

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 15TH DAY OF SEPTEMBER 2015/24TH BHADRA, 1937

CRL.A.No. 301 of 2009 (C)

AGAINST THE JUDGMENT IN ST 97/2007 of JUDICIAL FIRST CLASS
MAGISTRATE-II, CHANGANACHERRY

PETITIONER/COMPLAINANT:

TOM JOSEPH, KALARIPARAMBIL HOUSE,
THRIKKODITHANAM P.O. CHANGANACHERRY TALUK.

BY ADV. SRI.P.R.VENKATESH

RESPONDENTS/STATE/ACCUSED 1-5:

1. MATHEW JOSEPH, MOOLAYIL HOUSE,
NEAR S.B.H.S.CHANGANACHERRY.
2. JOSEPH MATHEW, MOOLAYIL HOUSE,
NEAR S.B.H.S. CHANGANACHERRY.
3. JOSEPH JOSEPH, MOOLAYIL HOUSE,
NEAR S.B.H.S, CHANGANACHERRY.
4. SIBY JOSEPH, MOOLAYIL HOUSE,
NEAR S.B.H.S., CHANGANACHERRY.
5. UNITED AGENCIES, NEAR S.B COLLEGE,
CHANGANACHERRY. (REPRESENTED BY THE MANAGING
PARTNER, IST PETITIONER)
6. STATE OF KERALA REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R1-R5 BY ADV. SRI.JOMY GEORGE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
15-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.301 OF 2009

Dated this the 15th day of September, 2015.

J U D G M E N T

A firm and four partners were prosecuted for the offence punishable under Section 138 of the Negotiable Instruments Act. After trial, they were found not guilty and were acquitted. The said acquittal is assailed in this appeal.

2. The complainant is a reputed businessman in Changanassery and he had close association with the accused persons. 5th accused-partnership firm is engaged in the business of petroleum products and accused Nos.1 to 4 are its partners. It is alleged in the complaint that due to the close association between the complainant and the 1st accused, 1st accused borrowed a sum of Rs.6,40,000/- from the complainant. Later, to discharge the said debt, Ext.P1 cheque was issued which, on presentation, bounced for want of funds. Though statutory notice was issued, the accused refused to accept the same. Since the amount remained unpaid, complaint was laid.

3. Cognizance of the offence was taken and on appearance of the accused and after completing the formalities, particulars of offence were read out to the accused. They pleaded not guilty and claimed to be tried.

4. The complainant had PWs 1 and 2 examined and Exts.P1 to P8 marked.

5. After the close of the complainant's evidence, accused were 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. They also pointed out that the complainant used to run chitty business to which they were subscribers and for that purpose he used to received blank cheques from the accused persons and one of those signed blank cheques has been misused by the complainant.

6. The court below, on appreciation of evidence, found that the claim of borrowal by the 1st accused cannot be countenanced for the simple reason that as on the alleged date, he was not in India. The court also found that on the alleged date of borrowal, the 1st accused was no longer a partner of the firm as he has

disassociated himself from the partnership from 27.03.2001 as would be evident from Ext.D3. On the basis of these findings, court below concluded that the so called incurring of debt alleged against the partners cannot be true and therefore dismissed the complaint and acquitted the accused.

7. Assailing the acquittal, learned counsel appearing for the appellant contended that the court below has not adverted to Section 139 of the Negotiable Instruments Act at all and that presumption is available to the complainant. Initially a sum of Rs.5 lakh was borrowed and later on Rs.1,40,000/- was borrowed. It was only on demand of repayment that the accused had issued Ext.P1 cheque. Referring to Ext.P1 cheque, it is pointed out that the said cheque has been signed by the 1st accused and that shows that he continues to be a partner of the firm. The signature in Ext.P1 having been admitted, in a way handing over of cheque was also admitted though for a different transaction. The court below was not justified in overlooking these aspects and it mainly based on the plea that the 1st accused was not in station. According to the learned

counsel, the findings of the court below are clearly unsustainable.

8. Learned counsel appearing for the respondents, on the other hand, contended that the court below has analysed the evidence in considerable detail and based on the documents produced by the accused and also on the basis of the evidence adduced by them, had come to the conclusion that the claim of borrowal of amount of Rs.6,40,000/- is highly improbable and the story put forward by the accused persons is probably true. Based on the materials on record, a different view was not possible and therefore, the court below had come to the above conclusion. According to the learned counsel, there is no ground to interfere with the judgment of the court below.

