

M.Shajideen, vs Jayakumar.N,

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SooperKanoon Citation : sooperkanoon.com/1442381

Court : Kerala

Decided On : May-13-2022

Judge : Honourable Mrs. Justice Mary Joseph

Appeal No. : Crl.Rev.Pet/43/2019

Appellant : M.Shajideen,

Respondent : Jayakumar.N,

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE MARY JOSEPH FRIDAY, THE
13TH DAY OF MAY 2022 / 23RD VAISAKHA, 1944 CRL.REV.PET NO. 19 OF
2019 AGAINST THE JUDGMENT DATED 18.09.2015 IN ST NO.37/2010 OF
JUDICIAL FIRST CLASS MAGISTRATE COURT-IV, NEDUMANGAD

JUDGMENT DATED 17.11.2018 IN CRL.A.NO.286/2015 OF

ADDITIONAL SESSIONS COURT-IV, THIRUVANANTHAPURAM REVISION
PETITIONER/APPELLANT/ACCUSED: JAYAKUMAR N., AGED 53 YEARS,
S/O.NARAYANA KURUP, REGHU MANDIRAM, KUDAPPANAKUNNU, OZONE
SANITATIONS, CIVIL STATION, KUDAPPANAKUNNU,
THIRUVANANTHAPURAM. BY ADVS.SRI.V.R.GOPU SRI.J.NARAYANA PILLAI

RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE: 1 M.SHAJIDEEN, S/O.MOIDEEN PICHA, PULLIKA PARAMBIL, AMBALA NAGAR, VATTAPPARA P.O., THIRUVANANTHAPURAM - 695028. 2 STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-682031. R1 BY ADV SRI. PIRAPPANCODE V.S.SUDHIR R2 BY PUBLIC PROSECUTOR SMT.T.V.NEEMA THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 21.10.2021, ALONG WITH CRL.R.P.NO.43/2019, THE COURT ON 13.05.2022 PASSED THE FOLLOWING:
-:2:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE MARY JOSEPH FRIDAY, THE 13TH DAY OF MAY 2022 / 23RD VAISAKHA, 1944 CRL.REV.PET NO. 43 OF 2019 AGAINST THE JUDGMENT DATED 18.09.2015 IN ST NO.37/2010 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-IV, NEDUMANGAD

JUDGMENT DATED 17.11.2018 IN CRL.A.NO.286/2015 OF ADDITIONAL

SESSIONS COURT- IV, THIRUVANANTHAPURAM. PETITIONER/1ST RESPONDENT/COMPLAINANT: M.SHAJIDEEN, S/O MOIDEEN PICHA, PULLIKA PARAMBIL, AMBALA NAGAR, VATTAPPARA P.O. THIRUVANANTHAPURAM BY ADVS.SRI.PIRAPPANCODE V.S.SUDHIR SRI.JELSON J.EDAMPADAM SRI.M.UNNIKRISHNAN SMT.A.MEGHA
RESPONDENTS/APPELLANT/ACCUSED & STATE:

1 JAYAKUMAR.N, S/O NARAYANA KURUP, REGHU MANDIRAM, KUDAPPANAKUNNU, OZONE SANITATIONS, CIVIL STATION, KUDAPPANAKUNNU, THIRUVANANTHAPURAM-695 112 2 STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, OFFICE OF THE ADVOCATE GENERAL, ERNAKULAM. R1 BY ADVS.SRI.V.R.GOPU SRI.J.NARAYANA PILLAI R2 BY PUBLIC PROSECUTOR SMT T V NEEMA

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 21.10.2021, ALONG WITH CRL.R.P.NO.19/2019, THE COURT ON 13.05.2022 PASSED THE FOLLOWING: -:3:-

MARY JOSEPH, J.

----- Dated this the 13th day of May, 2022

ORDER

Revision Petitioner in Crl.R.P No.19/2019 is the accused in a prosecution launched by the 1st respondent before Judicial First Class Magistrate Court-IV, Nedumangad (for short, Court below) alleging commission of offences punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, N.I Act). Revision petitioner in Crl.R.P No.43/2019 is the complainant in the above prosecution.

