

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

CRL.A.No. 1759 of 2003 ()

AGAINST THE ORDER/JUDGMENT IN Cr1.L.P. 452/2003 of HIGH COURT OF KERALA
DATED,14-08-2003

&

AGAINST THE JUDGMENT IN CC 871/2000 of J.M.F.C.,
VADAKARA, DTD 12.06.2003.

APPELLANT/COMPLAINANT:

K.T.RAMESHAN, AGED 30 YEARS,
S/O.KRISHNAN,MANAGER, AQUILA FINANCE PVT. LTD.,
POWER OF ATTORNEY HOLDER OF
M/S. AQUILA FINANCE PVT. LTD.,

BY ADV. SRI.K.RAMKUMAR (SR.)

RESPONDENT/ ACCUSED & STATE:

1. K.ALIKUTTY, AGED 42 YEARS,
KALLERI HOUSE, KUNJOM POST,
VELLAMUNDA, WYNAD DISTRICT.
2. STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

R1 BY ADV. SRI.LALJI P.THOMAS
R2 BY PUBLIC PROSECUTOR SRI.JIBU P. THOMAS.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.1759 of 2003

Dated this the 8th day of September, 2015

JUDGMENT

Complainant in C.C.No.871/2000 on the file of the Judicial First Class Magistrate Court, Vadakara, is the appellant herein. The case was taken on file on the basis of a private complaint filed by the complainant through his power of attorney holder under Section 138 of the Negotiable Instruments Act.

2. The case of the complainant in the complaint was that, they were conducting a finance business and the accused had taken loan from the company and in discharge of the balance amount of ₹43,893.79, he had issued Ext.P4 cheque dated 13.09.2000. When it was presented, it was dishonoured for the reason 'funds insufficient' evidenced by Ext.P5 dishonour memo and the same was intimated to the complainant by their banker on 05.10.2000 evidenced by Ext.P6 intimation letter. The complainant issued Ext.P7 notice, which was returned with endorsement 'unclaimed',

in spite of intimation given, he had not paid the amount. So he had committed the offence punishable under Section 138 of the Negotiable Instruments Act. Hence the complaint.

3. When the accused appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, PWs 1 and 2 were examined and Exts.P1 to P13 were marked on their side. After closure of the complainant's evidence, accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had filed a statement stating that he had no transaction with the complainant and his brother Moidu was having some transaction with the company and as security for the loan transaction with them, his blank signed cheques were given. Though the brother of the complainant had paid the amount, but the cheques were not returned and

misusing the cheque the present false complaint has been filed. In order to prove his case DW1 was examined and Exts.D1 to D4 were marked. After considering the evidence on record, the court below found that the complainant had failed to prove the execution of the cheque as there is difference in the signature and acquitted the accused. Aggrieved by the same, the present appeal has been preferred by the appellant/complainant before the court below along with leave to file appeal and leave was granted and the appeal was admitted.

4. Heard Smt.P. Asha Babu representing the senior counsel Sri.K.Ramkumar appearing for the appellant and Sri. Lalji P.Thomas, counsel appearing for the first respondent and Sri.Jibu P. Thomas, learned Public Prosecutor appearing for the State.

5. The counsel for the appellant submitted that there was no suggestion given to PW1 that the signature in Ext.P1 was not his signature. Further only at the time of

313 examination he had a case that blank cheques were given to some other person on behalf of his brother Moidu was misused. Merely because there was some difference in the signature put by him later, it is not a ground to come to the conclusion that the signature in Ext.P1 was not that of the accused as found by the court below and the acquittal on that basis is not proper. Learned counsel relied on the decision reported in **Ajithkumar v. Rejinkumar and another (2009(3) KHC 221)** and also **P.V. Constructions v. Shri.K.J.Augusty (2007 KHC 3813)**, in support of their case.

6. On the other hand, the counsel appearing for the first respondent submitted that, once the execution of the cheque is denied, there is a duty cast on the complainant to prove the same which he had not discharged. So the court below was perfectly justified in acquitting the accused.

