

John P P vs George

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Court : Kerala

Decided On : Jul-07-2023

Judge : Honourable Mrs. Justice Mary Joseph

Appeal No. : CRL.A/826/2021

Appellant : John P P

Respondent : George

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE MARY JOSEPH
FRIDAY, THE 7TH DAY OF JULY 2023 / 16TH ASHADHA, 1945 CRL.A
NO. 826 OF 2021 AGAINST THE JUDGMENT DATED 18.09.2021 IN
CC NO.1916/2016 OF JUDICIAL FIRST CLASS MAGISTRATE COURT
(N.I.ACT CASES)ERNAKULAM CrI.L.P. NO. 225/2021
APPELLANT/PETITIONER/COMPLAINANT JOHN P.P., AGED 40
YEARS, S/O. PAUL, PANACKAL HOUSE, POTTAKUZHY ROAD,
PACHALAM P.O, KOCHI - 12. BY ADV.SRI. A.T.ANILKUMAR
RESPONDENTS/RESPONDENTS/ACCUSED & STATE 1 GEORGE,
AGED 64 YEARS, S/O. THOMAS, KOCHIKATTIL HOUSE, ABHINAV
LINE, CHALIKKAVATTOM ROAD, KOCHI - 28. 2 STATE OF KERALA,

REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM -31. BY ADVS.SRI.C.G.PREETHA SRI.P.E.THOMAS DR.ABHILASH O.U. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07.07.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 7th day of July, 2023

This Appeal is originated from a judgment passed by Judicial First Class Magistrate Court (N.I.Act Cases), Ernakulam (for short the trial court) on 18.09.2021 in CC No.1916/2016. The appellant is the complainant before the trial court. The complaint filed by him under Section 142 of the Negotiable Instruments Act, 1881 (for short the NI Act) alleging commission of offence under Section 138 NI Act was tried and the trial court arrived at a finding that the accused was not guilty for the offence punishable under Section 138 NI Act. Accordingly the accused was acquitted under Section 255 (1) of the Code of Criminal Procedure, 1973 (for short the Cr.P.C.). His bail bond was cancelled and he was set at liberty.

2. The case of the complainant was that himself and the

accused were acquainted with each other. The accused borrowed a sum of `1,90,000/- from the complainant agreeing to repay it as and when demanded by the former. Return of the amount was demanded and then the accused issued cheque dated 15.09.2012 bearing No.630532 for a sum of `1,90,000/- drawn from the main branch of Ernakulam District Co-operative Bank Ltd, Ernakulam to him. He presented it for collection through Pachalam branch of Federal Bank Ltd. It was bounced due to insufficient funds in the account of the accused. A memo

of dishonour was obtained by the accused from the bank. He caused a lawyer notice to be issued to the accused and informed him about the dishonour of the cheque. Amount covered by the cheque was demanded by the notice to be paid

within 15 days. Notice was received by the accused, but payment was not made within the time and thereupon complaint was filed to launch the prosecution for the offence under Section 138 N.I.Act.

3. The appellant herein, as already stated, is the

complainant in CC No.1916/2016. The case of the accused was that `10,000/- was borrowed by him from the complainant and a cheque was issued as security for that amount. Exts. D1 to D3 marked on his side were also relied on to establish that the amount borrowed is already paid and thus the liability was discharged.

4. Complainant was examined as PW1. According to

him he was conducting interior decoration business since 1990. According to him the accused was known to him and therefore that he had advanced `1,90,000/- to him on an undertaking to return it on demand. According to him, when he demanded the amount, Ext.P1 was given. It was presented by him at Federal Bank for encashment, but was returned to him bounced for the reason, insufficiency of funds in the account of the accused. Notice issued to the accused as Ext.P4 did not evoke any response and thereupon, complaint was filed and a prosecution under Section 138 N.I.Act was launched.

5. According to PW1 the accused was known to him for

more than five to eight years. According to him, he went to the house of the accused for loading some materials required for construction of a house by the latter. According to him money was lent by him to the accused in July, 2012, but the exact date is not known. According to him `1,95,000/- was availed from the bank after pledging the gold ornaments of his wife and out of which `1,90,000/- was advanced to the accused.

