

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 3RD DAY OF NOVEMBER 2015/12TH KARTHIKA, 1937

CRL.A.No. 23 of 2009

AGAINST THE JUDGMENT IN ST 1166/2006 of JUDICIAL FIRST CLASS
MAGISTRATE COURT- I, ETTUMANOOR DATED 22.10.2008

APPELLANT/COMPLAINANT:

P.SUNILKUMAR, S/O.PARAMESWARAN,
LAKSHMI NIVAS, VETTIMUKAL P.O., ETTUMANOOR,
KOTTAYAM.

BY ADVS.SRI.P.R.AJITHKUMAR
SRI.K.MANOJ CHANDRAN

RESPONDENTS/STATE & ACCUSED:

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1. STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.
 2. BINDU SAJEEVAN, PUTHIYADATHU HOUSE,
VYTTILA P.O., CHALIKKAVATTOM, ERNAKULAM.

R2 BY ADVS. SRI.T.K.RADHAKRISHNAN
SMT.K.L.SREEDEVI
SMT.S.SREEDEVI(ALP)
SRI.K.J.GLADIS
SMT.K.S.SUDHA
R1 BY SMT.S.HYMA, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
03-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.23 OF 2009

Dated this the 3rd day of November, 2015.

J U D G M E N T

In a prosecution for the offence punishable under Section 138 of the Negotiable Instruments Act, court below namely, Judicial First Class Magistrate Court-I, Ettumanoor acquitted the accused. Challenge is against the said order of acquittal.

2. The short case put forward by the complainant is that in order to discharge a liability due to him, accused issued Ext.P1 cheque dated 30.04.2006. The cheque, on presentation, bounced for want of funds. Statutory notice issued to the accused invoked a reply containing false allegations. Since the amount remained unpaid, complaint was laid.

3. The court before which complaint was laid took cognizance of the offence and after following necessary procedures, summons was issued to the accused who entered

appearance. On appearance of the accused, copies of the documents were furnished to her and particulars of the offence were read out to her. She pleaded not guilty and claimed to be tried.

4. The complainant examined himself as PW1 and had Exts.P1 to P5 marked.

5. At the time of questioning under Section 313 Cr.P.C, accused had not only denied the incriminating circumstances put to her but also added that the complainant had taken the contract work of the house intended to be put up by the husband of the accused and the accused never had any direct monetary transaction with the complainant. There was no transaction as alleged and she was never in financial difficulty. With reference to the construction of the house, on instructions by the complainant a blank cheque was given as security. Though the amount as per the contract was in fact paid to the complainant, cheque was not returned in spite of several requests. The accused concluded stating that she had sent a letter on

25.05.2006 to the complainant requesting him to return the cheque. According to her, it was thereafter that the cheque was presented and subsequent proceedings started. She pointed out that as per the agreement executed by her husband and the complainant in the case, the understanding was that the complainant would be paid Rs.600/- per square meters and the total plinth area will be 91.54m². The amount due there of i.e. Rs.5,27,000/- had been paid to the complainant. The cheque in question is not supported by any consideration. The cheque which has been given to the complainant as security has been misused to make unlawful gains.

6. The court below, after analysing the evidence, found that there was little evidence regarding the payment alleged to have been made by the complainant to the accused. The court has also referred to a letter alleged to have been sent by the accused to the complainant prior to the presentation of cheque which, the accused claimed, called upon him to return the cheque. Reliance was also placed by the court below on Exts.D1

and D2. The court below therefore concluded that the complainant had not succeeded in establishing that the accused in fact was indebted to complainant, in discharge of which Ext.P1 cheque was issued and accordingly, accused was acquitted.

7. Assailing the acquittal, learned counsel appearing for the appellant contended that the story put forward by the accused, on the very face of it, is absurd and unbelievable. Admittedly, the complainant had been engaged to put up a building as per the desire expressed by the husband of the accused and Ext.D1 agreement was entered into. It is inconceivable, according to the learned counsel for the appellant, that at that time a cheque would have been given by the accused as security to the complainant. It is highly improbable, so says the learned counsel. Learned counsel also pointed out that the court below was not justified in placing faith on the assertion made by the accused that even prior to the presentation of cheque, the complainant was in possession of a letter said to have been sent by the accused calling upon him to return the cheque. Even

though an attempt was made, according to the learned counsel, to mark a photostat copy of the said communication, in the light of the strong objection taken by the complainant's counsel, that was not marked. Therefore, according to the learned counsel, the court below should not have referred to it. Learned counsel went on to point out that if, at the time of entering into an agreement Ext.D1, a blank cheque had been handed over to the complainant, that would have certainly found a place in Ext.D1. Non mention of the cheque in Ext.D1 belies the version given by the accused that the cheque was given at the time when Ext.D1 agreement was entered into. These vital aspects have been omitted to be noticed by the court below and that has resulted in an erroneous decision.

