
(2024) 11 KL CK 0126

High Court Of Kerala

Case No: Criminal Appeal No. 1844 Of 2008

Mathew K.Chериан

APPELLANT

Vs

Enjini R. And Another

RESPONDENT

Date of Decision: Nov. 28, 2024

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 313
- Negotiable Instruments Act, 1881 - Section 118, 138, 138(b), 139

Hon'ble Judges: Sophy Thomas, J

Bench: Single Bench

Advocate: R.Ramadas, C.Dilip, Nagaraj Narayanan, Saijo Hassan, M.C. Ashi

Final Decision: Dismissed

Judgement

Sophy Thomas, J

1. This appeal is at the instance of the complainant in ST No.2060 of 2007 on the file of Judicial First Class Magistrate-II (Mobile), Kottayam,

challenging acquittal of the accused under Section 138 of the Negotiable Instruments Act (hereinafter referred as "the NI Act"), vide judgment

dated 23.05.2008.

2. The case of the complainant was that, towards discharge of Rs.50,000/- owed by the accused, she issued Ext.P1 cheque dated 07.08.1994 assuring

that, it would be honoured on presentation before the Bank. The complainant presented that cheque before his Bank, but it was returned dishonoured

for the reason "funds insufficient". He sent Ext.P4 lawyer notice intimating dishonour of the cheque and demanding the cheque amount. Though

the accused received that notice as per Ext.P6 AD card, no reply was sent and the amount was not returned. Hence the complaint.

3. After taking cognizance and on appearance of the accused before the trial court, particulars of offence were read over and explained, to which, she pleaded not guilty and claimed to be tried. Thereupon, PW1-the power of attorney holder was examined and Exts.P1 to P7 were marked from the side of the complainant.

4. On closure of complainant's evidence, the accused was questioned under Section 313 of Cr.P.C. She denied all the incriminating circumstances brought on record and stated that she had no transaction with the complainant and she never issued any cheque in his favour. Her husband had business transactions, for which she had given her cheques to him. No defence evidence was adduced.

5. On analysing the facts and evidence, and on hearing the rival contentions from either side, the trial court acquitted the accused finding that the complainant miserably failed, in proving that Ext.P1 cheque was executed and issued by the accused towards discharge of any legally enforceable debt. Aggrieved by the acquittal of the accused, the complainant has preferred this appeal.

6. Heard learned counsel for the appellant and learned counsel for the 1st respondent/accused.

7. Learned counsel for the appellant would contend that, the appellant was the Proprietor of Kosamattam Bankers and the 1st respondent issued

Ext.P1 cheque dated 07.08.2004 towards discharge of Rs.50,000/- borrowed by her from that Bank. That cheque was dishonoured for the reason

“funds insufficient”. All the statutory formalities have been complied with by the complainant in order to bring home an offence punishable under

Section 138 of the NI Act, against the accused. No reply was sent by the accused, in spite of receipt of Ext.P4 lawyer notice. The signature of the

accused in Ext.P1 cheque was never disputed. The presumptions available under Sections 118 and 139 of the NI Act will come to the aid of the

complainant to find that Ext.P1 cheque was issued by the accused towards discharge of a legally enforceable debt. So, according to him, the acquittal

of the accused by the trial court, is liable to be set aside.

8. Learned counsel for the 1st respondent/accused pointed out that, even the nature of transaction between the complainant and the accused was not

mentioned either in the complaint or in Ext.P4 lawyer notice. The complaint is filed by Sri.Mathew K.Churian through his power of attorney holder

Sri.T.K Jacob. Though his address is shown as Mathew K.Churian, Kosamattam Bankers, it is not stated that, the complainant was Kosamattam

Bankers represented by Sri.Mathew K. Churian, its Proprietor. So, it has to be treated as a complaint filed by Sri.Mathew K.Churian in his personal

capacity, and it was not, for or on behalf of Kosamattam Bankers. The deposition of PW1, who is the power of attorney holder of the complainant,

also is to the effect that, it was a personal transaction between the complainant Sri.Mathew K.Churian and the accused, and it has no connection with

Kosamattam Finance. PW1 categorically deposed that, loan from Kosamattam Bank will be given, only on daily return basis. But, the transaction

between the complainant and the accused was not on daily return basis, as he himself would say that, the amount was advanced for 15 days. PW1 is

the Accountant of Kosamattam Bank and Kosamattam Chitty Fund and according to him the complainant advanced Rs.50,000/- to the accused in his

presence and she issued Ext.P1 cheque dated 07.08.2004 at the time of receipt of the amount itself, i.e on 23.07.2004.

