

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 25TH DAY OF NOVEMBER 2015/4TH AGRAHAYANA, 1937

CRL.A.No. 1751 of 2004 (B)

AGAINST THE ORDER/JUDGMENT IN CrI.L.P.449/2004 of
HIGH COURT OF KERALA DATED 09-08-2004

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AGAINST THE JUDGMENT IN CC 781/2002 of J.M.F.C.-I,
KOTTARAKKARA, DATED 18-11-2003

APPELLANT(S)/PETITIONER:

VINOD K.ARAVIND, S/O.K.ARAVINDAKSHAN,
V.M.BHAVAN, KARINGANNOOR P.O., VELINALOOR VILLAGE,
KOTTARAKKARA TALUK.

BY ADV. SRI.S.RAJEEV

RESPONDENT(S)/RESPONDENTS:

1. VENKATARAMANAN POTTY,
S/O.SRINIVASAN POTTY, THOPPIL HOUSE, MUKHATHALA P.O.,
KOLLAM TALUK.

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

R2 BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1751 of 2004

.....
Dated this the 25th day of November, 2015

JUDGMENT

Complainant in C.C.No.781/2002, on the file of the Judicial First Class Magistrate Court-I, Kottarakkara, is the appellant herein. The case was taken on file by the magistrate 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 issued Ext.P1 cheque for ₹87,000/- in discharge of a legally enforceable debt due from him. The cheque when presented was dishonoured for the reasons 'funds insufficient' in the account of the accused evidenced by Ext.P2 dishonour memo. Complainant issued Ext.P3 notice vide Ext.P4 postal receipt intimating the dishonour

and demanding payment of the amount covered by the cheque. The same was received by the accused evidenced by Ext.P5 postal acknowledgment. He had sent a reply with false allegations. He did not pay the amount. So he had committed the offence punishable under Section 138 of the Negotiable Instruments 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 the Secretary of the Co-operative Bank was examined as PW2 and Exts.P1 to P6 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 borrowed

any amount and he was only an authorised agent of the complainant for distributing his articles and the dealership was terminated and the accounts were settled. There was no amount due from him, but he filed a complaint before the Deputy Superintendent of Police and he was summoned to the police station and cheque was obtained by force and misusing that cheque the present complaint was filed. In order to prove his case, the complainant was cited as defence witness and he was examined as DW1. The accused himself was examined as DW2 and then Deputy Superintendent of Police, Kollam, was examined as DW3 and Exts.D1 to D5 were marked on his side. After considering the evidence on record, the court below found that the complainant had failed to prove his case and the accused has rebutted the presumption and no offence under Section 138 of the Act is attracted and acquitted the accused under Section 255(1) of Crl.Procedure Code.

Aggrieved by the same, the present appeal has been preferred by the appellant/complainant along with Leave Petition as Crl.L.P.No.449/2004 and the application was allowed and the leave was granted and then the appeal was admitted.

4. Heard counsel for the petitioner Sri.Vinay, counsel representing Sri.S.Rajeev, counsel for the appellant and Smt.Seena Ramakrishnan, Public Prosecutor appearing for the 2nd respondent. In spite of notice served on the first respondent he did not appear.

5. The counsel for the appellant submitted that, the entire procedure adopted is not correct. In the reply notice, the accused had no case that the cheque was obtained by coercion from the police station, but only after the evidence of the complainant is over, he had taken up a new plea and DW3 was examined, who is not competent to prove the documents. In fact the document was not proved

through him and court below had only received this document and given a marking as Ext.D5 and relied on the same for the purpose of considering the defence case, which is illegal. Further in this case, the complainant was examined as defence witness as DW1, which is unknown to law. The evidence of the accused is not sufficient to rebut the presumption.

