IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA, 1937

CRL.A.No. 319 of 2007

AGAINST THE JUDGMENT IN CC 113/2005 of JUDL.MAG. OF FIRST CLASS, PAYYOLI .

APPELLANT(S)/COMPLAINANT.:

SULAIMAN HAJI, S/O.MOOSSA,
PUTHUKKOTTA HOUSE, THRIKKOTTUR AMSOM DESOM,
KOYILADNY TALUK.

BY ADV. SRI.R.BINDU (SASTHAMANGALAM)

RESPONDENT(S)/ACCUSED & STATE.:
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1. MAMMAD, S/O.ABUBACKER,
UTHERAPARAMBIL HOUSE, MELADY AMSOM DESOM,
KOYILANDY TALUK.

2. SIRAJ, S/O.MAMMAD,
UTHIRAPARAMBIL HOUSE, MELADY AMSOM DESOM,
KOYILANDY TALUK.

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

R1 & 2 BY ADV. SMT.K.V.RESHMI
R3 BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 319 of 2007

Dated this the 18th day of December, 2015.

JUDGMENT

Aggrieved by the order of acquittal in C.C. No. 113 of 2005 by the JFCM, Payyoli, the complainant before the court below has come up in appeal after obtaining leave of this Court.

2. Proceedings originated on a private complaint. The allegation in the complaint was that the accused and the complainant were known to each other and the accused was engaged in fishing business. The first respondent is alleged to have approached the appellant and persuaded him to engage in fishing activity promising good returns. Convinced about the assurance given by the accused, the complainant joined the business. The accused had promised 1/4th share of the profit if he invested Rs.5,00,000/-. The complainant readily agreed and invested the amount. A boat was purchased for their business purpose and even though the

complainant was promised 1/4th share, without the knowledge and consent of the complainant, the accused persons associated more persons in the business. Soon the complainant realized that the various assurances given to him by the accused persons were false and fictitious and the accused failed to honour their word of paying 1/4th share of the profit to the complainant from 15.8.2003 onwards. Complaining of misappropriation of money and cheating, a private complaint was laid for the offence under Sections 406 and 420 of Indian Penal Code.

3. The court below took cognizance of the offence and after following the necessary procedures issued summons to the accused, who entered appearance. On appearance of the accused, copies of the documents were given to them and then the court went on to follow the procedure envisaged under Section 244 Cr.P.C. Having found that there is a prima facie case against the accused persons, charge was framed.

To the charge, the accused pleaded not guilty and claimed to be tried. The complainant, therefore, examined P.Ws.1 to 4 and had Exts.P1 and P2 marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C., wherein they denied all the incriminating circumstances put to them. The accused in their defence had Ext.D1 marked. The court below referring to the evidence of P.Ws. 1 and 4 and the documents produced as Ext.D1 came to the conclusion that the claim of misappropriation and cheating cannot lie and therefore the accused were acquitted.

4. Assailing the acquittal, it is contended that the reasons given for the acquittal are not justifiable and the court below has not addressed itself to the real issue that arose for consideration. Learned counsel went on to point out that as per the promise given to him by the accused persons, he was to get $1/4^{th}$ share of profit and that was due from the accused persons. There is no finding by the court below that $1/4^{th}$

share of profit as promised was ever paid and if that be so, the complainant could not have been non-suited.

5. Learned counsel appearing for the respondents referred to the evidence of P.Ws. 1 and 4 and Ext.D1 document and pointed out that nothing remains to be done by the accused persons and they had settled rights and liabilities as could be discerned from the evidence of P.W.4. Even assuming all what the complainant says is true, still it is extremely doubtful whether offence under Sections 406 and 420 of I.P.C. are made out for the reason that the ingredients necessary to constitute those offences are conspicuously absent in the present case. Learned counsel went on to point out that there was reasons to interfere with the order of acquittal.

6. Before going into the facts and analyzing the evidence, this Court may remind itself to the fact that this Court is exercising the appellate power against an order of

acquittal where the accused are armed with two presumptions; (1) unless shown otherwise, the accused are presumed to be innocent and (2) the accused, having been acquitted by a court of law, stand on a better footing. The law is well settled that unless it is shown that the above findings are so perverse or based on irrelevant materials, the mere fact that a different view could be possible and a different conclusion could have been drawn are not grounds for interference.

7. The dispute between the parties relate to the fishing business. According to the complainant, he was drawn into the business by the promise of $1/4^{th}$ share of profit in the business. He claims to have invested a sum of Rs.5,00,000/- and as rightly pointed out by the learned counsel for the appellant, even assuming all what the complainant says is true, it is difficult to understand how offences under Sections 406 and 420 of of I.P.C. will lie. The ingredients necessary to attract those provisions are conspicuously absent in the case.

Subsequent conduct is not a criterion for attracting those offences, though it may be one of the circumstances of the original intention. There is no enrichment as is known to law or misappropriation and there is no initial intention to cheat so as to attract Section 420 of I.P.C. The mere fact that profits were not paid as promised or the money was not utilized for the business do not enable the complainant to come forward with a complaint of misappropriation and cheating.

8. Apart from the above fact, it is interesting to note the evidence of P.W.4, the witness examined by the complainant himself. His status is that of a Mediator which is not disputed by either side. According to him, whatever was due to the complainant was paid by the accused to him and he had handed over the same to the complainant. If that be so, nothing remains to be done in this case. In his evidence P.W.4 deposed as follows: "Ext.D1 പ്രകാരം യാതൊരു സംഖ്യയും വാദിക്ക് പ്രതികളിൽ നിന്നും കിട്ടാനില്ല." Relying on the evidence of

P.Ws. 1 and 4 the court below found against the complainant.

9. This court fails to see any illegality, irregularity or impropriety in the order of the court below warranting interference in appeal.

The result is that this appeal is without merits and it is liable to be dismissed. I do so.

P. BHAVADASAN,
JUDGE

sb.