

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 6TH DAY OF OCTOBER 2015/14TH ASWINA, 1937

CRL.A.No. 512 of 2007 ()

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AGAINST THE JUDGMENT IN ST 96/2005 of CHIEF JUDICIAL MAGISTRATE COURT,
MANJERI**

APPELLANT(S)/COMPLAINANT:

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KUNNATHODI ISHAQ @ MOHAMMED ISHAQ,
S/O CHEKKUTY HAJI, ANNAKAYAM CHECK POST, VALIKKAPATTA
MALAPPURAM DISTRICT.**

BY ADV. SRI.M.K.CHANDRA MOHANDAS

RESPONDENT(S)/STATE & ACCUSED:

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

**2. SURESH, S/O AYYAPPAN,
K.P.NIVAS, IRARIMANGALAM P.O., PERUTHALMANNA.**

**BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR
R2 BY ADV. SRI.C.M.KAMMAPPU
R2 BY ADV. SMT.NIMA JACOB**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 512 of 2007

Dated this the 06th day of October, 2015

J U D G M E N T

Aggrieved by the acquittal of the accused for the offence punishable under Section 138 of the Negotiable Instruments Act, the complainant has come up in appeal.

2. According to the complainant, the accused, who was his friend, borrowed an amount of ₹1,40,000/- from the complainant on 25.04.2004 and agreed to repay the same within 1½ months. The amount was not paid within the time so agreed to between the parties. When the money was demanded back, Ext.P1 cheque was issued by the accused. The cheque on presentation was returned for want of funds in the account of the accused. A statutory notice was issued by the complainant which did not invoke any reply or response. Since the amount remained unpaid, a complaint was laid.

3. Cognizance of the offence was taken by the court below. After following the necessary procedures, summons was issued to the accused. On appearance of the accused and after completing the formalities, particulars of offence were read out to him to which he pleaded not guilty and claimed to be tried. The complainant therefore examined PW1 and had Exts. P1 to P7 marked.

4. After the close of complainant's evidence, the 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.

5. The court below, on appreciation of the evidence, found that Ext.P1 cheque has been drawn in the name of K. Mohammad Ishaq while the complaint was laid by Kunnathodi Ishaq. After elaborate discussion of the materials before it, the trial court came to the conclusion that there is want of evidence to show that the complainant and the drawee are one and the same person and since the

complaint has not been laid by the drawee or the payee as the case may be, it is not maintainable and therefore acquitted the accused.

6. Assailing the acquittal, the learned counsel appearing for the appellant contended that the court below ought not have dismissed the complaint in the light of various items of evidence produced before said court to show that K. Muhammad Ishaq is the same person as Kunnathodi Ishaq and there is no confusion in that regard at all. Attention was also drawn to C.M.P.No. 4291/2006 wherein, the complainant sought reopening of the evidence and also the amendment of the cause title to correct the name in the complaint. No orders were passed on that petition. The learned counsel pointed out that without passing any orders in that petition, the matter could not have been disposed of and the court below has not discussed any of materials produced by the complainant to show that the payee and the complainant are one and the

same person. This non-application of mind has resulted in miscarriage of justice.

7. The learned counsel appearing for the respondent on the other hand referred to the evidence of PW1, the complainant in cross examination and pointed out that he is categorical in his statement that he is known as Kunnathodi Ishaq and by no other name. It was this fact which had persuaded the court below to dismiss the complaint. Accordingly, it is contended that no grounds are made out to interfere with the acquittal passed by the court below.

8. After having heard the learned counsel on both sides and after having perused the records, the plea of the complainant seems to be fully justified. True, Ext.P1 cheque is drawn in the name of K. Muhammad Ishaq. The complaint has been laid by Kunnathodi Ishaq. It is also true that in the proof affidavit filed in lieu of chief examination also, it is not stated by the complainant that he is known as Muhammad Ishaq. As rightly pointed out by the learned counsel for the

respondent, in cross examination, he stated that he is known only as Kunnathodiyil Ishaq and by no other name.

9. Probably, the complainant realized the folly at a latter stage and therefore filed C.M.P. No. 4291/2006 under Section 311 of Cr.P.C. to reopen the evidence and also to amend the cause title by changing the name from Kunnathodi Ishaq to K. Muhammad Ishaq. The court below relegated the consideration of that petition to the stage of final disposal of the case. However, no order has been passed on that petition at the time of final disposal of the case.

10. Before this Court, the complainant has produced Ration Card as well as his Passport from which it would appear that he is known as Kunnathodi Muhammad Ishaq. Even before the court below, he had produced Exts.P6 and P7 which are the certificates issued by the Village officer stating that Kunnathodi Ishaq and K. Mohammad Ishaq are one and the same person and also the election identity card

which shows that both are the same person. For reasons best known to the court below, court below chose not to accept the documents. The reasons given are not acceptable at all.

11. Any doubt regarding the identity could have been set at rest by the complainant, had he produced the passport before the court below. He did not do so. However, he has produced a photocopy of the passport before this Court. That contains his photo also. If as a matter of fact, the complainant answers the description of the person shown in the passport then naturally, Kunnathodi Ishaq and K. Mohammad Ishaq are one and the same person.

12. The court below has erred in not considering the question regarding the C.M.P. wherein amendment was sought for in the cause title. The complainant has specifically stated in the petition that it was an inadvertent mistake and the accused is fully aware of the fact that the

real name of the complainant is Muhammad Ishaq. The court below tried to distinguish the decisions relied on by the complainant on the ground that in those cases, it was the name of the accused which was sought to be corrected and not the complainant. One fails to understand the distinction so drawn by the court below. The reasons given by the court below to come to the conclusion that the payee mentioned in the cheque and the complainant are two different persons, does not appear to be very convincing.

13. At any rate, a reconsideration of the issue is felt necessary. The court below also found that the complainant had not produced the receipt for having them a statutory notice and going by the endorsement in the cover, the statutory notice was sent out of time. Any how, these are all matters to be reconsidered afresh in the light of the fact that the main reason for dismissing the complaint was the difference in the name of the payee and the complainant.

14. It is felt that an opportunity ought to be given to both sides to adduce evidence in respect of their respective contentions in order to do justice between the parties before the court.

15. For the above reasons, this appeal is allowed. The acquittal of the accused is set aside and the matter is remanded to the trial court for fresh consideration in accordance with law and in the light of what has been stated above allowing both the parties to adduce further evidence if they so chose.

Parties shall appear before the court below on **02.11.2015**. The court below shall dispose of the matter within three months from the date of appearance of the parties.

Sd/-
P.BHAVADASAN
JUDGE

ds

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P.A. to Judge