NAGARJUNA HERBAL CONCENTRATES LTD.,
KALAYAMATHANI P.O., THODUPUZHA.

BY ADV. SRI.R.PARTHASARATHY.

RESPONDENTS/ACCUSED & STATE:

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1. P.C.MOHANAN, THRIKULAM,
   THIRURANGADY.

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

R1 BY ADV. SRI.K.M.SATHYANATHA MENON.
R2 BY SMT.S. HYMA, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.BHAVADASAN, J.**

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**Crl. Appeal No.1055 OF 2006**

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**Dated this the 10th day of September, 2015.**

**J U D G M E N T**

This appeal arises out of an order of acquittal in a proceeding under Section 138 of the Negotiable Instruments Act.

2. According to the complainant who manufactures and sells Ayurveda products, accused purchased medicines from them and for the amount due to the Company, Ext.P1 cheque was issued. That, on presentation, bounced for want of funds. Notice was issued as contemplated under the Act which was returned unclaimed. Since the amount remained unpaid, complaint was laid.

3. The Chief Judicial Magistrate Court, Muttom took cognizance of the offence. On appearance of the accused, all formalities were completed. The particulars of offence read out to him and he pleaded not guilty and claimed to be tried. The complainant examined PW1 and had Exts.P1 to P8 marked.

4. After the close of the complainant's evidence, accused was questioned under Section 313 Cr.P.C wherein he denied all the incriminating circumstances. He contended that he had monetary dealings with DW1 to whom he handed over a signed blank cheque. That cheque has been misused. He owed no amount to the Company. The accused in his defence had DW1 examined and Ext.D1 marked.

5. On evaluation of the materials before it, the trial court came to the conclusion that the cheque was issued not as alleged in the complaint, and the agency of the Company was not in the name of the accused. Pointing out that the complainant had failed to prove that cheque was issued as alleged by him, complaint was dismissed and the accused was acquitted.

6. Assailing the acquittal, learned counsel appearing for the appellant-complainant, contended that the court below was not justified in ignoring Exts.P7 and P8. Those documents would conclusively show that amounts were in fact due to the Company. It can be seen from the evidence that it was the accused who was actually purchasing medicines and discharging the monetary

obligations. Though the agency might have been in the name of his wife, for all practical purposes as far as the Company is concerned, they were dealing with the accused. When the balance amount due stood at Rs.62,528/-, accused was called to the office of the Company and there he had executed the cheque. Learned counsel referred to Ext.P7 account ledger and pointed out that it is clear from that ledger that there was an outstanding amount for which cheque was issued. Learned counsel then went on to point out that even assuming that his wife was the agent, the accused had taken on himself the obligation to discharge the liability of his wife and if that be so, he is liable. In fact, according to the learned counsel, accused stands in the position of a surety and if a cheque issued by a person is dishonoured, he is responsible for the same as a debtor.

7. For the above proposition, learned counsel for the appellant relied on the decisions in ***General Auto Sales*** *vs.* ***Vijayalakshmi*** (2005 (1) KLT 478) and in ***Komalam*** *vs.* ***Mohankumar*** (2009 (3) KLT 263). For the purpose of reliance on the presumption under Section 118 of the Negotiable

Instruments Act, learned counsel relied on the decision in ***Bharat Barrel & Drum Manufacturing Co.*** *vs.* ***Amin Chand*** (1999 (2) KLT S.N. 23 Case No.24).

8. Learned counsel appearing for the appellant went on to point out that merely because in the complaint it was not stated that agency was taken by the wife of the accused and the accused was acting for and on behalf of her cannot absolve the accused when it is clearly proved that he was dealing with the Company directly and it was he who was discharging the monetary obligations. At any rate, even assuming that he is not the person who is running the agency while issuing the cheque, it is clear that he had taken up the responsibility of discharging the liability and if that be so, he is liable. Therefore, it is contended that the finding of the court below cannot be supported.

9. Learned counsel appearing for the respondents, on the other hand, pointed out that the court below was justified in acquitting the accused since the evidence adduced by the complainant was in total variance to the statement in the complaint. Nowhere in the complaint it was stated that wife of

the accused was the agent and the accused was acting for and on behalf of her. The complaint is so couched that it could appear that the agency was taken by the accused himself and he was liable. Learned counsel also pointed out that there is no consistent version regarding the handing over of cheque also. The evidence of PW1 is to the effect that cheque was handed over when intimation was given to the accused about the outstanding amount. But, evidence of DW1, who is admittedly an Officer of the Company and who is responsible for collecting the amount is entirely different. He was examined as defence witness and in cross examination that witness was made to say that he had collected the cheque long prior to the date on which it was issued and on the date on which it was issued, both the accused and he had been called to the office of the Company and there the accused accepted the outstanding liability as shown in the ledger. DW1 says that he took out the blank cheque which had already been given by the accused to him. The inconsistency about issuance of cheque, person who is running the agency and such other significant factors as regards the liability was not proved by the complainant. Therefore, the court below was justified in dismissing the complaint.

10. The fact that the statement in the complaint varies from the evidence adduced by DW1 cannot be disputed. The case of the Company as discernible from the complaint is that the accused used to purchase medicines from the Company and an amount of Rs.62,528/- was outstanding for which Ext.P1 cheque was given and then usual averments of dishonour etc. are made. In the affidavit in lieu of chief examination, PW1 maintained that accused was purchasing medicines from the Company and he was liable for the amount for which the cheque was issued. He was later recalled and in examination in chief, he again at first stated that accused was the agent of the Company. One may recall here that when he was originally examined, he had maintained the stand that accused was the agent and the Company had documents to establish the said fact. In chief examination after recalling though he initially maintained the stand that agency was run by the accused, when he produced Ext.P8 he had a different version that agency was in the name of the wife of the accused

but business was being looked after by the accused who is the husband of the person who had taken the agency. Thus there is considerable inconsistency in the statement made in the complaint and in the evidence. Nowhere in the complaint it is stated that the agency was taken by the wife of the accused or that the accused was acting on behalf of the person who had taken the agency.

