IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 14TH DAY OF OCTOBER 2015/22ND ASWINA, 1937

CRL.A.No. 1345 of 2011 ( )

(AGAINST THE ORDER/JUDGMENT IN Crl.L.P. 606/2011 of HIGH COURT OF KERALA DATED 15-07-2011
AGAINST THE ORDER/JUDGMENT IN ST 3349/2005 of J.M.F.C.-II,PALAKKAD DATED 10-05-2011)

APPELLANT(S)/COMPLAINANT:

M.A.KALYANKRISHNAN,
S/O.KGISHNA GUPTHAN (LATE), SWATHY, 15/430 (3)
PALAYAPET, PALAKKAD DISTRICT.

BY ADVS.SRI.K.RAMAKUMAR (SR.)
SRI.S.M.PRASANTH
SRI.M.MANOJKUMAR (CHELAKKADAN)
SMT.ASHA BABU
SMT.AMMU CHARLES

RESPONDENT(S)/STATE & ACCUSED:

1. STATE OF KERALA,
PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM-682031.

2. SRI.K.P.HARIDAS, PROPRIETOR,
CAPITAL LIGHTS, 43/37, ARAPATHU KALLINGAL HOUSE
SREE DURGA STREET, KARNAKI NAGAR, VADAKKANTHARA
MELAMURI, PALAKKAD-679307.

3. MRS RAJI HARIDAS, W/O K.P.HARIDAS,
43/37, ARAPATHU KALLINGAL HOUSE, SREE DURGA STREET
KARNAKI NAGAR, VADAKKANTHARA, MELAMURI
PALAKKAD-679307.

R, BY ADV. PUBLIC PROSECUTOR M.G. LISHA
R2,R3 BY ADV. SRI.RAJESH SIVARAMANKUTTY

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 8-10-2015, THE COURT ON 14/10/2015 DELIVERED THE FOLLOWING:

**SUNIL THOMAS, J.**

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**Crl.Appeal. No.1345 of 2011**

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Dated this the 14th day of October, 2015

**JUDGMENT**

The complainant in S.T.No.3349/2005, under Section 138 of Negotiable Instruments Act, aggrieved by the dismissal of his complaint and acquittal of both the accused, has approached this Court in appeal.

2. The case of the complainant was that he is a distant relative of the accused, who are spouses. The first accused had availed a loan for Rs. 3 Lakhs from a bank on 15/5/2000 and the property belonging to the complainant was offered as security. In spite of repeated demands from the Bank, the accused did not re-pay the amount. Ultimately, on 24/1/2004 he received a notice from the Bank. On 2/3/2004 both the accused came to the house of the de-facto complainant, expressed their inability to re-pay the amount immediately and requested him to re-pay, on an assurance that the amount would be repaid within ten days. A demand promissory note was executed by the accused in favour of the complainant to

ensure re-payment of the money. Thereafter, the complainant discharged the liability by remitting a sum of Rs.6,01,108/-. The Demand promissory note was thereafter returned on receipt of a cheque for a sum of Rs.6,50,000/- as arrived at through mediation of the third party. The cheque on presentation was returned dishonoured on the ground of insufficiency of fund. After issuing a statutory notice, complaint was lodged alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act.

3. Before the Court below, the accused pleaded not guilty and went for trial. On the side of the complainant, PWs 1 to 3 were examined and Exts.P1 to P12 were marked. On the side of the accused, DW1 and DW2 were examined and Exts.D1 and D2 were marked. The court below, on an evaluation of the available materials, concluded that the complainant failed to prove due execution of Ext.P1 cheque, essentially on the ground that the signature of the second accused in Ext.P1 cheque differed from her admitted signature in Ext.D2, the specimen signature card retained in her bank. This is challenged in this appeal.

4. Heard both sides and examined the records.

5. The learned counsel for the complainant vehemently

challenged the findings of the court below on the ground that the court went wrong in analysing the evidence on a wrong premise and that the enquiry of the court below was essentially confined to the signature of the second acused and as to whether the accused had succeeded in proving the defence, instead of deciding whether the complainant has succeeded in proving his case.

7. PW1 in his evidence had deposed in accordance with his complaint. According to him, Ext.P1 cheque was handed over by the accused towards the discharge of the legally recoverable debt. Apart from asserting his pleading, he specifically denied the allegation that the signature of the second accused in Ext.P1 was forged by him. He also denied the suggestion that the cheque was given as a security towards the liability of one of their common relative Ramankutty and the signature of the second accused was forged in that. He further denied the suggestion that he had availed two loans, one from the Co-operative Bank and another from a Nationalized Bank through the first accused and that the money was utilised by him for the construction of his house. He not only denied the above suggestion, but also asserted that the house was constructed by

him utilising his own fund,and he volunteered to produce documents to prove that contention. It was further admitted that though Ramankutty was his relative, he had instituted a suit against him for recovery of money.

