

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

THURSDAY, THE 25TH DAY OF JUNE 2015/4TH ASHADHA, 1937

CRL.APPEAL No. 532 of 2015

AGAINST THE JUDGMENT IN ST 5184/2010 of J.M.F.C.-IV (MOBILE COURT),
THIRUVANANTHAPURAM DATED 24-02-2015

APPELLANT(S)/COMPLAINANT:-:

MADHU D.R.
S/O.DIVAKARAN NAIR, T.C.41/1685, MANACAUD P.O.
THIRUVANANTHAPURAM.

BY ADVS.SRI.S.V.PREMAKUMARAN NAIR
SRI.R.T.PRADEEP

RESPONDENT(S)/STATE/ACCUSED:-:

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1. STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.
 2. SOBHA RANI P.
W/O.MANOJ KUMAR, HARISREE ENTRANCE COACHING CENTRE
NEAR CARMEL SCHOOL, VAZHUTHACAUD
THIRUVANANTHAPURAM - 695 014.

R1 BY PUBLIC PROSECUTOR SMT.P.MAYA

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 25-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T. RAVIKUMAR, J.

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Crl.Appeal No.532 OF 2015

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Dated this the 25th day of June, 2015

JUDGMENT

The appellant herein was the complainant in S.T.No.5184 of 2010. He filed the complaint which was taken on file and registered as S.T.No.5184 of 2010 alleging commission of offence under section 138 of the Negotiable Instruments Act against the accused/second respondent. The said complaint was filed, inter alia, raising the following allegations:- The accused/second respondent borrowed an amount of ₹1,10,000/- from him and she issued Ext.P1 cheque dated 3.2.2010 in discharge of the said legally enforceable debt. The said cheque on presentation for encashment was bounced owing to paucity of funds in the account maintained by the accused/second respondent in her account. The factum of dishonour of the cheque was duly intimated to the accused/second respondent and she was called upon

to pay the amount due thereunder by issuing Ext.P3 notice dated 5.5.2010 within the statutorily prescribed period. Despite the receipt of the same, the accused/second respondent failed to pay the amount within the time fixed statutorily and thereby committed offence under section 138, N.I Act.

2. On due process, the second respondent/accused appeared before the court and the particulars of the offence were read over and explained to her. She pleaded not guilty. To bring home the offence against the accused/second respondent, the appellant got himself examined as PW1 besides getting examined M. Eswara Iyer, D.Anilkumar and M.A Manoj respectively as PW2 to PW4. Exts.P1 to P8(a) were also marked on his side and Ext.X1 is the court document viz., the expert report from the Forensic Science Laboratory, Thiruvananthapuram on Ext.P1 cheque on being sent for comparison. No defence evidence was adduced by the second respondent. After careful evaluation of the evidence on record, the learned Magistrate

found that the complainant/appellant had failed to prove the execution of the cheque as also passing of consideration and consequently, held the accused/second respondent not guilty of the offence punishable under section 138, N.I Act and acquitted her under section 255(1) Cr.P.C. This appeal is filed challenging the aforesaid order of acquittal.

3. I have heard the learned counsel for the appellant and the learned Public Prosecutor. At the very outset, it is to be noted that the complainant/appellant did not have a case that the evidence tendered by him were not correctly adverted to by the trial court though he got grievance regarding the manner of appreciation of the evidence on record. I have already adverted to the case of the complainant/appellant made out in the complaint. It is evident that the precise case of the complainant/appellant was that the accused/second respondent borrowed an amount of ₹1,10,000/- from him and issued Ext.P1 cheque in discharge of the said legally enforceable debt. The

second respondent/accused specifically stated that she had not borrowed any amount from the complainant and that she did not issue any cheque to the appellant and specifically denied her signature in Ext.P1 cheque. Evidently, at the instance of the accused, Ext.P1 cheque was sent for comparison by an expert of Forensic Science Laboratory, Thiruvananthapuram. The expert who issued Ext.X1 report was examined as PW4. The report was marked as court document viz., Ext.X1. After hearing the sides the following points were framed for determining the case:-

1. Whether Ext.P1 was executed and issued by the accused to the complainant?
2. Whether Ext.P1 was supported by consideration?
3. Whether Ext.P1 was dishonoured for insufficiency of funds in the account of the accused?
4. Whether the accused was given the statutory notice as alleged?
5. Whether the accused failed to make the repayment of the money covered by Ext.P1 as alleged?
6. Whether the accused is guilty or not?
7. What shall be the sentence if any, to be awarded to the accused?

