Prakasan. K. Vs. K.Shereff

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Court : Kerala

Decided On : Nov-12-2013

Judge : Honourable Mr.Justice V.K.Mohanan

Appellant : Prakasan. K.

Respondent : K.Shereff

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN TUESDAY, THE12H DAY OF NOVEMBER201321ST KARTHIKA, 1935 CRL.A.No. 264 of 2008 (C) -------------------------- AGAINST THE

ORDER
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JUDGMENT
IN C.C.No.143/2005 of J.M.F.C.-I, CHERTHALA DATED2811-2007 Crl.L.P. 93/2008 of HIGH COURT OF KERALA DATED2901/2008 APPELLANT/COMPLAINANT: -------------------------- K.PRAKASAN, S/O. (LATE) KARUNAKARAN, SAIJAS, WARD No.6, VAYALAR PANCHAYAT, VAYALAR P.O., CHERTHALA. BY ADV. SRI.ABRAHAM VAKKANAL (SR.) RESPONDENTS/ACCUSED & STATE: -------------------------------- 1.ANJILICHIRA S/O. BAVAKUNJU, K.SHEREFF, CHERTHALA.VEEDU, WARD No.6, VAYALAR

PANCHAYAT, 2.THE STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. R1 BY ADV. SRI.JOHN JOSEPH(ROY) R1 BY ADV. SRI.G.N.NAIR R2 BY PUBLIC PROSECUTOR SRI.N.SURESH THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON1211-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: V.K.MOHANAN, J.

------------------------------------ Crl.A.No.264 of 2008 -------------------------------------- Dated this the 12th day of November, 2013

JUDGMENT
The complainant in a prosecution for the offence punishable under Section 138 of the N.I. Act is the appellant, as he is aggrieved by the judgment dated 28/11/2007 in C.C.No.143 of 2005 of the court of the Judicial First Class Magistrate-I, Cherthala, by which the learned Magistrate acquitted the accused under Section 255(1) of Cr.P.C.

2. The case of the complainant is that, himself and the accused are neighbours and at about 9 A.M. on 20/6/2004 the accused came to the office of the complainant and requested for a loan of `5,00,000/- for purchasing a new bus and on the representation made by the accused that he is having sufficient cash balance account in his bank account and he was unable to withdraw the amount on that particular day and promised to issue a cheque for discharging such liability, the complainant went to his residence and brought Rupees Five lakhs and handed over the same to the accused and Crl.A.No.264 of 2008 :-2-: simultaneously the accused issued a cheque dated 20/6/2004 for Rupees Five lakhs and when the said cheque presented for encashment, the same was dishonoured, for the reason insufficiency of fund in the account maintained by the accused and though the complainant caused to send a notice to the accused demanding him to pay the amount covered by the dishonoured cheque and though he received the same, no amount was paid and therefore, according to the complainant, the accused has committed the offence punishable under Section 138 of the N.I. Act.

3. With the above allegation, the complainant preferred a complaint before the court below upon which cognizance was taken for the offence punishable under

Section 138 of the N.I. Act and during the trial of the case, from the side of the complainant, himself was examined as PW.1 and Exts.P1 to P14 documents were produced. From the side of the accused DWs.1 and 2 were examined and Exts.D1 to D6 were marked. The trial court finally found that the complainant has miserably failed to prove the due execution of Ext.P1 cheque by the Crl.A.No.264 of 2008 :- 3-: accused and the genuineness and authenticity of Ext.P11 also could not be proved by the complainant with independent witnesses and thus found the complainant has failed to prove the execution of Ext.P1 cheque and thus the accused found not guilty of the offence under Section 138 of the N.I. Act and accordingly he is acquitted under Section 255(1) of Cr.P.C. It is the above finding and order of acquittal that are challenged in this appeal.

4. Heard Sri.Abraham Vakkanal, the learned counsel for the appellant and Sri.John Joseph, the learned counsel for the 1st respondent/accused.

5. The learned counsel for the appellant vehemently submitted that the accused has admitted his signature in Ext.P1 cheque as well as in Ext.P11 receipt and therefore the complainant is entitled to get statutory presumption under Section 139 of the N.I. Act. But, the learned Magistrate of the trial court failed in extending such statutory benefit in favour of the complainant on an erroneous ground particularly holding that there was delay in producing cheque for Crl.A.No.264 of 2008 :-4-: encashment and the mere presence of signature of the accused in the cheque is not sufficient to prove the execution of the cheque. According to the learned counsel, the learned Magistrate went wrong in holding that the complainant has not established his source to release an amount of Rupees Five lakhs in favour of the accused and holding that non- examination of one Soman who was present at the time of the alleged transaction are fatal to the complainant. So, according to the learned counsel, the findings of the court below on the above grounds are incorrect and unwarranted especially in the light of the decision reported in Hiten P.Dalal Vs. Bratindranath Banerjee [(2001)6 SCC page 16].

