

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 12TH DAY OF NOVEMBER 2015/21ST KARTHIKA, 1937

CRL.A.No. 1466 of 2004 ()

**AGAINST THE ORDER/JUDGMENT IN CrI.L.P. 468/2004 of HIGH COURT OF KERALA
DATED 02-08-2004**

**AGAINST THE JUDGMENT IN CC 937/1997 of JUDICIAL FIRST CLASS MAGISTRATE
COURT, KATTAKADA DATED 31-10-2003**

APPELLANT(S)/COMPLAINANT::

**SRI.VIBILSON
KANTHALA VADAKKE PUTHEN VEEDU, KATTAKKADA
KATTAKKADA P.O., TRIVANDRUM.**

BY ADV. SRI.M.RAMACHANDRAN NAIR

RESPONDENTS/ACCUSED & STATE::

**1. SRI.SUARNAN NAIR
S/O VELUPILLAI, PULLUVILA PUTHEN VEEDU,
MUTHIYAVILA, KATTAKKADA
TRIVANDRUM.**

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

**R2 BY ADV.JIBU P.THOMAS, PUBLIC PROSECUTOR
R1 BY ADV. SRI.V.V.SURESH, LEGAL AID COUNSEL (BY ORDER)**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-11-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

K. RAMAKRISHNAN, J.

Crl. Appeal No.1466 of 2004

Dated this the 12th day of November, 2015

JUDGMENT

Complainant in C.C.No.937/1997 on the file of the Judicial First Class Magistrate Court, Kattakkada is the appellant herein. The case was taken on file on the basis of a private complaint filed by the complainant under Section 138 of the Negotiable Instruments Act, hereinafter called 'the Act'.

2. The case of the complainant in the complaint was that the accused was borrowed a sum of Rs.24,681/- on 10.05.1997 and issued Ext.P1 post dated cheque with date 19.05.1997. The cheque when presented was dishonoured for the reason 'not arranged for' evidenced by Ext.P2 dishonour memo. This was intimated to the complainant by his banker vide Ext.P3 intimation letter in Ext.P6 cover. Complainant issued Ext.P5 notice. The accused has not received the notice and it was returned unclaimed evidenced by Ext.P5(a) returned notice. He had not paid the amount. So he had committed the offence punishable under Section 138 of the Act. Hence the complaint

was filed.

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 PW-1 and the Bank Managers of the collecting bank and drawee bank were examined as PWs. 2 and 3 and Exts.P1 to P9 and Ext.P5(a) 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 and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that he had not committed any offence and he is innocent of the same. No evidence was adduced on his side in defence. After considering the evidence on record, the court below found that the complainant had failed to prove his case and Ext.P1 cheque could not have been issued as claimed by the complainant and acquitted the accused under Section 255 (1) of the Code of Criminal Procedure. Aggrieved by the same, the above appeal has been preferred by the appellant-complainant before the court below alongwith Special Leave Petition as Crl. L.P.No.468/2004 and the application was

allowed, leave was granted and appeal was admitted to file.

4. Though notice was served on the 1st respondent, he remained absent. So this Court appointed Sri V.V.Suresh as Legal Aid Counsel.

5. Heard Sri Rajesh Kannan, counsel representing Sri M.Ramachandran Nair, learned counsel for the appellant and Sri V.V.Suresh, the Legal Aid Counsel appointed and Sri Jibu P.Thomas, learned Public Prosecutor appearing for the 2nd respondent.

6. The counsel for the appellant submitted that the accused had no case that the cheque was not issued from his account maintained in the Bank. He had no explanation as to how his cheque had reached the hands of the complainant. He had not taken any steps to disprove that the signature found in Ext.P1 was not that of the accused. Further, he did not even send any reply to the notice issued and he has no case that he has got any transaction with the complainant and cheque was issued earlier which was materially altered and the present complaint was filed. So under the circumstances, the court below ought to have believed the evidence of PW-1 regarding explanation given for the correction of the date and should have

convicted the accused and the reasons stated by the court below are not sufficient to acquit the accused and he prayed for allowing the appeal.

7. On the other hand, the Legal Aid Counsel Sri V.V.Suresh submitted that in the absence of any proper evidence adduced on the side of the complainant regarding the transaction, it cannot be said that he had discharged his burden. Only if he discharged his burden, the burden shifts to the accused to prove his case. The court below had considered the entire evidence and came to the conclusion that there is no possibility for any transaction and issuance of cheque as claimed by the complainant and there is material alteration of the cheque and rightly acquitted the accused and the finding does not call for any interference.

