

Roy Thomas, vs Vipin T.,

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Court : Kerala

Decided On : Jul-22-2024

Judge : Honourable Mr.Justice K. Babu

Appeal No. : CRL.A/1375/2019

Appellant : Roy Thomas,

Respondent : Vipin T.,

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU MONDAY, THE 22ND DAY OF JULY 2024 / 31ST ASHADHA, 1946 CRL.A NO. 1375 OF 2019 AGAINST THE ORDER/JUDGMENT DATED IN CrI.L.P. NO.459 OF 2019 OF HIGH COURT OF KERALA ARISING OUT OF THE ORDER/JUDGMENT DATED IN CC NO.157 OF 2014 OF JUDICIAL MAGISTRATE OF FIRST CLASS -VI, THIRUVANANTHAPURAM APPELLANT/S: ROY THOMAS, AGED 41 YEARS S/O.THOMAS, MANICKATHINAL HOUSE, T.C.8/38(1), TBRA 24, LIC LANE, THIRUMALA P.O., THIRUVANANTHAPURAM. BY ADV BONNY BENNY RESPONDENT/S:

1 VIPIN T., AGED 38, S/O.THULASEEDHARAN NAIR K., SHOBA NIVAS, UMRA - 219, T.C.NO.24/1245/1, JYOTHIPURAM LANE, VALIYASALA, CHALAI P.O., THIRUVANANTHAPURAM - 695 036. 2 STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM - 682 031. BY ADV ADITHYA RAJEEV THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 22.07.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: .2.. K. BABU, J
----- Crl Appeal No.1375 of 2019
----- Dated this the 22nd day of July, 2024 The challenge in this appeal is to the judgment dated 29.09.2018 in C.C.No.157 of 2014 passed by the Judicial First Class Magistrate Court-VI, Thiruvananthapuram. The appellant is the complainant. Respondent No.1 is the accused.

2. The complainant filed a complaint alleging

offence punishable under Section 138 of the Negotiable Instruments Act. The case of the complainant is that the accused executed a cheque for Rs.4,50,000/- (Four Lakhs and Fifty Thousand Only) drawn on the Bank of Baroda, Palayam Branch, Thiruvananthapuram in favour of the complainant. The cheque was dishonoured due to insufficient funds in the account of the accused. .3..

3. The complainant caused to issue statutory notice, but the accused failed to repay the amount covered by the cheque.

4. The complainant gave evidence as PW1 and proved Exts.P1 to P6. The accused gave evidence as DW1 and proved Exts.D1 to D5. The trial Court acquitted the accused.

5. I have heard Shri. Bonny Benny, the learned counsel for the appellant/complainant, Shri. Adithya Rajeev, the learned counsel for respondent No.1/accused and the learned Public Prosecutor.

6. The learned counsel for the complainant

submitted that the complainant has established execution of Ext.P1 cheque by the accused, and therefore, the mandatory presumption as provided under Section 139 of the NI Act has drawn in his favour. The learned counsel further submitted that the finding of the trial Court that .4.. the accused has succeeded in rebutting the presumption drawn in favour of the complainant is against the settled principles of law.

7. The learned counsel for the accused submitted that Ext.P1 cheque was given to the wife of the accused to meet the household expenses and she misutilised the same when their family relationship got strained. The learned counsel for the accused submitted that the complainant failed to establish the capacity to pay the amount covered by the cheque at the time of the alleged transaction. It is further submitted that at the very first opportunity, through Ext.P5 reply, the accused had taken

the defence that the transaction pleaded by the complainant was false. The learned counsel also contended that the accused could rebut the presumption drawn in favour of the complainant satisfying the standard of preponderance of probabilities. .5..

8. The case of the complainant (PW1) is that he

and the accused were friends, and the latter borrowed a sum of Rupees Two Lakhs on 04.07.2012 and another Two Lakhs and Fifty Thousand on 05.08.2012 and in discharge of this legally enforceable debt, he issued a cheque for Rs.4,50,000/-. The complainant gave evidence that he was working as an employee in a Film Distribution Company. He was drawing Rs.10,000/- as monthly salary.

