

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 8TH DAY OF DECEMBER 2015/17TH AGRAHAYANA, 1937

CRL.A.No. 1199 of 2011 ()

AGAINST THE ORDER IN Cr1.L.P. 399/2010 of HIGH COURT OF KERALA DATED
07-06-2011

AGAINST THE ORDER IN CRL.A.200/2009 of ADDL.SESIONS COURT,KOTTAYAM
DATED 04-01-2010

APPELLANT/COMPLAINANT:

JOHN JOSEPH,
KALLUPARACKAL VEEDU, AVALUKUNNU.P.O., ALAPPUZHA.

BY ADV. SRI.ABDUL JALEEL.A

RESPONDENTS/APPELLANT/ACCUSED:

1. ASHA N.C.,
TEACHER, GOOD SHEPHERDED PUBLIC SCHOOL
MADAPPALLY.P.O., CHANGANACHERRY-686 546.

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

BY ADV. PUBLIC PROSECUTOR: SMT.M.G.LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-12-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.1199 of 2011

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Dated this the 8th day of December, 2015

JUDGMENT

The complainant in S.T.No.21 of 2008 of the Judicial First Class Magistrate Court-II, Changanassery, who is aggrieved by the judgment in Crl.A.No.200 of 2009 by which the Additional Sessions Court, Kottayam reversed the conviction and sentence imposed by the learned magistrate and acquitted the accused in a proceeding under Section 138 of the Negotiable Instruments Act, is the appellant herein. The case of the complainant was that the accused was known to him and she had availed a loan of Rs.75,000/- on 24.02.2006. Subsequently, towards the discharge of that liability, a cheque dated 10.08.2006 was handed over to him on 09.08.2006. The cheque was presented for collection but was returned dishonoured on ground of insufficiency of funds. A statutory notice was issued, which was received by the accused, but was neither replied nor the amount paid. Hence, the complaint was laid by the complainant alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act.

2. Before the court below, the accused pleaded not guilty and demanded trial. The complainant let in evidence through himself as PW1 and marked Exts.P1 to P6(a). There was no defence evidence. Learned trial magistrate found the accused guilty, convicted and sentenced. This was carried in appeal by the accused. Learned Additional Sessions Judge on a fresh evaluation of all the materials differed with the finding of the court below and acquitted the accused. This is under challenge in this appeal.

3. In spite of service of notice on the first respondent, she has not appeared to contest the proceeding. Heard the learned counsel for the appellant and examined the records.

4. The trial court on an evaluation of the entire inputs concluded that the accused has committed offences punishable under Section 138 of the Negotiable Instruments Act. It seems that there is no dispute that the cheque was presented for collection and was returned dishonoured on ground of insufficiency of funds. A statutory notice was also issued which was received by the accused, though, a feeble defence that it was served on another person with the same name was also set up. However, it seems that it was not pursued thereafter. It appears that all the

legal formalities for invoking a proceeding under Section 138 of the Negotiable Instruments Act was complied by the complainant.

5. PW1 had tendered evidence in accordance with the complaint. He deposed that the accused is a family friend of him and that, the amount of Rs.75,000/- was given by way of a cheque for Rs.45,000/- and cash of Rs.30,000/-. He deposed that when the amount was sought, a cheque was signed and delivered to him. The complainant has consistently spoken in terms of his complaint.

6. The defence set up by the accused was a case of total denial. She contended that the husband had a transaction with the complainant and towards that transaction, a blank signed cheque of the accused was delivered by the husband. She asserted that she had no direct transaction with the complainant. This defence is seen set up in the course of the cross examination as well as revealed by her in Section 313 Cr.P.C questioning and also in the additional statement filed by her.

