

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 24TH DAY OF JULY 2024 / 2ND SRAVANA, 1946

OP(CRL.) NO. 533 OF 2021

AGAINST THE ORDER/JUDGMENT DATED 20.10.2021 IN CRMP NO.880 OF 2016
OF JUDICIAL FIRST CLASS MAGISTRATE COURT, NJARAKKAL

PETITIONER/COMPAINANT:

TOMY.T.J.,
AGED 71 YEARS
S/O.JOSEPH, THATTARUPARAMBIL HOUSE, PUTHUVYPEE P.O.,
ERNAKULAM DISTRICT, PIN-682 508.
BY ADVS.
T.N.SURESH
MONSY K.V
DHANUJA VETTATHU
KORAH JOY

RESPONDENT/STATE/ACCUSED:

- 1 STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA-682 031.
- 2 V.R.SASI,
AGED 62 YEARS
S/O.RAJAPPAN, C/O.NOUFAL, S/O.MOHAMMAD @ MAMMAD,
KURAPPAMPALATHU HOUSE, HOUSE NO.XI/415, KOOTTUNACHIRA,
EDAVANAKAD P.O., ERNAKULAM DISTRICT, PIN-682 505.

BY ADVS.
DENIZEN KOMATH
RAMZY BIN O.A.(K/00748/2024)
DEAN DENIZEN KOMATH(K/002080/2024)
MEGHA MADHAVAN(K/1671/2024)
GANGA S.(K/001039/2024)

SRI.C N PRABHAKARAN,SR PP

THIS OP (CRIMINAL) HAVING BEEN FINALLY HEARD ON 24.07.2024,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

The petitioner, the complainant in C.C No.864 of 2015 on the file of the Judicial First Class Magistrate Court, Njarakkal challenges the order dated 20.10.2021 in CMP No.880 of 2016. The petitioner filed a complaint alleging offence under Section 138 of the Negotiable Instruments Act against the party respondent/accused before the Trial Court. The court took cognizance of the offence. The accused appeared on summons. He pleaded not guilty to the particulars of offence read over to him. The Court proceeded with the trial. The complainant was examined as PW1. He gave evidence that the accused filled up the cheque in his presence.

2. The accused contended that he has not filled up the cheque, but admitted the signature. The accused then filed the above referred CMP requesting to send the cheque and his admitted writings for comparison by experts in the Forensic Science Laboratory. The learned Magistrate allowed the application. This order is under challenge.

3. The learned counsel for the petitioner/complainant submitted that as the accused admitted the signature in the cheque, there is no requirement to send the cheque for comparison as when a drawer signs a cheque and hands it over to the payee, he is

presumed to be liable unless he adduces evidence to rebut the presumption that the cheque has been issued towards a payment of debt or in discharge of a liability.

4. The learned counsel for the party respondent/accused submitted that the examination of the disputed cheque by the Forensic Science Laboratory with the admitted writings of the accused would reveal the fact that the cheque was not drawn by the accused.

5. The learned counsel for the petitioner relied on the judgment of the Apex Court in **Oriental Bank of Commerce v. Prabodh Kumar Tewari** [2022 (5) KHC 560 (SC)] in support of his contentions.

6. The submission of the learned counsel for the petitioner is that the attempt of the party respondent/accused is to protract the matter as it may take years to get a report from the Forensic Science Laboratory in view of the pendency of matters in the laboratory and the lack of facilities available as of now.

7. The case of the petitioner is that the accused executed a cheque for a sum of Rs. 2,00,000/-. He presented the cheque for encashment which was dishonoured due to the insufficiency of funds in the account. A statutory notice was issued which the accused received, but he did not send any reply. In the statement under

Section 313 Cr.P.C, the accused admitted that he had given a signed blank cheque to the complainant. In **Oriental Bank of Commerce** (supra), the Supreme Court considered the challenge of an order directing to send the disputed cheque to the Forensic Science Laboratory for expert examination wherein the drawer/accused admitted the signature of the cheque. The Supreme Court held that a drawer who signs a cheque and hands it over to the payee, is presumed to be liable unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of a debt or in discharge of a liability.

8. The fact that the details in the cheque have been filled up not by the drawer but by some other person would be immaterial and which is not relevant to the question whether the cheque was issued towards payment of a debt or in discharge of a liability.

9. In **Kalyani Bhaskar v. M.S.Sampooranam** [2007(2) SCC 258], the Supreme Court held that adducing evidence in support of the defence is a valuable right and denial of that right would mean denial of a fair trial. In that case, the Apex Court allowed the application filed by the accused for sending the cheque for opinion of the handwriting expert holding that the Magistrate should have granted such a request unless he thinks that the object of the accused is vexation or delaying the criminal proceedings.

