IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 12TH DAY OF NOVEMBER 2015/21ST KARTHIKA, 1937

CRL.A.No. 123 of 2009 (A)

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AGAINST THE JUDGMENT IN CRA 286/2007 of ADDL. DISTRICT & SESSIONS COURT FAST TRACK (ADHOC-II), KOZHIKODE
DATED 10-04-2008

APPELLANT/RESPONDENT:

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P.N.M.MOOSAKOYA,
S/O. MOHAMMED KOYA,
PARAPURATH HOUSE,
JOSEPH ROAD JUNCTION, VELLAYIL,
KOZHIKODE.

BY ADV. SRI.SUNNY MATHEW

RESPONDENTS/3RD APPELLANT AND STATE:

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1. LAMYA, W/O. N.P. ABBAS,
CHEMBAKA HOUSING COLONY,
B.C. ROAD, BEYPORE.

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

R1 BY ADVS. SRI.R.SUDHISH
SMT.M.MANJU
SRI.K.R.RANJITH
R2 BY SMT.S.HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-11-2015, ALONG WITH CRL.RP.1969/2008, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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Crl.Appeal. No. 123 of 2009 &
Crl.R.P. No. 1969 of 2008

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Dated this the 12th day of November, 2015.

JUDGMENT

The appeal and the revision arises out of C.C No. 79 of 2004 of Judicial First Class Magistrate Court-IV, Kozhikode wherein three persons were prosecuted for the offences punishable under Section 138 of the Negotiable Instruments Act. The trial court found all the three accused guilty and convicted them. The first accused was sentenced to pay fine of Rs.10,000/- and accused Nos. 2 and 3 were sentenced to undergo simple imprisonment for a period of six months each and to pay fine of Rs.3,00,000/- each, in default, to undergo simple imprisonment for a period of six months each. It was also ordered that if the fine amount is realized, the same shall be paid to the complainant as compensation.

2. In appeal, the appellate court acquitted the third accused.

3. The present Criminal Appeal is directed against the acquittal of the third accused by the lower appellate court after obtaining leave of this Court. The Criminal Revision Petition is filed by the two convicted persons against the conviction and sentence confirmed by the lower appellate court.

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

It is stated that the first accused is a firm of which the second accused is the Managing Partner and the third accused is a partner. Third accused is the wife of the second accused. The allegation is that the firm had borrowed a sum of Rs.6,00,000/- on two occasions, i.e. Rs.3,00,000/- each. First of which was paid by cheque dated 14.8.2000 drawn on Calicut Co-operative Bank. The balance amount of Rs.3,00,000/- was paid on 5.12.2000 by cash. The understanding was that the amount would be repaid by the end of June, 2001. Since the repayment was not made as agreed to, the amount was demanded.

Accused Nos.2 and 3 approached the complainant in November, 2002 and handed over three Demand Drafts for a total amount of Rs.1,00,000/-. Subsequently for the balance amount due Ext.P1 cheque was issued. When that cheque was presented, it was returned with the endorsement 'A/c closed'. The complainant sent notice to accused Nos. 1 to 3 which resulted in a reply containing false contentions. Since the amount was not paid, the complaint was laid.

5. The court, before which the complaint was laid, took cognizance of the offence. On appearance of the accused, particulars of the offence were read out to them, to which they pleaded not guilty and claimed to be tried. The evidence consists of the testimony of P.Ws.1 and 2 and documents marked as Exts.P1 to P5. After the close of the complainant's evidence, the accused was questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they are innocent. The second accused

examined himself as D.W.1. Exts. X1 to X3 were marked as court exhibits. The trial court, on appreciation of the evidence in the case, found that the complainant has been able to establish the case against the accused and therefore, convicted and sentenced as already mentioned.

6. The convicted accused preferred appeal as Crl.A. No. 286 of 2007 before the Sessions Court, Kozhikode. The lower appellate court found that there was want of pleadings with regard to the role played by the third accused and it does not comply with the requirements of Section 141 of the N.I. Act and therefore acquitted the third accused. The appellate court confirmed the conviction and sentence imposed on the first and second accused.

7. Assailing the acquittal of the third accused, learned counsel appearing for the appellant in Crl.Appeal No.123 of 2009 contended that the court below was not justified in finding that there was no averment in the complaint nor in the affidavit filed in lieu of chief-examination to the effect that the third accused had

any role to play in the transaction. Both in the complaint as well as in the affidavit in chief, it has been specifically stated that on all the occasions the third accused had accompanied the second accused when the amount was borrowed and also when the cheque was handed over to the complainant and at that time they had assured that the cheque would be honoured.