9. The defence raised by the accused is that he signed Ext.P1 and handed over to his wife for meeting

their household expenses. The accused denied the execution of the cheque as pleaded by the complainant. It is the case of the accused that the relationship between him and his wife strained and thereafter his wife misutilised Ext.P1

cheque to institute this complaint alleging false things. .6..

10. Ext.P1 was drawn from the account of the accused. He admitted his signature in the cheque. The complainant gave evidence that the accused issued Ext.P1 cheque in his favour.

11. A negotiable instrument, including the cheque, carries the presumption in consideration in terms of Sections 118(a) and 139 of the Negotiable Instruments

Act. Dishonour of a cheque carries a statutory presumption of consideration. The holder of the cheque in due course is only required to prove that the cheque was issued by the accused and that when the same was presented, it was not honoured. Since there is a statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or other liability. The evidence of the complainant together with the admission of his signature in Ext.P1 by the accused would lead to

.7.. the conclusion that the complainant has established the execution of Ext.P1 cheque by the accused.

12. Now, the question that arises for consideration is

whether the accused could successfully get the presumption rebutted. A presumption is an inference as to the existence of a fact not actually known arising from its connection with another which is known. A

presumption is a conclusion drawn from the proof of facts

or circumstances and stands as establishing facts until

overcome by contrary proof. Analysing the terms proved and disproved as provided in Section 3 of the Evidence Act, a court shall presume a Negotiable Instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non- existence of the consideration so probable that a prudent man ought, under the circumstances of the particular

.8.. case, to act upon the supposition that the consideration does not exist. The necessary conclusion is that for rebutting such a presumption, what is needed is to raise a probable defence. All the circumstances, including the evidence adduced on behalf of the complainant, could be relied upon.

13. In *Hiten P. Dalal v. Bratindranath Banerjee*

[(2001) 6 SCC 16], a three-judge Bench of the Supreme Court, on the scope of Sections 138 and 139 of the Negotiable Instruments Act, held that the obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non- existence of the presumed fact. In *Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal* [(1999) 3 SCC 35], while considering the presumption under Section 118(a) of the Negotiable Instruments Act, the Supreme

.9.. Court held that the defendant can prove the non- existence of a consideration by raising a probable

defence. The Supreme Court observed that if the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the complainant, who would be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the Negotiable Instrument. The Supreme Court further observed that the burden upon the defendant of proving the non-existence of the consideration can be either directly or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies.

14. In *Harbhajan Singh v. State of Punjab* [AIR 1966 SC 97], the Supreme Court, while considering the .10..

nature and scope of onus of proof which the accused was required to discharge in a criminal case, held that the onus on an accused person might well be compared to the onus on a party in civil proceedings, and just as in civil proceedings the court trying an issue makes its decision by adopting the test of probabilities. In *V.*

D. Jhingan v. State of Uttar Pradesh (AIR 1966 SC 1762), the Supreme Court held that it is well established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. In Rajaram S/o.Sriramulu Naidu (Since Deceased) through L.Rs. v. Maruthachalam (Since Deceased) through L.Rs. (2023 LiveLaw (SC) 46) = [2023 SCC OnLine SC 48] , the Supreme Court held that the standard of proof for rebutting the presumption is that of preponderance of probabilities, and it is open for the accused to rely on the

.11.. evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence.

15. The principle that emerges from the above

discussion is that the rebuttal does not have to be conclusively established, but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of responsibility being that of the prudent man.

16. In M.S.Narayana Menon v. State of Kerala [(2006) 6 SCC 39], the Supreme Court has elaborately considered the question of the standard of proof for

rebutting the mandatory presumption drawn under Section 139 of the Negotiable Instruments Act. In Narayana Menon, the Supreme Court held that if some material is brought on record consistent with the .12..

innocence of the accused, which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal. The Supreme Court further held that it is not necessary for the accused to disprove the existence of consideration by way of direct evidence and that the standard of proof evidently is preponderance of probabilities.

