

**Mohanan Vs. Bibhukumar**

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**SooperKanoon Citation :** [sooperkanoon.com/725909](http://sooperkanoon.com/725909)

**Court :** Kerala

**Decided On :** Apr-04-2003

**Reported in :** III(2003)BC421; 2003(2)KLT825

**Judge :** R. Basant, J.

**Acts :** [Negotiable Instruments Act, 1881](#) - Sections 138 and 139

**Appeal No. :** Crl. A. No. 18 of 1997

**Appellant :** Mohanan

**Respondent :** Bibhukumar

**Advocate for Def. :** S. Gopakumaran Nair, Adv.

**Advocate for Pet/Ap. :** B. Jayasurya, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**R. Basant, J.**

1. The complainant is the appellant. He is aggrieved by the verdict of not guilty and the consequent judgment of acquittal rendered by the learned Magistrate in favour of the accused-respondent.

2. The complainant alleged that the respondent-accused owed an amount of Rs. 40,000/- to him. When repayment was demanded, two cheques for Rs. 20,000 dated 21.9.1993 and 8.2.1994 were issued. This prosecution relates to one of those two cheques. When the said cheque was presented for encashment it was dishonoured by the bank on the ground of insufficiency of funds. Notice of demand was issued. There was no useful response. Payment was not effected. It is in these circumstances that the complainant came to court with this complaint under Section 138 of the Negotiable Instruments Act. In respect of the other cheque also there was a prosecution. The same has been compromised after making some payment, it is concerned by both sides.

3. The learned Magistrate took cognizance. The accused entered appearance and denied the offence alleged against him. Thereupon the complainant examined himself as PW1 and the Manager of the drawee bank as PW2. Exts. P1 to P6 were marked. The accused denied all circumstances which appeared in evidence and which were put to him. The gravamen of the defence put forward by the accused is that though the cheque bears his signature, it was not issued for the due discharge of any legally enforceable debt/liability. He was compelled and coerced to part with Ext. P2 cheque. He examined himself as DW1 and a friend of his as DW2. Exts. D1 to D3 letters were also proved.

4. The learned Magistrate came to the conclusion that all statutory formalities have been complied with. However, the learned Magistrate took the view that there is no evidence to show that the cheque was issued for the due discharge of a legally enforceable debt/liability.

5. The learned counsel for the appellant/complainant assails the finding that the cheque is not proved to have been issued for the due discharge of a legally enforceable debt/liability. The learned counsel for the respondent/accused on the contrary supports the said finding but assails the finding that a proper notice of demand has been served.

6. I have considered all the contentions. I find no merit in the challenge raised by the respondent/accused against the finding that a proper notice of demand has not been served. Section 138 of the Negotiable Instruments Act only obliges the

complainant to give a notice of demand. We have satisfactory evidence to show that a notice of demand by prepaid post was despatched in the correct address of the accused. The same has been served also. The acknowledgment card with the signature of the accused therein is produced before Court. The learned Magistrate was in these circumstances eminently correct in invoking the presumption of due service under Section 114 of the Evidence Act and Section 27 of the General Clauses Act. I find the said finding to be eminently correct and the same does not call for any interference.

7. The more serious question to be considered is whether the finding of the learned Magistrate that the cheque is not proved to have been issued for the discharge of the legally enforceable debt/liability is correct or not. In this context it must be noted particularly that a financial transaction between the accused and the complainant is admitted. It is also admitted that the cheque in question bears the signature of the complainant. There is no contention that the complainant is an illiterate person. It is also conceded that Ext. P2 cheque is written on a cheque leaf issued to the accused by his bank to operate his account. Notwithstanding the challenge raised inconclusively and unconvincingly about the genuineness of the signature appearing on the cheque, it is very evident from the evidence of DWs. 1 and 2 that the cheque leaf in question bore the signature, of the accused when it reached the hands of the complainant. There is no merit thus in the dispute raised incidentally that the signature appearing in the cheque is not that of the accused.