8. The fact that the cheque was presented and returned dishonoured is not in dispute. DW1 has also admitted the fact that the cheque was presented and was returned dishonoured on the ground of insufficiency of fund. To prove that the money allegedly due to the bank from the accused was re-paid by the de facto complainant, he relied on Ext.P7 which was a certificate issued from the State Co-operative Bank. It showed that an OD facility of three Lakhs of the first accused was paid off by the complainant for a total sum of Rs.6,01,108/-. This clinches the fact that the complainant has re-paid the money. The bone of contention between the complainant and the accused in this regard is that, though the accused admits that loan was availed in their account and the complainant was a surety, according to the accused,it was essentially for the benefit of the complainant. This is countered by the plaintiff by saying that he was only a surety and the entire loan amount was utilised by the accused. According to him, on the request of the accused, he had repaid

the amount. Evidently, the amount has been repaid by the complainant evidenced by Exts.P8-P10 also. Ext.P1 is the passbook of the Co-Operative Bank, which also proved the contentions of plaintiff.

9. It is pertinent to note that the accused has not challenged the financial capacity of the complainant. In fact, it appears that the complainant is a Government employee and appears to have sufficient fund. This fact and the source of the person and the capacity of the complainant to pay such a amount is not challenged in the cross examination by the accused.

10. The specific defence, as seen taken up by the complainant in Ext.P12 reply notice which is available on record was that there were three financial transactions between the complainant and the accused. The first transaction was availing of loan for a sum of Rs. 3 Lakhs from the State Co-operative Bank. There is no dispute regarding that and it is admitted that the liability was in the name of the first accused with the complainant as the guarantor. As mentioned earlier, the bone of contention is as to who was the beneficiary of the loan transaction. According to the accused, thereafter, the complainant again approached him and sought a further loan of

Rupees One Lakh. In the meanwhile, one of their common relative, one Ramankutty, was in need of Rs. 50,000/-. Hence, a loan of Rs.1,50,000/- was allegedly taken from the Indian Bank and Rs.50,000/- is claimed to have been paid to Ramankutty. The nature of this transaction is not admitted by the complainant. The specific contention as seen disclosed in Ext.P12, which is a reply notice sent under the instructions from both the accused, is that a signed blank cheque was handed over to the complainant as security for the transaction with Ramankutty. A perusal of Ext.P12 specifically shows that the accused have referred to the cheque mentioned in the notice and answered that it was a blank cheque signed by both the accused. The detailed reply notice categorically reiterates the initial stand of the accused that it was a blank signed cheque executed by both the accused.

11. A perusal of the separate statements in answer to Section 313 Cr.P.C. questioning shows that the second accused has taken a totally different stand in the reply to Section 313 Cr.P.C. questioning, as distinct from their stand in the reply notice. The stand taken by the first accused in his statement was that he had no transaction, as mentioned in the complaint, in

relation to Ext.P1. He reiterated that Ramankutty had availed a loan of Rs.50,000/- and, as a security towards that, a blank cheque signed by him alone was handed over. His case was that his wife, the second accused, had not signed it. It was specifically alleged that the cheque was later filled up by the complainant to create a false claim. He has further stated that a sum of Rs.4,88,000/- was paid to PW1 in the presence of witnesses. It is strange to notice that in the reply notice his specific stand was that the entire amounts, received as loan from the Co-operative Bank, were taken by the complainant and that no amount was due to be re-paid, by him to the complainant. In this regard, what was the obligation of the accused to pay a sum of Rs.4,88,000/- to the complainant is shrouded in the mystery. It clearly indicates that the some amount was due from the accused to the complainant which, he says, has been repaid. Evidently, he is suppressing some of the transaction or the real transaction between them. He has also not examined any witness to support the above case of repayment.

12. On the other hand, the specific case set up by the second accused in reply to Section 313 Crl.P.C. questioning was that she had no transaction with PW1. There was no liability

with the Co-operative bank also. According to her, the signature of the second accused, purported to be that of the second accused as seen in Ext.P1, was not hers. Her specific case was that, on the cheque handed over by the first accused, as security towards the liability of Ramankutty, the complainant must have forged her signature after seeing her signature, in the records of the Indian Bank. It clearly shows that she had given total go bye to her version in Ext.P12 reply notice. However, she has a further case at the time of her deposition as DW2, that she had not instructed to send Ext.P12 reply notice.

