IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

MONDAY, THE 29TH DAY OF JULY 2019 / 7TH SRAVANA, 1941

CRL.A.No.2535 of 2008

AGAINST THE JUDGMENT IN CC 1065/2004 of JUDICIAL MAGISTRATE OF FIRST CLASS -II(MOBILE),KOTTAYAM DATED 25-10-2006

LEAVE GRANTED AS PER ORDER IN Crl.L.P. 1255/2008 DATED

26-08-2008

APPELLANT/COMPLAINANT:

GEEMOL JOSEPH
PALATHINKAL HOUSE, KODIMATHA KOTTAYAM S.P.O.KOTTAYAM
REPRESENTED BY HER POWER OF ATTORNEY HOLDER LOSAN JOSEPH.

BY ADVS.
SRI.JOSEKUTTY MATHEW
SHRI.ABHIJITH GEORGE
SMT.PRASEENA ELIZABETH JOSEPH
SRI.PRAFIN JOSEPH ZACHARIA

RESPONDENTS/ACCUSED AND STATE

1 KOUSTHABHAN
S/O MADHAVAN, KAVANAL HOUSE, MALAMKUZHA, NATTAKOM P.O., KOTTAYAM.

2 STATE OF KERALA REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY ADVS.
SRI.S.JAYAKRISHNAN
SRI.VINO V.GEORGE
SRI C.M.KAMMAPPU -SR.P.P

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 24.07.2019, THE COURT ON 29.07.2019 PASSED THE FOLLOWING:

"CR"

R. NARAYANA PISHARADI, J.

* *

Crl.Appeal No.2535 OF 2008

Dated this the 29th day of July, 2019

JUDGMENT

R.Narayana Pisharadi,J

The appellant is the complainant. Challenge in the appeal is directed against the judgment of the trial court acquitting the first respondent/accused of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act').

2. The case of the complainant is as follows: The accused borrowed an amount of Rs.65,000/- from her on 06.09.2003 on the promise that he would repay it after three months. After the expiry of the aforesaid period, the complainant demanded the amount from the accused. Then, the accused signed and delivered a cheque dated 06.12.2003 for Rs.70,000/- to her. The complainant presented the cheque in

the bank. It was dishonoured for the reason that there was no sufficient amount in the account of the accused. On 18.12.2003, the complainant sent a lawyer notice to the accused demanding payment of the amount of the cheque. The accused did not accept the notice though he received intimation regarding the notice from the postal authorities. The accused did not pay the amount.

3. The case was initially disposed of by the trial court by judgment dated 08.02.2005 by convicting and sentencing the accused for the offence punishable under Section 138 of the Act. The accused challenged the aforesaid judgment in appeal before the Court of Session. The appellate court set aside the order of conviction and sentence and remanded the case to the trial court to enable the complainant to adduce further evidence in the case.

4. During the trial of the case conducted initially, PW1 was examined and Exts.P1 to P6 were marked on the side of the complainant. The accused had got himself examined as DW1. After the remand of the case, PW2 was examined and Exts.P7 to P9 documents were marked on the side of the complainant. No further evidence was adduced by the accused.

5. The complaint was instituted by PW1, the power of attorney holder of the complainant. The accused had challenged the competency of PW1 to institute the complaint. The trial court found that PW1 had the authority to institute the complaint on behalf of the complainant. The accused had also alleged that Ext.P1 cheque is void on account of material alteration. The trial court accepted this plea and found that material alteration of Ext.P1 cheque was effected by the complainant. Consequently, the trial court found the accused not guilty of the offence punishable under Section 138 of the Act and acquitted him.

6. Heard learned counsel for the appellant and also the first respondent and perused the records.

7. Ext.P6 is the power of attorney executed by the complainant in favour of PW1. The first sentence in Ext.P6 reads as follows:

> "I, Geemol Joseph W/O M.J Joseph, aged 40, Palathimkal House, Kodimatha, Kottayam South do here by constitute and appoint Losan Joseph, aged 33, Mannarath Hosue, Puthupally as my attorney in my name or in the name of Director, St.Mary's Communications, Kodimatha, Kottayam South to prosecute and

> conduct of the pending as well as the new suits/cases before the J.F.M.C Ettumanoor /Magistrate Courts Kottayam / C.J.M Court Kottayam/Munsiff's Courts, Ettumanoor/ Munsiff's Courts Kottayam/ Sub-Courts Kottayam/District Courts Kottayam and to do all other acts which are necessary or incidental for the proper conduct of the cases in which "St. Mary's Communications" as complainant/ petitioner/plaintiff/applicant or defendant/ counter petitioner."