6. Per contra the learned counsel for the respondent/accused on the strength of the decision reported in Gopan Vs. Tonny Varghese [2008(1)KLT257], Kamalammal Vs. Mohanan [2006(3)KLT972], submitted that mere admission of

signature on the cheque in question are not sufficient to attract Section 138 of the N.I. Act. According to the learned counsel, the entire transaction claimed by the Crl.A.No.264 of 2008 :-5-: complainant properly considered by the trial court and found the same are unbelievable and unacceptable. Thus, according to the learned counsel in the given facts and circumstances of the case, the complainant has miserably failed to prove his case against the accused beyond reasonable doubt and therefore the finding of the court below requires no interference and the appeal is liable to be dismissed.

7. I have carefully considered the contentions advanced by the learned senior counsel for the appellant and the learned counsel for the 1st respondent/accused. I have also perused the evidence and materials on record and the authorities cited.

8. Having regard to the facts and circumstances involved in the case and in the light of the evidence and materials on record and especially in view of the rival contentions advanced, the question to be considered is, whether the trial court is justified in its finding and acquitting the accused and further question to be considered is, whether the appellant has succeeded in establishing that the findings of the court is perverse or illegal so as to interfere in appeal. At Crl.A.No.264 of 2008 :-6-: the out set, it is to be noted that the complainant in the present case is none other than a practising lawyer and the accused in the present case is a worker in a meat shop though the complainant alleged that he is the meat store owner and a bus operator. The case of the complainant is that, on 20/6/2004 the accused approached him at about 9 A.M. demanding a hand loan of Rupees Five lakhs since he is in urgent need to purchase a bus for which, amount is required and out of the friendship between the complainant and the accused he arrived for the same, he went to his house and brought an amount of `5,00,000/- which he raised for purchasing a land property and that too from his friends and relatives and thus handed over the same to the accused and the accused simultaneously issued Ext.P1 cheque for the said amount. It is the further case of the complainant that he was made believe by the accused that he is having sufficient bank balance in his account and on that day he was unable to withdraw the amount and the complainant can present the cheque on the next working day

of the bank and according to the Crl.A.No.264 of 2008 :-7-: complainant, believing the words of the accused, he advanced the amount. But the specific case of the accused is that there was no such transaction as claimed by the complainant and he did not avail any such huge amount from the complainant and according to the accused, Ext.P1 cheque is the one, which he entrusted it its blank form with the complainant, when he availed a sum of `25,000/-, during the year 2000 and the said cheque misused by the complainant for the purpose of filing the present case. It is the above two rival contentions considered by the trial court in the light of the evidence and materials on record and found that the complainant has not succeeded in proving its case against the accused beyond reasonable doubt.

9. I have gone through the evidence of the complainant including the chief affidavit filed in lieu of chief-examination and the deposition made by him during the cross-examination. In this case it is relevant to note that, even though the case of the complainant, which I mentioned above, in the present case Ext.P1 cheque was presented only on 15/12/2004 inspite of the Crl.A.No.264 of 2008 :-8-: complainant that he handed over the amount of `5,00,000/- on 20/6/2004, accepting the version of the accused that the cheque can be presented on the next day since there was sufficient fund in the account of the accused, which he could not taken the same on that day, no convincing reason assigned by the complainant for not presenting the cheque immediately after on any near date, from the date of the transaction. Of course, the complainant by producing Ext.P14 document made an attempt to show that he was laid up and admitted in an hospital on 21/6/2004. But, according to me, the above evasive explanation cannot be accepted. The amount involved is `5,00,000/- and the cheque in question is also for `5,00,000/-. If the case of the complainant is true and correct, the cheque could have been presented on 21/6/2004 itself. If the complainant was not physically well, the cheque could have been presented through his agency or his friends, or his family members but that was not done. For not presenting the cheque on 21/6/2004 or on the next day after the transaction, only version is that he was laid up which according to me, is Crl.A.No.264 of 2008 :-9-: not acceptable, for the aforesaid reason.

10. In this juncture it is also relevant to note that, as per Ext.P10 notice dated 18/10/2004 a copy of which is also marked as defence evidence as Ext.D2,

requested the complainant for returning the blank cheque. Though the complainant received the said notice as per Ext.D3 acknowledgment card dated 25/10/2004, the complainant did not present cheque either on 25/10/2004 or on the next date, but presented Ext.P1 cheque only on 15/12/2004 after nearly two months from the date of Ext.D3. For the delayed presenting of Ext.P1 cheque for encashment even after Ext.D3, no convincing explanation offered. The facts thus show that Ext.P1 was presented towards the fag end of six months, i.e. towards the expiry of currency of Ext.P1 cheque. As I indicated earlier Ext.P1 cheque is for an amount of `5,00,000/- and at least on the basis normal rate of interest an amount of `5,000/- will get per month towards interest. So, the above facts and circumstances render the case of the complainant as unbelievable and unacceptable and the trial court rightly Crl.A.No.264 of 2008 :-10-: disbelieved the case of the complainant.