2. The complainants averments in the complaint filed under Section 142 N.I Act to launch the prosecution are to the following effect: Himself and the accused were known to each other and the

accused demanded a sum of Rs.5,00,000/- on 10.05.2008 and he advanced the same to him. To discharge the said liability a cheque bearing No.324294 dated 10.10.2008 drawn on State Bank of India, Civil Station, Kudappanakunnu Branch was issued by the accused. The cheque was presented by the complainant for encashment but was returned with a memo dated 3.11.2008 stating the reason for non-

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encashment as funds insufficient. Lawyer notice was issued by the complainant to the accused on 12.11.2008 informing the factum of dishonour of the cheque and demanding repayment of the sum. The lawyer notice was received by the accused and a reply was sent to the complainant through his counsel on 20.11.2008. The money demanded through notice was not paid and therefore, the prosecution in question was initiated.

3. The complaint filed was taken on file by Judicial First Class

Magistrate Court-I, Nedumangad as S.T No.33/2009 and was made over to Judicial First Class Magistrate Court-IV, Nedumangad, where the accused faced trial. Complainant examined himself as PW1 and marked Exts.P1 to P10 in evidence. Ext.X1 was also marked as Court Exhibit. Accused was examined with reference to evidence having incriminating nature brought against him by the complainant. The accused adduced oral evidence through DW1 and DW2.

4. The complainant in his affidavit filed in lieu of Chief

Examination has spoken all facts dealt with in the complaint. A specific stand was taken by the accused during cross examination that Rs.1,00,000/- was borrowed by him from the complainant and a signed blank cheque was issued as security for the transaction, which was -:5:- misused to launch the prosecution. He had also denied to have authored the writings in the cheque and thereby, the execution of the cheque.

5. According to PW1, due to shivering of hands of accused his

wife was made to fill up the entries in Ext.P1 cheque. Signature alone was put by him. According to him, the above factum recorded by the wife of the accused in a paper and given to him on 10.05.2008, the date on which Rs.5,00,000/- was borrowed from him is marked in evidence as Ext.P10. Ext.P10 was shown to DW1 and he identified the signature

affixed in it as his own. But, he denied the signature found in Ext.P10 allegedly put by his wife. He also denied the authorship of the handwritings by which entries in Ext.P10 are filled as that of his wife. DW1 gave a version that when tensed, his hands used to shiver.

6. The wife of the accused was examined as DW2. According to

her, the accused had borrowed Rs.1,00,000/- from the complainant on the security of a signed blank cheque and signed white paper. She had identified the signature of the accused in Ext.P10 and denied one found in Ext.P10 allegedly put by her

and the writings therein allegedly authored by her. According to her, the address written in Ext.P10 is also not that of her. During cross examination she admitted to have resided

-:6:- in the address for a period of 5 months, but not at the relevant time of the alleged transaction. Exts.P10, P1 and the specimen writings of the

wife were forwarded to Forensic Science Laboratory, Thiruvananthapuram for expert opinion and Ext.X1 was obtained. In Ext.X1, the disputed writings and signature in Ext.P1 and Ext.P10 were reported as that of the wife of the accused, whose standard signature and writings had also been sent. In Ext.X1, 29 significant similarities among the questioned writings and signatures and standard items were noted.

7. The source of income with him to advance Rs.5,00,000/- on

10.05.2008 to the accused was also well established by the complainant by producing the statement of accounts from his Bank. It shows that Rs.14,00,000/- was withdrawn from the Bank by the complainant on 10.05.2008.

8. During Examination, DW1 was found confused about the date of the transaction of borrowal of Rs.1,00,000/- which was stated initially as April 2008, later as January 2008 and ultimately as April

2008. The confusion of DW1 about the date of the transaction itself creates some doubt about his version. -:7:-

9. From the discussion above, this Court is convinced that the

signatures in Exts.P1 and P10 were admittedly affixed by the accused (DW1). The signature and writings in Ext.P10 allegedly authored by the wife of the accused were disowned by her.