The question is whether PW1 had authority, on the basis of Ext.P6 power of attorney, to institute the complaint on behalf of the complainant.

8. On a close scrutiny of the recitals in Ext.P6 power of attorney, it can be found that the complainant had authorised PW1 to prosecute and conduct the cases before different courts in her name. The fact that she had also authorised PW1 to conduct cases in the name of the Director of St.Mary's Communications, Kodimatha does not in any way derogate the authority conferred upon PW1 by virtue of Ext.P6 to institute a complaint on behalf of the complainant. In the instant case, PW1 has instituted the complaint not in his own name but on behalf of his principal. Whatever ambiguity existed in the

recitals in Ext.P6 regarding the authority of PW1 to institute the complaint stands cleared by the evidence of the complainant (PW2). She has categorically stated that she had executed Ext.P6 power of attorney authorising PW1 to institute cases on her behalf.

9. The power of attorney holder is the agent of the grantor. When the grantor authorises the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his power of attorney holder and not by the attorney holder in his personal capacity. True, the power of attorney holder cannot file a complaint in his own name as if he is the complainant. He can initiate criminal proceedings on behalf of the principal. Filing of a complaint under Section 138 of the Act through the power of attorney holder is perfectly legal and competent (**See A.C Narayanan v. State of Maharashtra : AIR 2014 SC 630**).

10. In the aforesaid circumstances, the trial court has correctly found that PW1 had authority, by virtue of Ext.P6 power of attorney, to institute the complaint on behalf of the complainant.

11. Ext.P1 is the cheque dated 06.12.2003 for Rs.70,000/- alleged to have been executed and delivered by the accused to the complainant. Ext.P2 memorandum issued from the bank shows that the cheque was returned unpaid for want of sufficient funds in the account of the accused. Ext.P3 is the intimation given to the complainant from her bank regarding the dishonour of the cheque. It is dated 13.12.2003. Ext.P4 is the cover containing the notice issued to the accused by the complainant, by registered post, demanding payment of the amount of the cheque. The postal seal on Ext.P4 cover shows that the notice was returned to the complainant unserved on 29.12.2003. The complaint was filed on 04.02.2004.

12. The accused has raised the contention that material alteration was made to Ext.P1 cheque and that it is a void document for that reason.

13. On a perusal of Ext.P1 cheque, it is seen that the name "Kousthubhan" (the name of the accused) was initially written as the name of the payee. It is seen that the name of the payee written as "Kousthubhan" is struck off and the name of the complainant is written in the cheque as the payee. Therefore, it is evident that there was alteration made in the

cheque with regard to the name of the payee. The question is whether it is a material alteration or not.

14. A material alteration, is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed (See **Loonkaran Sethia v. Ivan E. John: AIR 1977 SC 336**).

15. Alteration of the payee's name in a cheque is material which affects the character of the instrument, and so also the relationship of the parties and their legal position as originally expressed. Therefore, it has to be concluded that material alteration of Ext.P1 cheque was effected with regard to the name of the payee.

16. Section 87 of the Act reads as follows:

> *"87. Effect of material alteration - Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto,*

unless it was made in order to carry out the common intention of the original parties.

Alteration by indorsee - Any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof.

The provisions of this section are subject to those of Sections 20, 49 and 86 and 125".

17. The party who consents to the alteration as well as the party who made the alteration are not entitled to complain against such alteration. If the drawer of the cheque himself altered the cheque, he cannot take advantage of it later by saying that the cheque became void as there is material alteration thereto. Even if the payee or the holder of the cheque made the alteration with the consent of the drawer thereof, such alteration also cannot be used as a ground to resist the right of the payee or the holder thereof. It is always a question of fact whether the alteration was made by the drawer himself or whether it was made with the consent of the drawer. It requires evidence to prove the aforesaid question whenever it is disputed (See **Veera Exports v. Kalavathy: AIR 2002 SC 38**).

18. Therefore, the question now arises whether material alteration of the cheque was made by the accused himself or with his consent.

19. The evidence of PW1, the power of attorney holder of the complainant, does not throw any light with regard to the circumstances under which alteration was made in the cheque with regard to the name of the payee. PW1 has got a specific case that Ext.P1 cheque was executed by the accused and delivered by him to the complainant in his presence. However, in examination-in-chief (proof affidavit) he has not stated anything about the correction made in the cheque with regard to the name of the payee. On cross examination also, PW1 has not stated anything with regard to the circumstances under which correction of the name of the payee was made in the cheque.

