

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.K.MOHANAN

TUESDAY, THE 9TH AUGUST 2011 / 18TH SRAVANA 1933

Crl.L.P..No. 569 of 2008()

CC.41/2006 of JUDICIAL FIRST CLASS MAGISTRATE COURT-IV (PRL.M.C.),
NEYYATTINKARA
.....

(S): PETITIONER/ COMPLAINANT

T.GIRIJA DEVI, KAMMALA VEEDU,
KADAVATTARAM DESOM, NEYYATTINKARA P.O.

BY ADV. SRI.M.SREEKUMAR

RESPONDENT(S): ACCUSED & STATE

1. J.VINCENT, Y.R.N.BUNGLOW,
MUKKAMPALAMOODU, NARUVAMMOODU P.O.

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

PUBLIC PROSECUTOR SRI.K.S.SIVAKUMAR

THIS CRIMINAL LEAVE PETITION HAVING BEEN FINALLY HEARD
ON 09/08/2011, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

V.K.MOHANAN,J

Crl. L.P.NO.569 of 2008

Dated this the 9th day of August, 2011

ORDER

The complainant in a prosecution for the offence u/s. 138 of the NI Act is the petitioner herein, who seeks special leave of this Court u/s.378(4) of Cr.P.C. to file an appeal against the order of the trial court by which the learned Magistrate, in his complaint, acquitted the accused u/s.255(1) of Cr.P.C.

2. The case of the complainant is that the accused issued two cheques for Rs.30,000/- and Rs.50,000/- each dated 25.7.2005 towards the discharge of a total debt of Rs.80,000/-. According to the complainant, the said cheque when presented for encashment dishonoured as there was no sufficient fund in the account of the accused and the cheque amount was not paid though a formal demand was made. The case of the defence is to the effect that there was no transaction as claimed by the complainant. According to him when he borrowed Rs.5,000/- from the complainant, she obtained two blank cheques and retained the same, as the complainant wanted to get interest at the rate of 5% per annum in spite of the discharge of the debt. During the trial, the complainant has herself examined as PW1 and her mother was also examined as PW2. Ext.P1 to P6 are

the documents produced by the complainant and Ext.P1 and Ext.P1(a) are the cheques in question and other documents are connected with the dishonour of the cheques and demand notice. Though no document was produced one witness was examined from the side of the defence as DW1. The trial court has found that the accused has succeeded in rebutting the presumption u/s.139 of the NI Act and thus, held that the accused is not guilty u/s.138 of the NI Act. It is the above finding and order of acquittal sought to be challenged by filing an appeal for which the leave of this court is sought for u/s.378(4) of Cr.P.C.

3. I have heard Sri.M.Sreekumar, the learned counsel appearing for the petitioner. I have also perused the judgment of the trial court.

4. Sri.M.Sreekumar, learned counsel for the petitioner vehemently submitted that the learned Magistrate has committed wrong in holding that the accused has rebut the presumption, since there is no evidence adduced by the accused to rebutted the presumption whereas the evidence of the complainant is intact. It is pointed out by the learned counsel for the petitioner that the accused has also admitted the transaction and therefore, the trial court is not correct in disbelieving the evidence of PW1 and also that of PW2 with

respect to the transaction.

5. I have carefully considered the arguments advanced by the learned counsel. In the light of the arguments advanced by the learned counsel and in the light of the findings of the trial court, the question to be considered is whether the petitioner has succeeded in making out of a case so as to grant special leave of this court u/s.378(4) of Cr.P.C. In the present case, the crux of the allegation is that the accused received a sum of Rs.80,000/- from the complainant and towards the discharge of the said liability, the accused issued two cheques which bear the same date. Absolutely, there is no evidence to establish the above transaction except the interested version of PW1 and 2. In this juncture, it is relevant to note that accused got a specific case to the effect that and he admitted that he used to borrow money from the complainant and the same being repaid in time with interest. The above version of the accused is also admitted by PW1. With respect to the present transaction according to the accused, the amount involved is only 5,000/-. At the time of obtaining the amount he had issued two cheques as security and because of the payment of PW1 for interest at the rate of 5% which was not amenable to the accused, the cheque in question are not returned to the accused and misusing the said cheques

the present complaint is filed. When PW1 was examined, as correctly observed and recorded by the learned Magistrate, she had admitted;

"അതിന്റെ ഉറപ്പിലേയ്ക്ക് ഓരോ തവണയും ചെക്ക് ലീഫുകൾ വാങ്ങി വെച്ചിട്ടുണ്ട്. Adds. ഈ 80,000/- നാണ് ഈ ചെക്ക് ലീഫ് വാങ്ങി വെച്ചത് . മുൻപത്തതിന് ചെക്ക് വാങ്ങിയിട്ടില്ല."

However, it is because of the above version of PW1, the learned Magistrate opted to accept the defence version and rejected the claim of the complainant. The trial court, who got the opportunity to evaluate the evidence and to assess the demeanour of the parties to the proceedings and came into a conclusion that the accused has succeeded in rebutting the presumption. It is relevant to note that even though, the case of the complainant is that the accused borrowed a sum of Rs.80,000/-, I am unable to understand as to why two cheques bearing same date were issued to the complainant, for which absolutely there is no explanation. The absence of any such explanation has to be considered in the light of the admission of PW1, who says that she used to obtain blank cheque leaf as security for the amount released by herself. Thus the above admission is consistent with the defence version. In Dattatraya's case, the apex court has

held that in order to discharge the burden of rebutting the presumption, the accused need not enter into the box and that burden can be discharged by making out a probable case from the materials available on record and from the circumstances involved the case. So in the light of the above settled legal position and in view of the facts and circumstance involved in this case, and especially in the light of the evidence of PW1, I am of the view that the learned Magistrate is perfectly justified in holding that the accused has rebutted the presumption u/s.139 of the NI Act. If that be so, even if an appeal is entertained, there is no scope for any interference with respect to the findings of the court below and as there is no compelling or substantial reason to interfere with the order of acquittal and to reverse the same. Thus according to me, the petitioner is miserably failed to make out a case, so as to get special leave of this court 378(4) of Cr.P.C.

In the result, there is no merit in the petition and accordingly, the same is dismissed, declining the request for special leave.

**V.K.MOHANAN,
JUDGE.**

pm/