IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

TUESDAY, THE 18TH DAY OF AUGUST 2015 / 27TH SRAVANA, 1937

CRL.A.No. 735 of 2011

AGAINST THE JUDGMENT IN CRL.APPEAL NO.486/2009 of DISTRICT COURT & SESSIONS COURT,KOTTAYAM DATED 28-10-2010

AGAINST THE JUDGMENT IN CC NO.22/2007 of JUDICIAL MAGISTRATE OF FIRST CLASS - II, CHENGANACHERRY

APPELLANT/2ND RESPONDENT/COMPLAINANT:

C.M.JOSEPH, KATTAYUIL,
MOOLAMKULAM, CHINGAVANAM,,
KOTTAYAM.

BY ADV. SRI.A.K.HARIDAS

RESPONDENTS/APPELLANT& IST RESPONDENT/ACCUSED & STATE:

1 SOBHA, W/O. REJI.
NELLICKAL HOUSE,
PARUTHUMPARA, KUZHIMATTOM.P.O.,
CHINGAVANAM.PIN 666 533

2 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,,
HIGH COURT OF KERALA, ERNAKULAM.-682 031

BY ADVS.
R1 BY SRI.P.SANTHOSH KUMAR (TR)
R2 BY SRI.N.SURESH, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18.08.2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

JUDGMENT

This appeal is preferred against the judgment of acquittal in Crl.A.No.486/2009 passed by the Court of Session, Kottayam after reversing an order of conviction passed by the Court of the Judicial First Class Magistrate-II, Changanassery in C.C.No.22/2007. The appellant herein was the complainant and the first respondent herein was the accused in the aforementioned calender case. For the sake of convenience the parties are referred to hereinafter in this judgment in the order of their status in this appeal.

2. The appellant filed a private complaint that was taken on file and registered as C.C.No.22/2007 with the following averments. The cheque (Ext.P1) No.480910 dated 22.6.2001 for ₹5,00,000/- drawn on State Bank of Travancore, Chingavanam was issued by the first respondent for discharging a legally enforceable debt arising out of borrowal of the aforementioned amount by him from the appellant. The said cheque on its

presentation for encashment was dishonoured owing to paucity of funds in the account maintained by the first respondent. Statutory notice intimating the first respondent regarding the dishonour of the cheque and calling upon him to pay the amount due was served on him within the statutorily prescribed period. Despite the receipt of the same, the first respondent has failed to pay the amount due within the statutorily permissible period. On due process the first respondent appeared before the court and particulars of the offence under section 138 of the Negotiable Instruments Act were read over and explained to her and she pleaded not guilty. To prove the offence against the first respondent, the appellant got herself examined as PW1 and one Moncy V.E was examined as PW2 besides getting marked Exts.P1 to P7. Ext.X1, which is the Account Opening Form marked through PW2. After closing the evidence of the appellant the first respondent was examined under section 313 of the Code of Criminal Procedure and she denied all the incriminating circumstances put to her. On her side one Girija Saju and Suresh were examined respectively as DW 1 and DW2. Earlier, Ext.D1 reply notice dated 9.8.2005 was got marked through PW1. On evaluating the evidence on record the trial court found that the appellant had succeeded in proving the guilt of the first respondent-accused for an offence punishable under section 138, N.I.Act. Consequently, the first respondent was found guilty under section 138, N.I.Act and she was convicted thereunder and sentenced to undergo simple imprisonment for a period of six months and to pay a compensation of ₹5,00,000/- to the complainant under section 357(3), Cr.P.C. In case of default of payment of compensation the accused/the first respondent herein was directed to undergo simple imprisonment for a further period of three months. Aggrieved by the said order of conviction the first respondent herein filed Crl.A.No.486/2009. The Court of Session, Kottyam after a careful consideration of the evidence on record and the arguments advanced on both sides allowed the appeal and set aside the conviction and the sentence and allowed the appeal. This appeal is filed in the aforesaid circumstances by the complainant.

3. It is thus evident that on the same set of facts the trial court entered conviction against the first respondent under section 138, N.I.Act and sentenced her as aforesaid and the trial

court on a careful consideration of those evidences found that the appellant has failed to prove the offence under section 138, N.I.Act against the first respondent. In view of the divergent findings I am of the view that the appreciation of the evidence on record is inevitable.