10. The impact of denial of writings in a cheque in a prosecution u/s.138 N.I.Act was dealt with by the Apex Court in Bir Singh Vs. Mukesh Kumar [2019 (1) KHC 774 (SC)] and held:

38. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

39. It is not the case of the respondent-accused that he either

signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

11. The revision petitioner in the case on hand also does not have a case that he signed the disputed cheque or parted with it under some threat or coercion. He also does not have a case that a signed :-8:-

unfilled cheque has been stolen by the complainant from him. His specific case was that a cheque drawn from his account maintained with State Bank of India, was given to the complainant to secure repayment of a monetary liability of Rs.1,00,000/- and misusing it, the prosecution in question under Section 138 N.I Act was launched against him.

12. Admittedly, the issuance of cheque by the accused to the

complainant was a voluntary act. Therefore, the accused has no right to challenge the prosecution on the ground that the entries in the disputed cheque were not filled by him, but by some other person and therefore, the complainant has thoroughly failed to establish issuance of the cheque towards the discharge of a legally enforceable debt.

The Apex Court has also held: 37. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted. -:9:-

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.

13. When viewed in the above backdrop, the arguments

advanced by the revision petitioner are only to fail. When by evidence it stands established that the disputed signed cheque was issued by the accused to the complainant, there is every reason for the presumptions under Section 118(a) and Section 139 N.I Act to attract in favour of the complainant. The onus to rebut the presumption lies on the accused and therefore, he has to adduce convincing and reliable evidence in his venture to discharge it. Only when the onus is discharged successfully, the presumptions would be rebutted. In his attempt to discharge the

onus, the accused examined himself as DW1 and his wife as DW2. Both DW1 and DW2 admitted signature of the accused in Exts.P1 and P10. The signature of the wife of the accused in Ext.P10 and authorship of writings in Exts.P1 and P10 were also denied. As already observed by this Court complainant is not bound to establish authorship of the writings in the disputed cheque when issuance of a signed cheque is admitted by him. In such a context the accused has to adduce cogent

-:10:-

and convincing evidence to establish that the cheque was issued to discharge some liability other than the one described in the complaint. The oral evidence tendered by the accused and his witness and the documentary evidence of Exts. P1 to P10 did not help him to rebut the presumption. Crl.R.P.No.19/2019 filed by the accused is only to fail.

14. Criminal Revision Petition No.43/2019 was filed by the

complainant, who is the 1st respondent in Criminal Revision Petition No.19/2019 seeking to restore the sentence imposed on the accused by the trial court after setting aside the modification made by the appellate court.

15. The trial court after finding the accused guilty for the offence

under Section 138 NI Act had imposed a substantive sentence of imprisonment till rising of the court and fine of Rs.7,02,500/- and to undergo simple imprisonment for four months as default sentence. In a prosecution under Section 138 NI Act the trial court is empowered to sentence the accused to imprisonment upto two years or with fine upto twice the amount of the cheque or with both. The amount covered by

Ext.P1 cheque being Rs.5,00,000/-, the trial court is empowered to direct payment of compensation, double that amount. Rs.7,02,500/- is the fine imposed in the case on hand and the trial court is justified in -:11:- doing so. The appellate court has modified the sum to Rs.5,00,000/-, but, without stating any reasons for doing so. The appellate court omitted to state anything about the substantive sentence of simple imprisonment till rising of the court imposed on the accused by the trial court. Crl.R.P is only to be allowed for the above reason. In the result, Crl.R.P No.19/2019 is dismissed and Crl.R.P

No.43/2019 is allowed. The modification made by the appellate court in the fine amount is set aside. The sentence imposed by the trial court with the modified term of default sentence for two months is restored. Therefore, the accused has to serve imprisonment till rising of the court and pay fine of Rs.7,02,500/- as substantive sentence and to serve simple imprisonment for two months as

sentence in case of default in payment of fine.

Sd/- MARY JOSEPH, JUDGE JJ

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