

(2003) 01 KL CK 0013
In the High Court Of Kerala
Case No : C.R.A. 535 of 2002

Capital Syndicate

APPELLANT

Vs

Jameela and Another

RESPONDENT

Date of Decision : 13-01-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 255(1)
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139, 5, 6

Citation : (2003) 1 KLJ 333

Hon'ble Judges : R. Rajendra Babu, J

Bench : Single Bench

Advocate : M.V. Mathew, for the Appellant; Sujith Mathew Jose (GP), for the Respondent

Final Decision : Dismissed

Judgement

R. Rajendra Babu

1. This appeal is at the instance of the complainant in C.C. No. 312/99 before the Judl First Class Magistrate's Court, Kunnamkulam. The firm Capital Syndicate through its Manager filed the criminal complaint against the accused Jameela alleging commission of offence u/s. 138 of the Negotiable Instruments Act (for short, hereinafter referred to as "the Act"). The accused obtained hire purchase facility from the complainant firm, doing financial business, in respect of her autorikshaw bearing No. KL-10/7100 and received an amount of Rs. 27,950/- by executing Ext. P3 agreement on 8-10-1983. The entire amount with interest thereon had to be repaid in 36 instalments. It was alleged that after remitting 8 instalments, the accused defaulted and when the complainant demanded repayment of the entire balance amount, in April 1999, the accused issued a cheque drawn on Dhanalakshmi Bank, Kunnamkulam Branch for an amount of Rs. 36,300/-. On presentation of the above cheque for encashment, it was dishonoured due to the insufficiency of funds in the account of the accused and after complying with all the necessary legal formalities, the Manager of the firm

Capital Syndicate filed the criminal complaint. The Manager of the firm was examined as PW 1 and Exts. P1 to P10 were marked on the side of the complainant. On the side of the accused DWs 1 and 2 were examined and Exts. D1 and D2 were marked. After considering the entire evidence, the court below found the accused not guilty of the offence u/s. 138 of the Act and acquitted her u/s.255(1) of Cr. P.C. Aggrieved by the above, the complainant filed this appeal with the leave of the court, challenging the order of acquittal. The accused/First respondent herein availed of hire purchase facility and received Rs. 27,950/- from the appellant financier by executing Ext. P3 hire purchase agreement in respect of her autorikshaw and the entire amount, with interest thereon, had to be repaid in 36 instalments. The first respondent remitted only 8 instalments and thereafter defaulted in paying the remaining instalments. According to the appellant, when a demand was made for payment of the entire defaulted instalments, the first respondent had gone to the office of the appellant in April, 1999, and issued Ext. P5 cheque for Rs. 36,300/- and the above cheque when presented for encashment, was dishonoured due to the insufficiency of funds in the account of the first respondent.

2. The learned counsel for the appellant submitted that a presumption u/s. 139 of the Act should have been drawn in favour of the appellant that the cheque had been issued in discharge of a legally enforceable debt and accordingly the accused should have been found guilty of the offence u/s. 138 of the act. The definite case put forward by the first respondent was that at the time of executing the hire purchase agreement the appellant financier had obtained two blank cheques signed by the first respondent without any further entries regarding the date, payee's name and the amount and later, after nearly 6 years the appellant misused the above cheque leaf by making false entries regarding the amount, name of payee and date without the knowledge or consent of the first respondent and thus there had been material alteration of the cheque rendering it void u/s.87 of the Act. The learned counsel for the 1st respondent further argued that the issue of a cheque leaf with the signature of the drawer only and without the name of the payee, specifying the amount and the date, would not make the instrument a "cheque" as defined in the Act and a presumption under Sec. 118 or 139 of the Act would not be drawn in respect of such an instrument. A cheque is defined in Sec.6 on the Act as:

a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

A "bill of exchange" is defined in Sec. 5 of the Act as "an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument.

For being a valid cheque, the essential elements are, that the instrument should direct a certain person to pay a certain sum of money to a certain person, or his order or to the bearer of the instrument. It means that the instrument should

certainty specify the above amount and the details regarding the person to whom the amount should be paid. Thus the cheque to be valid, should certainly specify the amount and also the details regarding the payee. If at the time of the issue, the amount is not specified and payee is uncertain, then the cheque which is a bill of exchange, does not become a valid negotiable instrument as defined in the Act. For being a valid negotiable instrument, the essential requisite was certainty, regarding the amount to be paid as well as the person to whom amount has to be paid. Bhashyam and Adiga, on N.I. Act 4th Edition at page 64 says:

It is obvious, therefore, that the first and essential requisite is certainty. This means certainty (1) As to the person to make the payment, (2) as to the person to receive it, (3) as to the time and place of payment, (4) as to the conditions of liability, and (5) as to the amount to be paid. This and the following sections endeavour to define and enforce these certainties not in such an exact and technical way as would only embarrass the transaction of business but substantially in a perfect and practical way.

Certainty is an essential ingredient for an instrument to be treated as a negotiable instrument, under the Act. The cheque, being a negotiable instrument should, also specify the amount to be paid and the details of the payee. In the absence of certainty regarding the amount and the payee at the time of the issue, the cheque cannot be said to be a valid one, though it bear the signature of the drawer.