17. In Basalingappa v. Mudibasappa [AIR 2019

SC 1983] the Supreme Court observed that when there is no satisfactory explanation for the financial capacity of the complainant to pay a sum of Rupees

Six Lakhs to the accused it is a probable defence on behalf of the accused which shifted the burden on the complainant to prove his financial capacity. In *APS Forex Service Private Limited v. Shakti International Fashion Linkers* [AIR 2020 SC 945], the Apex Court held that whenever the accused has questioned the financial capacity of the .13.. complainant in support of his probable defence, despite the presumption under Section 139 of N.I. Act about the presumption of legally enforceable debt and such presumption is rebuttable, the onus shifts on the complainant to prove his financial capacity and at that stage the complainant is required to lead the evidence to prove his financial capacity more particularly when it is a case of giving loan by cash and thereafter issuance of cheque.

18. In *Sunitha v. Sheela Antony* (Crl.R.P.No. Supreme Court in *Basalingappa v. Mudibasappa* (Supra), this Court observed thus:-

27. In my view, the crux of the decisions referred to above is the following: The complainant has no obligation, in all cases under Section 138 of the Act, to prove his financial capacity. But, when the case of the complainant is that he lent money to the accused by cash and that the accused issued the cheque in discharge of

.14..

the liability, and if the accused challenges the financial capacity of the complainant to advance the money, despite the presumption under Section 139 of the Act, the complainant has the obligation to prove his financial capacity or the source of the money allegedly lent by him to the accused. The complainant has no initial burden to prove his financial capacity or the source of the money. The obligation in that regard would arise only when his capacity or capability to advance the money is challenged by the accused.

19. Now, I turn to consider whether the accused has succeeded in rebutting the presumption drawn in favour of the complainant.

20. The accused had at the earliest opportunity by way of Ext.P6 reply to the statutory notice

challenged the consideration of Ext.P1 cheque. He took the stand that Ext.P1 cheque had been given to his wife in blank form to meet their household expenses. According to the accused, he is now living separately from his wife. The accused relied on .15.. Exts.D1 to D4 to support his contention that he is living separately from his wife and that their relationship got strained.

21. While examining in cross, the complainant

stated that he was an employee in a film distribution company earning a monthly salary of Rs.10,000/-. It is his case that he lent Rs.2,00,000/- on 04.07.2012 and Rs.2,50,000/- on 05.08.2012 to the accused. His case is that he paid the loan by cash. He is not an income tax assessee. He miserably failed to establish his source of income to advance money as pleaded.

22. The accused has succeeded in discharging his initial onus of proof showing that the existence of consideration was doubtful.

23. It is trite that the complainant has no initial burden to prove his financial capacity or the source of money to lend the amount covered by the cheques, but .16.. the onus shifts to the complainant when his capacity and capability to advance the money is challenged by the accused.

24. In the present case, the accused challenged

the financial capacity of the complainant to lend an amount of Rs.4,50,000/- as pleaded. He has also led a probable defence that Ext.P1 cheque had been given to his wife which was misutilized by her when their relationship got strained. Therefore, I am of the view that the defence raised by the accused satisfies the standard of preponderance of probability.

25. I have gone through the appreciation of evidence by the trial Court. I find it difficult to hold

that the appreciation of evidence is perverse. In *Rajaram S/o Sriramalu Naidu (Since Deceased) Through LRS v. Maruthachalam (Since Deceased Through LRS.)* (Supra), the Supreme Court held that .17.. the scope of interference in an appeal against acquittal is limited and unless the Appellate Court found that the appreciation of the evidence is perverse, it could not have interfered with the finding of acquittal recorded by the Trial Court.

26. In the instant case, the complainant failed to give satisfactory explanation for the suspicious circumstances brought out regarding the

consideration of Ext.P1 cheque. The trial Court held

that the complainant failed to prove that Ext.P1

cheque was issued in discharge of a legally

reasoning recorded by the trial Court for acquitting the accused was possible and plausible and no interference is required. .18.. The appeal lacks merits and is accordingly dismissed. Sd/- K.BABU, JUDGE kkj

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