IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

WEDNESDAY, THE 20TH DAY OF SEPTEMBER 2023 / 29TH BHADRA, 1945

CRL.A NO. 2200 OF 2011

AGAINST THE ORDER DATED 19.12.2011IN CRL.L.P.NO.1119/2011 OF HIGH COURT OF KERALA

IN ST 70/2008 OF JUDICIAL MAGISTRATE OF FIRST CLASS ,KOLENCHERRY

APPELLANT/COMPLAINANT:

C.Y.PAULOSE,
AGED 57 YEARS,
S/O.YOHANNAN,CHEERETHU HOUSE,
PUTHEN CRUZ P.O.

BY ADVS. SRI.G.KRISHNAKUMAR
SRI.TITTO THOMAS
KUMARI ANNET JERALD

RESPONDENTS/ACCUSED & STATE:

1 C.Y.ISSAC
AGED 59 YEARS
S/O.YOHANNAN,CHEERETHU HOUSE,
PUTHENCRUZ P.O.682540.

2 STATE OF KERALA
REPRESENTED BY ITS PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM. 682 031.

BY ADVS. SMT.ACHU SUBHA ABRAHAM
SRI.PHILIP T.VARGHESE
SRI.THOMAS T.VARGHESE
SMT.LITHA T

OTHER PRESENT:

SR PP SMT SEETHA S

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 20.09.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R"

Dated this the 20th day of September,2023

J U D G M E N T

The appellant questions the legality and correctness of the judgment passed by the Court of the Judicial First Class Magistrate, Kolencherry, in S.T.No.70/2008, acquitting the first respondent – accused – holding him not guilty for the offence under Section 138 of the Negotiable Instruments Act, 1881 *(for brevity, 'N.I. Act').*

Relevant Factual Matrix:

2. The appellant had filed the complaint before the court below, alleging that the first respondent had borrowed an amount of Rs.2,00,000/- from him and in the discharge of the debt, the first respondent had issued Ext P1 cheque. The cheque on presentation to the bank for collection was returned with an endorsement 'payment stopped by the drawer'.

Although the appellant had issued Ext P4 statutory notice, the first respondent failed to pay the demanded amount. Instead, the first respondent sent Ext P7 reply notice alleging that he was not liable to pay any amount. Hence, the first respondent committed the offence under Section 138 of the N.I. Act. The first respondent appeared and pleaded not guilty to the substance of the accusation against him. Consequently, the complaint was posted for trial.

Trial

3. The appellant was examined as PW1 and Exts P1 to P7 were marked in evidence. The first respondent was questioned under Section 313 of the Code of Criminal Procedure(Cr.P.C) and he denied the incriminating circumstances against him. The first respondent got himself and two other witnesses examined as DWs 1 to 3 and marked Exts.D1 to D5 through them.

Trial Court judgment

4. After analysing the materials on record, the learned Magistrate, by the impugned judgment, found the first respondent not guilty for the offence under Section 138 of the N.I. Act.

5. Heard; Kumari Annet Jerald., the learned counsel for the appellant, Smt.Litha T., the learned counsel for the first respondent and Smt.Seetha S., the learned Senior Public Prosecutor appearing for the second respondent – State.

6. The learned counsel for the appellant strenuously argued that the learned Magistrate had failed to appreciate Sections 138 and 139 of the N.I. Act and the materials on record in their proper perspective. Instead, the court below has blindly accepted the defence version of the first respondent and passed the impugned judgment. Her two cardinal

contentions were (i) there was a material irregularity in the procedure adopted by the learned Magistrate, who permitted the defence witnesses to file proof affidavits in lieu of their examination in chief in flagrant violation of the mandate under Section 145 (1) of the N.I.Act and the law declared by the Honourable Supreme Court in ***Mandvi Cooop. Bank Ltd.(M/s.) v. Nimesh B. Thakore*** [2010 (1) KHC 310] and the decision of this Court in ***Tomy T.J. v. State of Kerala and Another*** [2017 (2) KHC 841] and (ii) the learned Magistrate has committed an error in holding that the offence under Section 138 of the N.I.Act is not attracted because the cheque got dishonoured for the reason of 'payment stopped by the drawer' and not 'insufficient funds', which is against the decisions of the Honourable Supreme Court in ***M.M.T.C. Ltd. v. Medchil Chemicals and Pharma (P) Ltd.***[2002 KHC 241], ***Laxmi Dyechem (M/s.) v. State of***

Gujarat and Others [2012 (4) KHC 826] and ***HMT Watches Ltd. v. M.A. Abida and Another*** [2015(2) KHC 264]. Hence, she prayed that the appeal be allowed.

