

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE V.K.MOHANAN**

**THURSDAY, THE 22ND SEPTEMBER 2011 / 31ST BHADRA 1933**

**Crl.L.P..No. 849 of 2011()**

**CC.109/2010 of SPL.J.M.F.C. ( MARADU CASES),KOZHIKODE**

**PETITIONER/COMPLAINANT**

**M/S.ACE FINLEASE (P) LTD,(AGENT:INDIAN OVERSEAS BANK)  
LEELA TOWERS, KALLAI ROAD, KOZHIKODE- 673002,  
A COMPANY REPRESENTED BY ITS POWER OF  
ATTORNEY HOLDER K.GIRISHAN, S/O.LATE K.BHASKARAN  
AGED 55, RESIDIGN AT "GREENS" NEAR WATER TANK,  
PUTHIYARA, CALICUT-673004.**

**BY ADV. SRI.SRINATH GIRISH  
SRI.E.NARAYANAN**

**RESPONDENTS:**

**1. VEERANKUTTY,S/O.MUHAMMED, AGE NOT KNOWN  
PATHATH HOUSE, KARUVABBALAM P.O.,KOLATHUR,  
MALAPPURAM-679338**

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

**R2 BY P.P. SRI K.S. SIVAKUMAR.**

**THIS CRIMINAL LEAVE PETITION HAVING BEEN FINALLY HEARD  
ON 22/09/2011, THE COURT ON THE SAME DAY PASSED THE  
FOLLOWING:**

**V.K.MOHANAN, J.**

-----  
**Crl.L.P.No. 849 of 2011**  
-----

Dated the 22<sup>nd</sup> day of September, 2011

**ORDER**

The complainant in a prosecution for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the N.I.Act') is the petitioner herein, who seeks special leave under Section 378(4) of the Criminal Procedure Code (for short 'the 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 under section 255 (1) of Cr P.C.

2. The case of the complainant is that it is a company and the agent of the Indian Overseas Bank and is authorized to enter into all such transactions and obtain payment of all amounts due to the said bank, and for taking legal proceedings for the same. According to the complainant, the accused has entered into hypothecation/loan agreement No.IOB 095 with Indian Overseas Bank regarding a vehicle, through the complainant company. Thus according to the complainant, the accused defaulted in payment of the instalments connected with the vehicle loan and on demands made by the complainant's employees, the

accused came to the office of the complainant at Calicut and issued a cheque dated 10.10.2009 drawn on Indian Overseas Bank, Perinthalmanna Branch for Rs.64,728/-, being the full amount due on the vehicle. According to the complainant, when the said cheque presented for encashment, the same was dishonoured for the reason of insufficient funds in the account maintained by the accused and the accused has not paid the cheque amount in spite of a statutory notice sent by the complainant. Thus according to the complainant, the accused has committed the offence punishable under section 138 of the N.I.Act. With the above allegation, by filing a complaint, the complainant approached the court of Chief Judicial Magistrate, Kozhikode whereupon cognizance was taken and subsequently the case was made over to the present trial court wherein it is taken on file as C.C.No.109 o 2010. During the trial, PW1 was examined from the side of the complainant and produced Exts.P1 to P7 documents. No evidence, either oral or documentary was produced from the side of the accused. After considering the entire evidence and materials, the trial court came into the conclusion that the complainant

has failed to prove the cheque which is drawn by the accused, as alleged in the complaint and accordingly held that the complainant has not succeeded in bringing home the guilt of the accused and consequently found that the accused is not guilty of the offence punishable under section 138 of the Act. Thus he is acquitted under section 255(1) Cr.P.C. It is the above findings and order of acquittal sought to be challenged by filing an appeal for which leave of this court is sought under section 378(4) Cr.P.C.

3. I have heard Sri E.Narayanan, the learned counsel appearing for the petitioner and I have perused the judgment of the trial court.

4. Counsel for the petitioner vehemently submitted that the accused had admitted the execution and issuance of the cheque and therefore, the findings of the trial court is against the facts and circumstances involved in this case. It is also the submission of the learned counsel that as per Ext.P7 agreement, the complainant is authorised to obtain payment of all amounts due to the Overseas bank, being the agent of the said bank and also to take legal proceedings for the same. It is also

the further submission of the learned counsel that in order to attract the penal liability under section 138 of the NI Act, there need not be any brevity of contract especially in the this particular case because of Ext.P7 agreement. It is also the submission of the learned counsel that though Ext.P2 cheque contained the seal of the complainant company in the space provided for showing the payee's name, there is no cross examination from the part of the accused as to under what circumstances the seal of the company was affixed on Ext.P2 cheque. Therefore the observation and findings of the learned Magistrate that contained in paragraph 11 of the trial court judgment, particularly regarding the handwriting contained in the cheque are absolutely incorrect and liable to be rejected.