4. I have heard the learned counsel for the appellant, the learned counsel for the first respondent as also the learned Public Prosecutor.

5. Before dealing with the contentions certain indisputable aspects borne out from records are to be stated. The husband of the first respondent and the appellant-complainant were business partners according to the first respondent but, according to the appellant he was only looking after the business of the husband of the first respondent. The husband of the first respondent was conducting a fruit vending stall in Kottayam railway station. While so, he was arraigned as the 4th accused in a gang rape case commonly known as 'sooryanelli' case. The case of the first respondent is that after his implication as an accused in the said case she left the company of her husband in the year 1996 and later, her husband

committed suicide. Only after his death she returned to the house of her husband, in the year 2004. The appellant contended that, in fact, at no point of time she left the company of her husband and she was actually residing with him. The appellant filed the complaint alleging that cheque bearing No.480910 dated 22.6.2001 drawn on SBT, Chingavanam was issued to him by the first respondent in discharge of a legally enforceable debt arising out of the borrowal of ₹5,00,000/- by her. He has also deposed in tune with pleadings in the complaint regarding the presentation, bouncing, issuance of statutory notice and also the failure on the part of the first respondent to pay the amount. In support of the said case, in fact, to substantiate the same that he got himself examined as PW1 and also examined the Manager of the drawer bank as PW2 besides marking Exts.P1 to P7. Ext.D1 is the documents of PW2 which is an account opening form submitted to the bank by the first respondent at the time of opening an account with the said bank. Evidently, the first respondent disputed the very issuance of Ext.P1 cheque and her precise case is that she has not borrowed such an amount from the appellant and in such circumstances there arose no occasion to execute Ext.P1 cheque for ₹5,00,000/- in favour of the appellant. The appellant contended that the transaction and the execution were witnessed by one Yohannan. Nonetheless, the said Yohannan was not even cited as a witness and the whereabouts of the said Yohannan was also not given in the complaint. Needless to say that the said Yohannan who allegedly witnessed the transaction was not examined as a witness by the appellant. The lawyer notice intimating the dishonour of cheque and calling upon the first respondent to pay the amount due was accepted to by the first respondent as evident from Exts.P5 to P7. A scanning of the judgment of the trial court would reveal that the first respondent denied her signature in Ext.P1 cheque as also in Ext. P1 cheque as also in Ext.P7 Acknowledgment Card. She filed Crl.M.P.No.166/2006 before the trial court for sending the cheque for expert opinion. That petition was allowed and Ext.P1 cheque was forwarded for opinion to FSL, Thiruvananthapuram. Thereafter, a report was submitted to the court. It is to be noted that the same has not been exhibited. At the same time, both the parties submitted that it was stated therein that the expert was not able to make any opinion regarding the authorship of the signature in Ext.P1 cheque. It is thereafter that PW2 was examined and Ext.X1 copy of the account opening form in the name of the first respondent -accused was marked through him. True that, the first respondent had earlier denied the receipt of Ext.P5 lawyer notice. However, Ext.D1 was got marked through PW1 by the first respondent herself. While marking Ext.D1 evidently, the first respondent herself admitted the fact that she received Ext.P5 lawyer notice. But, at the same time, she disputed the execution of Ext.P1 cheque as also the very signature in Ext.P1. In the light of the opinion of the expert that he was not in a position to express any opinion on the authorship of the signature in Ext.P1 the trial court exercised the power of the court under section 73 of the Indian Evidence Act, 1872. Evidently, on comparison of the signature with Ext.P1 and Ext.X1 account opening form, Vakalath, bond executed before court, remand report filed by the S.I. of Police at the time when the accused was arrested and produced before the Magistrate court and 313 statement the trial court formed the opinion that the signature in Ext.P1 and the signatures in those documents appear to be similar. Further the trial court found that the accused has purposefully not forwarded any contemporaneous documents along with Ext.P1 cheque for comparison and in such circumstances it was held that the contention of the first respondent that there was no proper service of notice was declined to be accepted by the trial court. The trial court further found that Ext.P5 notice was sent to the accused by the registered post. Ext.P7 is the acknowledgment card. In the light of the finding that it was the accused who signed on such documents, it was held by the trial court that Ext.P7 lawyer notice to the accused was issued in time and it was accepted by the accused. A careful scanning of the judgment of the trial court would reveal that besides the detailed consideration with respect to the issue regarding the signatures no proper finding was returned by the trial court even after formulating the point for consideration as to whether the accused had executed and issued Ext.P1 cheque in discharge of her liability. Without any discussion whatsoever of the evidence and the contentions on the aforesaid issue the trial court held that on appreciation of the entire evidence it got satisfied that the prosecution has succeeded in proving the guilt of the accused beyond reasonable doubt. The conviction and the imposition of the sentence followed the said findings. The appellate court re-appreciated the entire evidence, in the said circumstances. Evidently, the appellate court took serious note of the failure on the part of the appellant in examining Yohannan who allegedly witnessed the borrowal of ₹5,00,000/- by the first respondent from the appellant-complainant. The appellate court took note of the said matter seriously in the light of the nature of the case of the appellant. In this context it is to be noted that the very case of the appellant is that he borrowed the aforesaid amount for the purpose of lending it to the first respondent from the aforementioned Yohannan. Before dealing with the evidence on record any further I am of the view that in the light of the aforesaid specific case of the appellant one aspect beckons serious consideration. In the decision in **John K Abraham v. Simon C Abraham** reported in 2014(1) KLT 90 (SC) the Hon'ble Apex Court held that in order to draw the presumption under sections 118 and 139, N.I.Act the burden is heavy upon the complainant to show that he has the required fund for advancing the money to the accused, that the issuance of the cheque in support of the said advancement was true and that the accused was bound to make payment as he had agreed. Such a consideration is required in the light of the admitted fact borne out from the very oral testimony of the appellant who was examined as PW1 to the effect that the amount required for advancing the money was not actually available with him, but he borrowed the same from one of his friends by name Yohannan. In the contextual situation it is relevant to refer to the deposition of PW1 while being cross examined thus:-

