

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYAISHTA, 1937

CRL.A.No. 24 of 2010 ()

AGAINST THE JUDGMENT IN Cr1.L.P. 1151/2009 of HIGH COURT OF KERALA
DATED 05-01-2010

AGAINST THE ORDER/JUDGMENT IN ST 97/2008 of J.M.F.C.-II, NADAPURAM
DATED 09-02-2009

PETITIONER/COMPLAINANT:

V.M.MOIDU, S/O.KUNHAMMED, BUSINESS,
VARIYAM MADATHIL, PALERY AMSOM DESOM, KOYILANDY TALUK.

BY ADV. SRI.R.K.MURALEEDHARAN

RESPONDENT(S)/ACCUSED & STATE:

1. RAJOSH N., S/O.RAGHAVAN, BUSINESS,
NADAKKATAVIDA, AROOR AMSOM DESOM, VADAKARA TALUK.

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

R,R1 BY ADV. SRI.C.K.RAMAKRISHNAN
BY PP SMT SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25-05-
2015, ALONG WITH CRA. 1240/2011, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

P.D.RAJAN, J

.....
Crl.Appeal Nos.24 of 2010 &
1240 of 2011

.....
Dated 25th May, 2015

JUDGMENT

'CR'

These appeals by special leave have been preferred against the acquittal of the accused in S.T.97/2008 and S.T.98/2008 of the Judicial First Class Magistrate-II, Nadapuram. The appellant is the defacto complainant in S.T. 97 of 2008 and S.T.98 of 2008 of the Judicial First Class Magistrate II, Nadapuram which was filed under Section 138 of Negotiable Instruments Act. Appellant's case in the trial court was that in discharge of a debt of Rs.4,23,190/-, first respondent issued a cheque for Rs.2,00,000/- in S.T.97 of 2008 and another cheque for Rs.1,00,000/- in S.T.98 of 2008 to him. When these cheques were presented for encashment, it was dishonoured for the reason of funds insufficient. He demanded the said amount of money by giving a notice in writing to the drawer of the cheque within the statutory period, on receipt of dishonour memo from the bank. The 1st respondent failed to make payment of the money within time, hence the complaints were filed in the trial court.

2. Both transactions arose out of the same debt, two complaints were tried jointly by the trial court. To prove the allegation, appellant examined PW1 and 2 and marked Exts.P1 to P16 as his oral evidence. The incriminating circumstances brought out in evidence were denied by the first respondent while questioning him. He denied the allegation and examined DW1. Trial court after sifting and weighing the evidence on record, acquitted the accused, on the ground that there was material alteration in Ext.P1 and P6 cheques.

3. Heard both sides. Learned counsel appearing for the appellant contended that the findings of the court below about material alteration in Exts.P1 and P6 is unsustainable in law since the transaction was admitted by the first respondent and there is no reason to disbelieve that evidence.

4. However in the light of the argument the only question for consideration is whether adding name in the cheque leaf without the consent of the drawer amounts to a material alteration of a negotiable instrument? An immaterial alteration has no effect either on the deed or on the right of any of the parties, but at the same time a material alteration made with the consent of the parties does not prevent the person making

the alteration from enforcing it.

5. The effect of material alteration has been explained under Section 87 of the Negotiable Instruments Act. It reads as follows:-

“87. Effect of material alteration - Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties'

Alteration by indorsee - And any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof.

The provisions of this section are subject to those of sections 20, 49, 86 and 125”.

Therefore any material alteration made in an instrument while it is in the possession of a party without consent of the parties disentitle that party from relying upon it. When first respondent issued a signed cheque without mentioning the name of the appellant, it has to be proved by the appellant, for what purpose the cheque was issued, and whether there is any other liability. When he denied the issuance of cheque in

discharge of a debt, and person in possession of the cheque subsequently added something, in the blank portion, it can be described as one against the terms of the contract at the time of issuance of a negotiable instrument.

6. It follows that any addition made to the negotiable instrument without the consent of the drawer, that addition is an alteration of the character of the cheque which disqualifies the appellant in putting the first respondent under Section 138 of the N.I.Act. An alteration made by erasure, interlineation addition or substitution of material, affecting the identity of the instrument is an alteration in the material part of the instrument, which can be used as a piece of evidence in proof of an obligation alone. Therefore, that document cannot be used as a main document for effecting the relief.

7. In **Haran Chandra V. Kishori Lal** (AIR 1929 Calcutta 789), followed the decision in *Master V. Miller* (1891) 4 T.R.320 = 2H & B1, 141), a doctrine which has been stated in this way:

“ Whenever any instrument is purposely altered by a person in lawful possession of it in a material part of it, the instrument is void for the purpose of enabling any person

to sue on it or to defend himself by using it as direct defence depending on its obligatory force as an instrument”.

