

Thomas Augustine vs Mr. Jayakumar E.a

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Court : Kerala

Decided On : Aug-25-2023

Judge : Honourable Mr.Justice V.G.Arun

Appeal No. : CRL.A/704/2020

Appellant : Thomas Augustine

Respondent : Mr. Jayakumar E.a

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE V.G.ARUN FRIDAY, THE 25TH DAY OF AUGUST 2023 / 3RD BHADRA, 1945 CRL.A NO. 704 OF 2020 AGAINST THE ORDER/JUDGMENT CC 3553/2016 OF JMFC(SPECIAL COURT) FOR TRIAL OF SEC.138, NI ACT CASES APPELLANT/COMPLAINANT: THOMAS AUGUSTINE,AGED 53 YEARS,S/O.P.J.AUGUSTINE, FLAT NO.4-D, RDS NEDUNGADAN RESIDENCY, ST.BENEDICT ROAD, ERNAKULAM, NOW RESIDING AT FLAT NO.7-C, HEERA BLUE BELLS, NEAR ALTHARA TEMPLE, VELLAYAMBALAM, THIRUVANANTHAPURAM, PIN-695010. BY ADVS. S.SREEKUMAR (SR.) SRI.P.MARTIN JOSE SRI.P.PRIJITH SRI.THOMAS P.KURUVILLA SRI.AJAY BEN JOSE

SRI.S.VAIDYANATHAN RESPONDENTS/ACCUSED: 1 MR. JAYAKUMAR E.A,AGED 54 YEARS, S/O.AYYAPPAN PILLAI, ETTIYADATH KIZHAKEPUTHENPURAKKAL, ELOOR SOUTH, UDYOGAMANDAL P.O., ERNAKULAM DISTRICT, PIN-683501. 2 THE STATE OF KERALA,REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, PIN-682031. BY ADVS. ANN SUSAN GEORGE V.JAYAPRADEEP OTHER PRESENT: SR.GP.RENJITH GEORGE THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 13.07.2023, THE COURT ON 25/08/2023 DELIVERED THE FOLLOWING: Crl.Appeal No.704 of 2020 2 V.G.ARUN J. ----- Crl.Appeal No.704 of 2020 ----- Dated this the 25th day of August 2023

JUDGMENT

The appellant was the complainant in CC No.3553/2016 of the Judicial First Class Magistrate's Court (NI Act) Cases, Ernakulam. The complaint was filed alleging commission of the offence under Section 138 of the Negotiable Instruments Act ('the NI Act' for short) by the first respondent. The averments in the complaint are to the following effect;

The complainant is working as Chief Manager in the State Bank of India and is the President of the State Bank of India Officers Housing Development Co-operative Society Ltd No.4463 (hereinafter called the Society). The Society was on the lookout for a prime plot for constructing residential apartment for its members. The accused offered to sell his land having an extent of 112 cents, situated in Edappally North Village. After negotiation, the sale consideration was fixed at Rs.13,75,000/- per cent. The

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Society accepted the offer. Thereupon the accused executed a Memorandum of Understanding on 20/08/2015, expressing his willingness to sell the property to the Society. A few days later, the accused informed that he is in urgent need of Rs.25 Lakhs as his daughter's marriage is fixed to be conducted on 23/08/2015. It was assured by the accused that the money advanced can be adjusted towards the sale consideration of his property. Acceding to the request, Rs.20 Lakhs was paid to the accused on 21/08/2015. The amount was raised jointly by the appellant and the seven other members of the Society. Out of Rs.20 lakhs thus paid, Rs.6 Lakhs was paid by the appellant. After receiving Rs.20 lakhs, the accused retracted from his promise and refused to execute the sale deed, even though the complainant and other members of the society had expressed their willingness to pay the balance sale consideration. As it was evident that the sale would not happen, the complainant and other members who had paid amounts to the accused demanded to repay their money. After much hesitation the accused issued a cheque for Rs.21,40,000/- towards discharge of the amounts due to the complainant and the other members who had paid the amount of Rs.20 Lakhs. The cheque was dishonoured on presentation and in spite of issuance of statutory notice, the first respondent refused to pay the cheque amount.

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2. Before the trial court, PWs 1 to 11 were examined by the

complainant and Exhibits P1 to P11 marked. Exhibits X1 and X2 were marked as court Exhibits. In order to bolster his defence the accused gave evidence as DW1. The trial court, after appreciation of evidence and consideration of the legal contentions, acquitted the accused under Section 255(1) of Cr.P.C.

3. Heard Senior Advocate S.Sreekumar for the appellant and Advocate Jaya Pradeep for the first respondent.

4. Learned Senior Counsel submitted that the reasons stated

by the trial court for acquitting the first respondent are factually incorrect and legally unsustainable. The first respondent having admitted the issuance of Ext.P3 cheque, presumptions under Sections 118 and 139 of the NI Act got attracted. The first respondent having failed to rebut the presumption by letting in cogent evidence, the court below committed a gross illegality by acquitting the first respondent. The finding that the appellant failed to prove the execution of the cheque cannot be sustained since the first respondent having admitted the handing over of a signed blank cheque as security for the Rs.20 Lakhs paid by the appellant and others. Reliance is placed on the Apex Court decisions in *Bir Singh v. Mukesh Kumar* [2019 (4) SCC 197] and *Kalamani Tex &*

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Another v. P. Balasubramanian [2021 (5) SCC 283], to contend that even a blank cheque leaf, voluntarily signed and handed over by the accused towards some payment, is sufficient to raise the presumption under Section 139 of the NI Act and burden is upon the drawer of the cheque to rebut the presumption by letting in cogent evidence.

