

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

TUESDAY, THE 4TH DAY OF AUGUST 2015/13TH SRAVANA, 1937

CRL.A.No. 1399 of 2011 ()

AGAINST THE ORDER/JUDGMENT IN CRA 680/2006 of THE COURT OF ADDL.
SESSIONS JUDGE (FAST TRACK COURT-III), THIRUVANANTHAPURAM
DATED 11-11-2010

C.C.NO.228 OF 2004 OF THE COURT OF JUDICIAL FIRST CLASS MAGISTRATE-V
(SPECIAL COURT FOR MARKLIST CASES), THIRUVANANTHAPURAM

APPELLANT/COMPLAINANT:

SULOCHANA DEVI,
'ASWATHY', A.K.G.NAGAR, KUDAPPANAKUNNU
THIRUVANANTHAPURAM.

BY ADV. SRI.RAJESH P.NAIR

RESPONDENTS/ACCUSED & STATE:

1. BABURAJ.V,
RANJINI BHAVAN, PUNNACKAMUGAL
BACK OF VIJAYAMOHINI MILL, THIRUMALA P.O.
THIRUVANANTHAPURAM.
2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM-31.

R1 BY ADV. SRI.K.P.SUJESH KUMAR
R2 BY PUBLIC PROSECUTOR SMT.LALIZA T.Y.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
04-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T.RAVIKUMAR, J.

Crl.A.No.1399 of 2011

Dated 4th August, 2015

JUDGMENT

This appeal is directed against the judgment dated 11.11.2010 in Crl.A.No.680 of 2006 passed by the Court of Additional Sessions Judge (Fast Track Court-III), Thiruvananthapuram. As per the impugned judgment the Appellate Court reversed the conviction and also the sentence imposed on the first respondent/accused in a prosecution for commission of an offence punishable under Section 138 of the Negotiable Instruments Act. The appellant herein was the complainant and the first respondent herein was the accused in C.C.No.228 of 2004 on the files of the Court of Judicial First Class Magistrate-V (Special Court for Marklist Cases), Thiruvananthapuram. For the sake of convenience, the parties are referred to hereafter in this judgment in accordance with their status in this appeal.

2. The appellant filed a private complaint alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act against the first respondent. Her case was that the first respondent borrowed an amount of ₹ 75,000/- from her and in

discharge of the said legally enforceable debt he issued Ext.P1 cheque. When Ext.P1 cheque was presented for encashment it was bounced owing to paucity of funds in the account maintained by the first respondent. Thereupon, statutory notice was issued within the statutorily prescribed period to the first respondent intimating him of the dishonour of the cheque and also calling upon him to pay the amount due. The complaint was filed pursuant to the failure of the first respondent to pay the amount within the statutorily prescribed period. On the said complaint carrying such allegations cognizance was taken and it was taken on file and numbered as C.C.No.228 of 2004. On due process the first respondent appeared before the court and on being read over and explained the particulars of the offence he pleaded not guilty and claimed to be tried. To prove the offence evidently, the appellant got herself examined as PW1 and got marked Exts.P1 to P6. After the closure of the evidence of the appellant, the first respondent was examined under Section 313, Cr.P.C. and he denied all the incriminating circumstances put to him. He did not adduce any evidence in defence. After carefully evaluating the evidence on record the trial court found that the appellant had succeeded in proving commission of the offence under Section 138 of the Negotiable Instruments Act by the first respondent. Consequently, he was found guilty of the offence under Section 138 of the Negotiable

Instruments Act by the trial court and convicted thereunder and sentenced to undergo simple imprisonment for a period of four months and to pay a compensation of ₹ 75,000/- under Section 357(3), Cr.P.C. and in default of payment of compensation the first respondent was directed to undergo simple imprisonment for a further period of two months. Aggrieved by the same, the first respondent filed Crl.A.No.680 of 2006. As per the impugned judgment the appellate court reversed the findings and set aside the order of conviction passed by the trial court. The first respondent was found not guilty under Section 138 of N.I. Act and was consequently acquitted under Section 255(1) Cr.P.C. Hence, this appeal.

3. I have heard the learned counsel appearing for the appellant, the learned counsel for the first respondent and also the learned Public Prosecutor.