'‘(പ്രതിയുടെ ഭർത്താവിന്റെ പേര് റെജി എന്നാണ്. റെജി ആത്മഹത്യ ചെയ്തതായി അറിയാം. <u>(പ്രതിക്ക് പണം കൊടുത്തത് എന്റെ വീട്ടിൽ വച്ചാണ്. യോഹന്നാൻ എന്ന എന്റെ സുഹൃത്തിൽ നിന്നും ഞാൻ കടം വാങ്ങിയ പണം ആയിരുന്നു.</u>‘'

(emphasis added)

Thus, it is evident that going by the very case of the appellant he was not having the required amount with him for advancing the money to the accused and, in fact, he borrowed the amount from his friend Yohannan and then lent it to the first respondent. Who is that Yohannan? The appellant has not even cited the said Yohannan as a witness. Needless to say that in such circumstances, a person by name Yohannan who allegedly lend money to the appellant to enable the appellant to lend it to the first respondent, was not examined as a witness on the side of the appellant. It is in this context that the decision of the Hon'ble Apex Court in **John K Abraham**'s case (supra) assumes relevance. In the light of the said decision in order to draw the presumption under section 118 and 139 the burden is heavy upon the complainant to show he had the required fund for advancing the money to the accused. When the complainant himself admitted the fact that he had no money of his own and he borrowed a huge amount of ₹5,00,000/- from another person and then lend that amount to the accused the burden is heavy upon the appellant to establish the same. No doubt, it could not be established without examining the person concerned viz., Yohannan and if Yohannan was examined the first respondent-accused would have a fair opportunity to cross examine the said person in case he endorsed the case of the appellant that he lent money to the appellant. Normally, it cannot be believed that a person would borrow a huge amount of ₹5,00,000/- from some one solely for the purpose of lending it to another person. In this case it is to be noted that the very case of the first respondent is that her husband who was running a fruit stall with the appellant was arraigned as 4^{th} accused in Sooryanelli Sex Scandal case and thereupon, she parted with his company as early as in 1996 and returned to the husband's house only after his commission of suicide in the year 2004. Taking into account all such circumstances, the failure on the part of the appellant in not getting examined Yohannan (if actually such a person by name Yohannan was there and he lent money to the appellant) cannot be said to be a mere lapse and, in fact, the non-examination of Yohannan in this case is fatal to the case of the appellant in the light of the decision of the Hon'ble Apex Court in **John K Abraham**'s case (supra)). When the appellant had failed to establish that he was having the required money for advancing a huge amount of ₹5,00,000/- to the first respondent he is not established to claim the benefit of presumptions available under section 118 and 139 of the N.I., Act. Under section 118 of the Negotiable Instruments Act unless the contrary is proved it is to be presumed the Negotiable Instrument made or drawn for consideration. Under section 139 of the Negotiable Instruments 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. It is to get the said presumptions in favour that a complainant has to discharge the burden that he was having required fund for advancing the money to the accused in terms of the decision in **John K Abraham**'s case (supra). When he himself admitted lack of requisite funds and claimed that he raised the same by borrowing it from his friend Yohannan his failure to examine Yohannan and to establish the factum of borrowal would definitely disentitle him from claiming the benefit of the statutory presumptions. While considering the question whether the petitioner is still entitled to get the presumption available under sections 118 and 139 in his favour, the decision of the Hon'ble Apex Court in **Vasanthakumar.T v. Vijayakumari** reported in 2015 KHC 4332 assumes relevance. In the said decision, the Hon'ble Apex Court held that in a case where cheque as well as signature has been accepted by the accused presumption under section 139 would operate. I have already referred to the presumption which is statutorily available under section 139, N.I.Act. The Hon'ble Apex Court further went on to hold that even in such cases the presumption available under section 139 could be rebutted by the accused as the presumption under section 139 is only a rebuttable presumption. Now, the question is whether the first respondent has admitted the cheque as well as the signature. Evidently, in this case, the first respondent disputed his signature in Ext.P1 cheque. Her