IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 12TH DAY OF OCTOBER 2015/20TH ASWINA, 1937

CRL.A.No. 798 of 2006 (F)

AGAINST THE JUDGMENT IN CC 90/2003 of JUDICIAL FIRST CLASS MAGISTRATE COURT-I,THRISSUR DATED 25-01-2006

APPELLANT/COMPLAINANT:

K. NARAYANANKUTTY, S/O. MADHAVI AMMA,
KARUMATHIL HOUSE, KOTTAPURAM DESOM, THRISSUR.

BY ADV. SRI.C.A.CHACKO

RESPONDENTS/ACCUSED & STATE:

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1. SHAJI. P.J., S/O. JOSE,
C/O. SHEEBA SHAJI, CHERISSERY HOUSE, NECHIMANAD,
ALUVA.

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

R1 BY ADVS. SRI.M.A.ABDUL HAKHIM
SRI.JYOTHISH.J.KALLINGAL
R2 BY SRI.C.K. JAYAKUMAR, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.798 OF 2006

Dated this the 12th day of October, 2015.

J U D G M E N T

Aggrieved by the judgment dated 25.01.2006 in C.C.No.90/2003 before the Judicial First Class Magistrate Court-I, Thrissur acquitting the accused of the offence under Section 138 of the Negotiable Instruments Act, the complainant has come up in appeal.

2. According to the complainant, the accused had borrowed a sum of Rs.75,000/- from him undertaking to repay the same within a short span of time and that was not done and when the money was demanded back, the accused issued Ext.P1 cheque which, on presentation, bounced for want of funds. Though notice was issued and the accused accepted the same, the amount was not paid. Since the amount remained unpaid, complaint was laid.

3. Cognizance of the offence was taken and after following the procedures, summons was issued to the accused. On

appearance of the accused, particulars of the offence were read out to him. He pleaded not guilty and claimed to be tried.

4. The complainant therefore had PW1 examined and Exts.P1 to P6 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 against him. On the side of the defence, DWs 1 and 2 were examined.

6. The court below, on appreciation of evidence, found that the complainant had failed to prove the case beyond reasonable doubt. Finding that the case put forward by the accused is more probable, court below held that the accused is not guilty and thus acquitted the accused.

7. Assailing the acquittal, learned counsel appearing for the appellant contended that it is unmerited. Learned counsel went on to point out that the signature of the cheque is not disputed and if that be so, presumption under Section 139 of the Negotiable Instruments Act comes into operation and the burden is on the accused to show as to how the complainant came into

possession of Ext.P1 cheque. The story put forward by the defence is unacceptable. Even though wife of the complainant is examined as DW1, her evidence does not go against that of the complainant. It is contended that there has not been proper appreciation of evidence and that has resulted in acquittal.

8. Learned counsel appearing for the respondent-accused, on the other hand, contended that the court below has analysed the evidence in considerable detail and found the evidence adduced by the defence to be convincing enough. Learned counsel went on to point out that the burden of accused is not so onerous and mere preponderance of probabilities is sufficient in the case on hand to acquit the accused. The accused had taken the risk of examining the wife of the complainant and her evidence is not consistent with the evidence given by the complainant. According to the learned counsel, the transaction has not taken place as alleged even though cheque might have been issued by the accused. Learned counsel went on to point out that there are no reasons to interfere with the findings of the court below.

9. After having heard the learned counsel on both sides and also after having perused the records, this Court finds no grounds to interfere with the order of acquittal.

10. It is true that the complainant before the court below stated that a sum of Rs.75,000/- was borrowed by the accused and when he pressed for repayment of the amount, Ext.P1 cheque was issued. It is not in dispute that Ext.P1 cheque bounced for want of funds. It cannot be disputed that the complainant had issued a statutory notice and it was returned unclaimed. It is by now well settled that the initial burden of proving the existence of debt and due execution of cheque is on the complainant and that burden has to be discharged by the complainant by adducing acceptable evidence. When that burden is discharged, then the burden shifts to the accused and the degree of evidence required to be adduced by the accused is far less in standard than what is required from the complainant. Preponderance of probabilities is sufficient for an acquittal.

11. The complainant has given evidence as PW1. He has given evidence in terms of the complaint. It is significant to

notice that in chief examination, complainant does not say that the cheque was written and signed in his presence. He simply says that accused borrowed a sum of Rs.75,000/- from him and when he demanded the money, Ext.P1 cheque was issued. The accused took pains to examine DW1, the wife of the complainant. She, in her evidence, stated that a cheque and a plain paper was handed over to the complainant when the money was handed over to the accused. This is contrary to the version given by PW1 who says that after the money was borrowed, accused failed to repay the same and he demanded the money back and it was then that Ext.P1 cheque was given. In other words, as per the evidence given by the complainant, cheque was issued much later. The contradiction between the evidence of PW1 and DW1 cannot be easily ignored. Further, accused had produced a receipt said to have been issued by DW1 which shows that Rs.7200/- was received as interest from the accused. Since DW1 denied execution of that receipt, that was not marked. This is quite contrary to the stand taken by PW1 who says that he did not lend money levying interest. This inconsistency in the evidence of the complainant was found to be sufficient by the court below to doubt the version given by the complainant. The accused had a case that he had borrowed a sum of Rs.15,000/- from the complainant and two signed blank cheques were given as security. He would say that though the entire debt was repaid, documents were not returned. Whatever that be, in the light of the infirmities pointed out in the evidence of the complainant, it is difficult to believe that the case put forward by the complainant is true.

12. There might have been transactions between the accused and the complainant. But it is very evident that the transaction is not as spoken to by the complainant. Thus it can be said that the accused has discharged his burden to a certain extent. The mere fact that the signature of the cheque is not disputed does not mean that the cheque was issued to discharge a debt.

13. One may recall here the case of the accused who says that he had borrowed a sum of Rs.15,000/- from the complainant and the said amount was repaid and the documents were not

returned. On evaluation of the evidence in the case, it becomes very clear that the transaction spoken to by PW1 has not been established. The transaction in the present case has not been made out by the complainant.

For the above reasons, this Court finds no grounds to interfere with the judgment of the court below.

This appeal is without merits and it is accordingly dismissed.

Sd/-

P.BHAVADASAN
JUDGE

smp

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P.A to Judge.