IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

WEDNESDAY, THE 22ND DAY OF JULY 2015/31ST ASHADHA, 1937

CRL.A.No. 28 of 2013 ()

AGAINST THE JUDGMENT IN ST 5/2009 of J.M.F.C.-II, VAIKOM

PETITIONER/COMPLAINANT

KAMALADASAN
LOVE DALE, MUTHENDATHUKAVU, T.V PURAM P.O.
VAIKOM

BY ADVS.SRI.RENJITH THAMPAN (SR.)
SMT.P.R.REENA

RESPONDENT(S):

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

2. A. K THANKAPPAN,
PROPRIETOR, A.K.AGENCIES, SOUMYALAYAM
MUTHEDATHUKAVU, T. V PURAM P.O, VAIKOM
KOTTAYAM DIST.-686141

R2 BY ADV. SRI.K.R.VINOD
R1 BY PUBLIC PROSECUTOR SMT.P.MAYA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T. RAVIKUMAR, J.

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Crl.Appeal No.28 of 2013

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Dated this the 22nd day of July, 2015

JUDGMENT

This appeal is directed against the order of acquittal passed by the Court of Judicial First Class Magistrate-II, Vaikom in S.T.No.5 of 2009. The appellant was the complainant therein and he launched the prosecution against the second respondent/accused for commission of offence under section 138 of the Negotiable Instruments Act thereunder raising a case as follows:-

The second respondent borrowed an amount of ₹3,00,000/-from the complainant and in discharge of the said liability, he issued Ext.P1 cheque dated 3.5.2007 bearing No.691382 drawn on South Indian Bank, Vaikom for an amount of ₹3,00,000/-. When the said cheque was presented for encashment, it was bounced on the ground of paucity of funds in the account maintained by the second respondent. Thereupon, statutory notice was issued to the second respondent intimating him of the dishonour of the cheque and calling upon him to pay the amount due. Within the expiry of the statutory period, the second respondent failed to pay the amount due.

2.To prove the offence alleged against the second respondent, the appellant herein got himself examined as PW1 and got marked Exts.P1 to P6. After the closure of the evidence of the complainant/appellant herein, the second respondent/accused was examined under section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances put to him. So also, he got himself examined as DW2 besides getting examined DW1 and DW3. Exts.D1 and D2 were also got marked on his side through DW3. Ext.C1 series are the court exhibits. After a careful evaluation of the evidence thus adduced by both sides and appreciating the rival arguments advanced, the trial court found that he was not liable to be convicted under section 138 N.I Act and consequently, acquitted him under section 255(1) Cr.P.C. Hence, this appeal.

3. I have heard the learned counsel for the appellant, learned counsel for the second respondent and also learned Public Prosecutor.

4.Before analysing the evidence on record it is only appropriate to note a crucial indisputable fact that the complaint did not carry any mention regarding the date of borrowal of the amount in question. True that in the affidavit filed in lieu of chief examination, the appellant stated that the second respondent borrowed the amount in question on 28.3.2007. He would further state therein that on the date on which the said amount was received by the second respondent he had handed over Ext.P1 cheque dated 3.5.2007, a typewritten cheque. He would also depose that when the said cheque was presented for encashment it was dishonoured on the ground of insufficiency of funds in the account maintained by the second respondent. He further deposed regarding the issuance of the statutory notice within the time limit owing to the failure on the part of the second respondent in effecting payment of the amount due. His cross examination would reveal that a definite question was put to him as to whether he had enquired about the reason for bringing the typewritten cheque and that he had replied it in the negative. A scanning of the impugned judgment would also reveal that earlier, as per judgment dated 17.5.2010, the trial court found the second respondent guilty under section 138 N.I Act and convicted him thereunder. It is also discernible from the judgment that the said order of conviction was challenged in Crl.A.No.266/2010 by the second respondent and the appellate court set aside the same and remanded the case with direction to consider Ext.C1 series of documents as also to provide opportunity to the second respondent herein to examine the second witness in the witness list filed by him. The impugned judgment was passed after such compliance. Evidently, the said witness was examined as DW3 and through him Exts.D1 and D2 were marked and the entire evidence was analysed by the trial court while passing the impugned judgment.

