

**(2006) 05 KL CK 0038****High Court Of Kerala****Case No:** Criminal A. No. 1154 of 2002

Supply House

APPELLANT

Vs

Ullas and Another

RESPONDENT

**Date of Decision:** May 30, 2006**Acts Referred:**

- Negotiable Instruments Act, 1881 (NI) - Section 138

**Citation:** (2007) 3 BC 645 : (2006) 4 CivCC 335 : (2006) 133 CompCas 709 : (2006) CriLJ 4330 : (2006) 3 ILR (Ker) 695 : (2007) 1 KLJ 63 : (2006) 3 KLT 921 : (2007) 5 RCR(Criminal) 406**Hon'ble Judges:** K.A. Abdul Gafoor, J**Bench:** Single Bench**Advocate:** T.M. Chandran, for the Appellant; Grashious Kuriakose and P.M. Habeeb, (P.P.), for the Respondent**Final Decision:** Dismissed**Judgement**

K.A. Abdul Gafoor, J.

Acquittal of the respondent for the offence punishable u/s 138 of the N.I. Act is assailed in this appeal by the complainant. According to him, he was a dealer in house hold articles. Accused also did have a shop of the similar articles somewhere else. The accused used to purchase articles on credit from the shop of the complainant. On this count amount was due from the accused. He issued Ext.P1 cheque. It was a post dated one bearing date 24-3-1998, for an amount of Rs. 58,520/- drawn on State Bank of India, Thodupuzha. It was presented to the bank in August, 1998. It bounced as is revealed by Ext. P2. There upon complainant made a demand for payment of the amount covered by Ext.P1 cheque by issuing a notice, Ext. P4. This was responded to in Ext.P7. As the complainant did not get payment, prosecution was launched. The case of the accused was that Ext.P1 cheque was issued as price of 28 number of mixies, which he had ordered from the complainant on 9-2-1998. But the complainant failed to supply the item. Therefore he issued Ext. D4 stop memo to the Bank, on 10-3-1998. Copy of the order that he had placed was

produced as Ext.D1. That was on 9-2-1998. As the complainant did not honour the order placed in Ext.D1 for which Ext.P1 cheque was issued, it was not towards discharge of any liability that the accused did have at that time towards the complainant. So no case to attract Section 138 had been made out, the accused defended the case. Appreciating the evidence on record the court below found that Ext.P1 cheque was not one issued in discharge of the liability that the accused had incurred towards the complainant.

2. It is submitted by the appellant that going by Ext. D3 and Ext. P8, the accused had admitted liability towards the complainant. In Ext.D3 dated 16-3-1998 the accused had even though intimated the complainant not to present the cheque in question in bank, he had agreed to settle the account later. This is also revealed from Ext. P8 communication issued by the complainant on 12-8-1998 as well. Thus when there was liability incurred by the accused towards the transaction subsisting between the parties the appellant was justified in presenting Ext.P1 cheque towards the subsisting liability, even though it was issued as price of the 28 numbers of mixies ordered as per Ext.D1. As on the date of the presentation of the cheque for encashment in the bank, as revealed by Exts.D3 and P8 there was subsisting liability from the part of the accused towards the complainant. Therefore Ext.P1 cheque cannot be stated to be one issued otherwise than towards discharge of the liability.

3. Ext. D1 dated 9-2-1998 is the order that the accused had placed with the complainant. It disclosed that he was ordering 28 numbers of mixies and that he was enclosing there with Ext.P1 cheque for Rs. 58,520/- being the price amount for 28 number of mixies ordered. Order was placed on 9-2-1998 and the cheque is dated 24-3-1998. It was thus a post dated cheque towards thus ordered. Ext. D4 is the stop memo that the accused had issued to his bankers directing the bank that, the cheque had been issued along with an order placed by the accused on the complainant who failed to supply the articles so ordered and therefore the amount as per the cheque shall not be paid. This was as early as on 10-3-1998 even before the date of Ext.P1 cheque and far earlier than its presentation by the complainant in the bank. It is after that he intimated to the complainant in Ext. D3 letter dated 16-3-1998 that he had not given the articles ordered and therefore the cheque shall not be presented to the bank. Of course, it contains a further request that settlement of the other transactions could be done later, Thus even before the date of the cheque, the accused had informed the complainant that it shall not be presented to the bank because of the failure of the complainant himself in not supplying the items ordered as per Ext.D1, enclosing there with Ext.P1 post dated cheque. Thus it is clear that the accused had not incurred the liability for the amount covered by Ext.P1, a post dated cheque. The statement of account referred to in Ext. D3 in respect of other transactions cannot be found to be linked with Ext.P1 cheque. It was issued for a particular purpose. True, Ext. D3 and Ext. P8 indicate that accused owes some amount to the complainant, which has to be settled between the parties, as offered by the accused in the said letters. But what was the amount so due on

settlement was not proved by the complainant. Whether it is in excess of the amount covered by Ext.P1 or whether it is less than the amount covered by Ext.P1 is a material aspect as regards the alleged liability on that count. In order to deem that one had committed offence u/s 138, the amount covered by the cheque shall be either in discharge of the liability incurred by the drawer, either in full or in part. It cannot in any way in excess of the liability incurred. Unless the complainant proves that the liability to be settled is to the tune of the amount covered by Ext. P1, he could not have made use of that cheque for such liability. Therefore, Ext. P1 cheque cannot be stated to be one issued in discharge of the liability to the tune of the amount covered by it, which was really issued, as is revealed by Ext.D1, as the price amount for 28 numbers of mixies, which the complainant had not supplied. Therefore the acquittal of the accused cannot be stated to be unjustified to invite interference in the appeal.

Appeal fails and is dismissed.