

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 21ST DAY OF JULY 2022 / 30TH ASHADHA, 1944

CRL.A NO. 1191 OF 2008

AGAINST THE ORDER DATED 10.04.2008 IN C.C.NO.155/2004 OF
JUDICIAL MAGISTRATE OF FIRST CLASS-V, TVM (SPECIAL COURT-MARK
LIST CASES)

SPL.LEAVE GRANTED AS PER ORDER DT.11.06.2008 IN Cr1.L.P.
489/2008 OF HIGH COURT OF KERALA

APPELLANT/COMPLAINANT:

SHIBU.L.P., S/O.E.C.LIVINGSTONE,
REPRESENTED BY THE POWER OF ATTORNEY
E.C.LIVINGSTONE, S/O.LATE CHRISTUDAS, SANTHOSH
BHAVAN, T.C.8/1967, ILIPPODE, THIRUMALA (P.O),
THIRUVANANTHAPURAM DISTRICT.

BY ADV GOPAKUMAR R.THALIYAL

RESPONDENTS/ACCUSED & STATE:

- 1 NEELAKANTAN, S/O NARAYANAN NAIR,
SAIRAM ENTERPRISES, ULLAS NAGAR, ELIPPODE VIA.
VALIYAVILA, THIRUMALA (P.O), THIRUVANANTHAPURAM.
- 2 STATE OF KERALA REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,,
ERNAKULAM.

BY ADV PUBLIC PROSECUTOR SMT.MAYA M.N.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
12.07.2022, THE COURT ON 21.07.2022 DELIVERED THE FOLLOWING:

“C.R”

A.BADHARUDEEN, J.

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Crl.Appeal No.1191 of 2008
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Dated this the 21st day of July, 2022

J U D G M E N T

This appeal is at the instance of the original complainant in C.C.No.155/2004 on the file of the Judicial First Class Magistrate Court-V, Thiruvananthapuram. The sole accused in the above case is the 1st respondent herein and State of Kerala represented by the learned Public Prosecutor is arrayed as the 2nd respondent.

2. At the time of admission, leave granted and appeal admitted.

3. Heard the learned counsel for the appellant as well as the learned Public Prosecutor. No representation for the 1st respondent/complainant.

4. Summary of the case : One Shibu L.P, lodged complaint before the Judicial First Class Magistrate Court-V, Thiruvananthapuram against the accused alleging commission of

offence under Section 138 of the Negotiable Instruments Act. The specific case put up by the complainant before the trial court is that the accused borrowed an amount of Rs.95 lakh from the complainant for his urgent personal requirement and issued cheque on 22.07.2000 drawn on Canara Bank, P.T.P Nagar, with assurance of encashment. Though the complainant accepted the cheque and presented the cheque for collection through District Co-operative Bank, Thiruvananthapuram, the same got dishonoured for want of fund. The further case of the complainant before the trial court is that though notice of dishonour of the cheque amount had been issued with demand for repayment, the accused failed to repay the same, even after accepting the notice. Thus the accused alleged to have committed offence under Section 138 of the Negotiable Instruments Act.

5. The court below took cognizance of the matter and tried the matter. Earlier, as on 31.01.2006, the trial court found the accused committed offence under Section 138 of the NI Act, and he was convicted and sentenced thereunder.

6. The said conviction and sentence were taken in appeal before the Sessions Court, Thiruvananthapuram as per Crl.Appeal No.201/2006.

7. The learned Sessions Judge set aside the conviction and sentence mainly on the ground that PW1 examined in the case, who is the power of attorney holder of the original complainant, had no direct knowledge about the transaction and his evidence is only hearsay. Accordingly, the matter was remanded back to the trial court for fresh disposal.

8. After remand, the trial court examined PW1 further.

9. After questioning the accused under Section 313(1)(b) of Criminal Procedure Code, DWs 1 and 2 were examined on the side of the accused.

10. On appreciation of evidence, the learned Magistrate had acquitted the accused.

11. The learned Magistrate found that PW1, the power of attorney holder, during further examination on 26.03.2008 categorically stated that PW1 had given evidence that his

deposition given on 07.10.2005 to the effect that the knowledge he had about the transaction was hearsay, is exactly true and genuine. This is the reason why the learned Magistrate acquitted the accused.

