IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 14TH DAY OF SEPTEMBER 2015/23RD BHADRA, 1937

CRL.A.No. 236 of 2009 ( )

AGAINST THE JUDGMENT IN C.C. 270/2007 of JUDICIAL FIRST CLASS MAGISTRATE III, KOTTARAKAKARA.

PETITIONER/COMPLAINANT:

CHANDRANANDAN,
SREEVATSAM, SAMNAGAR P.O., KULATHUPUZHA,
KOLLAM DISTRICT.

BY ADV. SRI.B.SURESH KUMAR

RESPONDENT(S)/ACCUSED & STATE:

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1. SAJIMON,
   SECURITY STAFF, GOVT.MODEL RESIDENTIAL SCHOOL,
   KULATHUPUZHA, KOLLAM DISTRICT.

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

R1 BY ADV. SRI.ALEXANDER GEORGE
R2 BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 236 of 2009

Dated this the 14th day of September, 2015.

JUDGMENT

Aggrieved by the order of acquittal dated 4.11.2008 in C.C. 270 of 2007, the complainant before the court below has come up in appeal.

2. According to the complainant, having borrowed a sum of Rs.Four Lakhs from him, the accused issued Ext.P1 cheque in discharge of the same. On presentation, the cheque bounced for want of funds. Statutory notice was issued to the accused and there was no response and no payment was also made. That led to the filing of the complaint.

3. The complaint initially was laid before JFCM-I, Kottarakkara, which took cognizance of the offence. On appearance of the accused, particulars of the offence were read over to the accused to which he pleaded not guilty. Later, the case was transferred to JFCM-III, Kottarakkara under

orders of Chief Judicial Magistrate, Kollam to dispose of the matter.

4. When the accused pleaded not guilty, the complainant examined P.Ws. 1 and 2 and had Exts. P1 to P6 marked. After the close of the complainant's evidence, the accused was questioned regarding the incriminating circumstances brought out in evidence against him. He denied having acquaintance with the complainant and denied that he had borrowed any amount. According to him, the cheque issued by him to one Sreedharan Pillai was misused by the complainant. In support of his case, he examined D.W.1 and marked Ext.D1.

5. The lower court greatly impressed by the fact that the complainant was unable to depose about the residential details of the accused, thought that it is quite inappropriate to say that the complainant had given Rs.Four Lakhs to the accused without knowing where the accused

resided. Mainly persuaded by the said fact, the court below then went on to hold that the case put forward by the defence is more probable and therefore dismissed the complaint. The said decision is assailed in this appeal.

6. Learned counsel appearing for the appellant contended that the judgment of the court below is perverse and contrary to the evidence on record. The main ground on which the court below dismissed the complaint was that the complainant was not aware of the residential address of the accused or in other words, the complainant did not know where the accused resided but only knew where he worked. That is the solitary reason which weighed with the court below to come to the conclusion that the case put forward by the complainant is highly arbitrary, a finding, which according to the learned counsel, cannot be sustained in law. It is significant to notice, according to the learned counsel that in his evidence, the complainant had stated that the accused had

borrowed Rs.5,000/- from him on earlier occasion and repaid. It is not necessary, according to the learned counsel that the complainant should be aware of the residential address of the accused. According to the learned counsel, the defence put forward was total denial and also characterizing the complainant as a stranger. The defence case regarding Ext.D1 is quite unbelievable. According to learned counsel, the fact that no reply was given to the notice issued further fortifies the contention of the complainant that debt was due in this case. Normal course of conduct has been omitted to be taken note of by the court below and that has resulted in complete injustice being done to the complainant.

7. Learned counsel for the respondent pointed out that there has been proper appreciation of the evidence by the court below. The initial burden being on the complainant, he has to discharge the same and then only the presumption under Section 139 of the Negotiable Instruments Act applies.

Learned counsel went on to point out that the complainant has not been able to show that he had the financial capacity to pay the sum of Rs.4 Lakhs and the evidence to show that he had the financial capacity is highly artificial. Further, it is contended that Ext.D1 cuts at the root of the case of the complainant and it is clear that Ext.P1 cheque was one issued by the accused as could be seen from the evidence of D.W.1. It is therefore contended that there are no grounds to interfere with the order of acquittal passed by the court below.