7. The learned counsel for the first respondent defended the impugned judgment and contended that the learned Magistrate had rightly found that the cheque was not issued in discharge of a legally enforceable debt. She submitted that the appellant and the first respondent are brothers. The first respondent had issued Ext P1 cheque to the appellant as per the covenants in Ext D5 Will deed executed by their late father. But, as the appellant refused to register the receipt acknowledging the receipt of the cheque; the first respondent was constrained to issue Ext D2 stop payment to his bank and Ext D4 letter to the appellant. Ext D1 bank statement issued by the first respondent's bank reveals that there were sufficient funds in the

first respondent's account to honour Ext P1 cheque. Therefore, Section 138 of the N.I.Act will not get attracted. She further contended that the Appellate Court should be slow in interfering with an order of acquittal. Hence, the appeal may be dismissed.

8. The points that arise for consideration are:-

(i) Will the judgment get vitiated because the defence witnesses were permitted to file proof affidavits in lieu of their examination in chief?

(ii) Whether Ext P1 cheque was issued towards a legally enforceable debt?

(iii) Is the impugned judgment correct or not?

Point No.(i)

9. Section 145 of the N.I. Act reads as under:

> "145. Evidence on affidavit.—(1)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.
>
> (2)The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and

examine any person giving evidence on affidavit as to the facts contained therein."

10. In ***Mandvi Cooop. Bank Ltd*** (supra), the Honourable Supreme Court has held that it is wrong to equate the defence evidence with the complainant's evidence and extend the option available to the complaint also to the accused under Section 145 of the N.I. Act. Under the said provision, only the complainant has the right to let in examination in chief by way of an affidavit. The above legal position has been reiterated by this Court in ***Tomy T.J.*** (supra).

11. ***Mandvi Cooop. Bank Ltd.*** (supra) was rendered in a petition filed under Section 482 Cr.P.C, challenging the interim order passed by the Trial Court, permitting the defence evidence to be let in by way of an affidavit. Whereas, in ***Tomy T.J.*** (supra), a similar interim order was challenged in an original petition filed under Article 227 of the Constitution of

India.

12. In the instant case, there is a substantial difference from the facts in ***Mandvi Cooop. Bank Ltd.*** and ***Tomy T.J.*** (supra). Here, neither did the appellant object to the defence witnesses filing affidavits in lieu of their examination in chief, nor was the order passed by the court below permitting the above course challenged.

13. Undisputedly, the appellant cross-examined DWs 1 to 3 without any demur or protest and participated in the entire trial. It is at the appellate stage, for the first time, that the above contention is raised. This Court finds the contention untenable in the light of Section 465 of the Cr.P.C, which reads thus:

> "S.465. Finding or sentence when reversible by reason of error, omission or irregularity:- (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant,

> proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.
>
> (2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

14. The above provision, in unequivocal terms, stipulates that no finding in an order passed by a court of competent jurisdiction shall be reversed or altered by an Appellate Court for the mere reason of an irregularity in the proceeding before or during the trial, unless such an irregularity has been occasioned a failure of justice, and further the objection having been raised at the earliest stage of the proceedings. There is a profusion of precedential authority on the above legal proposition.