6. Heard the Public Prosecutor also.

7. It is seen from the records that the case was taken on file on the basis of a private complaint filed by the appellant alleging offence under Section 138 of the Negotiable Instruments Act against the first respondent. The case of the complainant in the complaint was that accused issued Ext.P1 cheque for ₹87,000/- in favour of the complainant in discharge of a legally enforceable debt due from the accused to the complainant and the cheque when presented was dishonoured and in spite of notice issued, he

had not paid the amount. It is also seen from the records that when the accused appeared particulars of offence were read over and explained him and he pleaded not guilty. The complainant himself was examined as PW1 and the Secretary of the bank was examined as PW2 and Exts.P1 to P7 were marked on the side of the complainant (though in the indux portion only Exts.P1 to P6 were mentioned). When the accused was questioned under section 313 of the Code, he denied the transaction and also stated that, on 4.4.1998 a police official from Kollam police station came and informed that the complainant had sent a complaint to the Home Secretary and it has been forwarded to the Deputy Superintendent of Police for enquiry and he has to appear on 6.4.1998. Accordingly, on 6.4.1998, the accused appeared and he was threatened and the present cheque was obtained for ₹87,000/- and a receipt has been given by the complainant regarding receipt of the cheque.

In order to prove the case of the accused, the complainant was cited as defence witness and he was examined as DW1 and Exts.D1 and D2 were marked through him. The accused himself was examined as DW2 and Exts. D3 and D4 were marked through him. The Deputy Superintendent of Police, Kollam was summoned to produce the file relating to the complaint filed by the complainant and also culmination of the complaint and DW3 was examined. Since he did not produce the document, he was recalled and he had sent a report along with attested copy of the report said to have been filed by the then Deputy Superintendent of Police to the Home Department on the complaint filed by the complainant and that document was marked as Ext.D5 on consent. The procedure adopted by the court below for examining the complainant as defence witness is not proper and not contemplated under law. It is so held in the

decisions reported in **State of Madhya Pradesh v. Badri Yadav** [2006(3) KLT 205(SC)] and **Thomas v. Vijayakumari** (2002 KHC 150 = 2002(1) KLT 689, **Kamarudheen v. Shoukkathali** (2001 KHC 747 = 2001(3) KLT 476). If at all the accused wants to examine the complainant to prove certain facts, he can only recall him and further cross examine him to prove his defence, if subsequent facts were brought to his notice or to prove certain documents which were not put to him at the time when he was examined at the earlier time.

So the procedure adopted by the court below in examining the complainant as DW1 is against law. Further, it is seen from the records that the contents in Ext.D5 were not proved through witnesses. Even accused had not mentioned when he was examined under what circumstances the cheque happened to be issued as well. It is seen from the evidence that he had only marked

Exts.D3 and D4. He did not mention anything about Exts.D1, D2 or about the complaint if any filed and the enquiry conducted and the circumstances under which the cheque was issued as well. The court below had now relied on Ext.D5 for the purpose of coming to the conclusion that the cheque was obtained from the police station. Further, it is seen from the proceedings paper that after marking Ext.D5, said to have been marked on consent, no further opportunity was given to the complainant to adduce evidence to explain the document. So considering the circumstances, this Court feels that an opportunity has to be given to the complainant to controvert the evidence already adduced on the side of the accused to rebut the presumption, for which the order of acquittal passed by the court below has to be set aside and the matter has to be remanded to the court below for fresh disposal. Further, the defence must also be given an

opportunity to adduce further evidence including recalling of the complainant for the purpose of proving Exts.D1 and D2 in the process known to law invoking section 311 Code. So, the order of acquittal passed by the court below for the reasons stated above is set aside and the matter is remanded to the court below for fresh disposal in accordance with law. So, the appeal is allowed. The order of acquittal passed by the court below is set aside and the matter is remanded to the court below for fresh disposal in accordance with law. The learned Magistrate is directed to take the case on file and give an opportunity to the accused to recall the complainant under section 311 of the Code so as to prove Exts.D1 and D2, which were marked through DW1, by examining the complainant as defence witness which is not proper and also give an opportunity to the accused to adduce further evidence regarding the circumstances under which the cheque happens to be

issued and also give an opportunity to the complainant to adduce further evidence if any required on these aspects and after giving opportunities to the complainant and the accused, the court below is directed to expedite the disposal of the case. Since the accused is not appearing before this Court, the court below is directed to issue summons to the accused to appear and after getting his presence, dispose of the case as early as possible, at any rate, within three months from the date of procuring the presence of the accused. The complainant is directed to appear before the court below on 4.1.2016.

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

Sd/-
K. RAMAKRISHNAN, JUDGE.

//True Copy//

P.A. to Judge

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