

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

CRL.A.No. 311 of 2009

AGAINST THE JUDGMENT IN S.T.2507/2006 OF JUDICIAL FIRST CLASS
MAGISTRATE COURT, ALATHUR.

APPELLANT/COMPLAINANT:

K.I.PAULOSE, ITHAPIRI, 60 YEARS,
KURIAPURAM VEETIL, KATTAKODE, VADAKKENCHERRY,
ALATHUR, PALAKKADU DISTRICT.

BY ADV.SRI.JOHN JOSEPH (ROY).

RESPONDENTS/ACCUSED & STATE:

-
1. B.VAIDYANATHAN, S/O.BALAN, AGED 47 YEARS,
PEON, C.A.HIGH SCHOOL, AYAKKADU,
RESIDING AT SAROJA NIVAS, NAIRTHARA,
VADAKKENCHERRY, PALAKKADU DISTRICT.
 2. STATE OF KERALA REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R1 BY ADV. SRI.V.A.JOHNSON (VARIKKAPPALLIL).
R2 BY SMT. MADHUBEN, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
28-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.311 OF 2009

Dated this the 28th day of October, 2015.

J U D G M E N T

Aggrieved by the acquittal of the accused for the offence under Section 138 of the Negotiable Instruments Act, complainant before the court below, after obtaining leave of this Court, has come up in appeal.

2. The short case put forward by the complainant in his complaint is that the accused who was familiar to him had borrowed a sum of Rs.2,10,000/- in the month of April 2006 for his personal needs. In order to discharge the said debt, he had issued a post dated cheque to the complainant. The cheque, on presentation, bounced for want of funds in the account of the accused. Statutory notice issued had no impact on the accused and since the amount remained unpaid, complaint has been laid.

3. The court before which complaint was laid took cognizance of the offence and after following necessary procedures, issued summons to the accused. On his appearance,

copy of the documents were given to him and particulars of offence were read out to him. He pleaded not guilty and claimed to be tried.

4. The complainant was examined as PW1 and on his side, Exts.P1 to P5 were 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 brought out in evidence against him and maintained that he is innocent. In his defence, he had DWs 1 and 2 examined of which DW2 is none other than the accused himself and had Exts.D1 and D2 marked.

6. The court below being impressed with the probabilities of the case put forward by the accused, acquitted him. The court accepted the case of the accused that he had borrowed a sum of Rs.25,000/- only and at that point of time he had issued blank cheque which was later misused by the complainant, mainly on the ground that the complainant had denied any other transaction other than payment of Rs.2,10,000/- by the complainant which was proved to be untrue by the evidence

adduced by the accused. Finding that the accused is not guilty, court below acquitted him.

7. Assailing the acquittal, learned counsel appearing for the appellant contended that the signature on Ext.P1 cheque is admitted by the accused. It is significant to notice, according to the learned counsel, that if, as a matter of fact, no such borrowal as claimed by the complainant was made by the accused, he would have obviously reacted to the notice issued to the complainant. There is no case that he had not received the notice. His non-reply to the notice goes a long way in showing his complicity. It is also contended that there was no attempt from the side of the accused to show that Ext.P1 cheque was issued under the circumstances made mention of by him at the time of evidence. He did not attempt to have statement of account produced before court to establish the said fact.

8. Learned counsel appearing for the appellant also contended that even assuming that there was some other transaction between the accused and the complainant, and even though complainant initially had denied the same, that by itself is

not a ground to come to the conclusion that there was no debt as alleged by the complainant. The complainant had disclosed his source of funds for payment towards accused and the accused had no case that the complainant had no financial capacity to pay Rs.2,10,000/- to him. These vital aspects have been omitted to be noticed by the court below and it is contended that the acquittal is unmerited.

