IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 6TH DAY OF NOVEMBER 2015/15TH KARTHIKA, 1937

CRL.A.No. 754 of 2006

AGAINST THE JUDGMENT IN CC 374/2004 of J.M.F.C., MAVELIKKARA.

APPELLANT(S)/COMPLAINANT:

BABU VARGHESE, S/O.CHACKO VARGHESE,
BABU VILLA, MELPADAM POST, VIZHAVARSSERRIKKARA,
MANNAR.

BY ADV. SRI.A.SHAFEEK

RESPONDENT(S)/ACCUSED:

1. SUSILA, JAYA BHAVANAM,
ERAMANTHOOR POST, MANNAR.

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

R1 BY ADV. SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL)
BY ADV. SRI.A.R.DILEEP
BY ADV. SMT.KAVITHA GANGADHARAN
R2 BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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Crl.Appeal No. 754 of 2006

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Dated this the 6th day of November, 2015.

JUDGMENT

Aggrieved by the order of acquittal in C.C. 374 of 2004 by Judicial First Class Magistrate, Mavelikara, the 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 the complaint is that on 5.9.2003 the accused had borrowed a sum of Rs.1,00,000/- from him and issued Ext.P1 cheque for discharge of the said debt. The cheque was presented for encashment but bounced for want of funds. Statutory notice issued as Ext.P4 invoked Ext.P5 reply notice denying the liability. Since the amount was not paid, the complaint was laid.

3. Cognizance of the offence was taken by the court concerned after following the necessary procedures and

when the accused appeared before the said court, particulars of the offence were read out to her to which she pleaded not guilty. The complainant therefore examined himself as P.W.1 and marked Exts.P1 to P5. After the close of the complainant's evidence, the accused was questioned under Section 313 Cr.P.C. wherein she denied all the incriminating circumstances. She in her evidence examined herself as D.W.1, also examined D.W.2 and had Exts. D1 to D7 marked.

4. The court below was greatly impressed by the evidence of D.Ws. 1 and 2 with regard to Exts.D2, D5, D6 and D7. Holding that there was doubt regarding the complainant's case, on appreciation of evidence adduced by the defence, the accused was acquitted.

5. Assailing the acquittal, learned counsel for the appellant contended that there has not even a fair consideration of the evidence in the case at all and the court is carried away by irrelevant considerations. According to the

learned counsel, the accused had no consistent case and that would be evident from the various documents produced by her in defence. While she would admit that she had borrowed Rs.20,000/- from D.W.2, in Ext.D2 notice, she stated an entirely different case. She then had a case that she had paid the amount borrowed from the complainant through Subash himself. D.W.2 on the other hand says that he understood that the debt has been paid directly by the accused to the complainant. These inconsistencies and contradictions in the evidence of D.Ws.1 and 2 and the inherent improbability of the case put forward by the defendants have been overlooked.

6. Admittedly, according to the learned counsel, the complainant is a money lender by profession. He has pointed out that the accused had borrowed amount from him in discharge of which she had issued the cheque. Learned counsel pointed out that there was no case for the accused that the complainant did not have the financial capacity. But

her case was that one of the two cheques which Subhash took from her at the time when she borrowed the amount through Subash was found missing. This does not synchronize with the evidence adduced by the defence. As already pointed out, learned counsel went on to point out that the accused had different cases at different times and that shows that what she says are not true. The decision rendered mainly on the basis of Exts.D2, D5, D6 and D7 cannot stand. Learned counsel pointed out that the decision is rendered overlooking the relevant materials and taking note of irrelevant aspects.

7. Learned counsel appearing for the accused cautioned this Court that this Court is exercising appellate jurisdiction where the accused is armed with two presumptions; 1) the normal presumption that the accused is innocent unless proved guilty and 2) finding of a court that he is not guilty. A high degree of proof is required to over turn in a case of acquittal.

