IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 13TH DAY OF MARCH 2024 / 23RD PHALGUNA, 1945

CRL.A NO. 532 OF 2022

AGAINST THE JUDGMENT DATED 23.03.2022 IN CC NO.393 OF 2017 OF JUDICIAL FIRST CLASS MAGISTRATE-I, ALUVA

APPELLANT/COMPLAINANT:

RAHIYA, AGED 49 YEARS
W/O SHRI.ISMAIL, PULICKAL HOUSE,
KUTTAMASSERRY KARA, KEEZHMADU VILLAGE,
ALUVA TALUK, ERNAKULAM, PIN – 686135.

BY ADVS.
MATHAI EAPPEN VETTATH
T.G.RAJAN
P.K. RAGHAVAN
JIMMY G

RESPONDENTS/ACCUSED & STATE:

1 **JASNA, AGED 40 YEARS**
W/O SHRI NAJEEB, THAMARAPPALLY HOUSE,
NEAR MADAVANA STOP NETTOOR,
ERNAKULAM - 682040.

2 **STATE OF KERALA**
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM – 682031.

R1 BY ADV. NAVEEN THOMAS
R2 BY PP SRI.G.SUDHEER

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13.03.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R."

JUDGMENT

The challenge in this appeal is to the judgment dated 23.3.2022 in C.C.No.393/2017 passed by the Judicial First Class Magistrate-I, Aluva. The appellant is the complainant. Respondent No.1 is the accused.

2. The parties will be referred to hereinafter according to their position in the trial Court. The complainant filed a complaint alleging offence punishable under Section 138 of the Negotiable Instruments Act. The accused executed a cheque for Rs.10,00,000/- (Rupees ten lakhs only) drawn on the Federal Bank Ltd., Panangad Branch, in favour of the complainant. The cheque was dishonoured due to insufficient funds. The complainant caused to issue a lawyer's notice, which the accused received but failed to pay the amount covered by the cheque.

3. The complainant has examined herself as PW1. A witness was examined as PW2. The complainant proved Exts.P1 to P7. The Court below acquitted the accused at the close of the trial.

4. Heard the learned counsel appearing for the complainant and the learned counsel appearing for the accused.

5. The learned counsel for the complainant submitted that the judgment of acquittal passed by the Court below is illegal and unsustainable in law. The learned counsel, relying on **Uttam Ram** v. **Devinder Singh Hudan and Another [2019 (5) KHC 179 : (2019) 10 SCC 287]** and **Jacob K.M.** v. **State of Kerala and Another (2020 (1) KHC 291),** submitted that as the complainant established execution of Ext.P1 cheque, the mandatory presumption as provided under Section 139 of the Negotiable Instruments Act has been drawn in her favour.

6. The learned counsel relied on **Jacob K.M.** (supra) to contend that in a case where the accused did not send a reply to the statutory notice, the absence of details regarding the original transaction does not affect the credibility of the testimony of the complainant.

7. The learned counsel for the accused submitted that the complainant failed to prove the execution of the cheque. It is further submitted that even if it is assumed that a presumption has been drawn, the accused could successfully rebut it.

8. The complainant is the sister-in-law of the accused. She gave evidence that the accused requested a loan of Rs.10,00,000/- from her. The complainant went to Keezhmadu Service Co-operative Bank, Aluva Mahilalayam Branch, pledged 5 cents of land and a house therein, obtained Rs.10,00,000/- and handed it over to the accused without discussing it with the other members of her family. PW1 stated that the accused had agreed to return the amount on the 31st day after the borrowal. After 30 days, the accused came to the complainant's house and gave Ext.P1 cheque.

9. In the complaint, the complainant has not pleaded the dates she lent the money, and the accused executed the cheque. While giving evidence, the complainant stated that the accused executed the cheque on 3.1.2017.

10. Ext.P1 cheque is drawn from the account of the accused. The evidence of PW2 corroborates the oral evidence of PW1 to establish that the cheque was drawn from the account maintained by the accused. Therefore, the complainant could prove the issuance of Ext.P1 cheque by the accused. A negotiable instrument, including the cheque, carries presumption in consideration in terms of Section 118(a) and under Section 139 of the Negotiable Instruments Act. A dishonour

of cheque carries a statutory presumption of consideration. The holder of the cheque, in due course, is only required to prove that the cheque was issued by the accused and that when the same was presented, it was not honoured. Since there is a statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or other liability (Vide: **Uttam Ram** v. **Devinder Singh Hudan and Another [2019 (5) KHC 179 : (2019) 10 SCC 287].**

11. Therefore, the necessary conclusion is that the complainant has established the execution of Ext.P1 cheque by the accused.

12. Now, the question that arises for consideration is whether the accused could successfully get the presumption rebutted. A presumption is an inference as to the existence of a fact not actually known arising from its connection with another which is known. A presumption is a conclusion drawn from the proof of facts or circumstances and stands as establishing facts until overcome by contrary proof. Analysing the terms "proved" and "disproved" as provided in Section 3 of the Evidence Act, a court shall presume a Negotiable Instrument to be for consideration unless and until after

considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. The necessary conclusion is that for rebutting such a presumption, what is needed is to raise a probable defence. All the circumstances, including the evidence adduced on behalf of the complainant, could be relied upon.