9. PW1 claimed to be a witness to the entire transaction between the complainant and the accused, by which Rs.50,000/-was advanced by the

complainant and Ext.P1 cheque was issued by the accused in his name i.e. Sri.Mathew K.Churian. But, Ext.P1 cheque will show that, the payee in

the cheque was Kosamattam Bankers and it was not issued in the name of Sri.Mathew K.Churian. So, obviously, PW1 has not seen Ext.P1 cheque

issued by the accused in the name of Kosamattam Bankers. If PW1 had no personal knowledge about the transaction between the complainant and

the accused, he was not competent to give evidence on behalf of the complainant, in spite of Ext.P7 power of attorney executed by the complainant in

his favour. Moreover, since the case of PW1 was that, the transaction was purely a personal transaction between the complainant and the accused,

Ext.P4 notice ought to have been sent by the complainant himself and not by Kosamattam Bankers. But, Ext.P4 notice will show that, it was sent by

Kosamattam Bankers. The complainant or his power of attorney holder has no case that the accused borrowed Rs.50,000/- from Kosamattam

Bankers. That be the case, no statutory notice was sent by the complainant, which will violate the statutory mandate under Section 138(b) of the NI

Act.

10. Learned counsel for the 1st respondent/accused would contend that, the nature of transaction was conveniently suppressed by the complainant, in

the complaint as well as in Ext.P4 notice, since the cheque was in the name of Kosamattam Bankers, given as security, in connection with a loan

availed by the husband of the accused. During cross examination, PW1 was asked whether husband of the accused, was known to him, he pleaded

ignorance. But, later, he admitted that, he had filed CC No.252 of 2005 against the husband of the accused, before JFCM-III, Kottayam, as the power

of attorney holder of the complainant. He also admitted that, it was a case of dishonour of cheque for an amount of Rs.4,21,500/-. He further admitted

that, a civil suit also has been filed by Sri.Mathew K.Churian against the accused as well as her husband for recovery of that amount. So, obviously,

the accused herein, was also a party to the loan availed by her husband from Kosamattam Bankers. It probabilises the case of the accused, that her

cheque given to her husband, might have been used by him to avail loan from Kosamattam Bankers.

11. The evidence given by PW1 further indicates that, a cheque case has been filed against the husband of the accused, as CC No.252 of 2005 and

the cheque of the accused was used for filing the present complaint. So, the case of the accused, that her cheque given by her husband to

Kosamattam Bankers, for availing loan, was misused for filing the complaint, gets substantiated through the evidence of PW1 himself. So, the

presumptions under Sections 118 and 139 of the NI Act will disappear and the complainant has to prove his case without the aid of those

presumptions.

12. As we have seen, the definite case of PW1 was that, it was a personal transaction between Sri.Mathew K.Churian and the accused and the

cheque was issued in the name of Sri.Mathew K. Churian. But, Ext.P1 cheque is in the name of Kosamattam Bankers and not in the name of

Sri.Mathew K.Churian. That itself will show that PW1 had not witnessed the actual transaction, or issuance of Ext.P1 cheque in favour of

Kosamattam Bankers, and if so he was not competent to give evidence on behalf of the complainant. There is no statutory notice sent by the

complainant to the accused, as the transaction was purely a personal one, as deposed by PW1. If it was a personal transaction between the

complainant and the accused, notice by Kosamattam Bankers, cannot be a substitute for the legal notice to be sent by the complainant. The complaint

will not show that the complainant was Kosamattam Bankers represented by its Proprietor. It is filed by Sri.Mathew K.Churian in his personal

capacity, represented by his power of attorney holder. Since the power of attorney holder had no direct knowledge about the actual transaction

between the complainant and the accused, the complainant ought to have entered the witness box to give evidence.

For all these reasons, this Court has to concur with the finding of the trial court. The appeal fails and hence dismissed.