7. An evaluation of the defence set up by the accused indicates that she had no consistent defence. In the cross examination, suggestion was that the husband of the accused had a transaction with the complainant in the year 2001 for a sum of

Rs.10,000/- and towards the discharge of that liability, the blank signed cheque was handed over. In the cross examination, another suggestion was put up, that it was towards the discharge of a liability for a sum of Rs.30,000/-. This was further improved in the reply to Section 313 Cr.P.C questioning, wherein she contended that a sum of Rs.45,000/- was borrowed and towards the discharge of that liability, the blank cheque was given by her husband. A 4th defence was taken by her in the additional statement filed by her wherein, she reiterated the earlier contention set up in the initial transaction that the cheque was issued towards the discharge of a liability for a sum of Rs.10,000/-. This clearly shows that she had thoroughly inconsistent defence.

8. Lower appellate court reversed the finding of the trial court essentially on two grounds. The first ground was that the evidence on record indicated that the complainant had no acquaintance with the accused. It is true that at the initial cross examination, a question was put up to the complainant as to whether he was aware of the address of the accused. He fairly conceded that he was not aware of her address. However, he went on to state that the accused was residing in Kidangoor and is now

residing at Changanassery. He asserted that she was her family friend. He also asserted that the husband of the accused was known to him. The finding of the court below that the complainant had no acquaintance with the accused will not survive since even the defence of the accused was that the complainant had a transaction with her husband. Even other wise, in the light of the other details spoken by her, this finding of the court below is not legally sustainable. Yet another finding of the court below was that there was a difference in the handwriting, in so far as, it related to the date of the cheque from that of the other entries in the cheque. It is true that the accused had set up a contention that the date alone was not filled up by her. This implies that all other entries were in her handwriting. This includes the entry in relation to the amount also. This will cut at her earlier defence that it was given as a security towards a transaction for a sum of Rs.10,000/-. Further, the Supreme Court in **Rangappa v. Sri Mohan (2010 (11) SCC 441)** has held that once the execution of the cheque is proved, the presumption under Section 138 of the Negotiable Instruments Act can be invoked which includes the existence of a legally recoverable debt. This was the trend in **P.Gopalkumar v.**

B. Anil Kumar (2011(3) KHC 850) wherein, it was held that once the signature is admitted, the rigour of proof that is required to prove its execution gets reduced.

9. In the light of the statutory presumptions available coupled with the proof tendered by PW1 regarding the due execution, the difference in the handwriting in relation to the date pales into insignificance.

10. It is pertinent to note that though the accused had set up a contention that the husband had a transaction with the complainant and a signed cheque was given only as a security, there is absolutely no evidence to prove that. Not only she did not tender any evidence, the husband was also not examined. She did not even reply to the statutory notice received by her. Hence, the available materials clearly indicate that the complainant had succeeded in proving the due execution of Ext.P1 cheque. The finding of the trial court in this regard, which is supported by definite, cogent and consistent appreciation of evidence has been upset by the lower appellate court by a wrong process of reasoning and on grounds which are not legally sustainable. Hence, it is only to be held that the complainant had succeeded in proving that the

accused had committed an offence punishable under Section 138 of the Negotiable Instruments Act. The accused is liable for conviction.

11. Having regard to the fact that the order of acquittal is being reversed in appeal, I feel that a sentence of imprisonment till rising of the Court will serve the interest of justice provided, if it is coupled with compensation for a sum of Rs.75,000/-, in default of which, the accused shall undergo default sentence of three months. She shall appear before the court below within one month to undergo substantive sentence of one days' simple imprisonment and is further granted two month's time to pay the compensation to the complainant.

In the result, the appeal is allowed. Judgment of the lower appellate court is reversed and the accused is found guilty and convicted to undergo imprisonment till rising of the Court, for offence punishable under Section 138 of the Negotiable Instruments Act. She is directed to appear before the trial court within one month from today to undergo the sentence, failing which, the court below shall initiate proceeding to procure her presence. She shall pay the compensation of Rs.75,000/- (Rupees

Seventy Five Thousand only) to the complainant within two months from today, failing which, she shall undergo three months simple imprisonment. In case of non-payment of the compensation within two months from today, the court below shall initiate appropriate proceedings after the expiry of the two months period.

Sd/-
SUNIL THOMAS
Judge

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P.A to Judge