13. In **Hiten P. Balal** v. **Bratindranath Banerjee [(2001) 6 SCC 16]**, a three-judge Bench of the Supreme Court, on the scope of Sections 138 and 139 of the Negotiable Instruments Act, held that the obligation of the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact. In **Bharat Barrel & Drum Mfg. Co.** v. **Amin Chand Payrelal [(1999) 3 SCC 35],** while considering the presumption under Section 118(a) of the Negotiable Instruments Act, the Supreme Court held that the defendant can prove the non-existence of a consideration by raising a probable defence. The Supreme Court observed that if the defendant is proved to have discharged the initial onus of proof showing

that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the complainant, who would be to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the Negotiable Instrument. The Supreme Court further observed that the burden upon the defendant of proving the non-existence of the consideration can be either directly or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies.

14. In **Harbhajan Singh** v. **State of Punjab (AIR 1966 SC 97)**, the Supreme Court, while considering the nature and scope of onus of proof which the accused was required to discharge in a criminal case, held that the onus on an accused person might well be compared to the onus on a party in civil proceedings, and just as in civil proceedings the court trying an issue makes its decision by adopting the test of probabilities. In **V. D. Jhingan** v. **State of Uttar Pradesh (AIR 1966 SC 1762),** the Supreme Court held that it is well established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. In **Rajaram S/o.Sriramulu Naidu (Since Deceased) through L.Rs.** v. **Maruthachalam (Since**

Deceased) through L.Rs. (2023 LiveLaw (SC) 46), the Supreme Court held that the standard of proof for rebutting the presumption is that of preponderance of probabilities, and it is open for the accused to rely on the evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence.

15. The principle that emerges from the above discussion is that the rebuttal does not have to be conclusively established, but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of responsibility being that of the prudent man.

16. In **M.S.Narayana Menon** v. **State of Kerala [(2006) 6 SCC 39),** the Supreme Court has elaborately considered the question of the standard of proof for rebutting the mandatory presumption drawn under Section 139 of the Negotiable Instruments Act. In **Narayana Menon**, the Supreme Court held that if some material is brought on record consistent with the innocence of the accused, which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal. The Supreme Court further

held that it is not necessary for the accused to disprove the existence of consideration by way of direct evidence and that the standard of proof evidently is preponderance of probabilities.

17. Now, I consider whether the accused could rebut the presumption drawn in favour of the complainant. There is a vehement challenge to the consideration of Ext.P1 cheque. As I mentioned above, the complainant is the sister-in-law of the accused. The complainant stated that the cheque was executed on 3.1.2017. She further gave evidence that 30 days before the execution of the cheque, she had lent the money. Therefore, it is to be inferred that she must have paid the amount to the accused on 4.12.2016. According to the complainant, when the accused requested to take the loan, she, without even discussing it with the other members of her family, went to Keezmadu Service Co-operative Bank Ltd. and availed a loan mortgaging her landed property. The complainant relied on Ext.P6 account statement to substantiate this transaction. Ext.P6 account statement would show that she took the loan of Rs.10,00,000/- on 26.8.2015. In the chief affidavit, she specifically stated that she had availed the loan to lend money to the accused. So, the case of the complainant that she had lent the money utilizing the loan she availed on 26.8.2015 is shrouded

in suspicion. Ext.P6 account statement is inconsistent with the complainant's claim. In the cross-examination, the complainant changed her version and stated that she had taken the loan for her son, and when her son returned the money, the accused came to know about it and borrowed it. This version of the complainant contradicts her evidence in the proof affidavit, where she asserted that when the accused approached for the loan, she obtained the loan by mortgaging her landed property. The trial Court held that when suspicious circumstances surround the transaction, unless the holder of the instrument removes such suspicions by tendering satisfactory explanations, no conviction is legally permissible by banking on statutory presumptions. The accused could discharge her initial onus of proof showing that the existence of consideration was doubtful. The onus now shifted to the complainant, who is obliged to prove it as a matter of fact. In the present case, the complainant failed to prove the same. I am of the view that the accused could satisfy the court that there is a reasonable possibility of the non-existence of the consideration. The learned counsel for the accused further contended that the accused, having been acquitted by the trial Court, is entitled to the presumption of innocence and further that the accused, having

secured his acquittal, the presumption of his innocence is further reaffirmed and strengthened by the trial Court. The learned counsel for the accused also submitted that if reasonable conclusions are possible based on the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court.

18. The Apex Court in **Chandrappa and others** v. **State of Karnataka [(2007) 4 SCC 415],** following various authorities on the subject, deduced the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal, as follows:-

> "(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
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> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
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> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc, are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.
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> (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available

> to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the Trial Court.
>
> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the Trial Court."

19. In the instant case, the complainant failed to give a satisfactory explanation for the suspicious circumstances brought out regarding the consideration of Ext.P1 cheque. The trial Court held that the burden is shifted to the complainant to prove that Ext.P1 cheque was issued in discharge of a legally enforceable debt and that the cheque was transferred for consideration. The trial Court held that the complainant could not prove that Ext.P1 cheque was issued in discharge of a legally enforceable debt. This view cannot be held to be illegal, improper or contrary to law. Therefore, I am of the considered view that the reasoning recorded by the trial Court for acquitting the accused was possible and plausible and no interference is required.

For the above-mentioned reasons, the appeal lacks merit, and accordingly, it is dismissed.

Sd/-
K.BABU
Judge

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