

(2017) 06 KL CK 0041
In the High Court Of Kerala
Case No : 1244 of 2010

T.G.POLYMER AND COMPANY, MUHAMMA P.O.,

APPELLANT

Vs

K.S.SHAJI, MANAGING DIRECTOR

RESPONDENT

Date of Decision : 30-06-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 313, Section 255(1) - Power to examine the accused - Acquittal or conviction
Negotiable Instruments Act, 1881, <a href=2489-13

Citation : (2017) 06 KL CK 0041

Hon'ble Judges : P.Ubaid

Bench : SINGLE BENCH

Advocate : T.V.GEORGE, JIMMY GEORGE, G.PRIYADARSAN THAMPI,
C.S.HRITHWIK

Final Decision : Dismissed

Judgement

1. The appellant herein is the complainant in C.C 123/2009 of the Judicial First Class Magistrate's Court-II, Alappuzha, and the 1st respondent herein is the accused therein. The complainant brought the said prosecution under Section 138 of the Negotiable Instruments Act (for short " the N.I. Act "), on the allegation that a cheque for 1,34,391/- executed and issued by the accused in discharge of the goods purchased by him from the complainant's firm happened to be bounced due to insufficiency of funds, and in spite of statutory notice, the accused failed to make

payment of the cheque amount. The accused appeared before the trial court, and pleaded not guilty when the substance of the accusation was read over and explained to him. The complainant examined PW1 and proved Exts.P1 to P18 documents. The Ext.X1 specimen handwritings given by the accused were also marked. When examined under Section 313 Cr.P.C, the accused denied the incriminating circumstances, and projected a defence that he had no transaction with the complainant firm as alleged in the complaint, at the relevant time, and that he had not executed the cheque in question in discharge of any liability. The further defence projected by him is that the Ext.P1 cheque is in fact the cheque leaf given by him as a signed blank cheque to one T.G Lal years back, and the complainant's wife somehow procured the said cheque from the wife of T.G Lal after his death, and brought a false complaint to extract money from him. However, the accused did not adduce any evidence in defence.

2. On an appreciation of the evidence adduced by the complainant, the trial court found that the complainant has failed to prove the execution of the cheque in question and also the transaction, or the liability alleged in the complaint. Accordingly, the learned Magistrate found the accused not guilty and acquitted him under Section 255 (1) Cr.P.C by judgment dated 10.3.2010. Aggrieved by the judgment of acquittal, the complainant brought this appeal with the leave this Court.

3. There is no dispute regarding the fact that the Ext.P1 cheque was bounced due to insufficiency of funds.

The accused has no case that he had sufficient funds in his account to honour the cheque, or that it was bounced on some other ground. He has also no case that he had made any payment as required in the statutory notice. Thus, the complainant has proved the compliance of all statutory requirements for initiating prosecution under Section 138 of the Negotiable Instruments Act. But the question is whether the complainant has succeeded in proving the execution of the cheque in question, and also the transaction involving the liability, in discharge of which, the cheque was issued.

4. The learned counsel for the appellant cited a decision of the Hon"ble Supreme Court in *Beena v. Muniyappan* [2001 (3) KLT 950 SC]. The said decision is regarding the presumptions under Sections 118 and 139 of the N.I Act. The presumption under Section 118 of the N.I Act that a negotiable instrument is supported by consideration, or the presumption under Section 139 of the N.I Act, that a particular cheque in question was issued in discharge of a legally enforceable liability, will arise only when the cheque in question is either admitted, or its execution is duly proved. In a case where the cheque in question is not admitted or where its execution is not proved, the court cannot apply the presumption under Section 118 or under Section 139 of the N.I. Act. So the primary question in a case like this must be whether the complainant has proved the execution of the cheque in question, when its execution is denied by the accused. This Court and also the Hon"ble Supreme Court have well settled that merely because the cheque in question bears the signature of the accused or just because the signature is

admitted by the accused, the court cannot find execution against him. Conscious execution of a cheque is a different matter. When execution is denied by the accused, the complainant is bound to prove due and conscious execution of the cheque in question. Once that burden is discharged by the accused, he can very well avail the presumption under Sections 118 and also under Section 139 of the N.I Act.

5. In a prosecution under Section 138 of the N.I Act, based on a cheque bounced due to insufficiency of funds, it is quite fundamental that the complainant must prove a liability. As part of discharge of initial burden, this liability which is enforceable in law, must be proved by the complainant. In this case, the definite case projected by the accused is that he had no transaction with the complainant at the relevant time. The accused in this case is being prosecuted as the Managing Director of a company. The complaint does not show how exactly or in what capacity the accused purchased goods from the firm of the complainant. It is not known whether he purchased the goods in his personal capacity, or as Managing Director of the company. Ext.P1 cheque is issued as the authorised signatory of the company.

6. To prove the transaction, or to prove that the accused had business transaction with the complainant's firm at the relevant time, the complainant proved Exts.P8 to P18 documents. All these documents relate to the period up to July 2008. PW1 admitted in evidence that the goods in question were purchased by the accused in December, 2008. In short, the complainant's case must be that the

Ext.P1 cheque was issued in discharge of a liability incurred in December, 2008. But the documents produced by the complainant will not prove such a transaction, that the accused had purchased goods in December 2008 or that he had incurred any liability in December, 2008. It is pertinent to note that while marking or proving the Exts.P8 to P18 documents, PW1 did not state that these documents relate to the transaction with the accused. This very important aspect was not elicited in his examination. Anyway, when the transaction stands not proved, it is impossible to find that the Ext.P1 cheque was issued by the accused in discharge of a liability.

7. Now let me see whether the execution of the cheque is proved in this case. As already observed, mere admission of signature will not amount to admission of execution. PW1 is the power of attorney holder of the complainant firm. An examination of his evidence shows that he has no idea about the transaction or about the execution of the cheque in question. He does not know, who made the entries in the cheque or when exactly the cheque was executed, or how it was executed.

8. The defence projected by the accused is that the Ext.P1 cheque is in fact the signed blank cheque leaf handed over by him to one T.G Lal years back, and that after the death of T.G Lal, the complainant's wife somehow procured the said cheque from the wife of T.G Lal and brought a false complaint. The complainant's wife is admittedly the Managing Partner of the complainant firm. When this definite suggestion was put to PW1 in cross-examination, he just pleaded ignorance. He stated that he does not know

whether Ext.P1 is the cheque leaf somehow procured by his wife to bring a false complaint. This, to an extent, will falsify the complainant's case that the Ext.P1 cheque was executed by the accused in discharge of a legally enforceable debt. I find that the complainant has failed to prove the due and conscious execution of the Ext.P1 cheque. Once there is failure to prove execution, there is no question of the complainant being permitted to avail the presumptions under Section 118 or 139 of the N.I Act . Thus, I find that the accused was rightly found not guilty by the trial court.

In the result, this appeal is dismissed.