15. In a recent decision, a Three-Judge Bench of the Hon'ble Supreme Court in ***Pradeep S.Wodeyar v. State of Karnataka*** [2021 KHC 6768], after a survey of the earlier judgments on the point, has held as under:-

> "42. Rattiram (supra) had distinguished Gangula Ashok32 (supra) on the basis of the stage of the proceedings since the trial had not begun in the latter but was completed in the former. Rattiram (supra) does not hold that Section 465 CrPC would not be applicable to pre-trial cases. The differentiation between trial and pretrial cases was made only with reference to sub-Section (2) of Section 465. Since the cognizance order was challenged after the trial was over, the accused could not prove failure of justice in view of Section 465(2). However, Section 465(2) only provides one of the factors that shall be considered while determining if there has been a failure of justice. Section 465(2) by corollary does not mean that if the alleged irregularity is challenged at an earlier stage, the failure of justice is deemed to be proved. Even in such cases though, where the challenge is made before the trial begins, the party has the burden of proving a failure of justice'. Further, even if the challenge is made before the trial begins, the Court still needs to determine if the challenge could have been made earlier.
>
> 43. The test established for determining if there has been a failure of justice for the purpose of Section 465 is whether the irregularity has caused prejudice to the accused. No straitjacket formula can be applied. However, while determining if there was a failure of justice, the Courts could decide with reference to inter alia the stage of challenge, the seriousness of the offence charged, and

> apparent intention to prolong proceedings. It must be determined if the failure of justice would override the concern of delay in the conclusion of the proceedings and the objective of the provision to curb the menace of frivolous litigation."

16. In the above context, it is also apposite to extract Section 142 of the Indian Evidence Act, 1872, which reads as follows:

> "**142. When they must not be asked.-**Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved."

17. The said provision undoubtedly prescribes that a leading question may not be permitted in the examination-in-chief, if the opposite party objects to the same. If not, the right to object shall be deemed to have been waived.

18. On a reading of Section 465 of the Cr.P.C and Section 142 of the Indian Evidence Act, and the interpretation of the law in ***Pradeep S.Wodeyar***

(supra), I am of the definite view that, it is too late in the day for the appellant to raise the above technical contention at the appellate stage, especially after having waived his right to object to DWs1 to 3 letting in evidence in chief, at the trial stage, by way of affidavits. Moreover, there has been no failure of justice, and no prejudice has been caused to the appellant in the defence witnesses letting in examination in chief by affidavits, warranting this court to step in and set aside the judgment on the said ground. Even assuming for a moment this Court accepting the above contention and directing the oral evidence of the defence witnesses to be recorded, it is obvious that the witnesses will only depose in tune with the chief affidavit already on record. Thus, I don't find any meaning in indulging in such a futile exercise as sought by the appellant, particularly when no prejudice has been caused to the appellant.

Accordingly, I answer point No. (i) against the appellant.

Point No.(ii)

19. The appellant's case is that the first respondent had borrowed an amount of Rs.2,00,000/- from him, and in discharge of the said debt he issued Ext P1 cheque. The cheque was dishonoured on presentation for collection. Even though the appellant issued Ext P4 lawyer notice, the first respondent failed to pay the amount. Instead, he issued Ext P7 reply notice denying that he owed any money to the appellant.

20. The first respondent sent Ext P7 reply notice contending that Ext P1 cheque was issued as per the covenants in Ext P5 Will deed executed by the father of the parties, wherein the first respondent was directed to pay Rs.2,00,000/- to the appellant as his share in the father's property. However, as the appellant refused to

register the receipt acknowledging the receipt of payment, the first respondent was constrained to issue Ext D2 stop payment letter to his Bank, which was also duly informed to the appellant. To prove the defence, the first respondent examined his sister and an independent witness as DWs 2 and 3, who proved Exts D1 to D5.

21. The appellant (PW1) in his oral testimony testified that the first respondent had borrowed Rs.2,00,000/- to meet his son's educational expenses, and in the discharge of the debt, he issued Ext P1. He had also in his cross-examination categorically admitted that the first respondent was his brother and that he had two other sisters, including DW2. He bluntly denied that his father had executed Ext P5 Will deed, but admitted that a suit is pending before the civil court regarding the validity of the Will deed. He feigned ignorance on the stipulation in Ext P5 Will

deed that the first respondent has to pay him Rs.2,00,000/- and he has to issue a registered acknowledgment. He further admitted that no one has witnessed him giving Rs.2,00,000/- in cash, to the first respondent.