5.The learned counsel for the appellant contended that the court below erred in arriving at the conclusion that the appellant had failed to establish the charge of commission of offence under section 138 N.I Act by the second respondent. It is contended that the evidence of DW1 was sufficient to arrive at his culpability. Per contra, the learned counsel for the second respondent submitted that the order of acquittal was passed by the court below after a careful and proper appreciation of the evidence on record. It is further submitted that the evidence adduced in defence was sufficient to dislodge the presumption, if any, available to the appellant under section 139 N.I Act. The evidence on record would reveal the fact that earlier pursuant to the return of cheque No.691381 as unpaid, the brother-in-law of the complainant to whom it was issued launched prosecution against the second respondent under section 138, N.I.Act and also the factum of subsequent withdrawal of the same. The evidence would reveal that the cheque involved in that case was bearing No.691381. Ext.P1 cheque involved in this case is bearing No.691382. As noticed hereinbefore, the appellate court while remanding the case issued a direction to consider Ext.C1 series of documents. A perusal of paragraph 10 of the impugned judgment would reveal that the trial court considered Ext.C1 series. The 'Register of cheques issued' would reveal that the cheque book issued to the second respondent contained cheque leaves bearing Nos.691351 to 691400 and the same was collected from the Vaikom branch of South Indian Bank on 11.8.2003 and needless to say that Ext.P1 cheque bearing No.691382 is one among the cheque leaves. The register of cheques returned outward would reveal that the previous cheque leaf bearing No.691381 was received for collection on 20.8.2004. The said fact was spoken by DW3 the Branch Manager, South Indian Bank, Vaikom Branch. Ext.C1 series would, however, show that two more cheques from the aforementioned cheque leaves were received for collection in 2004 itself precisely on 4.2.2004 and 2.3.2004. The defence of the second respondent is that he borrowed amount from the brother-in-law of the complainant/appellant viz., DW1 and that he borrowed only an amount of ₹1,50,000/-. At the same time it is in evidence that DW1 filed a complaint alleging commission of offence under section 138 N.I Act against the second respondent in respect of his failure to pay an amount of ₹4,00,000/- borrowed from him and admittedly that case was subsequently compromised withdrawn. The case of the second respondent/accused is that the cheque involved in this case was issued to DW1 at the time of aforesaid transaction, but it was not returned. True that the mere statement in that regard by itself would not be sufficient to cast suspicion regarding the case of the appellant. The question is whether the court below was right in holding that there are certain circumstances which would probabilise the case of the second respondent. It is to be noted that nowhere in the complaint as also in the affidavit filed in lieu of chief examination, the appellant/complainant had stated specifically that prior to the borrowal of the amount of ₹3,00,000/-, the second respondent had approached him with a request to lend the said amount and that he had assured that he would lend the sum and it was pursuant to such assurance that the second respondent had, later, come to him with a typewritten cheque for ₹3,00,000/-. In this context, it is to be noted that the date of borrowal was conspicuously absent in the complaint. It is also to be noted that in the affidavit filed in lieu of chief examination the complainant stated that the amount in question was given to the second respondent on 28.3.2007 and also that it was a typewritten cheque dated 3.5.2007. It is relevant to note his version that it was given to him by the second respondent on the date of receipt of the money. In this context, one pointed question put to the appellant while being examined as PW1 assumes relevance. He was asked as to whether he had enquired about the reason for filling the cheque typewritten. Evidently, he replied that he did not make any such enquiry. He had also deposed to the effect that many a times the second respondent borrowed money from him, but he had given a cheque only in respect of the transaction involved in the case on hand. Strangely, even then, he had not enquired as to why the second respondent had brought such a typewritten cheque. It is also to be noted that he had deposed that he did not know the date of at least one earlier transaction. It is only during the cross examination that, for the first time, he put forth a case that prior to 28.3.2007 the second respondent approached him requiring such an amount. In order to obtain the benefit of presumption available under sections 118 and 139, N.I Act, it is incumbent on the part of the complainant to establish that he was having the required fund at the time of transaction. Evidently, the case of the appellant is that at the time of his retirement he obtained pensionary benefits. Such a case is seen advanced only during his cross-examination. Even then, it is to be noted that he did not state from which department he retired and what was the amount that he obtained by way of pensionary benefits. He had only deposed to the effect that he obtained pensionary benefits and then his brothers borrowed some amount from him and when they had returned the amounts he deposited the said amount in Vaikom branch of State Bank of Travancore. He would further depose that on 28.3.2007 he had withdrawn certain amount. At the same time, deposition of the appellant while being cross examined would not reveal what was the actual amount withdrawn by him from SBT Vaikom Branch. True that he would further depose:

> 28.03.07ന് പണമെടുത്തു. അന്ന് പ്രതിയ്ക്ക് കൊടുക്കാമെന്ന് പറഞ്ഞു. അതിനാൽ എടുത്തു കൊടുത്തു.