12. The learned counsel for the appellant/complainant argued that in this matter issuance of a cheque and the signature therein were admitted fact and, therefore, the complainant could very well avail benefit of presumptions under Sections 118 and 139 of the Negotiable Instruments Act. Since nothing extracted to rebut the presumption, the court below ought to have believed the version of PW1 and entered into conviction. He also submitted that in this matter, in the chief affidavit filed at the first instance itself, the power of attorney holder of the complainant given categoric averment that he had direct knowledge about the transaction.

13. He argued further that during cross examination PW1 had given evidence that the details in the complaint and the transaction between the complainant and the accused were

information given by his son. However, the trial court convicted and sentenced the accused and when the matter was taken in appeal, the appellate court set aside the conviction and sentence and remanded the case for adducing fresh evidence to prove the transaction and execution of the cheque.

14. It is not in dispute that an initial burden is cast upon the complainant to prove the transaction led to execution of the cheque, in order to canvass the benefit of presumption under Section 118 ad 139 of the Negotiable Instruments Act. In such cases, how far the evidence of power of attorney holder is reliable is a relevant question.

15. In the decision reported in [2013 (3) KHC 885 : 2013 (2) KLD 539 : 2013 (4) KLT 21 : 2013 (4) KLJ 279 : AIR 2014 SC 630 : 2014 CriLJ 576 : 2014 (11) SCC 790], *Narayanan A.C. & anr. v. State of Maharashtra & Ors.*, 3 Bench of the Apex Court considered filing of a complaint by the power of attorney and the nature of evidence of the power of attorney required to prove the transaction. In the said case, the Apex Court settled the following

principles:

“(i) Filing of complaint petition under Section 138 of NI Act through power of attorney is perfectly legal and competent.

(ii) The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

(iv) In the light of Section 145 of NI Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the NI Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant or his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the NI Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.”

Thus the law is settled on the point that a complaint alleging commission of offence under Section 138 of the Negotiable Instruments Act can be presented through the power of attorney

holder and the power of attorney holder can depose and verify on oath before the court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee or holder in due course or possess due knowledge regarding the said transaction. It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who had no knowledge regarding the transactions cannot be examined as a witness in the case.

16. In this matter, the complaint was originally filed by Shibu.L.P, the complainant. There is no mention in the complaint to the effect that the transaction was witnessed by the power of attorney holder, PW1. It was during evidence, PW1 the power of attorney holder filed chief affidavit and in the chief affidavit he had stated that he was aware of the facts of this case. But during cross examination, as on 07.10.2005, he had given evidence that he had only hearsay knowledge about the transaction between the accused

and his son. It was for the said reason, the appellate court set aside the conviction and sentence earlier imposed by the trial court. When the trial court again given opportunity to the complainant to adduce evidence, PW1 given evidence that the money was given in his presence and cheque was issued in his presence. During further cross examination again the earlier question was reiterated by the learned counsel for the accused. Then he answered in the negative. For clarity, the evidence during further cross examination is also extracted hereunder:

“ഇടപാടിനെക്കുറിച്ചു മക്കൾ പറഞ്ഞതറിവാണ്. അറഞ്ഞ പറഞ്ഞത് സത്യമാണ്.”

Thus it appears that when PW1 was examined after remand of the matter, he had given evidence supporting the transaction and execution of the cheque, but during further cross examination, he reiterated his earlier stand stating that he had only hearsay knowledge about the transaction. Now comes the significant question as to whether the appellant succeeded in proving the transaction and execution of the cheque. The evidence of PW1

discussed in detail would indicate that PW1 repeatedly given evidence during cross-examination that he had no direct knowledge about the transaction. Therefore, no credence can be given to the evidence of PW1, in the matter of transaction and execution of the cheque. Thus, in the case on hand, the complainant miserably failed to adduce convincing evidence to prove the transaction led to execution of Ext.P2 cheque in this case. Therefore, the trial court rightly recorded acquittal and I am not inclined to revisit the same.

Accordingly, the appeal fails and is dismissed.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/