2025:KER:62745

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

WEDNESDAY, THE 20TH DAY OF AUGUST 2025 / 29TH SRAVANA, 1947

CRL.A NO. 444 OF 2009

AGAINST THE JUDGMENT DATED 14.11.2008 IN CC NO.959 OF 2006 OF JUDICIAL MAGISTRATE OF FIRST CLASS- III, ALUVA

APPELLANT/COMPLAINANT:

1 K.P.VARGHESE, KOORAN THAZHATHU PARAMBIL HOUSE, PEECHANIKKAD SOUTH, PULIYANAM, ANGAMALY, ERNAKULAM DISTRICT.

BY ADVS.
SHRI.RENJIT BABU
SHRI.K.B.ARUNKUMAR

RESPONDENT/S:

1 I.M.ELIAS, INJAKKADAN HOUSE, PEECHANIKKADU SOUTH, PULIYANAM, ANGAMALY, ERNAKULAM DISTRICT.

2 STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM

SMT. HASNAMOL N.S., PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18.08.2025, THE COURT ON 20.08.2025 DELIVERED THE FOLLOWING:

2025:KER:62745

'C.R'

JOHNSON JOHN, J.

Crl. Appeal No. 444 of 2009

Dated this the 20th day of August, 2025

J U D G M E N T

The acquittal of the accused for the offence under Section 138 of the Negotiable Instruments Act, 1881 ('N.I Act' for short) is challenged by the complainant in this appeal.

2. As per the complaint, the accused issued cheque dated 16.05.2005 for Rs.1,90,000/- to the complainant in discharge of a debt and when the complainant presented the cheque for collection, the same was dishonoured due to insufficiency of funds in the account of the accused. It is stated that in spite of issuance of statutory notice, the accused failed to pay the cheque amount to the complainant.

3. Before the trial court, PW1 examined and Exhibits P1 to P7 were marked from the side of the complainant, and no evidence adduced from the side of the accused.

4. After considering the oral and documentary evidence and hearing both sides, the trial court found that the complainant has not

succeeded in proving the offence under Section 138 of the N.I Act against the accused and hence, the accused was acquitted.

5. Heard Sri. K.B. Arun Kumar, the learned counsel for the appellant, Sri. Mathews K. Philip, the learned counsel for the first respondent/accused and Smt. Haznamol N.S., the learned Public Prosecutor for the second respondent.

6. The learned counsel for the appellant argued that the accused has not disputed the signature in Exhibit P1 cheque and that the trial court ought to have found that the complainant is entitled for the benefit of the presumptions under Sections 139 and 118 of the N.I Act. But, the learned counsel for the accused/first respondent argued that the complainant has not disclosed the alleged date of execution and issuance of the cheque in the complaint or in his chief affidavit when examined as PW1.

7. It is also argued that the specific case of the accused is that he has not received the statutory notice and a perusal of the postal cover produced by the complainant would show that the notice was returned

for the reason "addressee out of station, present address not known" and therefore, there is no compliance with Section 138(b) of the N.I Act.

8. A perusal of the evidence of PW1 would show that he has not disclosed the date of execution and issuance of the cheque in the complaint or in his chief examination. Exhibit P1 cheque is dated 16.05.2005. In cross examination, PW1 admitted that himself and the accused were defendants in O.S. No. 135 of 2005 and that he was surety for a loan availed by the accused and when the court issued arrest warrant against him, he was compelled to pay the entire loan amount during 2007.

9. In another part of the cross examination, PW1 would say that he paid the amount in connection with this cheque to the accused on 15.12.2004. However, he admitted that the said fact is not stated in the complaint. In cross examination, PW1 also stated that he availed a house maintenance loan from HDFC Bank and out of the said loan amount, he advanced Rs.1,90,000/- to the accused.

10. It is well settled that the standard of proof which is required from the accused to rebut the statutory presumption under Sections 118 and 139 of the N.I Act is preponderance of probabilities and that the

accused is not required to prove his case beyond reasonable doubt. The standard of proof, in order to rebut the statutory presumption can be inferred from the materials on record and circumstantial evidence.

11. In ***M.S.Narayana Menon v. State of Kerala*** [(2006) 6 SCC 39), the Hon'ble Supreme Court considered the nature of the standard of proof for rebutting the presumption under Section 139 of the N.I Act and it was held that if some material is brought on record consistent with the innocence of the accused, which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal.

12. **In *Basalingappa v. Mudibasappa*** [(2019) 5 SCC 418), the Hon'ble Supreme Court summarised the principles of law governing the presumptions under Sections 118 and 139 of the N.I Act in the following manner:

> "(i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.
>
> (ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

> (iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.
>
> (iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.
>
> (v) It is not necessary for the accused to come in the witness box to support his defence."

13. As noticed earlier, the complainant has not disclosed the date of execution and issuance of the cheque in the complaint or when he is examined PW1 before the court. The evidence of PW1 in cross examination reveals that he stood as surety for the accused herein for availing a loan and that in O.S 135 of 2005, he was compelled to pay the entire loan amount during January 2007. In that circumstance, I find no reason to disagree with the finding of the trial court that the case put forward by the complainant that he advanced a loan of Rs.1,90,000/- to the accused during the period when the accused failed to discharge his liability towards the bank in connection with the loan transaction wherein the complainant was a surety is not at all probable.

14. In ***C. C. Alavi Haji v. Palapetty Muhammed and Another*** [2007 (2) KHC 932], a three member Bench of the Honourable Supreme

Court held that giving notice to the drawer before filing a complaint under Section 138 of the N.I Act is a mandatory requirement and if the accused is able to prove that the notice was not received by him and he has no knowledge about such notice, there is a violation of the provision. In the said decision, it was also observed that in a case where the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namely the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice. The Honourable Apex Court also held that the question as to whether the service of notice has been fraudulently refused by unscrupulous means is a question of fact to be decided on the basis of evidence.

15. In this case, it is not in dispute that the statutory notice was returned for the reason "addressee out of station and present address not known" and in this case, the complainant has not made any attempt to prove that the accused knew about the notice and deliberately evaded service to defeat the process of law.

16. In cross examination, when a specific suggestion was made to PW1 regarding the date of issuance of the notice, PW1 stated that he cannot remember the same and to the suggestion that the accused was

in Chennai during the said period, PW1 would say that he is not aware about the same. In the absence of any material to show that the service of notice has been fraudulently refused by the accused or the accused had knowledge about the notice, it cannot be held that there is proper service of statutory notice as contemplated under Section 138(b) of the N.I Act. In that circumstance, I find no reason to interfere with the findings in the impugned judgment that the complainant has not succeeded in proving the offence under Section 138 of the N.I Act against the accused. Therefore, I find that this appeal is liable to be dismissed.

In the result, this appeal is dismissed.

JOHNSON JOHN,
JUDGE.

Rv