6. The bank manager of Federal Bank Ltd., Pachalam Branch was summoned and examined by the complainant as

PW2. The statement of accounts of PW1 was brought by him and it was marked in evidence as Ext.X1. It is found therefrom that a sum of `1,95,000/- was withdrawn

by PW1 from his account maintained with the bank on 06.06.2012. During cross examination, PW2 stated that `1,95,000/- came into the account of PW1 by way of gold loan availed by him. It has also come out in evidence that apart from `1,95,000/- credited into his account by way of gold loan availed by him, no other huge amount was

credited there further. PW2 was re-called after his first examination before the Court and the gold loan pledge card of PW1 was procured. It was marked in evidence as Ext.X2. PW1 did not state any other reason for availing the gold loan. According to him when the accused demanded him to advance some money he pledged the gold ornaments and availed `1,95,000/- and `1,90,000/- out of that was given to him.

7. In the complaint filed, nothing was mentioned about

pledge of gold ornaments. Those aspects have come out only when the accused questioned PW1 about his source of money to advance the amount. The complaint is silent about the date on which the monetary transaction relied on by the complainant took place. According to him the accused approached him to

borrow the amount in July, 2012. Ext.X1 shows withdrawal of `1,95,000/- by PW1 from the bank on 06.06.2012. Therefore, it appears that the complainant had withdrawn the money and kept it with him. Therefore, the gold loan was availed prior to the demand for money came from the accused. Therefore, the case of PW1 that gold loan was availed by him after the demand

of money from the accused, cannot be believed. An ordinary prudent man would never lent money to another man with whom he has acquaintance only of the kind, spoken by PW1. In the case on hand, the relationship PW1 had with the accused developed with his visit of the latters house for loading some

materials in his goods vehicle. According to

have no knowledge on, whether the wife of the accused was

employed or not. Therefore, the acquaintance of the complainant with the accused do not appear to be so close to lent a huge sum of `1,90,000/- to the latter after obtaining it by pledging the gold ornaments of his wife in a bank. Undoubtedly, the gold loan would enure to PW1 the liability to pay interest for the money availed and it appears that by accepting Ext.P1 that

covered only the money allegedly borrowed, PW1 is found to have suffered the interest actually due for the gold loan. It also appears from the version of PW1 that at the time of advancing the amount, PW1 failed to collect any security from him.

8. PW1 is not a man having frequent transactions with his bank. As disclosed from Ext.X1, the only higher sum that has been credited into his account is by way of the gold loan availed

by him on 06.06.2012. When PW1 says that the amount of `1,90,000/- was advanced only in July, 2012, the purpose of availing gold loan in the month of June, 2012 may be for a different reason. PW1 has not offered any explanation why the loan amount availed prior to July 2012, credited into his account and withdrawn on 06.06.2012 was kept in his custody till it was advanced to the accused. Therefore, the case projected by the

complainant generates some suspicion. It is something that appears improbable to happen.

9. Then the question comes how come Ext.P1 drawn from the account of the accused reached the hands of PW1 and

utilised by him for launching the prosecution. For that the accused had taken a specific stand that `10,000/- was borrowed by him from the complainant on 04.04.2012 on the security of a signed cheque drawn from his bank account and given. According to him the amount was repaid by him in three installments of `3,500/-, `3,500/- and `3000/- respectively on 04.05.2012, 05.06.2012 and 05.06.2012. Exts.D1 to D3 receipts were also relied on by the accused as proof of

repayment of `10,000/- in three installments, which

appears more probable one than that was projected by the complainant.

10. The learned counsel for the appellant has also relied

on various decisions to support the arguments advanced. M/S. M.M.T.C. Ltd. and another V. M/s Medchil Chemicals and Pharma (P) Ltd and Another [2002 (Cr.L.J) 266] where it was held by the Apex Court that complaint under Section 138 N.I.Act can be launched either by the payee or holder of the cheque in due course and a defect in the complaint in that regard being a curable one, cannot be a ground for quashing the

complaint. In the opinion of this Court the decision has no relevance in the context of the case on hand.

