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. 111 of 2009 ( )

AGAINST THE ORDER/JUDGMENT IN ST 146/2008 of J.M.F.C.-II, NADAPURAM DATED 26-09-2008

APPELLANT/COMPLAINANT:

A.M.GOPALAN, MANAGING DIRECTOR
SREE GOKULAM CHITS AND FINANCE CO., (P) LTD., CHENNAI.
REP. BY HIS P/A.HOLDER, K.K.CHANDRASEKHARAN
S/O.KUNJUNNI KURUP, 56 YEARS, MEMUNDA AMSOM
KEEZHAL DESOM, VADAKARA TALUK.

BY ADVS.SRI.K.S.BABU
SMT.N.SUDHA

RESPONDENTS/ACCUSED & STATE

1. POKKAN, S/O.KANNAN,
   ARAYAKKOOL HOUSE, CHERAPURAM PO., KAKKATTIL
   VELAM AMSOM, CHERAPURAM DESOM.

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

R2 BY ADV. PUBLIC PROSECUTOR SMT. S. HYMA
R1 BY ADV. SRI.C.M.MOHAMMED IQUABAL

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

kp/-

P.BHAVADASAN, J.

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Crl.No.111 of 2009

Dated this the 3rd day of November, 2015

JUDGMENT

Aggrieved by the order of acquittal in S.T.No.146 of 2008 of the Judicial First Class Magistrate-II, Nadapuram for the offence under section 138 of the Negotiable Instruments Act, 1881, the complainant before the court below has come up in appeal after obtaining leave of this Court.

2. The facts absolutely necessary for the disposal of this appeal are as follows:

Sree Gokulam Chits & Finance Company Pvt. Ltd runs chitty business. It is stated that the daughter-in-law of the accused namely, Jeshma was a subscriber to one of the chits run by the company. She bid the chit and received the amount. Later on, when she defaulted in payment of instalments, it is the case of the complainant that the accused herein went along with the defaulter to the company and undertook to discharge the liability that was due from the subscriber. In pursuance thereof, the further case is that the accused issued Ext.P1 cheque. The cheque on presentation was returned for want of funds. A statutory notice did not either invoke any reply nor payment. Hence the complaint was laid.

3. The court before which the complaint was laid took cognizance of the offence and after following the procedure, issued notice to the accused. On appearance of the accused, copies of documents were furnished to him and to the particulars of offence read out to him, he pleaded not guilty and claimed to be tried. The complainant examined himself and other witness as PWs 1 and 2 and had Exts.P1 to P11 marked. Ext.D1 was marked on the side of the defence. The accused came forward with a case that he used to keep his cheque book in the drawer of his table and he says that his wife might have taken one of those cheque and handed it over to the complainant.

4. He however chose to adduce no evidence. The court below found that the complainant by virtue of the evidence of PWs 1 and 2 did not have any consistent case and there was no documents to show the liability of Jeshma also. The evidence of PW2 was to the effect that there are documents with the company to show that the accused stood as a surety when the chit was bid by Jeshma and amount was received by her. The court below was of the view that if that be so, those documents would have been the best evidence and the non-production of those documents calls for an adverse inference to be drawn against the complainant. Finding that the pleadings in the complaint and evidence are at variance and therefore a reasonable doubt is created in the mind of the court, the court below acquitted the accused.

5. Assailing the acquittal, the learned counsel appearing for the appellant contended that the court below has not adverted to the evidence in the proper manner and

has based its decision on conjectures and surmises. The crucial aspect, according to the learned counsel, is that the signature of the accused is not denied on Ext.P1 cheque and if that be so, it is for him to explain how the cheque happened to come into the possession of the company. It is also significant to notice, according to the learned counsel, that a statutory notice was issued to the accused which was received by him. If as a matter of fact, he had a case that he had not issued Ext.P1 cheque, that was the best opportunity for him to respond which he did not do. Thereby, he impliedly accepted that he had issued the cheque. For the said proposition, the learned counsel relied on the decision reported in **Gopakumar P. v. B. Anil Kumar and Another** (2011 (3) KHC 850).

6. The learned counsel for the appellant also pointed out that it is not rare or it is not prohibited that a person can agree to discharge the liability of another person and it is in that capacity, the cheque in the present case was issued. In

such cases also, the person who issued a cheque is as much liable as the original debtor. For the said proposition, learned counsel relied on the decision reported in **Komalam Gopi v. T.K. Mohankumar and Another** (2009 (3) KHC 269). It is also pointed out that had there been no relationship or connection between the accused and his daughter-in-law, it would not have been possible for the accused to produce Ext.D1 document. The very production of Ext.D1 document shows that they were hand in glove and the cheque was issued as claimed by the complainant.

7. According to the learned counsel for the appellant, these vital aspects have been omitted to be noted by the court below and the relevant aspects have not been taken into consideration. Therefore, the acquittal is quite unmerited.

8. The learned counsel appearing for the respondents pointed out that the court below found, on appreciation of the evidence that the complainant had no consistent case.

Both in the complaint as well as in the chief affidavit filed by PW1, there was no case for the complainant that the accused has stood as a surety and in that capacity had executed documents in favour of the company. However, the evidence of PW2, yet another employee of the company, is to the effect that the accused stood as a surety when his daughter-in-law received the amount on biding the chit and executed documents in favour of the company. The learned counsel pointed out that the court below was then perfectly justified in law in drawing the conclusion that the non-production of those documents must prove fatal. It is a case of withholding of the best evidence by the complainant. The learned counsel also pointed out that even though non-reply of the statutory notice may be one of the circumstances in aid of the complainant if there are other evidence to establish the case, it cannot by itself constitute substantive evidence.