4. As noticed hereinbefore, the complainant/appellant was examined as PW1. He filed an affidavit in lieu of his chief examination. His evidence is to the effect that he got acquaintance with the accused for several years and due to his relationship, the accused borrowed ₹1,10,000/- from him on 26.10.2009 and it was in discharge of the said legally enforceable debt that Ext.P1 cheque dated 3.2.2010 was issued. Thus it is evident that the definite case of the complainant/appellant was that the accused/second respondent borrowed the amount from him and it was to discharge the said legally enforceable debt that Ext.P1 cheque was issued. Ext.P1 cheque was sent for comparison of the signature thereon and Ext.X1 is the report thereon issued by PW4. The second respondent/accused relied on Ext.X1 expert opinion report. PW4 opined that the questioned signature is found exhibited significant differences with standard signatures in the individual writing characteristics of letters 'S', 'o', 'b', 'h', 'a', 'R' , 'ni' and 'p' and further that the manner of

underscoring is also found different. He has also opined that the said signature exhibited differences with the standard signatures in general writing characteristics such as skill, movement, speed etc. and that those differences were only due to different authorship and not due to intended disguise. In short, the report is to the effect that the signature in Ext.P1 cheque was not authored by the second respondent/accused. The appellant had examined PW2 who was the Manager of the Federal Bank, Cotton Hill Branch, Thiruvananthapuram during the relevant point of time to establish that an amount of ₹1,00,000/- was encashed from account No.3467 operated by the complainant through cheque No.227364 on 26.10.2009. The copy of the said cheque was marked as Ext.P8. The bearer of the cheque had put his signature on the reverse side of the cheque at the time of its encashment and that was marked as Ext.P8 (a). PW2 would depose that the signatures in Ext.P5 viz., the postal acknowledgment card showing the receipt of notice issued by the appellant pursuant to the dishonour of Ext.P1 cheque and P8 (a) are

similar. However, during the cross examination, he deposed that he did not know the person who had withdrawn the amount as per Ext.P8 as it was a cash cheque. In spite of the availability of Ext.X1, in view of the specific contentions raised by the counsel for the complainant the court below compared the signature in Ext.P5 cheque and in Ext.P8(a) as also in the vakalath executed by the second respondent and found that there is striking difference in those signatures. In the said circumstances, evidently, the learned counsel for the complainant took up contention that the amount covered by Ext.P8 was withdrawn by none other than the husband of the accused and that the signatures in Ext.P5 postal acknowledgment card and Ext.P8 (a) are put by the husband of the accused Sri.Manoj Kumar. The counsel had also contended that it is mentioned in the complaint itself that the second respondent is the wife of Manoj Kumar. The appellant had also examined one D.Anilkumar, an autorikshaw driver as PW3 to prove the execution of Ext.P1 cheque. His oral testimony is to the effect that on 26.10.2009 he took the appellant to Harisree Tuition Centre

where the second respondent was taking tuition classes, in his autorikshaw and he had seen the appellant handing over a cheque for ₹1,00,000/- to the second respondent from the office room and the second respondent giving a cheque for ₹1,10,000/- to the appellant then and there. However, it came out in evidence that there was a criminal case between PW3 and the second respondent and ultimately, he was acquitted in the said criminal case. He was found not trustworthy by the trial court. After appreciating the entire evidence the trial court found that no cogent and convincing evidence was adduced to show that the amount was received by the accused or that the amount covered by Ext.P8 cash cheque was received for and on behalf of the second respondent/ accused and in discharge of the legally enforceable debt she issued Ext.P1 cheque. It is not in dispute that the accused disputed the execution of the cheque and in such circumstances, the burden to prove the execution of the cheque was entirely on the complainant/appellant. It was after such consideration that the learned Magistrate found that the appellant had failed to

establish execution of Ext.P1 cheque and also that the second respondent-accused had succeeded in rebutting the presumption available under section 139, N.I Act by bringing preponderance of probabilities with reference to the circumstances relied on by her. As noticed hereinbefore, the appellant contends that the appreciation of evidence by the trial court was utterly perverse and the acquittal of the accused was the outcome of such perverse appreciation. The learned counsel for the appellant contended that Ext.P3 notice was received by the second respondent/accused and Ext.P5 is the acknowledgment card. In such circumstances, according to him, in view of the provisions under section 27 of the General Clauses Act notice in terms of the provisions under proviso (b) to section 138, N.I Act should be deemed to have been served on the accused and the variance in the signatures in Ext.P5 acknowledgment card and Ext.P1 cheque is of no consequence. As noticed hereinbefore, going by Ext.X1 report, the signatures in Ext.P1cheque and Ext.P8(a) are not put by the same person. The court below compared the signatures

invoking the power under section 73 of the Indian Evidence Act and found that there is striking difference in the signatures in Ext.P1 and Ext.P5, P8(a) and in the vakalath. In view of the case now, put forth by the appellant in the appeal virtually a further probe on the said question is unwarranted. Still it will not be inappropriate to refer to certain aspects. True that there cannot be any doubt with respect to the position that an expert opinion cannot be said to be a conclusive proof. Evidently, in this case, the trial court invoking the power under section 73 of the Evidence Act to compare the signatures and ultimately found that the signature in the cheque concerned was not that of the accused. The said position was discussed in detail in paragraph 15 of the impugned judgment. As noticed hereinbefore, as per Ext.X1 it was found that the signature was not that of the accused and add to it the comparison made by the court invoking the power under section 73 of the Evidence Act also supported the said view. The learned counsel for the appellant now takes up the contention that Ext.P8 cheque was encashed by the husband of the accused and

