

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 25TH FEBRUARY 2010 / 6TH PHALGUNA 1931

WP(C).No. 29921 of 2009(Q)

ST.1271/2006 of JUDL. FIRST CLASS MAGISTRATE COURT-X, TRIVANDRUM

PETITIONER(S):

**YESU DAS, NEDIYAVILAKAM VEEDU,
KARUNGAL, KANYAKUMARI DISTRICT,
TAMIL NADU.**

**BY ADV. MR.G.P.SHINOD,
MR.RAM MOHAN.G.,
MR.R.T.JAYARAJ SINGH.**

RESPONDENT(S):

**1. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

**2. SANJEEV. S,
VANAMALI, EVRA-445, EASWARAVILASOM ROAD,
THYCAUD.P.O, THIRUVANANTHAPURAM.**

**R1 BY GOVERNMENT PLEADER MR.K.S. SIVAKUMAR.
R2 BY ADV. MR.J.S.AJITHKUMAR.**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 25/02/2010,THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE COMPLAINANT IN ST NO.1271/2006 ON THE FILES OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT-X, THIRUVANANTHAPURAM, DATED 08/09/2006.

EXT.P2: COPY OF THE COMPLAINT FILED BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT-III, THIRUVANANTHAPURAM IN ST NO.418/2008 DATED 18/03/2008.

EXT.P3: COPY OF THE COMPLAINT FILED BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT-III, THIRUVANANTHAPURAM IN ST NO.425/2008 DATED 18/03/2008.

EXT.P4: COPY OF THE CMP.NO.1154/2009 IN ST.1271/2006 FILED BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT-X, DATED 24/07/2009.

EXT.P5: COPY OF THE OBJECTION FILED BY THE 2ND RESPONDENT TO EXHIBIT P4, DATED 10/08/2009.

EXT.P6: COPY OF THE CMP NO.1436/2009 IN ST NO.1271/2006 FILED BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT-X, DATED 26/09/2009.

EXT.P7: COPY OF THE CONTRACT DEED DATED 28/12/2005.

EXT.P8: COPY OF THE WITNESS SHCEDULE FILED BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT-X, DATED 06/10/2009.

EXT.P9: COPY OF THE ORDER DATED 06/10/2009 IN CMP NO.1154/2009 IN ST NO.1271/2006.

RESPONDENT'S EXHIBITS:

EXT.R2(a): COPY OF THE DEPOSITION OF PW1.

EXT.R2(b): COPY OF THE DEPOSITION OF DW1.

EXT.R2(c): COPY OF THE B-DIARY OF THE PROCEEDINGS OF THE J.F.M.C-III, THIRUVANANTHAPURAM

//TRUE COPY//

P.S. TO JUDGE

rs.

M.Sasidharan Nambiar, J.

W.P.(C)No.29921 of 2009 Q

JUDGMENT

Petitioner is the accused and second respondent, the complainant in S.T.No.1271/2006 on the file of Judicial First Class Magistrate's Court-X, Thiruvananthapuram. Petitioner filed C.M.P.No.1154/2009 at the defence stage to send Exhibit P1 dishonoured cheque to an expert to get an opinion whether the first numeral 'one' written in eleven lakh is in the same handwriting as the remaining numerals. Earlier, petitioner had filed Exhibit P6 petition under Section 311 of Code of Criminal Procedure to reopen the evidence, as the defence evidence was closed, contending that to substantiate his defence, it is necessary to examine the Manager of Federal Bank and the father of Mohandas, who filed S.T.Nos.418/2008 and 425/2008 before Judicial First Class Magistrate's Court-III, Thiruvananthapuram. By order dated

26.9.2009 that petition was allowed on cost of Rupees One thousand and the case was posted to 1.10.2009, evidenced by Exhibit R2(c) order sheet produced by the second respondent. On 1.10.2009, recording that no witness present, the case was posted as last chance to 6.10.2009. On that day, learned Magistrate dismissed C.M.P.No.1154/2009 under Exhibit P9 order, recording that though first witness sought to be summoned is the Manager of Federal Bank, Statue Branch, Thiruvananthapuram, as the account number of the complainant was not mentioned in the schedule, summons cannot be issued and the second witness, who was cited originally, was given up by the counsel on 24.7.2009. Hence, the defence evidence was closed once again and the case was posted to 14.10.2009. This petition is filed under Article 227 of Constitution of India to set aside Exhibit P9 order as well as the order dated 6.10.2009, where under, the defence evidence was closed with a direction to the Magistrate to

issue summons to the witnesses.

