

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 20TH DAY OF NOVEMBER 2015/29TH KARTHIKA, 1937

CRL.A.No. 148 of 2006 ()

AGAINST THE JUDGMENT IN ST 1696/2002 of J.M.F.C.,PERUMBAVOOR

APPELLANT(S)/PETITIONER/COMPLAINANT:

ABDUL RASSAK, S/O. MUHAMMED,
NAITHRAN VEEDU, PERUMBAVOOR.

BY ADVS.SRI.V.RAJENDRAN (PERUMBAVOOR)
SRI.GEORGE VARGHESE KIZHAKKAMBALAM

RESPONDENT(S)/STATE & ACCUSED:

-
1. STATE OF KERALA REP. BY
DIRECTOR GENERAL OF PROSECUTIONS,
HIGH COURT OF KERALA,
ERNAKULAM.
 2. SUKUMARAN, S/O. NARAYANAN,
PULLARAKKATT VEEDU, KANTHALLOOR P.O.,
DEVIKULAM TALUK, NOW RESIDING AT
MOUNT VIEW LODGE, ROOM NO.109,
MYSORE ROAD, GONI GOPAL P.O.-521 317,
SOUTH COORG DISTRICT, KARNATAKA STATE.

R1 BY PUBLIC PROSECUTOR SMT. LILLY LESLIE
R2 BY ADV. SRI.E.C.BINEESH
BY ADV. SMT.M.B.SHYNI

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
20-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 148 of 2006

Dated this the 20th day of November 2015.

JUDGMENT

Aggrieved by the acquittal of the accused for the offence under Section 138 of the Negotiable Instruments Act, the complainant before the court below came up in appeal after obtaining leave of this Court.

2. The complainant and the accused along with another person by name M.K.Muhammed entered into an agreement to conduct joint business for supply of timber. That is Ext.P1. Since the accused did not have money to invest at that point of time, he borrowed a sum of Rs.1,25,000/- promising to pay within a short time. At the time of borrowing the money, he had issued Ext.P2 cheque to the complainant. The complainant contended that since the money was not paid within the stipulated time, the cheque was presented and it was returned for want of sufficient funds.

After complying with the formalities, the complainant laid a complaint.

3. Cognizance of the complaint was taken by the court below and on appearance of the accused, after following the necessary procedures, particulars of the offence were read out to him, to which he pleaded not guilty and claimed to be tried. The complainant examined himself as P.W.1 and had Exts.P1 to P5 marked. After the close of the complainant's evidence, the accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He examined himself as D.W.1 and had Exts D1 and D2 marked.

4. On a consideration of the materials before it, the trial court was inclined to accept the defence set up by the accused to the effect that the cheque was given by the accused not voluntarily, but the cheque was obtained by threat and

coercion. The court below found that the case set up by the respondent is more probable and therefore acquitted him.

5. Assailing the acquittal, learned counsel appearing for the appellant contended that the court below was not justified in blindly accepting the evidence adduced by the defence without adverting to the evidence produced by the complainant. Issuance of cheque is mentioned in Ext.P1 itself and it is interesting to note, according to the learned counsel that issuance of the cheque and the signature on it are not disputed. But the only case is that the cheque happened to be given under threat and coercion. If that be so, according to the learned counsel, it is for the accused to prove those factors. The court below on the other hand was greatly impressed by Exts.D1 and D2 and gave benefit to the accused. This is not justifiable in law.

6. Learned counsel appearing for the respondent on the other hand supported the finding of the court below and

that the court below has analysed the evidence in considerable detail. It is also pointed out that even assuming that Ext.P2 can be accepted, it is not shown that the issuance of the cheque is supported by consideration. Learned counsel also pointed out that this court is exercising power under appellate jurisdiction against an order of acquittal and unless it is shown that the finding of the trial court is perverse or unwarranted, interference on that basis is not warranted.

7. It is not in dispute that there was an agreement between the accused and the petitioner and also one Muhammed, but there is considerable dispute regarding the terms of the agreement. The complainant banks upon Ext.P1 agreement and the accused banks upon Ext.D2. There are variations between Exts. P1 and D2.

8. The partnership which was intended to be formed with the accused did not actually carry on business and it fell apart.

9. It must be noticed that the burden to establish that there is a subsisting debt and that the cheque was issued to discharge that debt is on the complainant. Merely because a cheque happened to be in the hands of a person does not clothe him with the right to institute proceedings.

10. The accused had a case that the cheque was issued under vitiating circumstances and the true agreement is Ext.D2. The attitude of the complainant towards Ext.D2 was one of total denial and he did not take it seriously. When he is confronted with the same, he had no answer for the same.

11. Being a joint venture as already stated, it is very difficult to believe that soon after having entered into a partnership, one of the partners had borrowed money from the other partner to purchase articles. One cannot omit to notice that on a strict reading of the complaint would indicate that it was a partnership, but the evidence disclosed that they had agreed to conduct business with timber logs. So the

claim that it is a personal loan cannot be easily accepted.

12. The burden to prove the two ingredients to attract Section 138 of the N.I. Act is always on the complainant. The burden is indeed heavy. However, the onus cast on the accused is of mild nature and all that he has to do is to create a doubt in the mind of the court and then he is entitled to an acquittal.

13. The court below has analysed the evidence in considerable detail and has come to the conclusion that it is extremely difficult to accept the case put forward by the complainant.

14. While exercising appellate jurisdiction against an order of acquittal, unless it is shown that the findings of the courts below are perverse and against the materials on record or it took irrelevant matters into consideration, even assuming a different view is possible, law does not justify interference.

For the above reasons, this appeal is dismissed.

P. BHAVADASAN,
JUDGE

sb.