8. That Ext. P1 contains the signature of accused is a matter not in dispute. P.W.1 would say that on 31.8.2006 the accused had borrowed a sum of Rs.4 Lakhs from him and issued Ext.P1 cheque. He then speaks about the presentation of the cheque, its dishonour etc. He examined P.W.2 to show that he had the requisite funds.

9. One must notice that there is no suggestion to P.W.1 that the contents of Ext.P1 was filled up by him. There

is also no suggestion to P.W.1 as such that he did not have the financial capacity to pay Rs.4 Lakhs to the accused.

10. True, the initial burden is on the complainant to prove the due execution of the instrument. But, that has been discharged in the case on hand. It is not suggested that P.W.1 did not have the financial capacity to pay the amount. Further, the defence set up is based on Ext.D1.

11. To say the least, Ext.D1 is a strange document. It is styled as a promissory note. Usually a promissory note is not drawn by the creditor, but the debtor. In the case on hand, it is just the reverse. By Ext.D1 it is sought to be proved that the accused had borrowed Rs.10,000/- from Sreedharan Pillai, and had entrusted the cheque to him as security along with other documents. If for argument same, it is accepted that there is such a transaction, normally, the same would have been got returned as soon as the amount is repaid. Learned counsel also agreed that the said document

evidences the acceptance of certain documents from the accused.

12. It can hardly be so. Evidence of D.W.1 does not suggest so especially when it is only intended to be an agreement to return the documents on repayment of amount. If that is true, it would not have been of the nature as is now seen. It is not an agreement at all.

13. It is no doubt true that the accused had examined D.W.1, Sreedharan Pillai, to prove his case. It is also true that to a great extent the evidence of D.W.1 supports the accused. But there is one flaw. Even though the accused characterized the complainant as a total stranger, the evidence of D.W.1 shows that he had taken the accused to the complainant and he having paid the amount to the accused. This Court is not forgetting the fact that the transaction spoken to by D.W.1 is only with respect to Rs.10,000/-. But the fact that the accused knew that the amount came from the

complainant is very clear.

14. It is in this context one will have to view the passive attitude displayed by the accused. He received statutory notice. If as a matter of fact what he says is true, normally, certainly and surely, he would have replied stating that he had no transaction with the complainant and that the cheque had been misused by him. No such effort was taken by the accused. He kept quite and his silence goes a long way in showing his complicity.

15. Merely because the complainant is not in a position to give the details regarding the residential address of accused does not lead to the conclusion that the case set up by him is false. As already noticed, the financial capacity of the complainant is not specifically challenged in his evidence and P.W.1 has been able to show that he had the financial capacity through the evidence of P.W.2.

16. On the other hand, Ext.D1 seems to be highly artificial and does not appear to be a promissory note. The court below does not appear to be justified in placing implicit faith on Ext.D1. One has to remember that the signature on the cheque is not disputed though it could not by itself be sufficient to lead to the conclusion that it has been executed by the accused. The case put forward by the complainant on the basis of Ext.P1 can only be accepted.

17. Going by the evidence of D.W.1, at the time of execution of Ext.D1 certain documents were given to the complainant. Since the accused also claims that the amount has been repaid, there would have been some endorsement on Ext.D1 and what D.W.1 says is that he entrusted those documents to P.W.1. Assuming it to be so, it is difficult to believe that the accused would remain silent with regard to his documents which he claims to have been given as per Ext.D1. This conduct on the part of the accused creates suspicion. At

any rate, it is difficult to accept the finding of the court below as such. A fresh look at the matter is necessary.

In the result, the judgment of the trial court is set aside and the matter is remanded to the trial court for fresh consideration in accordance with law and in the light of what has been stated above. Both parties will be at liberty to adduce further evidence in the matter. Parties will appear before the court below on 8.10.2015. The court below may give priority to this case and dispose of the same as expeditiously as possible.

P. BHAVADASAN,
JUDGE

sb.