20. The complainant was examined as PW2. It is to be noted that she was examined before the court below after the remand of the case. Even then, in examination-in-chief (proof affidavit), the complainant has not stated anything about the correction seen or made in the cheque with regard to the name of the payee. The evidence given by the complainant in examination-in-chief is totally silent on this aspect. On cross

examination, the complainant was confronted with the correction seen in the cheque. She would then admit that the name of the payee written in the cheque is seen corrected. But, she would then say that she received the cheque in the same condition as shown to her in the court. She also stated that there is difference in the ink with which the name of the payee is written and the ink with which the date in the cheque is written.

21. PW1 has given evidence that it was in his presence that the accused signed the cheque and gave it to the complainant. But, he has not given any evidence that at the time of delivery of the cheque to the complainant, there was alteration or correction in the cheque with regard to the name of the payee. As noticed earlier, his evidence is totally silent with regard to the circumstances under which correction was made in the cheque with regard to the name of the payee.

22. Of course, the complainant has given evidence that she received the cheque from the accused in the very same condition as it was shown to her in the court. In other words, it is her version that when the accused gave the cheque to her, there was already correction in it with regard to the name of the payee. At this juncture, it is to be noted that the correction in

the cheque is not attested or countersigned by the accused. As rightly opined by the court below, when the cheque contained a correction with regard to the name of the payee, which was not even attested by the signature of the accused, it is highly improbable that the complainant would have accepted it. The complainant is not a rustic and illiterate lady. She is the director of a book publishing company. In such a situation, the plea of the complainant that she accepted the cheque given by the accused which contained a correction of the name of the payee, cannot be believed.

23. When there is an alteration in the cheque with regard to the name of the payee, the burden is upon the complainant to prove that such alteration was made by the accused himself or that it was made with the consent of the accused. The evidence of PW1 and PW2 does not prove that the alteration in the cheque with regard to the name of the payee was made by the accused himself or that it was made with his consent.

24. The upshot of the discussion above is that Ext.P1 is a cheque which was subjected to material alteration and that the complainant failed to prove that material alteration of the cheque was done or made by the accused himself or with his

consent.

25. The effect of making a material alteration on a negotiable instrument without the consent of the party bound under it is exactly the same as that of cancelling the instrument. By alteration, the identity of the instrument is destroyed. If there is any material alteration in the cheque which renders it void, no criminal prosecution can be launched based on such a cheque (See **Ramachandran v. Dinesan: 2005 (1) KLT 353**).

26. Of course, the accused had got a plea that he had drawn the cheque in his own name for withdrawing amount from his bank and he had entrusted the cheque with his friend Babu to withdraw money from the bank but the cheque was lost from the possession of Babu.

27. It shall be now considered whether the evidence adduced by the accused to prove the aforesaid plea can be acted upon. The accused filed only an affidavit in lieu of examination-in-chief. He did not orally depose before the court in examination-in-chief.

28. An accused, in a case against him under Section 138 of the Act, is not entitled to give evidence on affidavit. Section 145(1) of the Act does not confer a right on the accused to give

evidence on affidavit (See **Mandvi Co-operative Bank Limited v. Nimesh : AIR 2010 SC 1402**). The right available to a complainant, to adduce evidence by affidavit in lieu of examination-in-chief, is not available to an accused (See **Tomy v. State of Kerala : 2017 (2) KHC 841**). Therefore, there was no valid examination-in-chief of the accused (DW1).

29. When there was no examination-in-chief of a witness, no question of cross examination also arises. Section 138 of the Indian Evidence Act envisages that a witness would first be examined-in-chief and then subjected to cross examination. There is no meaning in tendering a witness for cross examination only. Tendering of a witness for cross examination, without conducting examination-in-chief, amounts to giving up of the witness (See **Sukhwant Singh v. State of Punjab: AIR 1995 SC 1601**). It follows that the evidence given by the accused (DW1) in the cross examination also cannot be acted upon.

30. The plea of the accused is also not probable. He did not even give any intimation to the bank regarding the loss of the cheque. According to him, the cheque was lost from the possession of his friend Babu. The accused did not examine his

friend Babu. Therefore, the plea raised by the accused regarding the circumstances under which the cheque left his possession cannot be accepted as probable or convincing.

31. However, in view of the material alteration of the cheque, non-acceptance of the plea of the accused, does not inure to the advantage of the complainant. The weakness of the plea of the accused does not come to the rescue of the complainant. Material alteration of the cheque, without the consent of the drawer, makes the instrument void and no criminal action would lie on the basis of such an instrument.

32. In the aforesaid circumstances, there are no compelling grounds to reverse the order of acquittal passed by the trial court. The appeal is liable to be dismissed.

In the result, the appeal is dismissed.

R.NARAYANA PISHARADI, JUDGE

jsr/lsn/26/07/2019

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PS to Judge