8. Learned counsel appearing for the respondent-accused, on the other hand, contended that the court below had analysed the evidence in considerable detail and found that the story put forward by the complainant to be unbelievable and untrue. According to the respondent, in cross examination of PW1 he had

deposed that his passbook would indicate the withdrawal of the amount given to the accused and if that be so, the best evidence would have been production of passbook. The non production of the said document, according to the learned counsel, calls for drawing an adverse inference. It is also contended that the court below has rightly found that there is want of evidence to show that Ext.P1 cheque was supported by consideration. Learned counsel went on to caution this Court that this Court is exercising its appellate jurisdiction against an order of acquittal and unless and until it is shown that the order of the court below is perverse or is totally unsustainable, interference may not be called for.

9. Well, there is much to be said on either side. The defence put forward by the accused is that she and her husband had engaged the complainant to put up a house for them and at that time they had entered into Ext.D1 agreement with the complainant. They would go on to say that at that time at the instance of the complainant, Ext.P1 blank cheque was also given with the understanding that the cheque would be presented after

the construction is over and accounts are settled. The defence has a case that the complainant left without completing the work and the relationship became bitter between them. According to the defence, they had issued a letter prior to the presentation of the cheque calling upon the complainant to return the cheque. The complainant, on the other hand, stated that if, as a matter of fact, cheque was in fact issued as security as contended by the defence, normally and usually that would have found a place in Ext.D1 itself. Ext.D1 is totally silent regarding the same and that would show that no cheque was given at that point of time.

10. One cannot omit to note that the two ingredients necessary to attract Section 138 of the Negotiable Instruments Act are; 1) there is a subsisting liability and 2) that the cheque was issued to discharge the said liability. It is no doubt true that the signature on the cheque and the handing over of cheque is admitted but under different circumstances.

11. Learned counsel appearing for the appellant placed reliance on the decision in **Vasanthakumar T.** vs.

Vijayakumari (2015 KHC 4332) wherein it was held as follows:

“In the present case since the cheque as well as the signature has been accepted by the accused respondent, the presumption under S.139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability. To this effect, the accused has come up with a story that the cheque was given to the complainant long back in 1999 as a security to a loan; the loan was repaid but the complainant did not return the security cheque. According to the accused, it was that very cheque used by the complainant to implicate the accused. However, it may be noted that the cheque was dishonoured because the payment was stopped and not for any other reason. This implies that the accused had knowledge of the cheque being presented to the bank, or else how would the accused have instructed her banker to stop the payment. Thus, the story brought out by the accused is unworthy of credit, apart from being unsupported by any evidence. Further, the High Court relied heavily on the printed date on the cheque.

However, we are of the view that by itself, in absence of any other evidence, cannot be conclusive of the fact that the cheque was issued in 1999. The date of the cheque was as such 20/05/2006. The accused in her evidence brought out nothing to prove the debt of 1999 nor disprove the loan taken in 2006. In light of the above reasoning, we find that the learned High Court was misplaced in putting the burden of proof on the complainant. As per S.139, the burden of proof had shifted on the accused which the accused failed to discharge. Thus, we find merit in this appeal”.

12. The decision has to be understood in the facts of the said case where the issue was regarding stop payment memo issued by the accused.

13. One should remember that the words used in Section 139 of N.I Act are the cheque of the nature mentioned in Section 138. Therefore, to understand the presumption under Section 139, it is necessary to refer to Section 138. If that be so, the ingredients constituting the offence under Section 138 will

have to be necessarily established by the complainant.

14. It is true that it is inconceivable that the accused would have given cheque at the time of entering into Ext.D1 agreement. It is significant to notice that neither in the complaint nor in the affidavit in lieu of chief examination, the complainant had specified the date, time and place on which or where the amount was given. Further, in cross examination, he had stated that his passbook would show the withdrawal and payment to the accused. For reasons best known to him, he chose not to produce that document. Merely because the signature and issuance is admitted, it cannot automatically lead to the conclusion that the debt has incurred in the facts and circumstances of the case. Though the accused had not in so many words challenged the capacity of the complainant to effect payment, the absence of mention of time, place and date on which the amount was paid assumes significance in the sense that the accused has a case that the building was not completed by the complainant and it was left uncompleted and the

relationship has become bitter. In this context, the date of payment assumes importance.

15. Even though in cross examination PW1 has stated that the amount was paid on 15.02.2006 and it was paid from his office, these are conspicuously absent in the complaint and in the affidavit in lieu of chief examination. Probably, the lower court had fallen into an error in placing reliance on a document which was not admitted in evidence and basing its conclusion on the same. To that extent, court below might have erred. But, the fact remains that except for the statement made by the complainant, without specifying the date, time and place of payment, there is no other evidence of payment having been made as claimed by the complainant.

16. At the risk of repetition, if the complainant has a case that his passbook would evidence the same, it was only proper for him to produce the same. Even assuming that the story put forward by the defence is improbable and unbelievable, that does not help the complainant much in the sense that the primary

ingredients necessary to attract Section 138 of N.I Act will have to be established by him. It is here the above infirmities assume importance.

17. Viewed from that angle, it could not be said that the order of acquittal passed by the court below is unjustifiable though for different reasons. It could not be said that the order of acquittal is perverse or contrary to the evidence on record. It is a possible view. If that be so, interference in appeal is uncalled for.

Result is that, this appeal is without merits and it is accordingly dismissed.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.