8. About the circumstances under which the cheque in question found its way from the possession of the accused to that of the complainant, we do primarily have the oral evidence of PW1. PW1's evidence on this aspect is eloquent. His version is clinchingly supported by his ability to produce the cheque with the signature of the accused affixed thereon. The presumption under Section 139 of the Negotiable Instruments Act does also stare on the accused. It is by now trite that the burden is on the accused to rebut the said presumption. The burden on him may not be as onerous as the initial paramount burden on the complainant to prove his case beyond reasonable doubt. But at any rate the accused is bound to discharge his burden at least by the yardstick of preponderance of possibilities and probabilities as in a civil case. The burden on the accused is akin to that on a litigant in a civil

proceedings. Any fanciful defence will not suffice. The test of probabilities will have to be passed.

9. Coming back to the facts in the instant case the accused offers an explanation that he was compelled, coerced and threatened to hand over the cheque. The incongruity in the evidence of DWs. 1 and 2 is in this context of crucial relevance. The evidence of DW2 would suggest that the matter was talked over and settled between the accused and the complainant in the presence of mediators. Thereafter DW2 was sent to get the cheque book from the house of the accused. The cheque book was brought. The obvious intention was to issue a cheque to discharge the liability which was agreed upon. We have no idea furnished by DWs. 1 and 2 as to what was the amount agreed upon. The parties had allegedly talked over the matter and settled. The decision to issue a cheque was also taken. But surprisingly thereafter, the accused wants the court to swallow the version that, DW2 brought a cheque book with blank signed cheque leaves. Under what circumstances the accused left such blank signed cheque leaves in his cheque book is not explained at all. The accused wants the court to believe that the complainant thereafter suddenly reduced the cheque book with the signed cheque leaves into his possession, illegally removed two cheques leaves with signatures of the accused thereon quite contrary to the terms of the understanding and retained the blank signed cheque leaves with him. The accused merely accepted that conduct did not make any complaint to any one, did not even instruct his bank to stop payment. He woke up from his slumber to advance this version in the course of trial only. To say the least, the theory advanced by the accused rebels against logic, reason and common sense. It is not consistent with human probabilities. It is inconsistent with accepted norms of human behaviour and the common and natural course of events. This explanation offered under Section 139 cannot be swallowed by a prudent mind. In these circumstances it has to be held that the burden under Section 139 has not been discharged.

10. The version of the complainant does not inspire confidence, it is contended. Even if the version of the accused be disbelieved, the version of the complainant cannot automatically claim acceptance. Relying on certain inconsistencies and incongruities in the evidence of the complainant it is contended that

notwithstanding the failure of the accused to rebut the burden imposed on him under Section 139, complainant's case must fall for the reason that such case was not proved beyond reasonable doubt.

11. The crucial question is whether the cheque has been issued for the discharge of a legally enforceable debt/liability. In a prosecution under Section 138 of the Negotiable Instruments Act the complainant is not obliged to establish the liability as in a suit claiming recovery of money. That is why the presumption under Section 139 has been incorporated. Otherwise every criminal court will have to first do the work of a civil court to identify the liability and the quantum. Admission of signature in a document goes a long way in the proof of the document. Once the document is proved the innocuous incongruities in details will not persuade a court to reject the complainant's version nor shall it persuade the court to hold that the burden under Section 139 has been discharged. The insignificant incongruities, innocent inadequacies and the inconsequential infirmities in the evidence tendered by the complainant cannot help the accused to claim any advantage. The Court below was obviously in error in accepting that defence.