9. Learned counsel appearing for the respondent-accused cautioned this Court that this Court is exercising its appellate jurisdiction against an order of acquittal and two presumptions are available to the accused. If it is seen that the finding entered into by the court below is a probable one, this Court would not be justified in interfering with the said finding merely because a different view is possible. The court below has given cogent and convincing reason for acquitting the accused. That is based on appreciation of evidence in the case. It could not be said that the court below has taken note of irrelevant facts and has omitted to take note of relevant facts. The case of the complainant that he had no other transaction except the one in question is belied by

the production of Exts.D1 and D2. According to the court below, that probabalise the defence put forward by the accused. Learned counsel also reminded this Court that the burden of proof of rebutting the presumption is considerably light as far as the accused is concerned and all that needs to be done is to create doubt in the mind of court. The burden of proof on the accused need not be discharged by adducing positive evidence and the accused can rely on the evidence adduced by the complainant himself to show that the case put forward is not true. These aspects have been taken note of by the court below and it was after appreciating the evidence in the case that order of acquittal was passed and therefore it does not call for any interference.

10. The court below seems to have been guided by the fact that by the production of Exts.D1 and D2, the case of the complainant that he had no other transaction other than the one in question was disproved. There was an earlier transaction by which the accused had received a sum of Rs.25,000/- from the complainant and that is evident from the issuance of cheque by the complainant which was encashed by the accused. This fact is

born out from Exts.D1 and D2.

11. It is by now well settled that the two ingredients necessary to attract the presumption under Section 139 of Negotiable Instruments Act is on the complainant. The complainant has not only to prove the existence of debt but also to show that cheque was issued in discharge of liability.

12. There seems to be some basis for the contention of the appellant that the accused had no consistent case. Apart from the fact that there was no reply to the notice issued by the complainant, at the time of questioning under Section 313 Cr.P.C, he came forward with a case that he had issued two signed blank cheques at the time of receiving Rs.25,000/- from the complainant on an earlier occasion. There was no suggestion to that effect to the complainant when he was cross examined by the accused. It is also significant to notice that there was no suggestion to the complainant that he did not have financial capacity to pay Rs.2,10,000/- to the accused.

13. It is interesting to note that when the accused was examined himself as DW2, except for stating that he had

received a sum of Rs.25,000/- by way of cheque from the complainant which he had encashed, he had no case in the chief examination that he had issued two signed blank cheques which have been misused by the complainant. He did not even have a case that cheque on which complaint is laid was issued as security for Rs.25,000/- received by him.

14. However, the fact remains that the initial burden is on the complainant to prove the two ingredients already made mention of. The complainant has a case that he had funds with him as he had closed his Provident Fund Account and had received the said amount. There was no evidence adduced in that regard at all. But, it may be remembered that there was no case for the accused that the complainant had no financial capacity to pay Rs.2,10,000/- to him. It is here that the non reply to the notice, statement made at the time of questioning under Section 313 Cr.P.C and non mentioning of issuance of blank cheques as security in the chief examination of DW2 assume importance and significance. The court below directed itself only to the issue that in the light of the fact that a sum of

Rs.25,000/- was earlier given to the accused, complainant's case cannot be true. Such a presumption could not have been drawn without appreciating the facts of the case.

15. The court below has only considered Exts.D1 and D2 produced and proved by the accused and has not addressed itself to the various questions that arose for consideration like the consequence of non reply to the notice, statement given at the time of questioning under Section 313 Cr.P.C and non mentioning of issuance of blank cheques as security in the chief examination of the accused when he was examined as DW2. The accused could have also sought for production of statement of his account to show that Ext.P1 cheque could not have been issued as alleged by the complainant. That was also not done.

16. In the light of the above facts and circumstances of the case, it is only appropriate that the matter be remanded to the trial court for fresh consideration after taking note of various items of evidence adduced by both sides. It is noticed that there is no discussion of the evidence adduced by the complainant at all in the case and the basis for acquittal is only on the ground

that there was another transaction between the parties. When viewed from that angle, prayer for remand made by the learned counsel for the complainant seems to be fully justified.

For the above reasons, this appeal is allowed. The judgment of the court below is set aside and the matter is remanded to the trial court for fresh disposal in accordance with law and in the light of what has been stated above. Both parties will be at liberty to adduce further evidence if they so choose. The parties will appear before the trial court on 25.11.2015.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

// True Copy //

P.A to Judge.