8. The effect of material alteration was explained by this court in **Jawahar Trading Corporation V. Ramadas** (1989 (2) KLT 932), in which it was held as follows:-

“ Any material alteration of a negotiable instrument renders the same void against any one who is a party thereto at the time of making the alteration and does not consent thereto, unless, it was made in order to carry the common intention of the original parties. Addition of parties to a contract is a material alteration. Adding stamps and signatures and corrections in signatures and writings are also material alterations. Failings of parties to raise specific pleas in that respect should not deter the Court in considering how the law should be applied to proved facts. The principle of law in this respect embodied in S.87 of the Negotiable Instruments Act is essential to the integrity and sanctity of contracts. It is intended to prevent fraud and deter men from tampering with written securities. It is repugnant to the policy of law to permit the holder of a negotiable instrument to attempt a fraud of this kind with impunity. By the lateration, the identity of the document itself is

destroyed. To hold one liable under the circumstances is to make him liable for a contract which he never agreed. The burden is on the plaintiff in such circumstance to show that the alteration was not improperly made. An alteration which varies the rights, liabilities or legal position of the parties ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained is a material alteration. To make an alteration material it is not necessary that it should adversely affect the party who raises that plea”.

The above decision was followed in another decision reported in **Ramachandran V.Dineshan** (2005(1) KLT 353).

9. A Division Bench of the Calcutta High Court in **K.Kisor De V. Nagendrabala Chowdhurani (AIR 1921 Calcutta 435)** relied on two earlier decisions, **Gour Chandra V. Prasanna Kumar** (54) and **Achutanand V. Ram Nath** (55), in which was ruled as follows:-

“that a material change or alteration of an instrument is one which causes it to speak a language different in legal effect from what it originally spoke. Accordingly, any act which

changes the legal effect of the instrument, that is, which changes the legal identity or character of the instrument, either in its terms or in the relation of the parties to it, is a material change or technically an alteration. It is the effect of the act upon the instrument and not the particular manner in which it is done, that is material, and hence an alteration to be material must be an actual alteration, whether by erasure, interlineation, addition or substitution of material matter affecting the identity of the instrument or contract; it must also be in the material part of the instrument and must affect the rights and obligations of the parties thereto. To constitute an alteration material, it is enough that, if the instrument were genuine, it would operate differently from the original”.

10. The full bench of the Apex Court had discussed about material alteration in a deed without consent of party liable under it and its effect in **Loonkaran Setha etc V. Ivan E John and others** (AIR 1977 SC 336), in which it was held in paragraphs 23 & 30 as follows:-

“Question No.5 - Before proceeding to determine this question, it would be well to advert to the legal position hearing on the matter. As aptly stated in paragraph 1378 of Volume 12 of

Halsbury's Laws of England (Fourth Edition) "if an alteration (by erasure, interlineation, or otherwise) is made in a material part of a deed, after its execution, by or with the consent of any party to or person entitled under it, but without the consent of the party or parties liable under it, the deed is rendered void from the time of the alteration so as to prevent the person who has made or authorised the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound by it, who did not consent to the alteration, any obligation, covenant or promise thereby undertaken or made.

A material alteration, according to this authoritative work, is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed.

The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed".

Xxxxxxx

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30. As the above mentioned alterations substantially vary the rights and liabilities as also the legal position of the parties, they cannot be held to be anything but material alterations and since they have been made without the consent of the defendants first set, they have the effect of cancelling the deed. Question No.5 is, therefore, answered in the affirmative”.

11. PW1 in his cross examination admitted that the name of the complainant was not entered in the cheque leaves. Therefore, the payee wrote the name of the complainant without the consent of drawer amounts to material alteration, since the drawer disputed the original transaction. It is the normal rule that any material alteration in a negotiable instrument without the consent of the drawer renders the instrument void. PW1 in his cross examination admitted that the cheques were issued in connection with liability in a partnership firm. The testimony of this witness prima facie asserts about the legal proof of liability which was disputed by the 1st respondent. This may be a good ground for suspicion about the conduct of PW1 when he entered his name in the cheque leaves without any consent. Therefore an alteration in

an instrument after its execution made without the consent of the drawer is void, which will vitiate the instrument.

In the light of the above discussion, I am unable to find any error in the view taken by the trial Magistrate. Accordingly, I dismiss both the appeals.

P.D.RAJAN, JUDGE

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