11. One of the contentions advanced by the learned counsel for the appellant is that the appellant is entitled to get presumption under Section 139 of the N.I. Act, but the trial court did not extend that statutory benefit in favour of the complainant/appellant. According to me, in the present case the complainant is not entitled to get such benefit since he had failed to establish the execution and handing over of the cheque in question and mere presence of the signature of the accused on Ext.P1 cheque itself is not sufficient to draw the statutory presumption. A Division Bench of this Court in the decision reported in Devan Vs. Krishna Menon [2010 (2) KLT397 has held :- "Once the signature, execution and handing over of the cheque is satisfactorily proved, presumption under Section 139 would come into play and remain there until the accused discharge the burden by inferior standard of preponderance of possibilities and probabilities as applicable in civil law." As rightly pointed out by the learned Magistrate in the present case, to prove the execution and handing over of Crl.A.No.264 of 2008 :-11-: the cheque except the interested version of the complainant whose version is already found as unbelievable, there is no independent or documentary evidence. Suffice to say, even according to the complainant at the time of the transaction one Soman was present in his office, but even the said Soman is not examined. The explanation offered by the learned counsel for the appellant is that even if the said Soman is examined, he will be treated only as an interested witness. I am unable to endorse

such submission. It is for the court to consider whether the evidence given by a witness is an interested one or whether any legal implements in accepting his evidence, etc. So, to prove the execution of Ext.P1 cheque and handing over the same by the accused, as alleged by the complainant, there is no satisfactory evidence and the complainant has not discharged his burden in proving the same and therefore, the statutory presumption is not available in favour of the complainant in the present case.

12. It is also pertinent to note that, even for a moment it is taken that the complainant has proved the execution and Crl.A.No.264 of 2008 :-12-: handing over of the cheque, according to me, the attending circumstance in the present case shows that the accused had succeeded in rebutting the presumption. As I indicated earlier, there is no convincing explanation for not presenting the cheque immediately after the alleged transaction which allegedly took place on 20/06/2004. The explanation offered by the complainant for the belated presenting of the cheque on 15/12/2004 is not believable. The Hon'ble Apex Court in the decision in Krishna Janardhan Bhat v. Dattatraya Hegde [2008(1)KLT425(SC)], has held "an accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on records." In paragraph 25 of the above decision the Hon'ble Apex Court has held "Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstances upon which he relies." Further in paragraph 26 in the very same decision it is held:- "A statutory presumption has an evidentiary value. The question Crl.A.No.264 of 2008 :-13-: as to whether the presumption whether stood rebutted or not, must, therefore, be determined keeping in view the other evidences on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration." So, according to me, even if the presumption is available in favour of the complainant by the conduct of the complainant which proved in the case, the accused has rebutted the presumption. In the light of the above facts and circumstances and the evidence and materials referred to above, I am of the view

that the trial court is fully justified in its finding and acquitting the accused.

13. The Hon'ble Apex Court in a recent decision in Mokkiah & Anr. Vs. State, Rep. by the Inspector of Police, Tamil Nadu [2013 (1) Supreme 88], has held as follows:- "8. In a recent decision in Murugesan & Crl.A.No.264 of 2008 :-14-: Ors. vs. State Through Inspector of Police, 2012 (10) SCC383 one of us Ranjan Gogoi, J.

elaborately considered the broad principles of law governing the power of the High Court under Section 378 of the Code of Criminal Procedure while hearing the appeal against an order of acquittal passed by the trial Judge. After adverting to the principles of law laid down in Sheo Swarup vs. King Emperor, AIR 1934 PC227(2) and series of subsequent pronouncements in para 21 summarized various principles as found in para 42 of Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC415as under: .... "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge: (1) An appellate court has full power to review, re-appreciate and re-consider the evidence upon which the order of acquittal is founded. (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law. (3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', very strong circumstances', Crl.A.No.264 of 2008 :-15-: 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion. (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court." (emphasis supplied). So, on examination of the facts and circumstances involved in the case and in the light of the above decision it can be seen that the appellant has miserably failed to make Crl.A.No.264 of 2008 :-16-: out any compelling circumstances or substantial reason to interfere with the findings of the court below and to disturb the double presumption of innocence secured by the accused in the light of the impugned judgment. So, the appellant has miserably failed to make out any ground to interfere with the order of acquittal recorded by the trial court in favour of the accused. In the result, there is no merit in this appeal and accordingly the same is dismissed. V.K.MOHANAN, JUDGE skj True copy P.A. to Judge