11. Joshy P.G. V. Jose Varghese and Another [2019 (4) KHC 753] was relied on by the learned counsel to support his argument that the accused is liable to rebut the

presumption under Section 139 N.I.Act, by relying upon the case set up by the complainant, averments or absence of material averments in the complaint and also evidence adduced by him.

12. In Kamala V. Vidhyadharan [2007 (3) KLT 861

(SC)] relied on by the learned counsel, the Apex Court held

that the standard of proof to discharge the burden to rebut the presumption in terms of Section 139 N.I.Act being, preponderance of probability, inference is possible from materials on record as well as from the circumstances upon which the accused rely on.

13. The meaning of presumption was dealt with by the Apex Court in M/s. Kumar Exports V. M/s. Sharma Carpets [2009 KHC 219] relied on by the learned counsel. The court

held that it shall be presumed unless the contrary is proved that

the holder of a cheque received it in the nature referred to in Section 138 N.I Act for discharge, in whole or in part of any debt or liability.

14. In *Zacaharia V.P. V. State of Kerala and Another*

[2021 (5) KHC 365] relied on by the learned counsel, this Court held that when the accused has rebutted the statutory presumption, it was the duty of the complainant to bring in evidence suggestive of existence of a transaction resulting in a legally enforceable debt payable by the accused and when the complainant failed to do so, the prosecution against the accused, should fail.

15. The dictums discussed about the fundamental principles to be followed in a prosecution under Section 138 N.I.Act. There is no quarrel with regard to those propositions of law.

16. In *John K.Abraham V. Simon C. Abraham and Another*, [2013 (4) KHC 853] the Apex Court held that the burden is heavily upon the complainant to show that he had the required funds for advancing the money to the accused, that issuance of cheque in support of the payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant.

17. The above position of law has underwent a change with the proposition of law propounded by the Apex Court in *Basalingappa V. Mudibasappa* [2019 (2) KHC 451]. It was

a case where evidence was led before the trial court by the complainant that apart from `6,00,000/- advanced by the complainant, `18,00,000/- was also given within two years and it was held that the complainant is under obligation to adduce evidence to prove his financial capacity only when questioned by the accused. The accused was acquitted in the case for failure of the complainant to establish his financial capacity at the relevant time to advance that much money.

18. The position of law has been changed further with the

laying of dictum by the Apex Court in Bir Singh V. Mukesh Kumar (2019 (1) KHC 774). Paragraph 40 of the judgment is extracted hereunder: 40. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

19. In the case on hand, the complainant's case, projected by PW1 by his oral evidence was that the disputed cheque was issued to discharge the monetary liability of

₹1,90,000/- availed by the accused from him. Though the monetary transaction projected by the complainant was denied by the accused, it is his specific case that the disputed cheque was given for a monetary transaction of borrowal of ₹10,000/- from the complainant. According to the accused, ₹10,000/- was

repaid in 3 instalments and that stands proved through the receipts, 3 in numbers marked in evidence as Exts.D1 to D3. The accused during cross examination of PW1 has also brought out that the gold loan availed by the complainant from the bank was the source of money to advance ₹1,90,000/- allegedly demanded from him by the accused. The accused has also brought out from PW1 that after the demand for the money made by the accused that the gold loan was availed. But on a

perusal of the statement of accounts of the complainant marked in evidence as Ext.X1, it is revealed that ₹1,90,000/- allegedly obtained by way of gold loan was credited into his account prior to the alleged time of demand for money made by the accused. Moreover, going by the disputed cheque marked in evidence as Ext.P1, ₹1,90,000/- itself was shown therein. Interest for the gold loan availed was not found demanded by the complainant. These aspects are sufficient to draw a

conclusion that the presumption under Section 139 N.I. Act, that

would be attracted in favour of the complainant on establishing the voluntary issuance of the cheque would stands rebutted. Thus the case of the complainant

is defeated and the accused is entitled for acquittal. The trial court has held so correctly. The

judgment under challenge is maintained. Appeal fail for the

above reasons and is dismissed. Sd/- MARY JOSEPH JUDGE MJL

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