Kerala High Court
Babukuttan Achary.R vs Prasanna Kumary.L. on 1 September, 2008

IN THE HIGH COURT OF KERALA AT ERNAKULAM

CRL.A.No. 829 of 2006()

1. BABUKUTTAN ACHARY.R.,
... Petitioner

Vs

1. PRASANNA KUMARY.L., W/O.VIJAYAN KUTTY,
... Respondent

For Petitioner :SRI.K.S.MANU (PUNUKKONNOOR)

For Respondent :SRI.PREMCHAND R.NAIR

The Hon'ble MR. Justice V.GIRI

Dated :01/09/2008

O R D E R

V.GIRI, J.

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Criminal Appeal No. 829 of 2006

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Dated this the 1st day of September, 2008.

J U D G M E N T

The complainant in C.C.No.875/2003, on the files of the Judicial First Class Magistrate Court-I, Kottarakkara, is the appellant herein. The complaint was instituted alleging that the accused, the sister of the complainant, had borrowed an amount of Rs.80,000/- and in discharge of the said liability, issued Ext.P1 cheque. The same on presentation was returned due to want of sufficient funds. After notice of demand was issued, a complaint was instituted alleging that the amount was not paid. Whereas the defence taken by the accused, as discernible from the testimony of DWs 1 to 5, version given in 313 statement and the documents adduced on her behalf, was essentially one of total denial. She denied her signature in Ext.P1 cheque. It was her case that she was residing in the house of PW1, the complainant, till 1999, when she was married. But the cheque book was not taken away by her to her matrimonial home, when she left her brother's home in 1999. Some family

dispute arose in 2002 and it is apparently as an off shoot of this dispute that the complainant went ahead in filing the complaint alleging that the accused had borrowed an amount of Rs.80,000/- and failed to pay back the same. The complainant himself was examined as PW1 and he proved the presentation of the cheque, dishonour of the same, despatch of the statutory notice and non-payment of amount in spite of service of notice whereas the accused took upon herself the burden of rebutting the initial presumption. According to PW1, an amount of Rs.80,000/-, borrowed by the accused was procured by the complainant from two different persons, Rs.30,000/- from one Ganesan and Rs.50,000/- from one Vasudevan, the brother-in-law of the complainant. DW2, Sri.Ganesan, was examined at the instance of the accused. He denied that he had lent any money to the complainant as such, though he admitted that he had entrusted some amount to the complainant for construction purposes. DW4, the handwriting expert had proved Ext.D3 report and according to the expert opinion, the signature in Ext.P1 cheque was most probably the same as the admitted signatures in 30 specimen documents. But the court below undertook a comparison of the signature on its own and declined to agree with the expert opinion. Reasons have also been given for the same. The court below, on appreciation of the entire evidence acquitted the accused, found that the complainant was not able to prove the transaction or that the cheque was issued by the accused in due discharge of the liability.

2. I heard the counsel on both sides and have gone through the copies of the deposition.

3. Apart from the testimony of PW1, there is no other evidence to show that an amount of Rs.80,000/- was borrowed by the accused and Ext.P1 cheque was issued in discharge of the said liability. The complainant himself admits that his elder brother knows about this transaction. The complainant could have examined the said brother. But he failed to do so. No other member of the family was examined at least to show that the accused had actually borrowed an amount from the complainant.

4. The testimony of DW2, Ganesan, definitely gives the impression that the complainant had not borrowed any money from Ganesan for giving it to the accused. Learned counsel for the appellant submits that the complainant had borrowed money from Ganesan and therefore testimony of DW2 has not been correctly appreciated by the court below. The point is that no suggestion is put forth to DW2, in the course of his cross examination, that an amount of Rs.30,000/- has been borrowed by the complainant. The reluctance on the part of the complainant to go the whole hog in this regard is material.

5. What ultimately clinches the issue is, Ext.D1. Ext.D1 is alleged to be a statement in the form of a letter given by the complainant before the DYSP, Punalur. Apparently, a complaint was filed by the complainant before the Chief Minister. It was then referred to the Circle Inspector of Police. Mediation by the Circle Inspector bring about fruitful result in the matter. The DYSP, proved Ext.D1 and his role in undertaking a mediation between the two. Essentially, Ext.D1 evidences a withdrawal of the complaint by the complainant originally lodged by him against the C.I. of Police. But the version given in Ext.D1 as regards the dispute between the complainant and the accused is completely inconsistent with the version given by the complainant in the court as well as in the complaint that an amount of Rs.80,000/- was borrowed by the accused from the complainant is

Ext.D1. Ext.D1 describes Ext.P1 cheque as one issued by the accused by way of alleged reimbursement of the marriage expenses incurred at the time of marriage of the sister, namely the accused. The complainant has not suggested that the contents of Ext.D1 are false or that he was made to submit Ext.D1 by coercion. There is no such suggestion to DW1, the DYSP of police, who was examined to prove Ext.D1. It is also noteworthy that Ext.D1 was submitted on 11.11.2004 well after the complaint itself was filed and the proceedings in C.C.875/2003 were under way. For all these reasons I am in complete agreement with the court below that the complainant has not able to prove due execution of the cheque and the other ingredients necessary to make out the offence under Section 138 of the Negotiable Instruments Act.

For all these reasons I find no merit in the appeal and it is accordingly dismissed.

V.GIRI, JUDGE bkn/-