7. The case of the complainant in the complaint

was that, accused had availed a loan from their company and issued Ext.P4 cheque in discharge of that liability. Issuance of the cheque to the complainant was disputed by the accused. It is true that once the execution of the cheque is denied, the burden is on the complainant to prove the execution of the cheque and the transaction between the parties. In this case it was admitted by accused himself by producing Ext.D1 notice that the complainant had issued a notice showing installment due and asking him to pay the amount. If really there was no transaction between the complainant and the accused, he would have sent a reply to that notice stating that there was no transaction between them and he had no liability to pay the amount. Further when PW1 was examined, no question was put to him that the signature in Ext.P1 was not that of the accused. On the other hand suggestion given was that, they obtained blank signed cheque and such a blank signed cheque was misused. In order to prove the case of the accused, he had

examined DW1, but he did not support the case of the accused. Thereafter no other steps were taken by the accused to prove that there was no transaction between him and the complainant so as to issue Ext.P4 cheque in discharge of any liability in their favour. The complaint had examined PW1, the manager of that branch with whom the accused was having transaction and he had deposed that the cheque was issued and signed in his presence and delivered for the amount due by the accused. Ext.P12 ledger maintained by them in the name of the accused will go to show that the amount mentioned in the cheque was due from the accused and in discharge of that liability Ext.P4 cheque was issued.

8. In the decision reported in **Ajithkumar v. Rejinkumar and another (2009(3) KHC 221)**, this court has held that, if the accused had a case that he had not executed the cheque as the cheque book was missing and also the transaction with the complainant and one of the

cheque out of the missing cheque book was found transacted, then the burden is on the accused to prove the genuineness of the signature in that cheque. This court has held that, there is no burden cast on the complainant to prove that the signature appearing on the cheque is that of the accused. It is for the accused to establish his defence that the cheque was not signed by him. Further in the case of a forgery, the burden is on the person alleging forgery to prove the same. No steps were taken by the accused to prove this fact. This proposition of this court has been followed in earlier decision of the Bombay High Court in **P.V. Constructions v. Shri. K.J. Augusty (2007 KHC 3813)**. Further the cheque was not dishonoured by the bank for the reasons 'signature differs'. It was dishonored only for the reasons 'funds insufficient'. If there is difference in the signature, that would have been noticed by the banker which has not been done in this case. So under the circumstances, the court below had really compared the

signature which the accused can later change for the purpose of escaping from his liability and coming to the conclusion that the signature in Ext.P4 was not that of the accused and acquitting the accused on that ground is unsustainable in law and the same is liable to be set aside, as the finding is perverse and against the legal principles discussed above. The accused had no case that he had sent any reply, when he got knowledge about the sending of notice. The notice was returned with endorsement 'unclaimed' and PW2 postman has proved that proper intimation was given and in spite of that notice was not received. So under the circumstances, the complainant had proved the issuance of the cheque and dishonor of the cheque and nonpayment of the amount in spite of notice issued after getting knowledge about the issuance of the notice by the accused. So the order of acquittal passed by the court below has to be set aside and this court found that on the basis of evidence available complainant had proved

the case against the accused and accused had committed the offence punishable under Section 138 of the Act and he is convicted there under.

9. As regards the sentence is concerned, the court has got the power to impose double the cheque amount as fine and fix the quantum of compensation payable, and this was so held in the decision reported **Somanath Sarkar v. Utpal Basu Mallick [2013(4) KLT 350 (S.C.)]**. So considering the circumstances, this court feels that sentencing the accused to undergo imprisonment till rising of the court and also to pay a fine of ₹50,000/-, in default to undergo simple imprisonment for one month and if the fine amount is realized, the same be paid to the complainant as compensation under section 357(1)(b) of the Code of Criminal Procedure will be sufficient and that will meet the ends of justice. So the appeal is allowed and the order of acquittal passed by the court below is set aside and the first respondent/ accused is convicted for the offence

under Section 138 of the Negotiable Instruments Act and sentenced him to undergo imprisonment till rising of the court and also to pay a fine of ₹50,000/-, in default to undergo simple imprisonment for one month. If the fine amount is realized, the court below is directed to pay the entire fine amount to the complainant as compensation under Section 357(1) (b) of the Code of Criminal Procedure and the accused is granted three months time to pay the amount, till then the execution of sentence is directed to kept in abeyance.

Office is directed to communicate this judgment to the court below at the earliest.

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge

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