3. The learned counsel for the 1st respondent argued that the subsequent insertion of the amount and the name of the payee in the cheque without the knowledge or consent of the drawer of the instrument would amount to a material alteration u/s.87 of the Act. The Supreme Court in Seth Loonkaran Sethiya and Others Vs. Mr. Ivan E. John and Others, explained "material alteration" as follows:

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.

A Division Bench of this Court in State Bank of India vs. Kerala State Co-operative Marketing Federation (1995 (2) KLJ 621) considered what all are material alterations and held:

Under Sec. 87 of the N.I. Act, any material alteration of a negotiable instrument renders it void as against any person being a party to that instrument at the time of such alteration provided he himself has not consented to such alteration. The following alterations are to be material, that is alteration of the date, the sum payable, the time of payment, the place of payment, the signature of the drawer and the original payee or addition or deletion or change of the name of the payee

therein without the consent of the drawer.

A Division Bench of this Court in Bhaskaran Chandrasekharan v. Radhakrishnan (1996(1) KLT 881) had considered whether the putting of the date in an undated cheque subsequent to the issue of the same when there was no dispute regarding consideration, signature, amount and the name of payee, would amount to material alteration rendering the instrument void under Sec. 87 of the Act. There it was held:

When a cheque is issued for valid consideration, with no dispute regarding signature, amount and name, it cannot be said that putting a date on the cheque by the payee who is the holder of the cheque in due course would amount to material alteration rendering the instrument void. In fact, there is no material alteration. When a cheque is admittedly issued with blank date, and when the payee has no objection with regard to the name, amount and signature, it can be presumed that there is an implied consent for putting the date as and when required by the beneficiary and get it encashed.

In the same judgment the Division Bench further held:

Alteration of the date in the cheque may be material alteration. Alteration may have the effect of lengthening the period of limitation or shortening it. So also alteration of payee's name is material which affects the character of the instrument, and so also the relationship of the parties. So also the alteration of signature as well as the amount. All this would amount to material alteration.

Though the subsequent putting of the date in an undated cheque would not always amount to material alteration rendering the instrument void under Sec. 87 of the Act, the subsequent insertion of the amount and the name of the payee without the consent of the drawer would amount to material alteration rendering the instrument void u/s. 87 of the Act.

When the signature in the cheque was admitted by the drawer even if the other entries in the cheque are disputed, a presumption u/s. 139 of the Act would arise that the cheque was issued in discharge of a legally enforceable debt. The above presumption is a rebuttable one. Likewise the presumption u/s. 118 of the Act also is rebuttable. The burden of rebutting the above presumption would be on the accused. The first respondent had led in evidence to establish her contention by examining DWs 1 and 2 and by Exts. D1 and D2 documents. DW 1, the husband of the 1st respondent had given evidence that when there was default in paying the instalments, the appellant financier repossessed the autorikshaw and thereafter it was not returned. He further stated that the appellant had informed that the liability would stand discharged and hence there was no need to remit any further amount. Though DW 1 was cross-examined, nothing could be brought out to discredit his version, DW 2, the manager of the Drawee Bank stated that the first respondent had opened an account on 8-10-1993 by filing Ext. D1 application and the first respondent was introduced before the bank by the appellant "Capital Investments". DW 2 had given further evidence that the

first respondent opened an account by remitting an amount of Rs. 100/- on 8-10-1993, that 3 cheque leaves had been given to the first respondent by the bank and that on the same day an amount of Rs. 27,950/- had been remitted in the above account and had been withdrawn. Thereafter there was no transaction at all in the above account. Ext. D2 statement of accounts issued from the Bank would further show that except an entry of Rs. 2/- towards interest on 14-3-1984, there was no other entry in the account. In the ordinary course when an account was not operated for a pretty longtime, the bank should have closed the account due to the non-operation for a very long time. In the light of the evidence let in by DWs 1 and 2, it would be highly improbable that a rustic lady like the first respondent would keep a cheque leaf for 6 years without operating the account and when a demand was made by the appellant after 6 years, she would go over to the office of the appellant and issue a cheque for the entire balance amount. That too in the light of the evidence of DW 1 that the autorikshaw had been repossessed by the financier when default was made and it was not returned. The evidence let in by DWs 1 and 2 in the above circumstances, appears to be reliable and acceptable. The case put forward by the first respondent was more probable and convincing than the case of the appellant. The presumption u/s. 118 and 139 of the Act would stand rebutted by the reliable and acceptable evidence and also by preponderance of probability. The court below after considering the entire evidence accepted the defence contention put forward by the first respondent and found her not guilty of the offence u/s. 138 of the N.I. Act and acquitted her. The court below is fully justified in finding the first respondent/accused not guilty of the offences u/s. 138 of the N.I. Act. The learned counsel for the appellant could not convince that the order of the court below was liable to be interfered. I find no reasons to interfere with the above finding and the order of acquittal passed by the court below. Hence, this appeal has to be dismissed.

In the result, the appeal is dismissed.