

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

THURSDAY, THE 13TH DAY OF AUGUST 2015/22ND SRAVANA, 1937

CRL.A.No. 403 of 2011 (A)

AGAINST THE JUDGMENT IN CC 434/2008 of THE COURT OF JUDICIAL FIRST
CLASS MAGISTRATE-VI, NEYYATTINKARA DATED 26-07-2010

APPELLANT/COMPLAINANT:

RAJU, S/O.DASAYYAN NADAR, RAJAGIRI
PANAYARAKONAM VARANI, KUNNATHUKAL P.O.,
NEYYATTINKARA.

BY ADVS.SRI.V.SURESH
SRI.G.SUDHEER

RESPONDENTS/ACCUSED & STATE:

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1. SUNILKUMAR, S/O.CHELLAPPAN NADAR,
EALI COTTAGE, OPP.MOOVELIKKARA LPS, KUNNATHUKAL P.O.
NEYYATTINKARA-695018.
 2. STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

R2 BY PUBLIC PROSECUTOR SRI.N.SURESH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
13-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T.RAVIKUMAR, J.

Crl.A.No.403 of 2011

Dated 13th August, 2015

JUDGMENT

This appeal is directed against the order of acquittal passed by the Court of Judicial First Class Magistrate-VI, Neyyattinkara in C.C.No.434 of 2008. The appellant was the complainant and the first respondent herein was the accused in the said calendar case in which the first respondent was prosecuted for commission of offence punishable under Section 138 of the Negotiable Instruments Act. The case of the appellant is as follows:-

On 10.10.2007 the first respondent/accused borrowed an amount of ₹ 2,00,000/- from him and for discharging the said legally enforceable debt he issued Ext.P1 cheque dated 10.10.2007 for ₹ 1,00,000/- and Ext.P1(a) cheque dated 5.11.2007 for ₹ 1,00,000/- to the appellant/complainant. When the aforesaid cheques were presented for encashment they were bounced for the reason 'insufficiency of fund' in the account maintained by the first respondent/accused. Exts.P2 and P3 are respectively the dishonour memos in respect of Exts.P1 and P1(a) respectively. The factum of dishonour of the cheques was duly intimated to the first respondent

within the statutorily prescribed period and in fact, a composite notice was issued in that regard intimating the dishonour as also claiming the amount due. Despite the receipt of the notice the first respondent did not respond to the notice and also did not pay the amount within the statutorily permissible period. In fact, it was with such allegations that the private complaint which was later registered as C.C.No.434 of 2008 was filed.

2. On due process, the first respondent entered appearance before the court and the particulars of the offence under Section 138 of N.I. Act were read over and explained to him. He pleaded not guilty and claimed to be tried. To prove the offence against the first respondent the appellant himself got examined as PW1 and his brother-in-law Nelson was examined as PW2. Exts.P1 to P7 were got marked on his side. After closing the evidence of the appellant the first respondent was examined under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances put to him. After careful evaluation of the evidence on record the learned Magistrate found that the appellant/complainant had failed to prove execution of Exts.P1 and P1(a) cheques as also the source of income for the purpose of funding the first respondent. In such circumstances, the learned Magistrate found that the appellant/complainant was not entitled to get the benefit of

presumptions available under Sections 118 and 139 of the Negotiable Instruments Act and consequently held that he has failed to prove the commission of offence under Section 138 of the Negotiable Instruments Act by the first respondent conclusively. Consequently, the first respondent was acquitted under Section 255(1) Cr.P.C. This appeal has been preferred in the said circumstances. Though notice has been issued to the first respondent he has not chosen to enter appearance.

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

4. The learned counsel for the appellant contended that the acquittal of the first respondent/accused is an outcome of perverse appreciation of the evidence and the oral testimonies of PWs 1 and 2 with Exts.P1 to P7 are sufficient to prove the guilt of the first respondent/accused for the offence punishable under Section 138 of N.I. Act. It is further contended that a scanning of the evidence of PW1 would reveal that he had categorically deposed that the first respondent came to his residence on 10.10.2007 and borrowed an amount of ₹ 2,00,000/- and he issued Exts.P1 and P1(a) cheques for ₹1,00,000/- each and the said cheques on presentation got dishonoured owing to paucity of fund in the account maintained by the first respondent. It is

