JOHN K. ABRAHAM
v.
SIMON C. ABRAHAM & ANOTHER
(Criminal Appeal No. 2043 of 2013)

DECEMBER 05, 2013

[SURINDER SINGH NIJJAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Negotiable Instruments Act, 1881 – s.138 – Dishonour of cheque – Trial acquitted accused-appellant – Reversal of acquittal by High Court – Justification – Held: Not justified – In order to draw presumption u/s.118 r/w s.139, the burden was heavily upon the respondent-complainant to have shown that he had the required funds for having advanced money to the appellant; that issuance of cheque in support of the payment advanced was true and that the appellant was bound to make the payment as had been agreed while issuing the cheque in favour of the respondent – Respondent, however, was not even aware of the date when substantial amount of Rs.1,50,000/- was advanced by him to the appellant; he was not sure as to who wrote the cheque; he was not even aware when exactly and where exactly the transaction took place for which the cheque came to be issued by the appellant – Moreover, the respondent took diametrically opposite stands – Various defects in the evidence of respondent, as noted by the trial Court were simply brushed aside by the High Court without assigning any valid reason – Serious lacuna in the evidence of respondent which strikes at the root of the complaint u/s.138 – This factor not examined by the High Court while reversing the judgment of trial Court – Conviction of appellant accordingly set aside.

The respondent no.1 filed complaint under Section 138 of the Negotiable Instruments Act, 1881, alleging that the appellant had borrowed a sum of Rs.1,50,000/- from

A him and had issued a cheque for the said sum in discharge of the debt and that when the cheque was presented for encashment, the same was dishonoured. In the questioning of the appellant made under Section 313 Cr.P.C., the appellant took the stand that his son took B the cheque from him and that if at all anything was to be recovered, it had to be made from the son of the appellant, since the appellant had not borrowed any money.

The trial court held that the respondent-complainant was making a prevaricating statement as regards the C issuance of the cheque, that he was not even aware of the date when the amount was said to have been borrowed by the appellant, that there was material alteration in the instrument and, therefore, the respondent failed to establish a case under Section 138 of the D Negotiable Instruments Act. Consequently, the trial court found the appellant not guilty and acquitted him under Section 255(1) of Cr.P.C. The High Court reversed the judgment of the trial court, and while convicting the appellant, imposed the sentence to pay a fine of E Rs.1,50,000/- as compensation under Section 357(1) of Cr.P.C, and therefore the present appeal.

Allowing the appeal, the Court

HELD: 1. The High Court committed a serious F illegality in reversing the judgment of the trial court. While reversing the judgment of the trial Court, what weighed with the High Court was that in the 313 questioning, it was not the case of the appellant that a blank signed cheque was handed over to his son and that even in the cross- G examination it was not suggested to PW-1 (respondent) that a blank cheque was issued. The High Court was also persuaded by the fact that the appellant failed to send any reply to the lawyer's notice, issued by the respondent. Based on the above conclusions, the High H Court held that the presumption under Sections 118 and

139 of the Negotiable Instruments Act could be easily drawn and that the appellant failed to rebut the said presumption. On that single factor, the High Court reversed the judgment of the trial Judge and convicted the appellant. In order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant. In the instant case, however, the respondent was not even aware of the date when substantial amount of Rs.1,50,000/- was advanced by him to the appellant, that he was not sure as to who wrote the cheque, that he was not even aware when exactly and where exactly the transaction took place for which the cheque came to be issued by the appellant. Apart from the said serious lacuna in the evidence of the complainant, he further admitted as PW.1 by stating once in the course of the cross-examination that the cheque was in the handwriting of the accused and the very next moment taking a diametrically opposite stand that it is not in the handwriting of the accused and that it was written by the complainant himself, by further reiterating that the amount in words was written by him. The various defects in the evidence of respondent, as noted by the trial Court were simply brushed aside by the High Court without assigning any valid reason. Such a serious lacuna in the evidence of the complainant, which strikes at the root of a complaint under Section 138, having been noted by the trial Judge, which factor was failed to be examined by the High Court while reversing the judgment of the trial Court, would vitiate the ultimate conclusion reached by it. In effect, the conclusion of the High Court would amount to a perverse one. The conviction and sentence

A **imposed on the appellant is accordingly set aside. [Paras 9, 10 & 11] [759-D-H; 760-A, B-H]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2043 of 2013.

B From the Judgment and Order dated 15.12.2010 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 452 of 2004.

Romy Chacko, Kedar Nath Tripathy for the Appellant.

C Jogy Scaria, Sashi Bhushan Kumar (A.C.) for the Respondents.

The Judgment of the Court was delivered by

D **FAKKIR MOHAMED IBRAHIM KALIFULLA, J.** 1. Leave granted.

2. This appeal is directed against the judgment of the High Court of Kerala at Ernakulam dated 15th December, 2010 E passed in Criminal Appeal No.452 of 2004.

