

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937

CRL.A.No. 1064 of 2006 (I)

**AGAINST THE JUDGMENT IN CC 153/2003 OF JUDICIAL FIRST CLASS MAGISTRATE
ERATTUPETTA, DATED 28-09-2005**

APPELLANT(S)/COMPLAINANT::

**M.K. ANSARI, AGED 43 YEARS,
S/O. M.K. KOCHUMHAMMED,
MANAGING PARTNER,
UNIVERSAL AGENCIES, ERATTUPETTA.**

BY ADV. SRI.C.S.AJITH PRAKASH

RESPONDENT(S)/ACCUSED & STATE::

- 1. P.H. HAZEEB, S/O. HASSAN PILLAI,
PLAMOOTIL HOUSE, KADUVAKOOZHY, ERATTUPETTA.**
- 2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 1064 of 2006

Dated this the 18th day of November, 2015

J U D G M E N T

Aggrieved by the order of acquittal for the offence under Section 138 of the Negotiable Instruments Act, the complainant has comes up in appeal, after obtaining leave of this Court.

2. It is not much in dispute that the accused in this case bought certain articles, be it tiles or pipes, from a partnership concern of which the complainant is the Managing Partner. For the amount due, it is alleged that the accused issued Ext.P1 instrument, which on presentation was returned for two reasons; (1) the funds insufficient and (2) Ext.P1 instrument is not negotiable. The complainant did institute a proceedings under Section 138 initially. But when it was disclosed to him that the instrument is not negotiable, he had to file a complaint for the offence under Section 420 of the Indian Penal Code. The present complaint is for the

offence under Section 420 of the IPC.

3. In the complaint, it is specifically alleged by the complainant that having bought the articles from the concern of which the complainant is the Managing Partner, he made the complainant believe that the instrument that is being issued is a cheque, though he at that point of time knew very well that it was not negotiable. The complainant in the complaint has specifically alleged that it was concealing that fact, the instrument was issued to the complainant. The complainant *bona fide* believed it to be a cheque and received the same. It is therefore contended that even at the time of purchase of the articles and issuance of cheque which was simultaneous, the accused had the intention to cheat the complainant.

4. The complaint was taken on file and 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, copies of the records were furnished to him and particulars of offence were read out to him to which he pleaded not guilty and claimed to be tried. The complainant examined PWs 1 to 3 and Exts. P1 to P9 were marked.

5. 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. He also stated that he had not purchased any floor tiles from the complainant he had only purchased some pipes and other materials for the irrigation projection of the Panchayat in his capacity as a member of the Panchayath. He also claimed that the entire sale price for the said material was paid. Further, he stated that two days prior to the last Panchayath election, the complainant and one Illias came to his residence and after threatening the complainant, forcibly obtained cheque from the accused. The case is falsely

instituted only to defame the accused. In support of his case, he examined DW1 and marked Ext.D1.

6. The court below found that Ext.P1 was in fact issued by the accused to discharge the liability of ₹30,000/- due to the complainant. However, as regards the offence of cheating, the court presumed that the purchase of articles and the issuance of cheque were on different dates and therefore it could not be understood that as on the date of purchase, the accused had the intention to cheat the complainant. The issuance of cheque on a subsequent date at best indicates the intention to cheat on that date and not on the date on which the purchase was made. Or in other words, the court formed the opinion that at the time of delivery of the property, there was no evidence to show that there was any intention to cheat. Accordingly, the accused was acquitted.

7. The learned counsel appearing for the appellant contended that the court below has not read the complaint

in its entirety wherein, it was specifically stated that as soon as the purchase was made and the money was demanded, the instrument namely, Ext.P1 was issued. It is interesting to note according to the learned counsel that even the court below accepts that Ext.P1 instrument was given in discharge of a debt. However, the court below then without any basis goes on to find that the issuance of Ext.P1 instrument was on a subsequent date and therefore, the offence is not attracted.

8. The learned counsel appearing for the appellant assailed the above finding by pointing out the averment in the complaint and also his evidence as PW1 wherein it is clearly stated that even though the cheque was post dated, it was given on the date on which the purchase was made. If that be so, the conclusion drawn by the court below cannot be sustained.

9. The learned counsel for the appellant pointed out that till the instrument was returned unpaid, he was

labouring under the impression that it was a cheque and only when it was returned with the endorsement 'not negotiable', he learnt that he had been cheated. It was then that the complaint was laid.

10. As rightly pointed out by the learned counsel for the appellant, even the trial court finds that Ext.P1 instrument was issued to him in discharge of a debt. On going through the evidence, there is nothing to show that the instrument was issued on a subsequent date and not simultaneously. The mere fact that it is post dated does not mean that the intention to deceive was not there initially. It is specifically averred in the complaint and as stated by PW1 that after the purchase when the money was sought for, he issued Ext.P1 instrument. That means the purchase of articles and issuance of instrument are simultaneous. It is very clear that Ext.P1 instrument was issued towards discharge of the debt due then.

11. There was much debate before this Court as to the true nature of Ext.P1 instrument. PW3, the Secretary of the Co-operative Bank on which Ext.P1 is drawn, has deposed before court that it is not negotiable. He also stated that usually a stamp affixed on such instrument shows that it is not negotiable.

12. Usually, in banking terms, they are known as withdrawal slips. Such withdrawal slips are obviously not negotiable. But, the nature of Ext.P1 does not indicate that it is a mere withdrawal slip. It contains serial number and all other characteristics of a cheque. More so, it is even payable to the bearer. It answers the definition of cheque and it also answers the definition of negotiable as contained in the Negotiable Instruments Act, 1881. Whatever that be, the assumption drawn that the cheque was given on a subsequent date does not seem to have any foundation at all. At any rate, that aspect needs reconsideration because there is no suggestion even made to PW1 that the cheque

was issued on subsequent date.

13. For the above reasons, this Court is unable to uphold the acquittal of the accused and it is felt that a re-consideration of the matter at the hands of the trial court is absolutely necessary.

14. In the result, 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 and in the light of what has been stated above.

The parties shall appear for the court below on **10.12.2015**. Both parties are at liberty to adduce further evidence and the matter may be disposed of as expeditiously as possible.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge