IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 11TH DAY OF SEPTEMBER 2015/20TH BHADRA, 1937

CRL.A.No.48 of 2009 (A)

AGAINST THE JUDGMENT IN ST 2612/2006 of JUDICIAL FIRST CLASS MAGISTRATE COURT-I, KOTTAYAM DATED 18.08.2008

APPELLANT/COMPLAINANT:

KOTTAYAM DISTRICT CO-OPERATIVE BANK LTD.,
REPRESENTED BY ITS MANAGER, MAIN BRANCH, KOTTAYAM.

BY SRI.SUNIL CYRIAC, SC, DIST.CO-OPERTAIVE BANK.

RESPONDENTS/ACCUSED & STATE:

1. HAMEED ALI SHEMNAL,
   MALAYIL, VELOOR.PO., KOTTAYAM.

2. STATE OF KERALA, REPRESENTED BY THE PUBLIC
   PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.48 OF 2009

Dated this the 11th day of September, 2015.

J U D G M E N T

This appeal is directed against the order of acquittal passed by the Judicial First Class Magistrate Court-I, Kottayam in S.T.No.2612/2006 whereby the accused was acquitted for the offence punishable under Section 138 of the Negotiable Instruments Act.

2. The complainant was the Kottayam District Co-operative Bank Ltd. It laid the complaint on the allegation that for the debt due to it and for discharge of it, the accused had issued Ext.P1 cheque which, on presentation, was bounced for want of funds. Notice issued to the accused as enjoined by the Statute invoked no response nor was the amount paid. That lead to laying of the complaint.

3. Cognizance of the offence was taken and requisite procedure was followed and summons was issued to the accused.

He entered appearance. The particulars of offence was read over to the accused, to which, he pleaded not guilty and claimed to be tried.

4. The complainant therefore had PW1 examined and Exts.P1 to P6 marked.

5. After the close of the complainant's evidence, accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances put to him and maintained that he is innocent. He adduced no evidence in his defence.

6. On appreciation of the materials before it, court below came to the conclusion that the complainant had not succeeded in establishing how the liability arose and the initial burden on the complainant was not discharged and thus acquitted the accused.

7. Assailing the acquittal, learned counsel appearing for the appellant contended that the fact that Ext.P1 cheque was issued by the accused is not disputed by him. If that be so, presumption under Section 139 of Negotiable Instruments Act

follows and the court below was not justified in acquitting the accused.

8. The case as disclosed from the evidence is that the accused had availed of a loan from the Bank and amount was due from him. It is significant to notice that no details of the loan is seen narrated in the complaint or in the affidavit in chief in lieu of chief examination of PW1. It is surprising to note that the statement of account was not produced. It is even more surprising to note that the date on which the cheque was issued was also not mentioned. All what is stated in the complaint is that the accused for the debt due from him issued a cheque on 07.07.2006 to the complainant.

9. The presumption under Section 139 of Negotiable Instruments Act is not automatic. The evidence regarding liability and the obligation on the part of the accused to discharge the same has to be established by the complainant. The burden to show how the liability arose rests on the complainant. More so, in the case on hand, complainant is a Bank and it should have

accounts showing the liability.

10. It must be noticed here that the Bank had advanced a loan of Rs.50,000/- and Ext.P1 cheque covers an amount of Rs.68,000/-. As to how the amount of Rs.68,000/- was due from the accused, there is no explanation from the complainant. It is significant to notice that arbitration proceedings are pending before the concerned authority regarding the very same matter. It is in this context the court below was compelled to take a view that in the absence of any document to show the loan and the amount due to the complainant as per loan, it may not be proper to apply the presumption under Section 139 of Negotiable Instruments Act. It could not be said that the finding is either perverse or contrary to the evidence on record.

11. Faced with the above situation, learned counsel appearing for the appellant pleaded that the appellant may be given an opportunity to establish its case since it is a Bank and dismissal of the complaint caused considerable injury to them.

12. It is felt that the request is just and reasonable.

In the result, this appeal is allowed and the order of acquittal is set aside and the matter is remanded to the trial court for fresh disposal in accordance with law after giving an opportunity to the parties to adduce further evidence if they so choose.

Sd/-

P.BHAVADASAN
JUDGE

smp

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P.A to Judge.