

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 6TH DAY OF APRIL 2015/16TH CHAITHRA, 1937

Crl.MC.No. 1205 of 2013 ()

AGAINST THE JUDGMENT IN ST 112/2012 OF JUDICIAL FIRST CLASS
MAGISTRATE COURT-II, KARUNAGAPPALLY

PETITIONER(S)/PETITIONER/ACCUSED:-

ASHA JOSE,
189 A, MALAVIKA, KADAPPAKKADA
KOLLAM EAST VILLAGE, KOLLAM.

BY ADV. SRI.C.UNNIKRISHNAN (KOLLAM)

RESPONDENT(S)/COUNTER PETITIONER/COMPLAINANT:-

1. JAYAKRISHNAN,
KIZHAKKUPURATHU VEEDU, KOLLAKA P.O.
VADAKKUMTHALA VILLAGE, KARUNAGAPPALLY.

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

R1 BY ADV. SRI.K.ABDUL JAWAD
R1 BY ADV. SRI.MATHEW A KUZHALANADAN
R1 BY ADV. SMT.N.M.SHEENA DAS
R2 BY SMT.V.H.JASMINE, PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON
06-04-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

APPENDIX

PETITIONER(S) EXHIBITS

ANNEXURE A1. TRUE COPY OF THE PROOF AFFIDAVIT FILED BY THE 1ST RESPONDENT/COMPLAINANT.

ANNEXURE A2. TRUE COPY OF THE STATEMENTS OF THE COMPLAINANT IN CORSS EXAMINATION.

ANNEXURE A3. TRUE COPY OF THE PETITION DATED 02.01.2013 FILED BY THE PETITIONER AS CRL.M.P.NO.14/13 IN ST.NO.112/12 ON THE FILE OF JFMC-II, KARUNAGAPPALLY.

ANNEXURE A4. TRUE COPY OF THE OBJECTION DATED 02.02.2013 FILED BY THE 1ST RESPONDENT/COMPLAINANT IN CRL.M.P.NO.14/2013 IN ST.NO.112/2012 PENDING ON THE FILES OF JFCM-II, KARUNAGAPPALLY.

ANNEXURE A5. TRUE COPY OF THE ORDER DATED 14.02.2013 IN CRL.M.P.NO.14/2013 IN ST.NO.112/2012 OF THE JFCM-II, KARUNAGAPPALLY.

RESPONDENT'S EXHIBITS

NIL

R.AV

//TRUE COPY//

PA TO JUDGE

K.RAMAKRISHNAN, J

CRL.M.C.NO.1205 OF 2013

Dated this the 6th day of March, 2015

O R D E R

Accused in ST.No.112/2012 of Judicial First Class Magistrate Court-II, Karunagappally has filed this application challenging the order in Crl.M.P.No.14/2013 of that court under section 482 of the Code of Criminal Procedure.

2. It is alleged in the petition that the case was taken on the basis of a private complaint filed by the first respondent alleging that the petitioner had committed the offence under section 138 of the Negotiable Instruments Act. The allegation in the complaint was that the petitioner borrowed a sum of Rs.2,50,000/- and in discharge of that liability, he had issued the disputed Ext.P1 cheque, which when presented was dishonoured for the reason funds in sufficient and in spite of notice issued, he had not paid the amount. But he had sent a reply with false allegations. So according to the complainant, the petitioner had committed the offence punishable under section 138 of the Negotiable Instruments Act.

3. When the petitioner appeared before the court below, the particulars of offences were read over and explained to her and she pleaded not guilty. Thereafter, in order to prove

the case of the complainant the complainant himself was examined as PW1 and the documents including the cheque Ext.P1 were marked. According to the petitioner, when the complainant was cross examined, he had admitted that entries in the cheque were in the handwriting of the petitioner and it was written in his presence and signed in his presence and delivered to him. So, in order to prove that the handwriting in Ext.P1 cheque was not that of the petitioner. He filed Crl.M.P.No.14/2013 for sending Ext.P1 cheque for expert opinion. The learned Magistrate by impugned Annexure-A5 order dismissed the application. Aggrieved by the same, the present criminal miscellaneous application has been filed.

4. Heard Adv.Sri.C.Unnikrishnan Kollam, the counsel appearing for the petitioner and Sri.Abdul Jawad, the counsel appearing for the first respondent and Smt.Jasmine, public prosecutor appearing for the second respondent.

5. The counsel for the petitioner submitted that the case of the petitioner was that he had not issued any cheque to the complainant and the cheque given to one Moly was misused and the present complaint was filed and PW1 had admittedly in deposition that the cheque was written and signed in his presence and it was delivered to him and in order to prove this fact it is necessary that the cheque will have to be sent for

expert opinion and dismissal of the application will amount to denial of an opportunity for the petitioner to prove her case.