9. That Ext.P1 cheque does contain the signature of the 1st accused is a matter not in dispute. The complainant would say that on 18.07.2005, accused had borrowed a sum of Rs.5 lakh and on 19.07.2005 another sum of Rs.1,40,000/- was borrowed. The case put forward by the complainant is that it was the 1st accused who had come and received the amount. The complainant would further say that repeated demands were made

for repaying the amount and ultimately Ext.P1 cheque was issued. It was contended that the claim made by the 1st accused that he was not a partner of the firm on the date of issuance of Ext.P1 cheque is not true and there is no paper publication informing third parties that the 1st accused was no longer a partner of the firm.

10. According to the learned counsel appearing for the respondents, the passport produced would show that the 1st accused was not in station at the relevant date. The veracity of Ext.D3 document reconstituting the partnership firm is not challenged. It is not put to PW1 whether it is a concocted document to falsely implicate the accused in the matter. It was contended that from Ext.D6 it can be seen that cheque book from which Ext.P1 is alleged to have been issued was given to the 1st accused as early as in 27.04.1999 and it is extremely difficult to believe that he kept a leaf apart to be issued in 2006. More probable is the case put forward by the accused that the complainant was running a chitty business to which some of the accused persons were subscribers and for that transaction on

request made by the complainant, the accused issued a blank cheque.

11. The initial burden to show that there is a debt and for discharging that debt, a cheque was issued is on the complainant. When the initial burden is discharged, then the burden shifts to the accused to show that the cheque was not issued as alleged, presumption under Section 139 of Negotiable Instruments Act comes into play. It is well settled in criminal law that even if burden is on the accused, the initial burden to prove the offence is on the complainant himself. In the case on hand, the court below has found that there is want of evidence to show that the claim made by the complainant that the 1st accused had borrowed the amount as alleged by him is true. It may be recollected here that the case of the complainant is that the 1st accused had borrowed a sum of Rs.5 lakhs on 18.07.2005 and Rs.1,40,000/- on 19.07.2005. The complainant is categorical in his submission that the 1st accused had borrowed the amount.

12. However, the 1st accused had produced Ext.D4, copy of passport and that is sufficient to show that on the alleged date of

borrowal, he was not in station at all. There is no challenge to the passport so produced by the 1st accused. If 1st accused was not in station on the relevant date, it cannot be said that the accused has made false statement. The complainant has no case that the passport so produced is a fabricated one. It shows that there is nothing to doubt the veracity of Ext.D4 document.

13. As far as Ext.D4 is concerned, no fraud is attributed to that document and it is not suggested to DW1 that that document is drawn up or cooked up to escape from the liability. It would appear from the document that the 1st accused was ceased to be a partner in 2001. One may recollect here that Ext.P1 cheque is issued in 2006. It is here one has to notice that the contention taken by the defence that a chitty business was being run by the complainant is a fact which is not denied by him. The accused has a case that they had subscribed to the chitty run by the complainant and there was some monetary transactions and for that purpose signed blank cheque has been issued and that cheque has been misused. The fact that Ext.D6 has been produced also indicates that the possibility of

1st accused issuing a cheque in 2006 is very very remote. The cheque book from which Ext.P1 seems to have been issued was given by the Bank to the accused in 1999.

14. As far as the contention based on holding out is concerned, it is not shown that the partnership is a registered partnership and there was nothing produced by the complainant to show that the 1st accused was holding out himself as partner of the firm after the date of Ext.P1. No circumstances have been spoken to by PW1 to show that even after the execution of Ext.P1, 1st accused is acting as partner of the firm. Of course, there is no proof of any publication having been made. There need not be further discussion on this aspect because the appellant has to fail on earlier grounds.

Apart from showing the infirmities in the evidence of PW1, the 1st accused has adduced positive evidence to show that the claim made by the complainant that he had borrowed the amount is not true. There is nothing to show that the reasons given by the court below are not sustainable in law. There is also nothing to show that the findings of the court below are either perverse

or contrary to the evidence on record. The view taken by the lower court is a possible view based on evidence on record. If that be so, being an acquittal, benefit should remain with the accused.

This appeal is without merits and it is accordingly dismissed.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

// True Copy //

P.A to Judge.