

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 10TH DAY OF JULY 2015/19TH ASHADHA, 1937

CRL.A.No. 2697 of 2009 ()

AGAINST THE JUDGMENT IN Cr1.L.P. 1124/2009 of HIGH COURT OF KERALA
DATED 18-12-2009

AGAINST THE JUDGMENT IN CRA 633/2007 of ADDL. DISTRICT COURT (ADHOC
2), THRISSUR

APPELLANT/PETITIONER/1ST RESPONDENT/COMPLAINANT:

ABDULKHADER
KATTINGACHIRA, IRINJALAKUDA, THRISSUR.

BY ADV. SRI.RAJESH CHAKYAT

RESPONDENT(S) /APPELLANT/ACCUSED:

1. ZUBAIR
MANGALATHARA VEEDU, SULTHANIYA MANZIL, EDATHIRUTHI
CHULLOOR P.O., THRISSUR.

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

R1 BY ADV. SRI.K.I.SAGEER
BY PP SMT SAREENA GEORGE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10-07-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.D.RAJAN, J

.....
Crl.A.No.2697 of 2009
.....

Dated 10th July, 2015

JUDGMENT

CR

Leave granted. Appellant challenges the judgment of acquittal in Crl.A.633 of 2007 of Additional Sessions Judge, Fast Track II(Adhoc), Thrissur for offence punishable under Section 138 of Negotiable Instruments Act (hereinafter referred to as N.I Act). The appellant is the complainant in ST 279/2006 of Judicial First Class Magistrate, Irinjalakuda, and the 1st respondent is the accused, he was convicted under Section 138 of N.I.Act and sentenced to imprisonment for three months and to pay compensation of Rs.15 lakhs under Section 357(3) Cr.P.C.

2. The facts considered for the indictment were that in May, 2004 first respondent approached the appellant and borrowed a sum of Rs.15 lakhs and in September, 2004 first respondent and his wife borrowed another Rs.15 lakhs (total Rs.30 lakhs) from the appellant. When appellant demanded the due amount of Rs.30 lakhs, first respondent gave a cheque dated 31.3.2005 drawn on SBI, Thriprayar branch for Rs.15 lakhs and his wife issued another cheque for Rs.15 lakhs to pay off the debt. When one cheque was presented for encashment

through Irinjalakuda Town Co-operative Bank, Kattingahira branch, it was dishonoured for the reason of funds insufficient. Appellant gave a notice in writing to the first respondent on 21.6.2005 and demanded the due amount. There was no repayment, instead of that, he sent a reply notice denying the claim of the appellant. On the ground of non payment, appellant filed the above complaint in the trial court.

3. In the trial court, appellant was examined as PW1 and his documents were marked as Ext.P1 to P11. The first respondent was examined as DW1 and S.I of Police, Mattannoor was examined as DW2. The documentary evidence Ext.D1 to D27 were marked in support of the defence evidence. Trial court after analysing the oral and documentary evidence, convicted the first respondent and sentenced thereunder. Against that, 1st respondent preferred the Crl.appeal 633 of 2007 and the Additional Sessions Court acquitted the accused. Hence the defacto complainant preferred this appeal.

4. Learned counsel appearing for the appellant contended that the cheque was dishonoured for the reason of funds insufficient and the presumption under Section 118 and

139 of the N.I.Act is available in this case and first appellate court misconstrued the evidence, took a wrong decision. The existence of legally enforceable debt was proved, the appellant's submission to draw a presumption under Section 139 is based upon evidence. Without considering the statutory liability, first respondent was acquitted which needs interference.

5. According to Section 138 of the Negotiable Instruments Act, where any cheque drawn by a person on an account maintained by him with a bank for payment of any amount of money to another person from out of that account, for the discharge in whole or in part of any debt or liability, is returned by the bank, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with a bank, such person shall be deemed to have committed an offence under Section 138 of the Negotiable Instruments Act. This deemed provision is subject to the statutory condition that the cheque has to be presented within the statutory period in which it is drawn or within the period of its validity. Secondly, the payee

or holder in due course of the cheque makes a demand for payment of such amount by giving a notice in writing to the drawer of the cheque and non payment of due amount after receipt of notice by the drawer of the cheque.