8. The case of the complainant in the complaint was that on 10.05.1997, accused borrowed a sum of Rs.24,681/- and issued Ext.P1 post dated cheque with date 19.05.1997. The accused had not even suggested to the complainant and he had not issued any cheque. It is true that once the execution of the cheque is proved by the complainant, then the presumption under Section 139 of the Act will be attracted and the burden

shifts to the accused to rebut the same either by adducing cogent evidence or by bringing material in the evidence of the complainant to prove his case. He had no case that Ext.P1 cheque was not issued from the account maintained by him in the Bank. Ext.P1 cheque was not dishonoured for the reason signature differs or for any material alteration in the cheque. If really there was difference in the signature, the Bank could have mentioned the same as one of the reason in dishonouring the cheque. That was not done in this case. Further, PW-1 had categorically stated that the accused has brought the cheque for the amount and since the date mentioned in the cheque was an old one, as directed by him the correct date was put as 19.05.1997 and he had put his counter signature in the corrected place and thereafter delivered the cheque to him. These aspects were not seriously cross-examined by the accused as well. Once the complainant had proved that the cheque has been issued by the accused and explained the reason for the correction in the date containing signature of the accused himself and proved that both signatures were put by him then the burden shifts to the accused to prove the circumstances under which this cheque had reached the hands of the complainant. Such an evidence is

lacking in this case. It is true that if two views are possible, the view taken by the court below in favour of the accused should not be disturbed by the appellate court unless there are compelling and justifiable reasons to come to the conclusion that the appreciation is not correct. In this case there is a statutory presumption under Section 139 of the Act in favour of the complainant, then he established that the cheque was issued by the accused for the amount due to him. In the absence of any evidence adduced on the side of the accused to rebut the presumption and in the absence of any evidence adduced on the side of the accused to prove that the signatures found in Ext.P1 was not his signature and it was manipulated by the complainant it can only be presumed that it was issued by the accused in discharge of a legally enforceable debt. Further, the suggestion given to PW-1 was that he had given a cheque obtained from Kasthuri Soap Company for an amount of Rs.25,000/- which he had given to his sister and infact the same was put PW-1 and he denied the same. That aspect has not been proved by the accused by adducing evidence as well. So from the suggestion it appears that he pleaded for a discharge but he did not establish the same as well. So under the circumstances, the finding of the

court below that the complainant had failed to prove the transaction as claimed by him and issuance of cheque is perverse and against the statutory presumption available under Section 139 of the Act in the absence of any evidence on the side of the accused to rebut the presumption and consequential acquittal made by the court below are unsustainable in law and the same is liable to be set aside. The complainant had proved the case by adducing proper evidence that the accused had issued the cheque in discharge of legal enforceable debt and the cheque was dishonoured for the reason 'not arranged for' and inspite of notice issued, he did not pay the amount. The accused had no case that he will not receive the notice in the address in which it was sent. Court below also found that there is proper notice. So under the circumstances, the court below ought to have convicted the accused for the offence under Section 138 of the Act. So the order of acquittal passed by the court below is set aside and the accused is found guilty for the offence under Section 138 of the Act and he is convicted thereunder.

9. Considering the amount involved, this Court feels that sentencing the accused to undergo imprisonment till raising of court and also to pay the cheque amount as compensation in

default to undergo simple imprisonment for one month under Section 357 (3) of the Code of Criminal Procedure will be sufficient and that will be ends of justice.

In the result, the appeal is allowed. The order of acquittal passed by the court below is set aside. The accused is found guilty for the offence under Section 138 of the Act and he is convicted thereunder and he is sentenced to undergo simple imprisonment till rising of court and also to pay the cheque amount of Rs.24,681/- as compensation to the complainant in default to undergo simple imprisonment for one month under Section 357(3) of the Code of Criminal Procedure. If the compensation amount is realised, court below is directed to pay the same to the complainant.

This Court place appreciation on record for the manner in which Sri V.V.Suresh, Legal Aid Counsel appointed to argue the case for the interest shown by him and effectively arguing the case for the 1st respondent accused.

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

SD/-
K. RAMAKRISHNAN,
JUDGE