

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 14TH DAY OF SEPTEMBER 2015/23RD BHADRA, 1937

CRL.A.No. 545 of 2009 (C)

AGAINST THE JUDGMENT IN STC. 705/2006 of JUDICIAL FIRST CLASS
MAGISTRATRE, THALASSERY.

PETITIONER/COMPLAINANT:

NAZAR. E.T., S/O. MAYAN,
AGED 40 YEARS, FISH MERCHANT, PADIKKAL HOUSE,
PILAKKOOL, THALASSERY-2.

BY ADV. SRI.CIBI THOMAS

RESPONDENT(S)/ACCUSED/STATE:

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1. M.K.MAHAMOOD, FISH MERCHANT,
NOOR MAHAL, KOOLI BAZAR, VADAKKUMBAD,
THALASSERY.
 2. STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

R1 BY ADV. SRI.C.KHALID
R2 BY PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
14-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 545 of 2009

Dated this the 14th day of September, 2015.

JUDGMENT

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

2. The short case put forward by the complainant is that in order to discharge a debt for Rs.One Lakh which the accused is alleged to have borrowed from him promising to pay within a stipulated time, issued Exts.P1 and P2 cheques to the complainant. Those cheques on presentation bounced for want of funds and statutory notice invoked a reply containing false contentions. Since the amount remained unpaid, the complaint was laid.

3. Cognizance on the complaint was taken and on issuance of summons to the accused, he entered appearance

and particulars of the offence were read over to him, to which he pleaded not guilty and claimed to be tried. The complainant therefore examined P.W.1 and had Exts. P1 to P6 marked. The accused was questioned under Section 313 Cr.P.C. and he denied all the incriminating circumstances brought in evidence. Ext.D1 was produced on the side of defence.

4. On appreciation of the evidence, the court below, for want of evidence regarding debt, found that there may be some substance in the grievance of the accused. The two cheques which were produced before the court below might have been stealthily taken by the complainant. At any rate, the lower court went on to hold that there is want of evidence to show as to when the payment was made to the accused and when the cheques were issued. These aspects, the court below felt, were significant for establishing the case.

Therefore, finding that there is want of evidence to show that there was due execution of the cheque, the complaint was dismissed.

5. Learned counsel appearing for the appellant contended that the court below was not justified in dismissing the complaint as the presumption under Section 139 of the Negotiable Instruments Act is available since the signature on the cheque is not disputed and there is no suggestion that the contents of the cheque was filled up by P.W.1. It is also contended that the story put forward at one point of time was that the cheque was stolen about four years back and at a later stage, it was reduced to two years. This inconsistency in the nature of evidence offered by the accused go a long way in establishing the complaint. It is also pointed out that the accused had a case that the complainant was his employee and his employment was terminated long ago and

then he took away the cheques. If that be so, according to the learned counsel, there would have been some act from the side of the accused to get the payment of cheques blocked through the Bank. Nothing had been done. In the light of all these aspects, it is too late in the day for the accused to contend that the cheques were stolen.

6. Learned counsel appearing for the respondent contended that the complainant cannot rely on the presumption available under Section 139 of the N.I. Act unless it is proved that the cheque in the nature made mention of in Section 138 of the N.I. Act has been issued. Section 138 of the Act contemplates the issuance of a cheque for discharge of a debt and therefore, the initial burden to prove the existence of debt and issuance of cheque to discharge the same lies on the complainant himself and unless that burden is discharged, presumption under Section 139 of the Act is not attracted.

7. Learned counsel also pointed out that it is not mandatory on the part of the accused to adduce evidence to rebut the presumption. The accused can rely on the evidence furnished by the complainant and contend that on the very face of it, the case put forward by the complainant is false and that there are no grounds to interfere.

8. There are two versions about the issuance of cheque. The complainant would say that it is in discharge of a debt, while the accused would say that it was stolen. The complaint is conspicuously silent as to when the amount was received by the accused. Then again, in the complaint what is stated is that the amount was borrowed promising to pay it within a stipulated time. On failure to do so, the cheques were issued. But at the time of cross-examination, the complainant had given a totally different story. According to him, he went

to the shop of the accused and gave him the money and at that time two cheques were issued to him. There is no consistency in the claim made by the complainant regarding the payment of amount and also as to when the cheques were issued. The accused has to some extent also succeeded in showing that the complainant has no means of income as such and therefore he could not raise Rs.One Lakh. It has brought out in cross-examination that the complainant had no licence to do fish vending, and he had no Bank account. If the court below then thought that such a person could not raise Rs.One Lakh to the accused, the court below could not be found fault with. It is erroneous to think that if there is a cheque containing the signature of the accused, presumption under Section 139 of the N.I. Act is automatically attracted. It is not so. The initial burden is on the complainant to prove that there existed a debt and the cheque was issued in

discharge of the same. That is a condition precedent for attracting Section 139 of the N.I. Act. If viewed from that angle, the court below cannot be found fault with for dismissing the complaint. If two views are possible, it is well settled that the view in favour of the accused should be preferred.

For the above reason, this Court is not inclined to interfere with the judgment passed by the court below. This appeal is without merits and it is dismissed.

P. BHAVADASAN,
JUDGE

sb.