the said fact stood proved by the evidence on record and therefore, the accused could wriggle out of the liability and she is estopped from denying the transaction regarding the receipt of ₹1,10,000/- from the appellant. It is to be noted that in the complaint as also in the affidavit filed in lieu of chief examination, admittedly, the precise case of the appellant was that the second respondent borrowed an amount of ₹1,10,000/- from him on 26.10.2009. It is also to be noted that during the cross-examination he testified that he had tendered ₹1,00,000/- by way of a cash cheque and ₹10,000/- in cash. It is to establish the said new case taken in deviation of his pleadings in the complaint that he got examined PW2. As found hereinbefore, ultimately it has come out in evidence that the signature in Ext.P8 cash cheque on its reverse side made at the time of its encashment is not that of the second respondent/accused. Now, the contention is that he had given an amount of ₹1,00,000/- by way of Ext.P8 cash cheque and the same was encashed by the husband of the second respondent/accused Sri.Manoj Kumar and the signature in

Ext.P8(a) and the signature in Ext.P5 acknowledgment card were put by him. According to the appellant, Ext.P8(a) synchronizes with the signature in Ext.P5 and therefore, it is obvious that the husband of the accused encashed Ext.P8 cheque on the ostensible authority of the second respondent. It is further contended that the second respondent is legally precluded from contending that she did not receive the amount in the wake of ostensible authority conferred on her husband to encash the cash cheque and to receive the postal article on her behalf. Thus, it is evident that the appellant had actually adduced evidence not exactly in tune with and to prove his pleading in the complaint. It was not his case in the complaint that he gave ₹1,00,000/- by way of cash cheque and ₹10,000/- in cash to the second respondent. Ext.X1 report and the comparison made by the trial court invoking the power under section 73 of the Evidence Act when once revealed that the accused was not a signatory to Ext.P1 cheque the fact that it was bounced owing to paucity of funds maintained by the accused and the consequential failure on her part to

pay the amount covered by the cheque within 15 days from the date of receipt of notice contemplated under section 138(b) would not be sufficient to hold her guilt under section 138, N.I Act. A bare perusal of the provisions under section 138, N.I Act would reveal that to have a successful prosecution for commission of the said offence the complainant has to establish that the accused was the drawer of the cheque in question and that the said cheque on its presentation got dishonoured on a ground which would attract offence under section 138, N.I Act. In this case, the evidence on record revealed from Ext.X1 report proved through PW4 and the result of the comparison made by the trial court invoking the power under section 73 of the Evidence Act would virtually reveal the contrary. Even then, the contention of the appellant is that Ext.P5 and Ext.P8 (a) would establish that the cheque in question was encashed by the husband of the accused and in such circumstances even if Ext.P1 cheque was not signed by the second respondent/accused would not absolve her from the culpability. I am afraid the said contention cannot be accepted. In

the light of the provisions available under the N.I Act especially under sections 6 and 138, there cannot be any doubt with respect to the position that it is the bounden duty of the complainant to establish that the author of the cheque in question is the second respondent/accused. Even if it is contended that the appellant had discharged his initial burden to get the benefit of the presumption available under section 139, N.I Act in the circumstances, explained hereinbefore, it could only be held that the second respondent has succeeded in dislodging the presumption by bringing preponderance of probabilities relying on the aforesaid circumstances. Undoubtedly, to dislodge the presumption under section 139, N.I Act, an accused need not adduce direct evidence and it can be inferred from the circumstances relied on by the accused. Though the term 'sign' is not defined in the N.I Act, the word 'sign' is defined under section 3(56) of the General Clauses Act. Section 3(56) reads thus:-

“sign”, with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include

“mark”, with its grammatical variations and cognate expressions.

5. In such circumstances, if a person who is able to put signature which is not mere the writing of the name or the sign in terms of the provisions under section 3(56) of the General Clauses Act in order to said to have signed his signature must appear at least somewhere in the cheque in question and it should have been made with an intention to be a part of the instrument in controversy. As found hereinbefore, when it is not conclusively proved that it was the accused who is the maker of the cheque in question and that her signature is appearing in it, a suspicion cannot take the place of proof. When Ext.X1 report as also the comparison made by the court invoking the power under section 73 of the Evidence Act. In such circumstances, when the appellant had failed to prove that the accused was the maker of Ext.P1 cheque the mere contention that Ext.P8 cash cheque was encashed by her husband cannot and will not be a ground for holding culpability against the second respondent/accused.

Viewing this from any angle I am unable to find any manifest illegality or error or legal infirmity in the impugned order of acquittal passed by the learned Magistrate. The appellant also cannot be heard to contend that in a prosecution for the offence punishable under section 138, N.I Act the standard of proof required from the part of the complainant is preponderance of probabilities. In short, the appellant has not made out a case for admitting this appeal into file and it is liable to fail. Accordingly, it is dismissed.

**Sd/-
C.T. RAVIKUMAR
(JUDGE)**

spc/

C.T. RAVIKUMAR, J.

JUDGMENT

September, 2010