definite case is that her husband who was the 4th accused in Sooryanelli Sex Scandal case fabricated the same after she parted with his company pursuant to his implication as an accused in the said case and she returned home only after the commission of suicide by her husband in November, 2004. It is also pertinent to note that she had denied her signature in Ext.P1 cheque. She filed C.M.P.No.166/2006 before the trial court for sending the cheque for expert opinion. The said petition was allowed and the cheque was forwarded to FSL, Thiruvananthapuram. Paragraph 8 of the trial court's judgment would reveal that after comparison a report was returned from FSL, Thiruvananthapuram to the effect that the expert was not able to express any opinion regarding the authorship of the signature in Ext.P1 cheque. True that, subsequently, the evidence of the complainant was re-opened and PW2, the Bank Manager was examined and Ext.X1 which is the copy of an account opening form in the name of the first respondent-accused was marked. It is evident from the judgment of the trial court that exercising the power under section 73 of the Indian Evidence Act, the learned Magistrate compared the signature in Ext.P1 with that of in Ext.X1 in account opening form, Vakalath, bond executed before court, remand report filed by the S.I. of Police at the time when the accused had arrested and produced before the Magistrate court and 313 statement before the trial court. Even after making such comparison, paragraph 10 of the judgment of the trial court would reveal that with the learned Magistrate has not found categorically that the signature in Ext.P1 is that of the first respondent-accused. Evidently,even after such comparison the learned Magistrate expressed only the opinion that the signature in Ext.P1 and the other signatures appear to be similar. Thus, it is evident that, even after exercising the power available under section 73 of the Indian Evidence Act no definite findings could be arrived at by the learned Magistrate to the effect that the signature in Ext.P1 is that of the first respondent. A further scanning of the judgment of the trial court would reveal that after considering elaborately on the issue of the signature in Ext.P1 and arriving at a finding as referred above the further question whether the first respondent had executed and issued Ext.P1 cheque in discharge of a liability, no definite finding was returned by trial court even after formulating such a point for consideration. In fact, there was absolute absence of any such discussion. A perusal of the judgment of the trial court would reveal that after arriving at a finding with respect to the signature in Ext.P1 the trial court merely stated that on appreciation of the entire evidence it is found that the prosecution had succeeded in proving the guilt of the accused under section 138 of the N.I.Act beyond reasonable doubt. It was in such circumstances that the appellate court elaborately considered the evidence on record. As noticed hereinbefore, the lower appellate court found that the non-examination of Yohannan who allegedly enabled him to lend money to the first respondent-accused is fatal to the case of the appellant. True that, the appellant as PW1 deposed in tune with his pleadings in the complaint. At the same time, it is to be noted that in the complaint as also in the affidavit filed in lieu of chief examination the appellant did not state anything about the date of borrowal of the amount of ₹5,00,000/- by the first respondent as also the date on which Ext.P1 cheque was issued. In the complaint as also in the affidavit filed in lieu of chief examination what is stated is that the first respondent gave a cheque bearing No.480910 with date 22.6.2001 drawn on State Bank of Travancore, Chingavanam Branch. It is also to be noted that with respect to the borrowal of the amount as also the date of issuance of the cheque the date, the month or even the year noting was mentioned in the complaint or in the said circumstances, a scanning of the evidence of the appellant would reveal that as PW1 he deposed that Ext.P1 cheque was issued in discharge of a legally enforceable debt arising out of borrowal of ₹5,00,000/- by the first respondent and the said cheque on its presentation was dishonoured on the ground of 'insufficiency of funds' in the account maintained by the first respondent. In relation to the compliance with the statutory mandates pursuant to the dishonour of the cheque and in respect of the filing of the complaint he had deposed in tune with the pleadings in the complaint. PW2 