4. Essentially, the contention of the appellant is that the lower appellate court erred in interfering with the order of conviction passed by the trial court after a careful evaluation and appreciation of the evidence on record. It is contended that the appellant was found entitled to the benefit of the presumptions available under Sections 118

and 139 of the Negotiable Instruments Act by the trial court and that the findings of the trial court were reversed by the appellate court on an erroneous appreciation of the evidence. It is also contended that the finding of the lower appellate court that there was no legally enforceable debt is also not founded on any basis and in fact, presumption was legally available to the appellant as she has successfully discharged the initial burden to have the benefit of the presumptions available under Sections 118 and 139 of N.I. Act. It is further contended that the lower appellate court arrived at such a finding owing to its conclusion that the first respondent was a total stranger to the appellant. It is submitted that the said finding is contrary to the common case advanced by both the appellant and the first respondent. Per contra the learned counsel for the first respondent submitted that the lower appellate court rightly interfered with the order of conviction of the trial court after a proper appreciation of the evidence as the order of conviction by the trial court was nothing but an outcome of an utter perverse appreciation of evidence. He has also contended that the trial court committed an error in not affording an opportunity to the first respondent for examining the husband of the appellant.

5. As noticed hereinbefore, the first respondent did not

mount the box and at the same time, the appellant gave evidence as PW1. She deposed that she got acquaintance with the first respondent for the past 10 years or thereabouts as he is a friend of her husband. She would also depose that he used to come to her residence and on 10.7.2002 he borrowed an amount of ₹ 75,000/- at a time when her husband was with her. It was also deposed that later, in discharge of the said debt Ext.P1 cheque was issued and she has further deposed in tune with her pleadings in the complaint. There is no case for the first respondent that the statutory mandates were not complied with by the appellant, either prior to the presentation of the complaint or for presenting the complaint. In such circumstances, the question to be considered is whether the finding of the lower appellate court that the appellant was not entitled to get the benefit of presumptions available under Sections 118 & 139 of N.I. Act in supersession of the findings of the trial court is sustainable ? There can be no doubt that under Section 118 of N.I. Act unless the contrary is proved, it is to be presumed that the negotiable instrument had been made or drawn for consideration. Under Section 139 of N.I. Act, the court has to presume, unless the contrary is proved, that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or liability. In the context of the contentions it is relevant to refer to a decision of the Hon'ble Apex

Court in **Vasanthakumar T. v. Vijayakumari (2015 (3) KHC S.N.4 (SC))**. Going by the dictum laid down therein if the cheque is admitted and the signature thereon is also admitted the complainant concerned is entitled to get the benefit of the presumptions available under Sections 118 and 139 of N.I. Act. There cannot be any doubt with respect to the position that such presumptions available under the aforesaid sections are rebuttable in nature. While dealing with the question regarding the standard of proof expected from the part of the complainant as also the accused in the decision in **Krishna Janardhan Bhat v. Dattatraya G. Hegde ((2008) 2 SCC (Crl.) 166)** the Hon'ble Apex Court held that the prosecution must prove the guilt of an accused beyond all reasonable doubt and at the same time, the standard of proof required on the part of the accused is 'preponderance of probabilities'. Further it was held 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 the circumstances upon which the accused relies. In the light of the aforesaid decisions the evidence on record has to be scanned.

6. In this case, it is the common case that the first respondent is a friend of the complainant's husband. The evidence on record would reveal that the cheque was admitted and the signature thereon was also

admitted. True that, the case of the first respondent was that the cheque in question was issued not to the appellant but to her husband in connection with an earlier transaction. But, at the same time, when once it is found that the cheque is admitted and the signature is also admitted in the light of the decision of the Hon'ble Apex Court in **Vasanthakumar's** case (supra), the appellant/complainant is entitled to get the benefit of presumptions available under Sections 118 and 139 of N.I. Act. When once it is so found the further question to be considered is whether the first respondent has succeeded in dislodging the presumptions available to the appellant under the aforesaid provisions by adducing evidence ? The contention of the first respondent is that he has succeeded in dislodging the said presumptions. To canvass the said position he is virtually, relying on certain suggestions put to the appellant. In this context, it is also to be noted that the first respondent did not mount the box. It is also true that he had put certain suggestions during the cross examination of the appellant. But, it is to be noted that a suggestion in cross examination can only be an indicative of the case put forth or the stand taken by a party on whose behalf the cross examination was being conducted and the suggestion was put. But, it cannot substitute for evidence when once the suggestion was repudiated by the witness to whom it was made. In this case, evidently,