also stated that Exts.P1 to P7 would also reveal the fact that the statutory procedures to be followed pursuant to the dishonour of Exts.P1 and P1(a) cheques were scrupulously followed and the first respondent had failed to repay the amount covered by Exts.P1 and P1(a) cheques within the statutorily prescribed period. It is also contended that the first respondent did not respond to Ext.P5 notice and taking into account all such circumstances the trial court ought not to have held that the appellant was not entitled to get the benefit of presumptions available under Sections 118 and 139 of the Negotiable Instruments Act. It is further contended that in the light of the evidence on record the appellant was entitled to get the benefit of presumption available under Sections 118 and 139 of N.I. Act and in such circumstances taking into account the fact that the first respondent failed to mount the box to adduce evidence and no evidence whatsoever was tendered by him the only conclusion that could have been arrived at by the court below was that the first respondent had failed to dislodge the presumptions available under Sections 118 and 139 of N.I. Act. In short, the contention is that the findings of the court below are unfounded in the light of the oral and documentary evidence adduced on the side of the appellant. In the light of the aforesaid contentions I have carefully scanned the evidence adduced by the appellant.

5. In this case, the appellant gave evidence as PW1. As noticed hereinbefore, he deposed in tune with the pleadings in the complaint. Going by his evidence, the first respondent came to his residence after filling the cheques in question and put signature thereon before him. While being examined PW1 deposed as follows:-

“ചെക്കിലെ കൈപ്പട ആരുടേതാണ് ? പ്രതിയുടേതാണ്. പ്രതി എഴുതി കൊണ്ടു വരികയായിരുന്നു. എന്റെ മുന്നിൽ വെച്ചാണ് ഒപ്പിട്ടു തന്നത്.”

It is to be noted that, according to PW1, his brother-in-law viz., PW2 was also there at the time of borrowal of the amount. PW2 deposed to the effect that in the cheques in question the name and the amount were written and the signatures were put by the first respondent in the house of the complainant viz., PW1. PW2 deposed thus:-

“ചെക്ക് കൊടുക്കുന്നത് ഞാൻ കണ്ടു. ഒപ്പിട്ടു കൊടുക്കുന്നത് കണ്ടു. ചെക്കിൽ തുക 2 ലക്ഷം എന്ന് എഴുതിയിരുന്നു. തുക കൈപ്പറ്റിയ ശേഷം ഒരുമിച്ചാണ് ഞാനും പ്രതിയും എഴുതിയത്. പ്രതി നിങ്ങളുടെ മുന്നിൽ വെച്ചാണോ പേരും തുകയും എഴുതിയത് ? പേരും തുകയും എഴുതിയത് വാദിയുടെ വീട്ടിൽ വെച്ചാണ്.”

In short, when the case of the appellant is that the first respondent has only signed the cheques before him the version of PW2 is to the effect that in fact, the first respondent had executed the cheques, in other words, filled in the name and the amount and also put the signatures in the house of the complainant. There cannot be any doubt with respect to the position that mere putting up of a signature in a cheque cannot be

equated to the execution of the cheque. It is also relevant to note that the trial court arrived at the finding that the appellant/complainant had failed to establish the source of income for advancing such an amount to the first respondent/accused. It is to be noted that PW1, the appellant deposed the manner in which he raised the amount in question. According to him, he withdrew the amount from his account maintained with the Service Co-operative Bank, Kunnathukal. He deposed that he had withdrawn an amount of ₹ 1,00,000/- from the Bank and he obtained an amount of ₹ 50,000/- from his provident fund account and he obtained the rest of the amount from a chitty transaction. Though PW1 made assertions as above a scanning of the evidence of PW1 would reveal that on the pointed questions put to him as to the date on which he has effected the withdrawal and the account number he replied that he did not know such details. Another pointed question was also put to him as what was the balance in the account maintained by him in the aforesaid Bank in November, 2007. To that question also he pleaded ignorance. According to him, he is a Government servant getting a monthly income of ₹15,000/- and his wife is working as a clerk in Karakkonam Medical College and she is getting a salary of ₹ 6,000/-. He has also deposed to the effect that he is getting an amount of ₹ 2,000/- per month from agricultural operations. But, at the same time, he stated that his annual agricultural income is only ₹ 20,000/-. He also deposed