11. It is no doubt true that in the decision in ***General Auto Sales*** *vs.* ***Vijayalakshmi*** (2005 (1) KLT 478), it was held that a guarantor who assures repayment of debt and issues cheque for that purpose is as much liable as an original debtor and proceedings under Section 138 of Negotiable Instruments Act can be initiated against him.

12. In the decision in ***Komalam*** *vs.* ***Mohankumar*** (2009 (3) KLT 263) it was held that a person who issues a cheque taking upon the obligation to discharge liability of another person is as much liable under Section 138 of Negotiable Instrument Act.

13. In the decision in ***Bharat Barrel & Drum Manufacturing Co.*** *vs.* ***Amin Chand*** (1999 (2) KLT S.N. 23

Case No.24), it was held as follows:

> "Section 118 of the Act deals with the presumption as to negotiable instruments. One of such presumption is, that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration". This presumption is based upon a principle and is not a mere technical provision. The principle incorporated being, inferring of a presumption of consideration in the case of a negotiable instrument. Merely because the plaintiff came forward with a case different from the one mentioned in the promissory note it would not be correct to say that the presumption under S.118 did not apply at all. Such a presumption applies once the execution of the promissory note is accepted by the defendant. The circumstances that the plaintiff's case was at a variance with the one contained in the promissory note could be relied by the defendant for the purpose of rebutting the presumption of shifting the evidential burden to the plaintiff. Once execution of the promissory note is admitted, the presumption under S.118(a) would arise that it is supported by consideration. Such a presumption is rebitable. The defendant can prove the non-existence of consideration by raising a probable defence".

14. One can have no quarrel with the above the proposition. The only question is how far it applies to the facts of the present case. There is absolutely no plea that accused was acting for and on behalf of the person who had taken the agency and in fact a reading of the complaint and portion of the affidavit in chief would indicate that the Company had a case that accused was the agent. However, with the production of Ext.P8, things changed. PW1 came forward with a different case that the agency was in the name of wife of the accused and the accused was conducting business. Thus, it could be seen that the case pleaded is not what is spoken to at the time of evidence.

15. There was considerable controversy regarding the issuance of notice and its non receipt by the accused. Ext.P4 is the relevant document. The address shown in Ext.P4 reads as follows:

> "Mr.P.C. Mohanan,
> Nagarjuna Oushadha Sala,
> Kadalundy,
> Kozhikode - 673 302".

The above address is different from the address seen in Ext.P8 which was the address given at the time of taking the agency of the Company and address in the complaint is yet again different. So, there are three different addresses. But, the endorsement on Ext.P5 shows that it was re-directed to the correct address of the accused and it remained unclaimed. Probably, appellant may rely on the presumption under Section 114 of the Indian Evidence Act and say that these are official duties performed by the postman and endorsement will be deemed to have been correct. However, the decision of the lower court did not rest on the question of notice alone.

16. One has, in this context, to appreciate the evidence of DW1 also. The accused had a case that DW1 had monetary transaction with him and signed blank cheque given to DW1 was misused by the Company. The Company did not chose to examine him. In cross examination, Company came out with a story that on the date on which cheque was issued, DW1 and the accused were summoned to the office of the Company and the accused was made known about the outstanding amount due from him. The accused then agreed to pay the amount by

cheque within a few days and surprisingly DW1 thereafter says that he then went through the file which he was carrying with him relating to the transaction and he had a blank cheque with him issued by the accused.

17. It must be noticed here that the cheque, according to DW1, even did not contain the signature of the accused at that point of time. It was only after the balance due from him was made known to him and after he had promised that it will be paid within a few days that DW1 produced the cheque from his file. He further says that then the accused signed the cheque.

18. The above explanation offered by DW1 is quite difficult to believe. It was pointed out by the learned counsel for the appellant that it is possible that DW1 being a Sales Manager of the Company might have at the time of taking the agency by the wife of the accused collected a cheque by way of security from the accused. It could be said so. However, it is beyond understanding that a cheque without even a signature would have been taken as security by the Company. Further, if the security was taken by the Company, cheque should have been

with the Company and not with DW1 who is only a Sales Manager. It is here one has to notice that PW1 has no case that on the date of issuance of cheque, both accused and DW1 come to the office of the Company and at the time when accused agreed to pay the amount due from him, DW1 had produced the cheque. The presence of DW1 at the place is not even spoken to by PW1.

19. The contention raised by the learned counsel for the appellant that the signature on the cheque having been admitted, execution will be duly presumed and if that be so, offence is made out.

20. It is not quite simple as that. It is well settled that due execution of the cheque will have to be proved by the complainant even assuming that the accused admits the signature on the cheque. The version of the complainant in this regard is not consistent and it is in fact contradictory with the evidence. The burden is on the complainant to prove that cheque was issued as alleged in the complaint. The evidence is in total variance with the statement in the complaint and the accused is

called upon only to meet the case pleaded in the complaint.

It was the above facts which persuaded the court below to hold that the complainant had failed to establish the case against the accused and had acquitted the accused. It could not be said that the view taken by the court below is perverse or contrary to the evidence on record. One may say that another view is possible. But, if two views are possible, it is well settled that view in favour of the accused should be preferred. On that ground also, this appeal fails.

This appeal is dismissed.

Sd/-

**P.BHAVADASAN**
**JUDGE**

smp

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P.A to Judge.