6. On the other hand, the learned counsel for the first respondent submitted that nowhere in the complaint, chief affidavit or even in the evidence, there was any admission of handwriting in the cheque as that of the petitioner. He had only stated that the cheque was handed over for the amount in discharge of the liability and it was signed in his presence and delivered to him. He had not made any assertion regarding the handwriting in the cheque. So, there is no necessity to send the cheque for expert opinion and the observation made by the court below that it was admitted by the complainant is also not correct.

7. It is an admitted fact that the complaint under section 138 of the Negotiable Instruments Act was filed by the first respondent against the petitioner alleging that the petitioner borrowed an amount of Rs.2,50,000/- and issued the disputed Ext.P1 cheque in discharge of that liability. It is also in away admitted by the first respondent that the petitioner had sent a reply notice. But, according to him, the allegations in the reply notice were false. The case of the accused who is the petitioner herein was that the blank signed cheque given to one Moly was misused and the present complaint was filed. In the

deposition of PW1 certain questions were put to him regarding the handwriting in the cheque.

The question was that 16.09.2009 തീയതി വെച്ച് മേൽപ്പടി തുക എഴുതി ഒപ്പിട്ട് മേൽപ്പടി തീയതിയിൽ പ്രതി ചെക്ക് തന്നു വെന്നു പറഞ്ഞു ഞതിട്ടുണ്ടല്ലോ

Answer: അതെ.

Question: അങ്ങനെ എനിക്ക് പ്രതി ഒപ്പിട്ട് തന്നതു നിങ്ങളുടെ മുമ്പിൽ വെച്ചാണോ?

Answer: അതെ.

8. According to the counsel for the petitioner, there is an admission on the part of the complainant that the entire handwriting in the cheque was that of the petitioner and it was filled and signed by the petitioner in his presence. But according to the counsel for the first respondent, there is no such admission as such. However, the petitioner had denied that the writings in Ext.P1 was not made by her and if she had also a case that the writings in the cheque was entered in a different date and in a different ink also. All those things can be considered only if it has been sent for expert opinion. Though, expert opinion is not a conclusive evidence under section 45 of the Evidence Act, it is one of the method by which the petitioner can prove her innocence and that can be filed by her only at the stage of defence evidence. This was so held in the decisions reported in **T.Nagappa Vs. Y.R.Muralidhar (2008) 5**

Supreme Court Cases 633 and Mrs.Kalyani Bhaskar Vs M.S.Sampoornam (2007) 2 Supreme Court Cases 258.

Further, the counsel for the first respondent also attacks the observation made by the learned Magistrate that in the evidence there was such an admission and a reading of the order according to the counsel will go to show that the learned Magistrate has already formed the opinion that the execution of the cheque has not been proved. It is on that basis dismissed the application which is not sustainable and a direction will have to be given to the Magistrate to consider the case on merit even if the application for sending Ext.P1 cheque was allowed by this court.

9. Considering the circumstances, the reasons stated by the lower court for dismissing the application appears to be not correct. If the court later come to the conclusion that the complainant had proved the case and convicted the petitioner, then the opportunity to prove the innocence of the petitioner will not be available to her at the later stage so an opportunity has to be given to the petitioner to prove her innocence and after giving such opportunity and if any materials has been produced, then the court will have to analyse those materials along with the evidence available on record, then come to an independent conclusion as to whether the cheque was issued in

discharge of legally enforceable debt and whether the petitioner had committed the offence under section 138 of the Negotiable Instruments Act. So, under the circumstances, this court feels that the reasons stated by the court below for dismissing the application is unsustainable in law, and in view of the dictum down in the above decisions, denying an opportunity for the petitioner to prove her case by sending Ext.P1 cheque for expert opinion will amount to denial of an opportunity to prove her case and that will cause prejudice to her as well. So, under the circumstances, the order passed by the court below dismissing the application in Crl.M.P.14/2013 is set aside and the application is allowed and the petitioner herein who is the accused in the lower court is directed to produce standard admitted handwriting of the petitioner during the relevant period, when the disputed cheque said to have been given along with the present standard handwriting as well for the purpose of sending the same to the expert for comparison and submitting a report. The petitioner is directed to furnish these documents within one week from the date on which the parties are directed to be appear before the court below by this court. Further, the lower court is directed to fix the time limit for the expert to send his report and after getting the report, the lower court is directed to dispose of the case within three months

from the date of receipt of the report from the handwriting expert after giving opportunity to the parties to adduce further evidence if any required on the basis of the expert opinion. Parties are directed to appear before the court below on 05.05.2015. Lower court is directed to consider the evidence untrammelled by the observation made by the court below in the impugned order that there is an admission regarding the handwriting by the complainant and dispose of the case in accordance with law.

With the above direction and observation, the criminal miscellaneous application is disposed of accordingly. Office is directed to communicate this order to the concerned court immediately.

Sd/-
K.RAMAKRISHNAN, JUDGE

R.AV

//TRUE COPY//

PA TO JUDGE