to the effect that he had lend the amount free of interest and the first respondent is neither his friend nor his relative. Evidently, apart from vaguely stating that he had withdrawn an amount of ₹ 1,00,000/- from the Bank and that he obtained ₹ 50,000/- from provident fund account no document whatsoever has been produced by the appellant in support of such contentions in the matter of establishing possession of adequate funds for advancing such a loan to a stranger. If such contentions are true he cannot be heard to contend that he was not in possession of such documents evidencing the said transactions. When such a person is withholding such documents necessarily, the court could only draw an adverse inference. Whatever that be, it is a fact that besides the bald statements that he withdrew an amount of ₹ 1,00,000/- from his Bank account and also withdrew an amount of ₹ 50,000/- from his provident fund account no scrap of paper showing such withdrawal have been produced before the court. With respect to the balance amount of ₹ 50,000/- his version is that he obtained it in a chitty transaction. Which is the chitty company and what was the amount which he had obtained by such chitty transaction are also not discernible from his evidence. In the contextual situation and taking note of the attempt on the part of the first respondent, to question the claim of the appellant of having sufficient fund at the time of the alleged lending, a reference to the decision of the Hon'ble Apex Court in **John K.Abraham** v. **Simon C.**

Abraham (2014 (1) KLT 90 (SC)) would be most appropriate. Going by the said decision of the Hon'ble Apex Court in order to get the benefit of presumptions available under Sections 118 and 139 of N.I. Act the burden is heavy upon the complainant to show that he had the required fund for advancing the money to the accused and that the issuance of cheque in support of such advancement was true. In this case, in the light of the evidence discussed as above, I do not find any reason to differ from the finding arrived at by the court below that the appellant had failed to show that he had the required fund in advancing the money to the first respondent/accused. In the light of the decision in **John K. Abraham's** case (supra), in such situation, the appellant cannot claim the benefit available under Sections 118 and 139 of N.I. Act. Under Section 118, N.I. Act unless contrary is proved it is to be presumed that the negotiable instrument has been made or drawn. Under Section 139 of N.I. Act the court has to presume, unless the contrary is proved, that the holder of the cheque received the cheque for discharge, in whole or part, of a debt or liability. But, in the light of the decision as aforesaid and owing to the failure to establish that the appellant was having the required fund for advancing the money on the relevant date the appellant cannot claim the benefit of the presumptions available under Sections 118 and 139 of N.I. Act. Even if it is taken that the cheques are admitted and the signatures are also admitted by the first

respondent/accused and thereby in the light of the decision of the Hon'ble Court in **Vasanthakumar T v. Vijayakumari (2015 (3) KHC SN 4(SC))** it would only enable the appellant to claim the benefit of the presumptions available under Sections 118 and 139 of N.I. Act. In such circumstances, it would be open to the first respondent to dislodge the presumptions available under Sections 118 and 139 of N.I. Act. In the decision in **Krishna Janardhan Bhat v. Dattatraya G. Hegde ((2008) 2 SCC (Crl.) 166)** the Hon'ble Apex Court considered the standard of proof required on the part of the accused and also on the part of the prosecution. In the case of the prosecution it must prove the guilt of the accused beyond all reasonable doubt and the standard of proof required on the part of an accused is preponderance of probabilities. In that decision it is further went on to hold that inference of preponderance of probabilities could be drawn not only from the materials brought on record by the parties but also by referring to those circumstances upon which the accused relies. In this case, evidently, when PW1 categorically deposed that the transaction was made in the presence of PW2 and the accused came to his residence on 10.10.2007 and borrowed the money and in discharge of the same issued the cheques and he had brought filled in cheques and only put the signatures before him, PW2, his own brother-in-law deposed in deviation of the said version and stated that in fact, the very execution of the cheques were made at the house of PW1.

He deposed that the name, the amount and the signatures were put on the cheques in question by the first respondent/accused at the residence of PW1. One another aspect also assumes relevance. Exts.P1 and P1(a) would reveal that all the entries, except name of the complainant, were entered with the same pen, but, the name is entered with a black ink pen. With respect to the source, I have already discussed the matter in detail. All such circumstances are sufficient to cast suspicion regarding the genuineness of the transaction and also to infer preponderance of probabilities in the circumstances relied on by the first respondent and consequently, to find dislodging of the presumptions under Sections 118 and 139 of N.I. Act. In the light of the evidence on record, I do not find any reason to interfere with the conclusions arrived at by the learned Magistrate. In fact, considering the evidence on record and in the light of the aforesaid decisions I do not find any reason to hold that the learned Magistrate has erred in his findings. In the said circumstances, it can only be said that the appellant has failed to bring out a case warranting an appellate interference.

In the result, this appeal has to fail and accordingly, it is dismissed.

Sd/-
C.T.RAVIKUMAR
Judge

TKS