6. The submission of the appellant was that the cheque was issued in discharge of a debt. For substantiating the contention of legally enforceable debt, PW1 was examined in the trial court. The oral evidence of PW1 shows that first respondent borrowed a sum of Rs.15 lakhs in May 2004 and his wife borrowed Rs.15 lakhs in September 2004, total they borrowed a sum of Rs.30 lakhs. In discharge of that debt, first respondent issued Ext.P1 cheque drawn on SBT, Triprayar branch. When Ext.P1 was presented for encashment, it was dishonoured on the ground of funds insufficient and Ext.P2 is the dishonour memo. In Ext.P2, it is specifically mentioned as funds insufficient. Ext.P3 is the memo issued from Irinjalakuda Town Co-operative Bank. After dishonour of Ext.P1, appellant issued a lawyer notice, Ext.P4 is the copy of the lawyer notice. Ext.P5 is the postal receipt and Ext.P6 is the acknowledgment. Appellant also produced Ext.P7 to P11 to prove the financial capacity and the source from where he

received the fund for giving the amount to the first respondent. Ext.P7, P8, P9, P10 and P11 are the passbooks of Irinjalakuda Town Co-operative Bank. As per Ext.P7, his wife is maintaining an account in Co-operative Bank as per Ext.P8 his son is maintaining an account, and as per Ext.P9, his daughter is also maintaining an account with the bank. Another daughter is also maintaining account as per Ext.P10. Appellant also maintained Ext.P11 membership in the bank. In Ext.P7, the Co-operative Bank granted a loan of Rs.5 lakhs to his wife on 6.5.2004 and she repaid the amount in 12 instalments. In Ext.P8, a sum of Rs.4,95,000/- was borrowed on 6.5.2004 and its repayment within 12 months. As per Ext.P9, Rs.5 lakhs was borrowed on 17.9.1994 and repayment was for eight months. As per Ext.P10 also, Rs.5 lakhs was borrowed on 17.9.1994 and repayment for nine months. As per Ext.P11, Rs.5 lakhs was availed as loan on 17.9.1994 and repayment made for nine instalments. Calculating the total amount, it comes only to Rs.24,95,000/-. Therefore a shortage of Rs.5,05,000/- remains there in the account of PW1.

7. When complainant proves the existence of a legally

enforceable debt, the presumption under Section 139 of the Negotiable Instruments Act starts operating and burden shifts to the accused. Section 139 reads as follows.

“139. Presumption in favour of the holder - It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability”.

A three Judge bench of the Apex Court in Rangappa V. Sri Mohan (2010(11) SCC 441) held as follows:-

“The presumption mandated by Section 139 includes a presumption and there exists a legally enforceable debt or liability. This is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the respondent complainant”.

Therefore, in the present case since the cheque as well as the signature has been accepted by the accused respondent, the presumption under Section 139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability.

8. Where the facts of the case raises any presumption, it is the duty of the court to raise such presumption in every

case. The language used under Section 138 and 139 demand that the court "shall presume" which explains the liability of the drawer of the cheque. In this context, whether a presumption under Section 118 and 139 of N.I Act can be drawn in this case is the question. For this, I have considered the defence version of the first respondent while he was questioned under Section 313 Cr.P.C, he denied the liability. He was examined as DW1 in the trial court, who deposed that he borrowed a sum of Rs.8,35,000/-, from the appellant, as a security for that amount, he gave the R.C.Books of two vehicles and four signed blank cheque leaves, one signed blank stamp papers, one signed white paper affixing revenue stamp, five cheque leaves of his wife and signed blank stamp papers as security. He paid a sum of Rs.2 lakhs towards the principal amount and paid more than double of the borrowed amount as interest. When he was unable to pay such huge amount, appellant's people came to his house and took two vehicles from his custody. For that, Irinjalakuda police registered a Crime No.314 of 1995 and seized the vehicle from appellant's custody, later it was produced before Judicial First Class Magistrate, Irinjalakuda. Subsequently, the vehicle was

released from court.

