IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 14TH DAY OF OCTOBER 2015/22ND ASWINA, 1937

CRL.A.No. 24 of 2007 ( )

AGAINST THE JUDGMENT IN CC 802/2001 OF JUDICIAL FIRST CLASS MAGISTRATE KOLENCHERRY, DATED 21-08-2006

APPELLANT(S)/COMPLAINANT:

SARATH CHANDRAN, S/O.PADMANABHAN NAIR,
SREE BHAVAN, KADAYIRIPPU P.O., POWER OF ATTORNEY
HOLDER OF SANJAY S., CHANDRAN, AGED 32
ANJALI, MARUTHAMKUZHI, KANJIRAPPARA P.O.
THIRUVANANTHAPURAM-30.

BY ADV. SRI.V.RAJENDRAN (PERUMBAVOOR)

RESPONDENT(S)/ACCUSED:
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1. STATE OF KERALA,
   REP. BY DIRECTOR OF PUBLIC PROSECUTOR
   HIGH COURT OF KERALA, ERNAKULAM.

2. AJAY KUMAR M.A.,
   S/O.ARAVINDAKSHAN, MUNDAYIKKARA VEEDU, VADAVUCODE
   PUTHENCRUZ, ERNAKULAM DISTRICT.

R2 BY ADV. SRI.M.K.DILEEPAN
R2 BY ADV. SRI.DEEPAK T.NEDUNGADAN
R2 BY ADV. SMT.P.SUMITHRA
R1 BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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P.BHAVADASAN, J.

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Crl.A. No.24 of 2007

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Dated this the 14th day of October, 2015

J U D G M E N T

Aggrieved by the acquittal of the accused for the offence punishable under Section 138 of the Negotiable Instruments Act, by judgment dated 21.08.2006 of the Judicial First Class Magistrate Court, Kolencherry, the complainant before the court below has come up in appeal after obtaining leave of this Court.

2. The complaint was laid by the power of attorney holder of Sanjay S. Chandran. The allegation was that a partnership business was carried on in rubber by Sanjay S. Chandran and the accused. On settlement of accounts, an amount of ₹6,78,197/- was found due to Sanjay S. Chandran. In order to discharge the said liability, the accused is alleged to have issued Ext.P2 cheque. The cheque on presentation bounced for want of funds and a statutory notice issued to

the accused invoked no reply. Since the amount remained unpaid, the complainant was constrained to lay a complaint.

3. Cognizance of the offence was taken by the court below. After following the necessary procedures, summons was issued to the accused. On appearance of the accused and after completing the formalities, particulars of offence were read out to him to which he pleaded not guilty and claimed to be tried. The complainant examined himself as PW1 and had Exts. P1 to P6 marked.

4. After the close of 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. The accused examined DWs 1 and 2 in his defence and had Exts. D1 to D7 marked.

5. On an evaluation of the materials before it, the court below came to the conclusion that the plea taken that Ext.P2 cheque was issued by the accused in lieu of the

liability which he owed to the complainant on settlement of accounts was not true and the complainant was unable to substantiate his claim that the amount covered by the cheque was a debt owed by the accused. Accordingly, the accused was acquitted.

6. Assailing the said order of acquittal, the learned counsel for the appellant points out that the signature on Ext.P2 cheque is not disputed and if that be so, the burden is on the accused to show under what circumstances the cheque had been issued to the complainant. The learned counsel relied on the presumption available under Section 139 and 118 of the Negotiable Instruments Act and pointed out that the burden was on the accused to show that the cheque was not issued as alleged in the complaint. The learned counsel for the appellant also drew attention of this Court to the fact that there were no reply notice issued by the accused to the statutory notice issued by the complainant. The absence of any reply notice goes a long

way showing the complicity of the accused. These vital aspects were ignored by the court below and that has resulted in a wrong order being passed.

7. The learned counsel appearing for the respondent on the other hand contended that the court below has evaluated the evidence in considerable detail and has come to the conclusion that the complainant was unable to substantiate any of the allegations based on which he claims that Ext.P2 cheque has been issued by the accused. The learned counsel also pointed out that the compliant itself is defective in the sense that it has not been filed either by the payee or the holder in due course, but by the power of attorney holder of the payee. This is not contemplated by the Negotiable Instruments Act.

8. Even though, the complainant claimed that Ext.P2 cheque was issued on settlement of accounts, when he was cross examined, the complainant admitted that no settlement of accounts had taken place till date and that

weighed with the court below. The complainant had no consistent case regarding the amount covered by Ext.P2 cheque. At one point of time, he would say that it was issued on settlement of accounts and at another stage, he would say that he was not made a partner at all and the third stand taken by him is that he has got documents and evidence to show that amounts were paid to the accused. None of which were produced to substantiate to his allegations.

9. The learned counsel went on to point out that the presumption under Section 139 can be attracted only if the complainant establishes the ingredients under Section 138 of the Negotiable Instruments Act. Having failed to establish prima facie the ingredients of Section 138, the complainant cannot be heard to say that he is entitled to get the aid of presumption under Section 139 of the Negotiable Instruments Act. The learned counsel pointed out that there are no grounds made out to interfere with the order of

acquittal.