5. On a perusal of the judgment of the trial court, it can be seen that the learned Magistrate has specifically observed that PW1 who was examined for and on behalf of of the complainant has no direct knowledge regarding the transaction as claimed by the complainant and PW1 was not present at the time when the accused signed the loan agreement. The trial court has also observed that admittedly, there is no evidence

to show that it was the complainant who had given the loan to the accused or any transaction that had taken place between the complainant and the accused because PW1, during cross examination, has stated that the accused used to make payment to the account of the accused with the Indian Overseas bank and thereafter issued the cheque for instalments payment to the complainant. It was also observed by the learned Magistrate that when PW1 was examined he had also deposed before the court that it was the complainant company released the loan amount in favour of the accused. Moreover the trial court further found that in Ext.P2 cheque, the space where the payee's name is to be entered, name of the complainant is affixed using a seal of the complainant. In the light of the above arguments of the learned counsel for the petitioner and in view of the findings of the trial court based upon the materials referred to above, the question to be considered is whether the petitioner has succeeded in making out a case so as to grant leave under section 378(4) Cr.P.C to file an appeal against the judgment of the trial court. In the present case, the specific defence taken by the accused is to

the effect that the accused has not entered into any monetary transaction with the complainant and the loan was taken by the accused from Indian Overseas Bank, Perinthalmanna branch and the accused had not executed and issued the cheque to the complainant. According to the accused, no intimation was given to the accused that the complainant is an agent of the Indian Overseas Bank and the cheque was to be given to the complainant. It is the further case of the accused that the entire amount was paid connected with the transaction with the Indian Overseas bank.

6. The specific case of the complainant is to the effect that the complainant company was given the authority, being the agent of Indian Overseas Bank, to enter into all transactions and obtain payment of all amounts and taking legal proceedings for realisation of the amount which are due. Thus, according to the complainant, the accused defaulted in payment of the instalments and on demand made by the complainant, the accused came to the office of the complainant at Calicut and issued cheque dated 10.10.2009 drawn on Indian Overseas Bank, Perinthalmanna branch for

Rs.64,728/-. Among the documents produced by the complainant, Ext.P1 is the certified copy of the power of attorney in favour of PW1. Ext.P2 is the cheque in question and Ext.P3 is the dishonour memo. Ext.P4 copy of the lawyer notice, Ext.P4(a) the postal receipt. Ext.P4(b) the unserved notice, Ext.P5 the copy of resolution and Ext.P6 the extract of ledger account maintained by the complainant were also marked. Ext.P7 is the copy of agreement dated 27.10.2010 which is the agreement allegedly executed by the complainant, Indian Overseas Bank and the accused, making the complainant as the agent of the Indian Overseas Bank. No document is produced by the complainant showing that the complainant has issued notice to the accused intimating him the due amount. So to substantiate the claim of the complainant that a formal demand was made towards the discharge of the arrears, there is no documentary evidence though the complainant is a company keeping the documents connected with its daily business. The person who was examined on behalf of PW1 has no direct knowledge regarding the dealings. Thus absolutely there is no evidence to show



that the accused came and issued the cheque, after having its due execution, in favour of the complainant company.

7. The learned counsel for the petitioner after inviting my attention to ground No.(H) in the memo of the leave petition submitted that the learned Magistrate did not permit to mark the certified extract of bills of the transaction with respect to the the Savings Bank Account maintained by the accused with the Indian Overseas Bank, which would show the entire transactions between the accused and the Indian Overseas Bank. Having regard to the facts and circumstances involved in this case, according to me, ground No.H has no relevance especially when the accused admitted his transaction with the Indian Overseas Bank. Thus there is no evidence to show that the accused came to the office of the complainant at Calicut and executed and issued the cheque in question.

8. It is also relevant to note that Ext.P2 cheque contained the seal of the complainant company. In paragraph 11 of the impugned judgment, the trial court has observed : " Perusal of the cheque also fortifies the case advanced by the

accused. The space where payee's name is to be entered , name of the complainant is affixed using a seal of the complainant. It is unheard that a drawer would obtain seal of the payee and affix the same on the cheque''. The above observation and findings of the learned Magistrate, according to me, is in consonance with the reasonable mind of a prudent man. In the absence of any direct and acceptable evidence in support of the claim of the complainant that the accused came to the office of the complainant at Calicut and executed the cheque and issued the same , the fact that Ext.P2 cheque contained the seal of the complainant would show that the same is in par with the probable case set up by the accused that the cheque in question is the one which was entrusted with the Indian Overseas Bank with whom the accused has got hypothecation agreement. The learned counsel for the petitioner submitted that the accused did not cross examine PW1 as to how and under what circumstances Ext.P2 cheque bears the seal of the complainant. According to me, as far as the defence is concerned, the facts and circumstances does not warrant such

a cross examination as suggested by the counsel for the petitioner, especially, when PW1 did not venture to offer any explanation as to how the seal of the complaint company seen in Ext.P2. It appears to me that, without any attempt to cross examine PW1, on the above aspect, the defence had succeeded in strengthening its probable case that the cheque was not executed and issued by the accused, but the same was obtained by the complainant bank from the Indian Overseas Bank and thereafter put the complainant's seal, which is within the exclusive possession of the complainant. In the light of the above facts and circumstances and the materials referred to above, according to me, the accused has succeeded in making out a case as to how Ext.P2 cheque reached in the possession of the complainant, especially, when there is no direct transaction between the complainant and the accused. That being the position, even if leave is granted there is no scope for any interference with the findings arrived on by the court below and there is no scope to interfere with the order of acquittal recorded by the trial court. Therefore according to me, the petitioner has miserably failed to make out a case so as to

grant leave under Section 378(4) Cr.P.C as sought for.

In the result, this Crl.L.P is dismissed.

**V.K.MOHANAN,  
JUDGE**

kvm/-

CRLP 849/11

-12-