3. The issue involved in this appeal arises under Section 138 of the Negotiable Instruments Act. The complaint was preferred by the respondent No.1 before the Chief Judicial Magistrate, Pathanamthitta alleging that appellant borrowed a F sum of Rs.1,50,000/- from him and issued a cheque for the said sum on 20.06.2001 drawn on Indian Overseas Bank, Plankamon branch in discharge of the debt. It is the further case of the respondent—complainant that when the cheque was presented for encashment through Pathanamthitta District Co- G operative Bank, Kozhencherry branch, the same was returned by the bankers with the endorsement 'insufficient funds in the account of the accused'. The respondent-complainant stated to have issued a lawyer's notice on 14.07.2001, which was received by the appellant on 16.07.2001, but yet there was no

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reply from the appellant. Based on the above averments alleged in the complaint, the case was tried by the learned Chief Judicial Magistrate. A

4. The respondent herein was examined as PW.1 and Exhibits P-1 to P-6 were marked. None was examined on the side of the appellant. In the questioning of the appellant made under Section 313 of Cr.P.C., the appellant took the stand that his son took the cheque from him and that if at all anything was to be recovered, it had to be made from the son of the appellant, since the appellant had not borrowed any money. B C

5. The learned Chief Judicial Magistrate after considering the oral and documentary evidence led on behalf of the respondent-complainant, held that the respondent-complainant was making a prevaricating statement as regards the issuance of the cheque, that he was not even aware of the date when the amount was said to have been borrowed by the appellant, that there was material alteration in the instrument and, therefore, the respondent failed to establish a case under Section 138 of the Negotiable Instruments Act. Consequently, the learned Chief Judicial Magistrate found the appellant not guilty and acquitted him under Section 255(1) of Cr.P.C. The respondent preferred the appeal in the High Court of Kerala at Ernakulam and by the impugned order the High Court reversed the judgment of the learned Chief Judicial Magistrate, convicted the appellant and imposed the sentence to pay a fine of Rs.1,50,000/- as compensation under Section 357(1) of Cr.P.C. In default of making the payment of the fine amount, the appellant was directed to suffer simple imprisonment for a period of three months. D E F G

6. We heard Mr. Romy Chacko, learned counsel for the appellant and Mr. Jogy Scaria, learned counsel for the 2nd respondent. We also perused the material papers placed before us, including the judgment of the trial Court as well as the High Court. Having considered the above, we are of the H

A view that the High Court was in error in having reversed the judgment of the trial Court.

7. When we examine the case of the respondent-complainant as projected before the learned Chief Judicial B Magistrate and the material evidence placed before the trial Court, we find that the trial Court had noted certain vital defects in the case of the respondent-complainant. Such defects noted by the learned Chief Judicial Magistrate were as under:

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(a) Though the respondent as PW-1 deposed that the accused received the money at his house also stated that he did not remember the date when the said sum of Rs.1,50,000/- was paid to him.

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(b) As regards the source for advancing the sum of Rs.1,50,000/-, the respondent claimed that the same was from and out of the sale consideration of his share in the family property, apart from a sum of Rs.50,000/-, which he availed by way of loan from the co-operative society of the college where E he was employed. Though the respondent stated before the Court below that he would be in a position to produce the documents in support of the said stand, it was noted that no documents were placed before the Court below.

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(c) In the course of cross-examination, the respondent stated that the cheque was signed on the date when the payment was made, nevertheless he stated that he was not aware of the date when he paid the sum of Rs.1,50,000/-.

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(d) According to the respondent, the cheque was in the handwriting of the accused himself and the very next moment he made a contradictory statement that the cheque was not in the handwriting of the appellant H and that he (complainant) wrote the same.

(e) The respondent also stated that the amount in words was written by him. A

(f) The trial Court has also noted that it was not the case of the respondent that the writing in the cheque and filling up of the figures were with the consent of the accused appellant. B

8. In light of the above evidence, which was lacking in very many material particulars, apart from the contradictions therein, the trial Court held that the appellant was not guilty of the offence alleged against under Section 138 of the Negotiable Instruments Act and acquitted him. C

9. Keeping the above factors in mind, when we examine the judgment impugned in this appeal, we find that the High Court committed a serious illegality in reversing the judgment of learned Chief Judicial Magistrate. While reversing the judgment of the trial Court, what weighed with the learned Judge of the High Court was that in the 313 questioning, it was not the case of the appellant that a blank signed cheque was handed over to his son and that even in the cross-examination it was not suggested to PW-1 that a blank cheque was issued. The High Court was also persuaded by the fact that the appellant failed to send any reply to the lawyer's notice, issued by the respondent. Based on the above conclusions, the High Court held that the presumption under Sections 118 and 139 of the Negotiable Instruments Act could be easily drawn and that the appellant failed to rebut the said presumption. On that single factor, the learned Judge of the High Court reversed the judgment of the trial Judge and convicted the appellant. It has to be stated that in order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the D E F G H

A accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant.

10. Keeping the said statutory requirements in mind, when we examine the facts as admitted by the respondent-B complainant, as rightly concluded by the learned trial Judge, the respondent was not even aware of the date when substantial amount of Rs.1,50,000/- was advanced by him to the appellant, that he was not sure as to who wrote the cheque, that he was not even aware when exactly and where exactly the transaction C took place for which the cheque came to be issued by the appellant. Apart from the said serious lacuna in the evidence of the complainant, he further admitted as PW.1 by stating once in the course of the cross-examination that the cheque was in the handwriting of the accused and the very next moment taking D a diametrically opposite stand that it is not in the handwriting of the accused and that it was written by the complainant himself, by further reiterating that the amount in words was written by him. We find that the various defects in the evidence of respondent, as noted by the trial Court, which we have set E out in paragraph 7 of the judgment, were simply brushed aside by the High Court without assigning any valid reason. Such a serious lacuna in the evidence of the complainant, which strikes at the root of a complaint under Section 138, having been noted by the learned trial Judge, which factor was failed to be F examined by the High Court while reversing the judgment of the trial Court, in our considered opinion would vitiate the ultimate conclusion reached by it. In effect, the conclusion of the learned Judge of the High Court would amount to a perverse one and, therefore, the said judgment of the High Court cannot be G sustained.

11. Having regard to our above conclusion, this appeal stands allowed. The order impugned is set-aside, the conviction and sentence imposed on the appellant is also set aside.

H B.B.B. Appeal allowed.