10. This Court may remind itself to the fact that it is dealing with an appeal against an order of acquittal. Apart from the fact that in criminal law, an accused is treated to be innocent unless found guilty, in the case of an appeal against the acquittal, there is an added advantage to the accused that he has been found not guilty by the court after evaluating the evidence in the case. Therefore, the burden of showing that the court below has erred in its finding is heavy on the appellant. Unless it is shown that the assessment or evaluation of the evidence by the trial court is perverse, or that the trial court was guided by irrelevant facts, even assuming a different view is possible, the appellate court may not be justified in interfering with an order of an acquittal.

11. Bearing the above principles in mind, an attempt shall now be made to see if the view taken by the court below is a possible view.

12. The definite case put forward by the complainant was that in 1996 he was made a partner in the rubber business conducted by the accused and he had invested amounts in the business. His further case was that on settlement of accounts, it was found that a sum of ₹6,78,197/- was due to him and in order to discharge the said liability, Ext.P2 cheque has been issued by the accused. In the affidavit filed in lieu of chief examination also, he maintained the same stand. However, in cross examination, he admitted that there had never been any settlement of accounts till date. The said statement in cross examination destroys the very foundation of the case set up by the complainant. It was also brought out in cross examination that the amount now claimed as per Ext.P2 cheque includes ₹2 lakhs said to have been paid by the complainant with respect to a case said to have been instituted by another person using a cheque which he claims to have issued to the accused.

13. The complainant is definite that he has got records to show the amount paid by him to the accused for business purposes. As already stated, he has no consistent case regarding the partnership. While he claimed the amount covered by Ext.P2 cheque was due on settlement of accounts, in his cross examination he also states he was never made a partner.

14. It is in this context, the defence case will have to be appreciated. It is not in dispute that the complainant and the accused are related to each other. It is also not in dispute that the accused was carrying on the business in rubber. It was brought out in cross examination of PW1 that the accused used to be away from place of business and on several occasions, the business was being managed by the complainant. The accused has a case that utilizing those opportunities, it is possible that one of the signed blank cheques kept by the accused had been taken by the complainant and the present case has been laid. It is not

necessary to probe into that aspect before finding that the case put forward by the complainant is probable.

15. In order to attract the presumption under Section 139 of the Negotiable Instruments Act, it is by now well settled that the ingredients to constitute the offence under Section 138 of Negotiable Instruments Act will have to be prima facie established by the complainant himself. The two ingredients are: (1) there is a enforceable debt due to the complainant and (2) the cheque concerned was executed and issued by the accused to discharge the said liability. The decisions lay down the principle that in a prosecution for the offence under Section 138 of the Negotiable Instruments Act, the court does not start with a presumption under Section 139 of the Negotiable Instruments Act but has to see whether the complainant has established the necessary factors to attract the presumption under Section 139 of the Negotiable Instruments Act. Even assuming that a signed blank cheque has been issued by the accused and

even assuming that the accused does not dispute his signature on the cheque in question, that does not automatically lead to the conclusion that cheque was executed and issued to discharge the liability for an enforceable debt. The existence of the debt is a matter to be established by the complainant himself.

16. Apart from the fact that at the time of cross examination, PW1 the complainant admitted that no settlement of accounts had taken place and it is also significant to notice that a cheque bearing subsequent number to the one issued in this case has already been encashed and the complaint has been filed against the accused utilizing the said cheque. It has also come out in evidence that there were both civil and criminal proceedings against the accused with respect to the said cheque and both ended against that complainant in this case. It was thereafter that the present complaint was laid.

17. A reading of the statements in cross examination give a different picture as far as the complainant is concerned. He is not definite about anything. To further add to his misery, he also stated that he has got records to show the amounts paid by him for the business purposes. It is not known as to what prevented him from producing that document. Whatever that be, the moment it is conceded by the complainant that there has never been a settlement of accounts the very basis on which the complainant claimed that Ext.P2 cheque has been issued ceases to exist. While the non issuance of reply notice may be an added circumstances in the case, the mere fact that no reply was sent to the notice by itself cannot be a ground to fasten liability on the accused. Even other factors are established or proved through evidence by the complainant, it may be an added circumstances to corroborate the case put forward by the complainant. The non issuance of the reply notice cannot foreclose the defence of the accused. The accused

can still show that the claim of the complainant is false. That is precisely what has been done in the present case. The court below has considered the evidence in considerable detail and has taken the relevant materials into consideration and has arrived at a conclusion that the complainant has miserably failed to establish that Ext.P2 cheque was issued on settlement of accounts for amount due under that situation. The court below came to the conclusion that the complainant was not able to show that there was an existing debt towards the discharge of which Ext.P2 cheque was issued.

It could not be said on re-evaluation of evidence that the finding of the court below is either perverse or that it is based irrelevant materials. Even assuming that a different view may be possible, this Court is exercising its appellate jurisdiction against an order of acquittal unless there are very compelling circumstances, interference is not called for. There is no such compelling circumstances in this case and it follows that this appeal is without any merits and it is liable to be dismissed. I do so.

Sd/-
P.BHAVADASAN
JUDGE

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//True copy//

P.A. to Judge