Kalyani Bhaskar is an authority for the proposition that if the intention of the accused is to protract the proceedings, the request for sending the cheque for expert opinion can be rejected. In **Nagappa v. Muralidhar** [AIR 2008 SC 2010], the Apex Court considered the prayer made by the accused for sending the cheque for expert opinion. In **Nagappa**, the Supreme Court held that the Court being the master of the proceedings must determine as to whether the application filed by the accused is bonafide or not or whether thereby he intends to bring on record a relevant material. The Apex Court further held that there cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protract the trial. In **Francis v. Pradeep** [2004 (2) KLT 1080], this Court held thus:-

“The easiest way to protract proceedings under Section 138 of the N.I. Act and thus stultify the spirit and object of the provisions of Section 138 of the N.I. Act is to request that the cheque be sent to the expert. The soul of the provision will be lost if there is no expeditious enforcement. On account of pressure of work at the Forensic Science Laboratory, it is common knowledge that the expert will not be able to give the report within a period of three to four years. Convenient protraction can be achieved by requesting that the cheque be forwarded to the expert for examination. It is for the Trial Court to alertly consider the acceptability of such request and ensure that the cheque is forwarded to the expert only if satisfactory reasons are available”.

(emphasis supplied).

10. In the present case, the complaint was filed as early as in 2013. The Court commenced the trial in 2016 and the trial continued up to 2021. The impugned order was passed on 20.10.2021.

11. Having regard to the fact that the accused admitted the signature in the cheque and that he did not reply to the statutory notice, the submission of the learned counsel for the petitioner that the attempt of the accused is to protract the proceedings is to be appreciated. Therefore, this Court is of the view that the order directing to send the disputed cheque for examination to the Forensic Science Laboratory is liable to be set aside.

12. The learned counsel for the party respondent/accused requested for directing the Trial Court to examine the admitted writings of the accused with the writings in Ext.P1 cheque by invoking Section 73 of the Indian Evidence Act.

13. The learned counsel for the petitioner submitted that the Court may not be in a position to compare the admitted writings of the accused with the disputed writings.

14. In **Murari Lal v. State of M.P.** [(1980) 1 SCC 704 : 1980 SCC (Cri) 330] the Apex Court indicated the circumstances in which the Court may itself compare disputed and admitted writings thus:-

“12. The argument that the court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. Section 73 of the Evidence Act expressly enables the court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. If it is hazardous to do so, as sometimes said, we are afraid it is one of the hazards to which judge and litigant must expose themselves whenever it becomes necessary. There may be cases where both sides call experts and two voices of science are heard. There may be cases where neither side calls an expert, being ill-able to afford him. In all such cases, it becomes the plain duty of the court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from some authoritative textbook and the court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence.”

15. The decision in **Murari Lal** (supra) was followed in **Lalit Popli v. Canara Bank and Others** [(2003) 3 SCC 583 : 2003 SCC (L&S) 353].

16. In **S.Sivadas v. State of Kerala** (MANU/KE/4089/2022), this Court observed thus:-

“34. In a case where the Court is constrained to undertake the responsibility of comparing the disputed writing or signature with the admitted handwriting or signature, it shall make a careful study, if necessary, with the assistance of counsel, to ascertain the characteristics, similarities and dissimilarities. The judgment shall contain the reasons for any conclusion based on a comparison of the handwriting/signature if the Court proceeds to record a finding thereon. Conclusions arrived based on a casual or routine glance,

or perusal shall not be relied on to enter into a finding leading to the conviction of an accused.”

17. Therefore, if the accused makes a request for comparison of his admitted or proved writings with the disputed writings, the Trial Court shall invoke Section 73 of the Evidence Act. Resultantly, the order dated 20.10.2021 in CMP No.880 of 2016 stands set aside. The learned Magistrate shall dispose of the case as expeditiously as possible.

The Original Petition is disposed of as above.

Sd/-

**K. BABU
JUDGE**

Sru

APPENDIX OF OP(CRL.) 533/2021

PETITIONER'S EXHIBITS

- Exhibit P1** **THE TRUE COPY OF THE COMPLAINT IN CC NO.864/2015.**
- Exhibit P2** **THE TRUE COPY OF THE DEPOSITION OF PW1 IN CC NO.864/2015.**
- Exhibit P3** **THE TRUE COPY OF CRL.MP NO.880/2016 FILED BY ACCUSED.**
- Exhibit P4** **THE TRUE COPY OF THE OBJECTION FILED AGAINST CRL.MP NO.880/2016.**
- Exhibit P5** **THE CERTIFIED COPY OF THE ORDER DATED 20.10.2021 IN CRL.MP NO.880/2016.**