13. In the light of the specific denial of signature the second accused in her oral testimony as DW2 and in her reply to Section 313 Crl.P.C. questioning, the court below ventured to conduct an enquiry as to whether the signature of the second accused on Ext.P1 tallied with the admitted signature. DW1, the bank manager, had given evidence in relation to the specimen signature card of both the accused. Ext.D2 is the specimen signature card retained by the Bank in relation to the second accused. The court below, on a comparison of both the signatures, held that the signature of the second accused seen in Ext.P1, was different from the admitted signature in Ext.D2.

The essential ground, on which the court made such a finding was that, in Ext.D2, an alphabet “V” was present in the first part of the signature as “V.Raji”. The court below on this ground concluded that the signature on Ext.P1 was not that of the second accused.

14. The Supreme Court in various decisions have held that, though the court is competent to compare the signature and that even the opinion given by an expert on that can only be an opinion evidence, had however cautioned that the court shall not, as far as possible, rest its finding only on a comparison of signatures. Evidently, along with the other materials, the court can also rely on the comparison of its own. In the case at hand, the court below essentially relied on comparison by itself and answered the issue. It is pertinent to note that the first accused had admitted his signature,, though the signature of the second accused was denied. Though Ext.D2 bears an admitted signature, it is evident that it was executed on 28/8/1998. Ext.P1 is a cheque executed in the year 2005. Evidently, there is a gap of seven years in between. Hence, D2 would not have been the best suited specimen for a comparison. There were several other admitted signatures of the second accused available on

record of a more contemporaneous origin. Ext.P6 was the Acknowledgment Card of the lawyer notice issued to the second accused. The signature seen therein is strikingly similar to that of the signature seen on Ext.P1. It is pertinent to note that in Ext.P6, alphabet “V” is not seen. In the statement of the second accused in reply to Section 313 Cr.P.C. questioning also, her signature is seen, which is similar to that of Ext.P1. In that also, Alphabet “V” is not present. In the deposition of DW2, her signature is seen, which is substantially similar to that of Ext.P1, though strangely Alphabet “V” has been added. It is clear that after Ext.D2 was let in evidence through DW1 and on finding that her earlier signature had one “V”pre-fixed, when she herself was examined as DW2, thereafter she has started adding Alphabet “V” pre-fixing her signature. Evidently, it appears to be a deliberate attempt to set up a defence. Hence, it is clear that the available materials, other than Ext.D2 disproves her case. On the other hand, it lead to an inference that signature seen on Ext.P1 is that of the second accused herself.

15. In the above circumstances, it is evident that the court below went wrong in harping on the signature of the second accused seen on Ext.P1 while comparing with Ext.D2. It is also

pertinent to note that the entire defence set up by the accused ought to have been appreciated in the background of Ext.P12 reply. In Ext.P12, it was admitted that both the accused had voluntarily handed over a blank signed cheque mentioned in the notice as security. In the light of this categoric admission, the defence set up by them that signature of 2nd accused was forged becomes irrelevant and inconsequential. No evidence was available to show that it was given as a security. The said Ramankutty was also not examined. In the light of the above, defence set up by the accused is not believable.

16. This lead to a conclusion that the complainant has succeeded in proving the due execution of Ext.P1 cheque and that the accused have committed the offence punishable under Section 138 of the Negotiable Act. Consequently, the accused are liable to be convicted accordingly.

17. In the light of the above finding, it is held that the accused have committed offence punishable under Section 138 of the Negotiable Instruments Act. Though a huge amount is payable, which has not been paid in spite of the long drawn proceedings, since the order of acquittal is reversed, a substantive sentence till rising of the court would satisfy the

interest of justice when coupled with a compensation of Rs.3,25,000/- by each of the accused with a default clause of Simple Imprisonment for two months.

In the result, the appeal is allowed. The impugned judgment is set aside. Each accused is convicted and sentenced to undergo simple imprisonment till rising of court and to pay a compensation of Rs.3,25,000/- (Rupees Three Lakh Twenty Five Thousand only) each payable to complainant, in default of which each of the accused shall undergo simple imprisonment for two months each. The accused shall appear before the Court below within two months from today to undergo sentence and to pay the compensation and in default, to undergo default sentence.

**Sd/-**

**SUNIL THOMAS**
**Judge**

dpk

**/true copy/ PS to Judge.**