12. I must also alertly note that the purpose of Section 138 of the Negotiable Instruments Act is to usher in a new commercial morality among the polity. Cheque transactions must be safe and sure. Transactions in cheques must be as efficacious and efficient as cash transactions. This is the legislative dream/goal. If that be so courts must certainly frown upon a defence raised by an accused that he, in a casual, indifferent or playful manner, kept signed blank cheque leaves or handed them over to others -whether as security or otherwise. It will be impossible to usher in the legislative dream if account holders were to deal with their cheques in such an irresponsible, playful or frivolous manner. If cheque transactions are to have credibility, account holders must deal with their cheques in such a manner which would ensure such credibility. The convenient defence urged by indictees that they handed over blank signed cheque leaves or left blank signed cheque leaves accessible to all and sundry cannot therefore be accepted readily by any court having a commitment to usher in the legislative dream which Section 138 seeks to achieve. Compelling and convincing evidence will certainly have to be adduced by an indictee who even according to himself has been guilty of the

indiscretion of dealing with cheques in an irresponsible manner contrary to the mandate of the legislature underlying Section 138. In this view of the matter also I am satisfied that sufficient evidence has not been tendered by the accused to discharge his burden under Section 139 of the Negotiable Instruments Act.

13. The admitted case of the accused that the second cheque which was also allegedly handed over/forcibly taken away by the complainant was dishonoured and the claim under that cheque was settled by making payment of the amount knocks the bottom out of the theory that both these cheques were obtained under duress from the accused by the complainant. An anxious consideration of all the relevant inputs compellingly persuades me to interfere with the conclusion of fact recorded by the learned Magistrate that the cheque has not been proved to be one issued for the discharge of the legally enforceable debt/liability. The impugned judgment warrants interference.

14. It is contended that the relevant writings in the cheque are not in the handwriting of the accused. With the help of the decision reported in *Capital Syndicate v. Jameela*, 2003 (1) KLT 604, it is contended that the accused is hence not liable to be convicted. In as much as the name of the payee and the other vital details in the cheque are entered in the handwriting of a person other than the accused, the case of the defence that the cheque in question was not even a bill of exchange when it was received by the complainant has to be accepted, it is urged.

15. I am unable to accept this contention. The decision in 2003 (1) KLT 604 does not at all lay down a proposition that if the relevant writings in the cheque are not in the handwriting of the drawer, Section 138 of the Negotiable Instruments Act is not applicable or that the presumption under Section 139 will not be available. Normally in the absence of compelling reasons it has to be assumed that the cheque was not a blank cheque when it was handed over. A person so handing over a blank cheque must be assumed to have given implied authority to such person to whom the cheque is handed over to fill up the relevant details. The entries made in the cheque under such authority cannot normally amount to material alterations also. Merely because the entries are in the handwriting of another, the cheque will not cease to be a cheque or a bill of exchange. The

presumption under Section 139 of the Negotiable Instruments Act is available to all cheques and not only to cheques in the hand writing of the drawer. In these circumstances the mere fact that the relevant and vital entries in the cheque are not in the handwriting of the drawee/accused cannot deliver to him any undeserved advantage.

16. No other contentions have been raised before me by the defence. I am satisfied that all ingredients of the offence punishable under Section 138 of the Negotiable Instruments Act have been established. The impugned judgment in these circumstances warrants interference.

17. Coming to the question of sentence I find that the cheque is dated 21.9.1993. It is for an amount of Rs. 20,000 only. Section 138 was brought into the statute book only in 1988. I have already adverted to the principles governing imposition of sentence in a proposition under Section 138 of the Negotiable Instruments Act in the decision reported in Anil Kumar v. Shammy, (2002 (3) KLT 852) I am satisfied that the interests of justice will be achieved eminently by imposition of a lenient substantive sentence of imprisonment along with a direction under Section 357(3) CrI. P.C. coupled with a default sentence.

18. In the result

i. This appeal is allowed.

ii. The impugned judgment is set aside.

iii. The respondent-accused is found guilty, convicted and sentenced under Section 138 of the Negotiable Instruments Act to undergo imprisonment till rising of court.

iv. The respondent-accused is further directed under Section 357(3) CrI .P.C. to pay an amount of Rs. 26,000/- (Rupees twenty six thousand only) as compensation to the complainant and in default to undergo simple imprisonment for a period of two months.

v. The amount if realised shall be released to the complainant.

19. The learned Magistrate shall take necessary steps for execution of the sentence hereby imposed. The respondent shall appear before the learned Magistrate on 30.6.2003 for execution of the sentence hereby imposed.

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