9. The burden of proof and its impact and the presumption u/s.139 of the N.I. Act was explained in **Narayana Menon v. State of Kerala** [2006(3) KLT 404 (SC)] as follows:

"In *Hiten P. Dalal v. Bratindranath Banerjee* ((2001) 6 SCC 16), a 3-Judge Bench of this Court held that although by reason of Ss.138 and 139 of the Act, the presumption of law as distinguished from presumption of fact is drawn, the court has no other option but to draw the same in every case where the factual basis of raising the presumption is established. Pal. J. speaking for a 3-Judge Bench, however, opined:

'Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,

'after considering the matters before it, the court either believes it to exist, or

considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man"

10. The principle behind S.118(a) of the Act is that the Court shall presume a negotiable instrument issued for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed in a case is to raise a probable defence, by the first respondent. For that the evidence adduced on behalf of the appellant could be relied upon. The standard of proof necessarily is pre-ponderance of probabilities, which can be drawn not only from the materials on records but also by the circumstances upon which he relies. The 1st respondent has only to discharge initial onus of proof, he is not required to

disprove the prosecution case.

11. The first respondent was examined as DW1 and produced Ext.D1 to D27 in the trial court. According to DW1, he gave Ext.D3 petition to the Chief Minister, another petition to District Police Superintendent, Thrissur. Accordingly Irinjalakkuda police registered a crime and Ext.D4 is the FIR in Crime No.314/2005 of Irinjalakuda Police Station. Ext.D5 is the scene mahazar and Ext.D6 is the seizure mahazar. The first respondent filed a claim petition before Judicial First Class Magistrate, Irinjalakuda. Ext.D7 is the copy of the claim petition. The appellant filed Ext.D8 objection and the Judicial First Class Magistrate issued Ext.D9 order in the claim petition. Analysing the evidence in Ext.D3 to D10, probablize the contention put forward by the first respondent, which is sufficient to discharge the initial burden, rebutting the presumption under Section 139 and 118 of the Negotiable Instruments Act. There are also other documents Ext.D10 to D27 in support of the contention. Analysing the oral evidence of DW1 and DW2 and evidence in Ext.D3 to D10, it is found that he had reasonably discharged his initial burden. PW1 in his evidence stated that he has no source of income which is

material while drawing the presumption of law. PW1 submitted that he has mortgaged his four properties and availed a loan for arranging the amount which was given to the first respondent for that there is no evidence.

12. Apex Court in **Hiten P. Dalal v. Bratindranath Banerjee** (2001) 6 SCC 16) held as follows:-

“ Because both sections 138 and 139 require that the court “shall presume” the liability of the drawer of the cheques for the amounts for which the cheque are drawn, as noted in State of Madras V. A.Vidyanatha Iyer it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. “It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused”. (Ibid.at p.65, para 14). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court “ may presume” a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt.

The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact”.

Coming to the given facts and circumstances of a case, the initial burden has been discharged by the 1st respondent. When initial burden has been discharged in a case by the accused the burden shifts and presumption disappears.

13. Appellate court after meticulous scanning of the oral and documentary evidence found that the defence put forward by the 1st respondent is sufficient to rebut the presumption. Hence appellate court observed that drawing of presumption provided 139 of the N.I.Act disappears and the conviction under Section 138 of the N.I.Act was set aside and the first respondent was set at liberty. I find no illegality in the above findings. There is no merit in this appeal and it is dismissed accordingly.

P.D.RAJAN, JUDGE

lgk/stk