5. The finding of the trial court that the amount due to the

appellant being only Rs.3 Lakhs, the cheque for Rs.21,40,000/-, alleged to have been issued by the first respondent, is not a cheque issued in discharge of the liability due to the appellant, is assailed by contending that the other members of the society, who had paid the amounts, had authorised the appellant to collect the money due to them. It was under such circumstances that the first respondent issued the cheque for Rs.21,40,000/- for discharging the debt as a whole. Learned Senior Counsel contended that, even though Section 138 contemplates drawing of cheque by a person, for payment of the amount to another person, the

payee can represent others also, if he is authorised to accept the cheque on their behalf. Such authorisation can be proven by producing the power of attorney, if any executed, or by examining the person who had given the authorisation. In the case at hand, all persons who had paid money to the first respondent were examined and all of them

Crl.Appeal No.704 of 2020 6 categorically stated that they had authorised the appellant to collect the money on their behalf also. To buttress the argument, reliance is placed on the decision in Sunil K.J. v. State of Kerala & Another [2020 (4) KLT 859].

6. Learned Counsel for the first respondent submitted that,

even though the appellant had claimed that the Memorandum of Understanding was executed pursuant to the decision of the Society to purchase the first respondents property, no evidence was let in before the trial court to prove that the Society had taken a decision to purchase the first respondent's property. Further, the contention that the appellant was the President of the Society and he was authorised to receive the amount due to the other members in that capacity should not have been accepted in the absence of any document to prove that the appellant was the President of the Society at the relevant point of time. More so, since the first respondent had set up a specific defence that he had paid off the amounts due to the other seven persons and out Rs.6 Lakhs due to the appellant, Rs.1 Lakh had been repaid.

7. It is submitted that the trial court had correctly noted the difference in the ink used for signing the cheque and for making the entries. This, along with the other suspicious circumstances, had Crl.Appeal No.704 of 2020 7 prompted the trial court to acquit the first respondent.

8. Finally, it is argued that this Court will not be justified in

interfering with the well considered judgement of the trial court, even if a different view is possible. To support the contention regarding the limited scope of

interference in an appeal against acquittal, the decision of the Apex Court in *K.Prakashan v. P.K.Surendran* [2008 (1) SCC 258] is pressed into service.

9. As contended by the Senior Counsel, even a signed blank

cheque handed over by the accused either towards discharge of liability or as security is sufficient to attract the offence under Section 138 of the Act. The legal position is no longer trite in view of the decisions in *Bir Singh* and *Kalamani Tex* (supra). It is pertinent to note that the presumption under Section 139 would be attracted only on the complainant proving that the cheque was issued towards discharge of any legally enforceable debt or liability. Here, the averments in the complaint and the wordings of the Memorandum of Understanding reveal that the first respondent had expressed his willingness to sell the property to the State Bank of India Officers Housing Development Co-operative Society Ltd. No.4463 and not to the appellant. It is admitted in the complaint that at the request of the first respondent, individual payments

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amounting to Rs.20 lakhs were made by the appellant and others. No doubt, being a juristic person, the Society can demand refund of the money advanced by its members on behalf of the Society. In this context it is essential to note the Ext.P3 cheque was issued in the appellant's name and not in his capacity as President of the Society. Although, PWs 2 to 6 & PWs 8 and 10, who had made payments along with the appellant, specifically stated that they had authorised the appellant to collect the money due to them, such authorisation was given in the appellants capacity as the President of the Society. Surprisingly, no document was produced either to prove that the Society had decided to purchase the first respondents property or that the appellant was its President. In the absence of such proof, the only possible conclusion is

that the payments were made by the appellant and others as individuals and not as members or office bearers of the Society. Here, the wordings of Section 138 of the NI Act, extracted hereunder, assumes relevance.

138. Dishonour of cheque for insufficiency, etc. of funds in the account . - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that Crl.Appeal No.704 of 2020 9

account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extent to twice the amount of the cheque, or with both:

A reading of the provision shows that the cheque should have been issued for the payment of money due to another person for the discharge of any liability or debt due to that person, whether an individual or a juristic person. This Court in Sunil K.J.(supra), has

held that the cheque can be issued in the name of one person,

towards discharge of the liability due to others also, if the other persons have authorised the payee to accept the cheque on their behalf. In the case at hand, although PWs2 to 6, PWs 8 & 10 deposed that they had authorised the appellant to accept the cheque inclusive of the amount due to them, the appellants version is that the first respondent had issued individual cheques to the others and those cheques were dishonoured on presentation.

Pertinently, the specific defence set up by the first respondent during Section 313 examination and as DW1 is that the amount due to the other seven persons was paid off and out of Rs. 6 lakhs paid by the appellant, Rs 1 Lakh had been repaid. There is no effective cross examination of DW1 on this aspect. If, as stated by the appellant, individual cheques were issued to the other seven persons, there is no possibility of the first respondent issuing a cheque for the entire amount and interest to the appellant.

10. Indisputably, only Rs.6 Lakhs was due to the appellant and

there was no understanding or agreement for payment of interest. As such, even if there is authorisation by others, the first respondent cannot be convicted for the offence under Section 138 of the NI Act, based on the dishonour of a cheque for Rs.21,40,000/-, when the amount allegedly due is only Rs. 20 lakhs.

11. The above factors, taken along with the finding of the trial

court that the entries and the signature in the cheque are made with different ink, makes the genuineness of the transaction and the authenticity of the cheque, doubtful.

12. In the facts and circumstances discussed above, I find no reason to interfere with the impugned judgment. Crl.Appeal No.704 of 2020 11 In the result, the Crl.Appeal is dismissed. Sd/- V.G.ARUN JUDGE dpk