2. Learned counsel appearing for the petitioner, second respondent and learned Government Pleader were heard.

3. Learned counsel appearing for the petitioner pointed out that Exhibit P7, the agreement entered into by the petitioner and Mohandas, would show that petitioner had given six cheques, showing the number of the cheques, stating that only the figure Rupees One lakh was written in numerals apart from the signatures in those cheques and the dishonoured cheque involved in this case is one among those cheques. It is also pointed out that as against the remaining cheques, father of Mohandas had lodged Exhibits P2 and P3 complaints alleging that those cheques, which were handed over under Exhibit P7 to Mohandas, were issued to him in discharge of legally enforceable debt and they were dishonoured and thereby, petitioner committed an offence under Section 138 of Negotiable Instruments Act. Learned

counsel argued that in the light of the defence raised by the petitioner, the question whether the first numeral one in the dishonoured cheque is in the same handwriting of the petitioner, as petitioner has written the remaining numerals, is a relevant aspect, which is very material to decide the case. Similarly, whether the amount written in figures is in the handwriting of the petitioner is also relevant, as it is his case that it was not written by him and learned Magistrate was not justified in dismissing the petition under Exhibit P9 order. Learned counsel also pointed out that as evidence was closed, petitioner filed Exhibit P6 petition under Section 311 of Code of Criminal Procedure stating that those witnesses, shown in Exhibit P8 witness list, are to be examined and when that petition was allowed on terms, learned Magistrate was not justified in closing the evidence, without examining those witnesses. It is submitted that second respondent was introduced to

the Bank by none other than by Mohandas, to whom six cheques were handed over as per Exhibit P7 agreement and as per the address of the second respondent, it is the same address as that of the complainant in Exhibits P2 and P3, which supports the defence case.

4. Learned counsel appearing for the second respondent argued that attempt is only to protract the case. It was pointed out that second witness in Exhibit P7 witness list was given up earlier and it is, in such circumstances, learned Magistrate closed the evidence without examining the witnesses as sought for. Learned counsel invited my attention to a portion of the cross-examination of the second respondent, when examined as PW1 and argued that the suggestion that cheque was not signed in his presence and handed over to the second respondent, would only mean that the cheque was handed over to the second respondent and as the signature of the petitioner is not disputed, subsequent development

of the case can only be disbelieved. It was also argued that when petitioner was examined as DW1, as evidenced by Exhibit R2(b), wherein, petitioner admitted that he had received a notice sent on dishonour of the cheque and he did not send any reply, it was argued that if, in fact, the cheque was not issued for Rupees Eleven lakh, as claimed by the second respondent, petitioner would have sent a reply and if the cheque was issued to Mohandas, as claimed, he would have filed a complaint immediately and in such circumstances, the case cannot be believed and hence, learned Magistrate was justified in dismissing the petition.

5. A valid defence available to an accused cannot lightly be rejected by the court. When a fact, which is to be proved by the accused, could be proved by a particular mode, it is neither for the complainant nor for the court to dictate that it shall not be proved in that way, but, by some

other mode. The choice is that of the accused. The signature in the cheque is not disputed. True, petitioner would admit that it is his signature. He would also admit that the numerals one lakh seen in the dishonoured cheque is written by him. But, it is his case that the numeral one, which is written on the left side of one lakh, making it a cheque for Rupees eleven lakhs, was not written by him. If the cheque is examined by an expert and the expert finds that the first numeral one as well as the writings of the amount in words are not that of the petitioner, it would establish the defence case. Therefore, it cannot be said that attempt of the petitioner to get reliable evidence in support of the defence case, by getting a report of an expert, is not a relevant fact. If that be so, learned Magistrate was not justified in dismissing the petition as done under Exhibit P9 order. There is no admission in the cross-examination of PW1, as canvassed by the learned counsel appearing for the

petitioner, that he had issued the cheque to the second respondent. So also, failure to send a reply to the notice sent by the second respondent by itself is not a valid ground to deny an opportunity to prove that the dishonoured cheque was not issued to the second respondent. In such circumstances, learned Magistrate should have sent the dishonoured cheque to an expert as sought for. Exhibit P9 order, therefore, can only to be quashed.

6. By allowing Exhibit P6 petition on cost, invoking the powers under Section 311 of Code of Criminal Procedure, learned Magistrate had permitted the petitioner to adduce evidence as sought for in Exhibit P6. In such circumstances, learned Magistrate was not justified in subsequently disallowing the petition to summon and examine the witnesses. If learned Magistrate was satisfied that as the second witness, shown in the witness list, was given up and cannot be examined, while exercising the powers under Section 311 of

Code of Criminal Procedure and allowing the petition, it should have been made clear. In the light of the contentions raised by the petitioner that the dishonoured cheque involved in this case as well as the cheques in Exhibits P2 and P3 cases, were handed over by him to Mohandas, as evidenced by Exhibit P7 agreement, learned Magistrate was not justified in rejecting an opportunity to the petitioner to examine the second witness to prove Exhibit P7 agreement. So also, having allowed Exhibit P6 petition, learned Magistrate was not justified in denying an opportunity to the petitioner to summon the Manager of Federal Bank to produce relevant records. If the details to produce the documents are not furnished, learned Magistrate should have directed the petitioner to furnish the details or should have directed the Manager of Federal Bank to produce documents, if it can be so produced, without any account number. In such circumstances, closing the evidence, without

permitting the petitioner to examine the witnesses, as allowed under Exhibit P6 earlier, was also not justified.

7. Exhibit P9 order is set aside. Learned Magistrate is directed to send Exhibit P1 cheque to an expert as sought for in Exhibit P4 petition, at the expense of the petitioner. Petitioner shall deposit the necessary amount before the learned Magistrate within ten days from the date fixed by the learned Magistrate and on such deposit, Exhibit P1 cheque shall be sent to an expert. Learned Magistrate is also directed to permit the petitioner to examine the witnesses shown in Exhibit P8 by issuing summons to them.

Petition is disposed.

25th February, 2010 (M.Sasidharan Nambiar, Judge)
tkv