was the then Manager of the State Bank of Travancore, Chingavanam Branch. Evidently, he was not the Manager during the relevant period in which the first respondent opened her account, as is obvious from Ext.X1. He deposed regarding the existence of Ext.X1 from the records and it was produced and got marked through him. He would depose that when a cheque is presented for collection firstly it will be verified whether sufficient amount is maintained by the account holder in the account and if it is not the cheque would be returned with the endorsement 'funds insufficient'. He deposed that the signature in Ext.P1 is that of the account holder as the then Manager had counter signed the signature in Ext.X1. A scanning of the evidence of the manner in which the evidence was discussed by the trial court would reveal that the trial court gave prime consideration only to the question whether the signature in Ext.P1 is that of the first respondent or not. After giving an elaborate discussion on the said issue and having found that the signature in Ext.P1 is similar to the signatures in other documents, without making any further consideration of the issues and even without returning a definite findings with respect to the point formulated for consideration the trial court arrived at the conclusion that the complainant had succeeded in proving the guilt of the first respondent-accused. These facts were duly taken note of by the appellate court, as is obvious from the impugned judgment. Besides viewing the non-examination of Yohannan, the person from whom the appellant claimed to have borrowed the amount for the purpose of lending the amount to the first respondent all the other aspects were dealt with in detail by the appellate court. After a careful scrutiny of the evidence of PW1 the appellate court arrived at the conclusion that the appellant and the husband of the first respondent-accused were business partners and it had also specifically taken note of the fact that the complainant-appellant got no case that the accused had issued the cheque in question in discharge of any debt due from her husband to the complainant. Needless to say that the appellate court took note of the fact that the specific case of the appellant-complainant was that the first respondent had borrowed a sum of ₹5,00,000/- from him and it was in discharge of the said debt debt that Ext.P1 cheque was issued. It is in this context that the failure on the part of the appellant in not specifically stating the date of borrowal of the amount of ₹5,00,000/- as also the date of issuance of the cheque have to be looked into. As noticed hereinbefore, even the date, month or year of borrowal or the issuance of Ext.P1 cheque were not mentioned by the appellant either in the complaint or in the affidavit filed in lieu of chief examination These aspects assume relevance in the context of the defence case. As noticed hereinbefore, the specific case of the first respondent was that after implication of her husband as the 4th accused in Sooryanelli Sex Scandal case she parted her company and went to her paternal home and thereafter she returned to the residence of her husband only after his suicide in the year 2004. To support the said case of the first respondent she got examined DW1 and DW2 who are respectively the sister of the first respondent-accused and one of the business partners of the husband of the first respondent. True that, DW2 deposed that the first respondent was also one of the partners and they were conducting the railway catering business in Chengannur and Kottayam railway stations. He would also depose that he came to know from the husband of the first respondent that the appellant was terminated from the partnership by giving a cheque for ₹2,50,000/- by the husband of the accused. He would further depose that he came to know about the said fact only from the husband of the accused. He would also depose that the husband of the accused was looking after the business in Chengannur as also in Kottayam and he was concentrating business at Chengannur whereas the appellant was concentrating the business in Kottayam. DW1 who is the sister of the first respondent-accused stated that during the period 2000-2001 accused was residing in their 'Tharavadu' house. She would also depose that the accused was brought there pursuant to the implication of her husband as an accused in Sooryanelly case and it happened prior to the issue in the year 1996. She would further depose that only after the death of her husband that the first respondent returned to the house of her husband. Though