9. The learned counsel also reminded this Court that

proceedings under Section 138 is a criminal proceedings and it may not be proper to say that if no reply notice is sent, liability should be inferred. The learned counsel for the respondent reminded this Court that this Court is exercising its appellate jurisdiction against an order of acquittal where the accused is armed with two presumptions. The initial presumption that the accused is not guilty unless proved otherwise and the second is, on evidence by the court below found the accused to be not guilty. The complainant has an added burden of case of acquittal to show that the findings of the court below are totally perverse and are contrary to the evidence on record. If this Court, on consideration of the evidence, comes to the conclusion that the view taken by the court below is a possible view, then no matter whether this Court feels a different view is possible, it will not be ground or there will be no justification for this Court to interfere with the order of acquittal. The court below, according to the learned counsel, has analysed the evidence in considerable detail and has come to the conclusion that there is a pale of doubt regarding the case put forward by the complainant. In short, the contention is that no grounds are made out to interfere with the order of acquittal.

10. After having heard the learned counsel for the appellant and respondents and after having gone through the evidence in its entirety, there seems to be considerable force in the submissions made by the learned counsel for the respondents. As rightly pointed out by the learned counsel for the respondents, this Court is exercising its appellate power against an order of acquittal. No doubt the powers are wide but, the court should be circumspect while exercising its appellate jurisdiction against an order of acquittal. The two presumptions pointed out by the learned counsel for the respondent operate in his favour. It is well settled by now that in an appeal against an order of acquittal, if the order of the court below is a possible view, then even if the Appellate Court feels that a different view is

possible, there may not be any justification for interfering with the order of acquittal.

11. Bearing the above principle in mind, an attempt shall now be made to see whether the court below has erred in any manner in arriving its conclusions.

12. The case put forward by the complainant and as spoken to by PW1 is that the daughter-in-law of the accused, who was a subscriber to the chit run by the company, bid the chit. She thereafter defaulted in paying the instalments and a notice was issued to her. She appeared along with the accused before the company and the accused is alleged to have taken over the liability and the responsibility to discharge the same. The further averment in the complaint and the evidence of PW1 is to the effect that then the accused issued the cheque in question.

13. As rightly noticed by the court below, even though the company claimed that a notice has been issued to the defaulted subscriber, no such document is produced. Exts.

P10 and P11 produced do not reflect the transaction in its entirety. It merely shows some figures and the complainant says that the amount due is as shown in Ext.P1 cheque.

14. The contention of the learned counsel for the appellant that once that signature is admitted, it is for the accused to prove the circumstances under which it came into the possession of the complainant and that the burden of the complainant stand discharged cannot be countenanced. The burden to show that there was a debt and that a cheque was issued to discharge that debt is always on the complainant. One should remember that the burden of proof never shifts and it is only the onus of proof that shifts according to the circumstances available in the case.

15. It is here that the evidence of PW2 assumes importance. Admittedly, PW2 was the Manager of the Kuttiady Branch, where the transaction took place. He therefore, is certainly in a better position to say about the

transaction than PW1, who, according to his own evidence, comes into picture only when informed about the default. The evidence of PW2 is to the effect that at the time when the chit shows bid and amount was received, the accused had also joined the subscriber in executing documents adorning the mantle of a surety and there are documents in the company to prove the same. As rightly noticed by the court below, if that be so, those documents would have been the ideal evidence in the case.

16. The result was that the evidence of PW1 and PW2 do not go together and by their evidence, the accused occupy two different status. It is one thing to say that the accused is a surety and it is quite other thing to say that he had undertaken the liability of somebody else and agreed to discharge the same.

17. No one doubt as per the principle laid down in the decision reported in **Komalam Gopi v. T.K. Mohankumar and Another** supra, it is perfectly open to a third person to

undertake to discharge the liability of another person and if in that capacity issue of a cheque of the nature contemplated under section 138 of the Negotiable Instruments Act, no doubt is liable. But in the case on hand, going by the evidence of PW1 and PW2 and the averments in the complaint, a reasonable doubt is created regarding the status of the accused.

18. Well, it is difficult to believe the story put forward by the accused. But as already noticed, the burden of proof is always on the complainant and it is not necessary for the accused, who adduced evidence in his defence or to prove his innocence. It is sufficient in the case then in prosecution evidence and shows that the evidence furnished by the complainant itself is doubtful, in which case, he is entitled to an acquittal.

19. In the light of the above facts and circumstances, it is not possible for the complainant to fall back upon the presumption available under Section 139 of the Negotiable

Instruments Act. That presumption is attracted only in cases where a cheque of the nature mentioned under Section 138 of the Act is issued by the person concerned. The cheque of the nature of Section 138 of the Act contemplates that there is debt alive and that it is issued for discharge of a liability. These two ingredients will have to be necessarily proved by the complainant.

20. The court below found that there is want of evidence to show that Ext.P1 cheque was issued in discharge of a debt. Mainly the court below drew its conclusion on the basis of the contradictory and inconsistent evidence of PW1 and PW2 and the doubt regarding the actual character occupied by the accused in the proceedings.

21. After having re-evaluated the evidence, this Court finds that by no stretch of imagination it could be said that the findings of the court below is either perverse or contrary to the evidence on record. It is indeed a possible view. If

that be so, this Court is precluded from interfering with the order of acquittal passed by the court below.

The result is that this appeal is without merits and it is liable to be dismissed. I do so.

P.BHAVADASAN,
JUDGE.

kp/-