6.In the decision in **John K.Abraham v. Simon C.Abraham [2014(1) KLT 90 SC]** the Hon'ble Apex Court held that in order to get the presumption available under sections 118 and 139, N.I Act, burden is heavy upon the complainant to show that he had required fund for advancing the money to the accused and that the issuance of the cheque in question in support of the said advancement was true and that the accused was bound to make the payment as he had agreed. The learned counsel for the appellant attempted to get over the situation by citing the decision of the Hon'ble Apex Court in **Vasanthakumar T. v. Vijayakumari [2015(3) KHC SN 4].** It was held therein that when the issuance of cheque and the signature thereon is admitted by the accused, the complainant would be entitled to get the benefit of the presumption available under section 139 N.I Act. In other words, it was held that under such circumstances the provisions under section 139 would operate. But at the same time, there can be no doubt with respect to the position that presumption available under sections 118 and 139 N.I Act is rebuttable. In the decision in **Krishna Janardhan Bhat v. Dattatraya G. Hegde [2008 (2) SCC Crl.166],** the Hon'ble Apex Court held that there can be no presumption as to the execution of the cheque under section 139 N.I Act and the presumption which is possible thereunder, would be only with regard to the consideration which can be raised when the execution of the cheque is proved. The Apex Court also went on to consider the standard of proof required from the part of an accused and also from the part of the prosecution in that case. The Apex Court held that prosecution must prove the guilt of the accused beyond all reasonable doubt and standard of proof required on the part of the accused is preponderance of probabilities. It was further held that inference of probabilities could be drawn not only from the materials brought on record by the parties but also by referring to the circumstances upon which the accused relies. As noticed hereinbefore, in this case, the case of the second respondent is that the cheque in question was handed over to DW1 when he had a transaction with him at an earlier point of time. True that though the brother-in-law of the appellant/complainant was examined as DW1 the appellant could not elicit anything in his favour and at the same time, on a pointed suggestion with respect to the aforesaid aspect, DW1 repudiated the same. At the same time, he would admit the fact that the case filed by him against the second respondent alleging commission of offence under section 138 N.I Act in respect of an amount of ₹4,00,000/- was settled and compromised. It occurred in the year 2004. When that be the circumstances, though the appellant feign ignorance about such transaction it could not be expected that the appellant who is none other than the brother-in-law of DW1 would part with such a huge amount viz., ₹3,00,000/- to the complainant without enquiring the reason for bringing a typewritten cheque. In the absence of any specific pleading by the appellant in the complaint as also in the affidavit filed in lieu of chief examination regarding an earlier visit of the second respondent with a request to lend an amount of ₹3,00,000/- prior to 28.3.2007, it could not be accepted that the second respondent came to the appellant for borrowing an amount of ₹3,00,000/- with a typewritten cheque where the figure of ₹3,00,000/- was typewritten. The appellant also deposed to the effect that he had not seen the execution of the cheque and what he has deposed is that the second respondent brought a typewritten cheque and thereafter put his signature in it. Apart from the aforesaid aspects, as noticed hereinbefore, the appellant had not adduced any evidence regarding his financial status i.e, whether he was having required fund to advance an amount of ₹3,00,000/- to the second respondent on 28.03.2007. True that he deposed during cross-examination that he had withdrawn certain amount from SBT, Vaikom Branch. At the same time, he had not deposed as to how much amount was withdrawn. If he had actually withdrawn an amount of ₹300000/- on that date, he could have produced such documents evidencing withdrawal. The learned counsel for the appellant when faced with such a situation submitted that an opportunity may be given to the appellant to produce such documents. In fact, he had gone to the extent of saying that such a document was handed over to the counsel who conducted the case at the trial stage. If the contention is believed it would reveal that the appellant was in possession of such a document, but failed to bring it on record. Evidently, such a document was not produced. In such circumstances this court has to be reminded of the settled position of law that no evidence can be admitted even at the stage of appeal to enable the party to fill up the lacuna. True that it is possible to admit evidence by invoking the power under section 391, Cr.P.C while dealing with an appeal. But it could be exercised with due circumspection and importance and also after recording the reasons therefor. The appellant has not produced any such document to be admitted in evidence and in such circumstances I am not inclined to grant any further opportunity to the appellant to adduce such an evidence at this stage. In short, as on today, there is absolute absence of any evidence to show that the appellant was having the required fund to advance a huge amount of ₹3,00,000/- on 28.03.2007. Considering all those aspects, I do not find any reason to interfere with the conclusion arrived at by the trial court that the appellant herein had failed to adduce evidence conclusively to bring home the charge of commission of offence under section 138 N.I Act against the second respondent. I am of the view that the said conclusions and findings arrived at by the court below, in the facts and circumstances obtained in this case, cannot be said to be suffering from any legal infirmity or it cannot be said to be an outcome of an utter perverse appreciation of evidence, warranting appellate interference. In such circumstances, this appeal is liable to fail and accordingly it is dismissed.

Sd/-
C.T. RAVIKUMAR
(JUDGE)

spc/

C.T. RAVIKUMAR, J.

JUDGMENT

September, 2010