22. On the contrary, DWs 1 to 3 have deposed in line with the defence version of the first respondent in Ext P7 reply notice, which is corroborated by Exts D1 to D5. In addition to the above, even before the cheque was presented to the bank for collection, the first respondent had issued Ext D2 stop payment letter to the bank. Ext D1 bank account proves that on the date the cheque was presented for collection, the first respondent had an amount of Rs.2,90,434/- in his bank account, which was sufficient to honour the cheque. Thus, the cheque was not dishonoured for 'insufficient funds' in the bank account of the first respondent.

23. After analysing the oral testimonies of PW1

and DWs 1 to 3, and Exts P1 to P7 and D1 to D5, the Trial Court concluded that Ext P1 cheque was not issued towards a legally enforceable debt.

24. This Court is remindful of the fact that the appeal is preferred against an order of acquittal.

25. The law is well settled in a plethora of judgments by the Honourable Supreme Court and this Court that, an Appellate Court should be slow in interfering with an order of acquittal. Only when the conclusion arrived by the Trial Court is patently illegal and manifestly erroneous should the Appellate Court step in and interfere with such an order.

26. In ***Jafarudeen vs. State of Kerala*** [2022 KHC 6449],the Honourable Supreme Court, after referring to all the earlier judgments on the point, has laid down the broad principles to deal with an appeal against an order of acquittal. It is profitable to extract the relevant portion, which declares the law thus:

"*25. Scope of Appeal filed against the Acquittal:*

While dealing with an appeal against acquittal by invoking S.378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal.Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters. Precedents:

• Mohan @Srinivas @Seena @TaiIor Seena v. State of Karnataka, [2021 SCC OnLine SC 1233] as hereunder: -

"20. S.378 CrPC enables the State to prefer an appeal against an order of acquittal. S.384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Art.21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform.Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark.

23. This court, time and again has laid down the law on the scope of inquiry by an Appellate court while dealing with an appeal against acquittal under S.378 CrPC. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this court in Anwar Ali v. State of Himanchal Pradesh, (2020) 10 SCC 166:

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under :

(Babu case [Babu v. State of Kerala, 2010 (9) SCC 189 : (2010) 3 SCC (Cri) 1179])

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding

relevant material or by taking into consideration irrelevant/ inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn.,(1984) 4 SCC 635 : 1985 SCC (L&S) 131], Excise & Taxation Officer - cum - Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer - cum - Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501], Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : 2010 (1) SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of AP. [Gamini Bala Koteswara Rao v. State of A.P, (2009) 10 SCC 636 : 2010 (1) SCC (Cri) 372])"

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429], that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon,the conclusions would not be treated as perverse and the findings would not be interfered with."

27. Recently, the Honourable Supreme Court in ***Rupesh Manger (Thapa) vs. State of Sikkim*** (MANU/SC/1014/2023) has observed that an Appellate Court may reverse an order of acquittal, if it is so

perverse and is not a plausible one. Merely because another view is possible, on re-appreciation of the evidence, the Appellate Court shall not disturb the finding of acquittal and substitute its own findings to convict the accused.

28. On a comprehensive re-appreciation of the facts, the materials on record and the law referred to above, this Court is of the firm view that the conclusions arrived by the court below are correct and does not warrant any interference. This Court does not find any valid ground to substitute the findings of the Trial Court and hold that Ext P1 cheque was issued towards a legally enforceable debt. Hence, this Court confirms the finding of the Trial Court that the first respondent is not guilty of having committed an offence under Section 138 of the N.I. Act and the complaint is only to be dismissed.

Point No.(iii)

28. In view of the findings on point Nos.1 and 2, the impugned judgment of the Trial Court, holding the first respondent not guilty for an offence under Section 138 of the N.I. Act, is confirmed.

The appeal is meritless and is, consequentially dismissed.

Sd/-

C.S.DIAS,JUDGE

DST/20.09.23

//True copy//

P.A.To Judge