DW1 and DW2 were cross examined virtually, nothing to discredit their version was elicited by the appellant. It is evident from the judgment of the appellate court that the appellate court had also took note of the observations of the trial court that the accused was purposefully changed the characteristic feature of her signature and it was done with the idea of distorting the truth. The appellate court further observed that even if the accused had changed characteristics of the signature and the writings the question to be considered is whether the initial burden of the complainant for the offence under section 138, N.I.Act could be discharged by finding fault with the accused or by pointing out the infirmity of the defects in the defence. After making such an observation the appellate court rightly observed that in a prosecution for the offence under section 138, N.I.Act the complainant got a prima facie duty to prove that a cheque was drawn by the accused in discharge of a debt or liability due to the complainant or in discharge of the liability due to some other person. The said fact was carefully considered by the appellate court. The appellate court found that in that regard the only piece of evidence available is that of the oral testimony of the appellant as PW1. It was further found that the appellant had failed to establish that there was a legally enforceable debt due from the accused. Evidently, the appellate court held that even if it is taken that the signature in Ext.P1 is that of the accused the appellant had failed to discharge her burden to establish the execution of Ext.P1 cheque. In fact, it was found that no reliable evidence was adduced either oral or documentary to show that the first respondent borrowed an amount of ₹5,00,000/- as alleged by the appellant and drew Ext.P1 cheque in discharge of the said liability arising out of such transaction. In such circumstances, even if it is taken that the signature in Ext.P1 is that of the first respondent, from the evidence adduced by the first respondent and the circumstances relied on by her, it could only be said that the accused had succeeded in dislodging the presumption if any, available to the appellant under section 139, N.I.Act. The fact that the appellant had failed to mention the date, month or atleast the year of the borrowal as also the issuance of the cheque was not duly taken note of by the trial court. In fact, it is not only a mere lapse or laches and it is fatal to the case of the appellant. It is besides the said fatal lapse that the appellant had failed to procure the evidence of Yohannan, whose name was mentioned in the complaint as also in his oral testimony claiming that it was from Yohannan that he borrowed the amount so as to lend it to the first respondent-accused. These aspects were not actually gone into by the trial court. As already noticed hereinbefore, the trial court was mainly concerned with the consideration of the question whether the signature in Ext.P1 cheque was that of the accused or not. Once it was found that the said signature is similar to the signature of the first respondent in the other documents used for the purpose of verification without a further probe into the matter taking into account the evidence on record, the trial court jumped into the conclusion that the appellant had succeeded in proving the guilt of the accused for the offence under section 138, N.I.Act. When that be the nature of the appreciation of evidence and the manner in which conclusions were arrived at by the trial court I have no hesitation to hold that the appellate court was perfectly justified and correctly interfered with the order of conviction. When the appreciation of the trial court is found to be perverse when being scrutinized in the light of the relevant provisions of law and it was found that such conclusions were arrived at based on no evidence it was the bounden duty of the appellate court to correct the manifest error in the appreciation. After a careful scanning of the evidence and going through the judgments of the courts below, I am of the view that the appellate court has rightly upturn the judgment of the trial court and set aside the conviction and acquitted the accused-first respondent. In view of the discussion as above, I do not find any reason to interfere with the judgment of the lower appellate court in Crl.A.No.486/2009 reversing the order of conviction passed by the court of the Judicial First Class Magistrate-II, Changanassery in C.C.No.22/2007. In the result, this appeal is dismissed.

Sd/-

C.T.RAVIKUMAR

JUDGE