8. It is true that the above averments are there. The question is whether they are sufficient to convict the third accused. The definite averment of the complainant is that the first accused is a partnership firm and the second accused is the Managing Partner and the third accused is a partner. Except saying that the third accused had accompanied the second accused at the time when he met the complainant, there is no averment at all to the effect that either the third accused was in charge of the affairs of the firm or that the amount was borrowed with the connivance and consent of the third accused or there was any negligence on the part of the third accused.

9. Learned counsel appearing for the appellant on the other hand submitted that the conduct of the third accused goes a long way in showing that she had active role to play.

10. Section 141 of the N.I.Act uses the words consent, connivance, or due to any neglect. It does not mention of any conduct at all. As already mentioned, there is no consent, connivance or any negligence on the part of the third accused with regard to the transaction. The lower appellate court was therefore perfectly justified in coming to the conclusion that there was want of pleadings and evidence as regards the charge against the third accused. Her acquittal is fully justified. The appeal is without merits.

11. Coming to the revision, learned counsel appearing for the revision petitioner contended that there is no proof of complainant having subsequently paid Rs.3,00,000/- which was paid by way of cash. The complainant had both in the complaint as well as in the affidavit in lieu of chief examination contended that he had

taken Rs.2,00,000/- from a Bank so that he can produce the bank account details to prove the same. He has not done so. The burden is on the complainant to show that there was an existing debt and the cheque was issued in discharge of that debt. These two aspects are not looked into by the court and so the conviction of accused Nos. 1 and 2 cannot be sustained.

12. Learned counsel appearing for the first respondent in the revision petition contended that there is no merit in the above contention. First of all, the capacity of the complainant to pay the amount is not seen challenged in cross-examination of P.W.1. Further, it is pointed out that in the reply notice sent by the accused, the claim is that they had borrowed a sum of Rs.2,00,000/-. The second accused in his Section 313 statement stated that he had borrowed Rs.1,00,000/- through another person. It is pointed out that there is no consistent case for the accused person and therefore, the court below was justified in holding them guilty.

13. As rightly pointed out by the learned counsel for the first respondent in the revision petition, there is no challenge to the capacity of the complainant to pay the amount. He has specifically stated the date on which the payment was made and there is no serious challenge to that version. If only the capacity of the complainant was challenged, there is necessity for him to produce the Bank Account to show that he had actually withdrawn the amount as shown by him.

14. It is significant to notice that in the complaint it has been specifically stated that a sum of Rs.1,00,000/- was paid by way of three Demand Drafts towards interest amount from the complainant. This is spoken to by the complainant in his evidence. There is no challenge to that version at all.

15. Then comes the inconsistency in the case set up by the accused persons. At the time of evidence D.W.1 had stated that at the time of borrowing the money, signed blank cheque was given to the complainant as security. He

further says that the amount was repaid and the cheque was not returned. However, in the reply notice, the version was that at the time of borrowing Rs.2,00,000/- from the complainant, two signed blank cheques were given as security. The second accused at the time of questioning under Section 313 has a case that Rs.1,00,000/- was borrowed through another person.

16. There is no suggestion to P.W.1 that the accused borrowed only Rs.1,00,000/- through another person or that the amount of Rs.1,00,000/- consisting of three Demand Drafts as claimed by P.W.1 is not true.

17. It was the above facts which made the court below to come to the conclusion that the accused are guilty. It may be noticed that the lower appellate court found that the third accused is not guilty of the offence alleged against her and the conviction and sentence against her are set aside.

18. For the reasons mentioned above, this Court finds no grounds to interfere with the conviction and

sentence against accused Nos. 1 and 2.

19. Coming to the sentence, learned counsel for the revision petitioner submits that some leniency be shown with regard to the term of imprisonment as regards the second accused is concerned.

20. Learned counsel appearing for the appellant has pointed out that Rs.2,00,000/- has already been deposited as per the interim order of this Court.

21. Passage of time has some effect on the complaint. It is seen that a sum of Rs.2,00,000/- has been deposited as ordered by this Court. Balance as per the appellate court judgment is Rs.1,10,000/-. It is felt that sentence of imprisonment for six months is on the high side which is not warranted in the facts and circumstances of the case. It is sufficient that the balance amount be directed to be paid within one month and the sentence be reduced to imprisonment till the rising of the court.

While retaining the sentence of fine imposed by the court below on accused Nos. 1 and 2, the second accused is sentenced to undergo imprisonment till the rising of the court and he is granted one month's time to deposit the balance Rs.1,10,000/-, and in case of default, to suffer simple imprisonment for two months. If any deposit has been made as per the order of the appellate court, that also should be adjusted towards the amount directed to be deposited by the court. The complainant is at liberty to withdraw the amount already deposited by the accused.

P. BHAVADASAN,
JUDGE

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