8. Learned counsel went on to point out that if it is found on an appreciation of the evidence that the view taken by the trial court is a possible view, then the fact that a different view may be possible is not a ground for this Court to interfere in the case of an acquittal. Learned counsel relying on the various documents and also the judgment of the court below contended for the position that the court below has taken note of the relevant aspects and reached a conclusion. It is also pointed out that the complainant had not produced any accounts to show that the amount was paid to the accused. The contention is that initial burden that lies on the complainant has not been discharged and therefore the question of attracting presumption under Section 139 of Negotiable Instruments Act did not arise for consideration. Learned counsel went to the extent of contending that even assuming that the evidence adduced by the defence is eschewed for the time being, still it can be seen that that the

complainant has to prove his case. If that be so, the important fact that there is wrong appreciation of evidence is not a ground to interfere. Learned counsel went on to point out that there are no grounds made out to interfere with the finding of the court below.

9. At the outset itself, it may be mentioned that it is an admitted fact that the complainant is a money lender by profession. There is no case for the accused that the complainant was incapable of raising a sum of Rs.1,00,000/- which he had in fact paid to her. The complainant in his evidence has clearly stated that he has nothing to do with D.W.2 and the amount was directly paid to D.W.1 and the cheque was infact issued in discharge of the debt.

10. The case put forward by the accused was that she needed money and she approached D.W.2, who did not have money with him, and he in turn approached the complainant who gave Rs.20,000/-. She would further say

that she was made to hand over two blank cheques and signed blank stamp papers to Subhash as security for the amount received from the complainant.

11. At once one may notice that there is no case for the accused that these documents were taken by the complainant.

12. In the reply notice Ext.P5, what is stated by the accused is that she had received a sum of Rs.20,000/- through Subhash and had handed over two blank cheques and blank stamp papers to him. She also goes on to say that towards interest of that amount, Rs.1,000/- was entrusted to Subash, i.e. D.W.2. Since three monthly instalments were defaulted, the said Subash has instituted C.C. 276 of 2002 against the accused. The reply ends up by saying that Subash and the complainant have colluded together and trying to extract money from the accused.

13. It is not inappropriate at this point of time to refer to Ext.D2 that is dated 14.1.2003. In Ext.D2 what is stated is that promising to make available loan for buying autorickshaw for the accused, Subash received two cheques. What is significant is that in the said document the number of the cheques are clearly mentioned and that includes the cheque involved in the present proceedings. Further, the notice goes on to say that since no finance was arranged, Subash was bound to return the cheque and she demanded the cheques.

14. It would at once be noticed that the contents of Ext.D2 do not go well with the contents of P5. So also the case put forward by D.W.1, i.e. the accused herself is that Subhash had instituted proceedings against her under the influence of the complainant and she had paid the amount to Subhash to discharge the liability of the complainant. However, D.W.2 does not seen to be in agreement with the same. He says that

according to his information, the transaction between the accused and the complainant was discharged by the accused directly. There is ample evidence to show that the relationship between D.W.2 and the complainant is far from cordial and there were litigations between them. Therefore, it is not very surprising to note that D.W.2 chose to favour D.W.1. But unfortunately for D.W.1, who is the accused, the various documents do not go well with the testimony of D.W.2. At any rate, these aspects ought to have been considered by the court below before reaching a conclusion. The court below has simply relied on Exts. D2, D5, D6 and D7 which may have relevance, but may not be conclusive. The inconsistent stand taken by the accused at various points of time remains important.

15. It is under these circumstances, the finding of the court below has to be viewed. It has not taken note of various relevant aspects which have a material bearing on the

various issues and a reconsideration appears to be absolutely necessary in the case on hand.

For the above reason, this appeal is allowed, the judgment of the court below is set aside and the matter is remanded to court below for fresh consideration n accordance with law and in the light of what has been stated above. The parties shall appear before the court below on 2.12.2015. The court below may make every endeavour to dispose of the suit within a period of six months from the date of appearance of the parties. Both sides are permitted to adduce evidence, if they so choose.

P. BHAVADASAN,
JUDGE

sb.