all suggestions put forth by the first respondent were repudiated by the appellant. But, at the same time, it is true that she has honestly admitted the fact that her husband is a friend of the first respondent and also that her relationship with her husband got strained. A careful consideration of the cross examination made on behalf of the first respondent, would reveal that despite such cross examination nothing could be elicited to discredit trustworthiness of the appellant. In such circumstances, the question is what circumstances constrained the appellate court to interfere with the findings of the trial court. It is evident that the appellate court after scanning the evidence on record arrived at the conclusion that the first respondent was a stranger to the appellant. I am afraid, the said conclusion was arrived at without a proper appreciation of the common case of the appellant and the first respondent. It is not in dispute that the first respondent is a friend of the husband of the appellant. The appellant has deposed that she got close acquaintance with the first respondent as friend of her husband for the past 10 years or thereabouts. In such circumstances, the finding of the lower appellate court that the first respondent was a total stranger to the appellant cannot be said to be a finding based on true appreciation of the evidence. The evidence on record would not permit drawing of a conclusion that the appellant was not having sufficient fund to advance

an amount of ₹ 75,000/- to the first respondent. Merely because the appellant had borrowed an amount of ₹ 1,00,000/- about a month prior to the transaction that by itself is not a ground to hold that the amount was not with her. When the person approached to borrow the money is none other than a close friend of the husband of the complainant and the amount was paid in the presence of the husband and also in the circumstances expatiated hereinbefore, I do not find any basis for the contention that the transaction is surrounded with suspicious circumstances. I am also of the view that in view of the evidence on record the decision of the Hon'ble Apex Court in **John K. Abraham v. Simon C. Abraham (2014 (1) KLT 90 (SC))** also cannot be a ground to hold that the appellant was not having sufficient income and therefore, not entitled to get the benefit of the presumptions available under Sections 118 and 139 of N.I. Act. As noticed hereinbefore, the amount involved is only ₹ 75,000/-. In the light of the appreciation of evidence as above, I am of the view that the manner in which the trial court appreciated the evidence and arrived at the conclusion ought not to have treated as perverse so as to invite interference in exercise of the appellate jurisdiction. In other words, I am of the considered view that the findings of the trial court was founded on materials and thus it is evident that the trial court appreciated the evidence in a proper manner

and there was no reason for the appellate court to overturn the judgment based on inferences. As noticed hereinbefore, the appellate court erred in holding that the appellant was not entitled to get the benefit of statutory presumptions referred above. In view of the discussion as above, I am of the view that the conviction entered by the trial court against the first respondent for the offence under Section 138 of N.I. Act is to be restored. Accordingly, the judgment of the appellate court in Crl.A.No.680 of 2006 is set aside and the conviction for the offence under Section 138 of N.I. Act entered against the first respondent by the trial court is restored.

7. As noticed hereinbefore, for the conviction under Section 138 of N.I. Act the trial court sentenced the first respondent to undergo simple imprisonment for a period of four months besides directing to pay compensation of an amount of ₹ 75,000/- to the complainant under Section 357(3) Cr.P.C. While considering the question of imposition of sentence the decision of the Hon'ble Apex Court in **Damodar S. Prabhu v. Sayed Babalal (AIR 2010 SC 1907)** assures relevance. Going by the said decision in the case of dishonour of a cheque pecuniary aspects have to be given preference over punitive aspects. In the said circumstances, I am of the view that while confirming the conviction the

sentence imposed on the first respondent for the conviction thereunder requires a modification. In the circumstances, the substantive sentence imposed on the first respondent is modified and reduced to imprisonment till the rising of the court. The directions to pay compensation of ₹ 75,000/- under Section 357(3) Cr.P.C. and to undergo simple imprisonment for a period of two months in default of payment of compensation are maintained. The learned Magistrate is directed to keep in abeyance execution of the sentence and also the steps to effect recovery of the amount for a period of six months. The first respondent shall pay the amount of compensation of ₹ 75,000/- and to appear before the trial court to suffer the sentence of imprisonment till the rising of the court within the above stipulated time. In case of failure on the part of the first respondent to comply with the above directions the trial court shall take appropriate steps for the execution of the sentence in accordance with law.

This appeal is allowed as above.

Sd/-
C.T.RAVIKUMAR
Judge

TKS

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P.S. to Judge