

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 25TH DAY OF NOVEMBER 2015/4TH AGRAHAYANA,
1937

CRL.A.No. 1330 of 2006 ()

AGAINST THE JUDGMENT IN CC 1022/2001 of CHIEF
JUDL.MAGISTRATE, ERNAKULAM.

APPELLANT(S)/COMPLAINANT:

DR. P.V.UNNIKRISHNAN,
S/O. LATE P.C.VELAYUDHAN, SAKTHI MEDICAL CENTRE,
MARKET CANAL ROAD, COCHIN-36.

BY ADV. SRI.S.SREEKUMAR (SR.)

RESPONDENT(S)/ACCUSED:

1. ANOOP S. KUMAR, 42,
POODULLIL HOUSE, NEAR KOMBARA MASJID,
COCHIN-682 018.

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

R1 BY ADV. SRI.J.JULIAN XAVIER

R1 BY ADV. SRI.A.J.VARGHESE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
25-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 1330 of 2006

Dated this the 25th day of November 2015.

JUDGMENT

Aggrieved by the acquittal of the accused in a proceedings under Section 138 of the Negotiable Instruments Act, the complainant before the trial court has come up in appeal after obtaining leave of this Court.

2. The short case put forward in the complaint is that the accused had borrowed a sum of Rs.5,00,000/- from the complainant. who is a doctor by profession, and to discharge the said debt, he issued Ext.P2 cheque. The cheque on presentation bounced for want of funds and statutory notice was issued. Statutory notice returned with the endorsement 'intimation given, unclaimed'. Since the amount remained unpaid, the complaint was laid.

3. The court below, before which the complaint was laid, took cognizance of the offence and after following the requisite procedures, summons was issued to the accused.

The accused entered appearance and after giving copies of the relevant documents, particulars of the offence were read out to him, to which he pleaded not guilty. The complainant through his power of attorney holder adduced evidence as P.W.1 and Exts.P1 to P7 marked. After the close of the complainant's evidence, the accused was questioned under Section 313 Cr.P.C., wherein he had pointed out that he was in search of a job and he was taken to the doctor by D.W.2. The accused was told that there was no vacancy in the hospital and he could work as a collection agent for collecting amounts from various persons. It was also stated that the doctor insisted for three blank cheques as security and according to the accused, one of them has been misused. In support of his case, D.Ws.1 and 2 were examined and Exts. D1 to D3 were marked.

4. The court below on the basis of the then existing law that power of attorney holder could not speak about the facts which is within the knowledge of the complainant found

that the evidence of power of attorney holder cannot be accepted in the case on hand. It was also found that notice was not properly addressed and there was no service of notice as contemplated under the Negotiable Instruments Act. Holding thus, the accused was acquitted.

5. Challenging the acquittal, learned Senior Counsel appearing for the appellant contended that the law that the power of attorney holder could not give evidence on behalf of the grantor with regard to personal matters has gone and the law now is that power of attorney holder can give evidence with regard to the matters within his personal knowledge. In the case on hand power of attorney was appointed and he gave evidence. If, for any reason, this Court finds that power of attorney holder could not evidence regarding personal matters, an opportunity may be given to the complainant to examine himself and prove the transaction. As far as non-service of notice is concerned, learned Senior Counsel contended that there is absolutely no basis for the above

finding. The address shown in the notice is the residential address of the accused and the notice was returned unclaimed and the accused cannot be heard to say that the address shown is not correct. The endorsement shown in the cover was that 'intimation given, unclaimed.' As per Section 114 of the Evidence Act, it is presumed that official duty is carried out in accordance with law. If the accused had a case that endorsement was wrong or the address was wrong, it is for him to examine the postman to establish that fact. Having not done so, he cannot be heard to say that the notice was not served. For the above proposition, learned counsel relied on the decision reported in C.C. Alavi Haji v. Palapetty Muhammed ((2007) 6 SCC 555) and contended that if as a matter of fact no notice has been received, even if summons is served on the complainant, within 15 days of receipt of summons, he could have paid the amount and ward off prosecution. That has not been done. It is therefore contended that acquittal is unwarranted.

6. Learned counsel appearing for the respondent on the other hand pointed out that both the findings, i.e., the finding regarding notice and the finding that power of attorney holder could not speak on behalf of the complainant regarding personal matters were both fortified by the decisions of various courts and the court below was justified in arriving at the conclusion that the complainant should fail. Learned counsel tried to establish it by producing ration card, identity card of the Election Commission etc to show that his address is different from the address shown in the cover in which the statutory notice is said to have been issued and pointed out that there was a willful attempt on the part of the complainant to send the notice in the wrong address and get the wrong endorsement.

7. As regards the issue regarding the evidence of power of attorney holder is concerned, learned counsel pointed out that even assuming that law changed during the interregnum, there has to be basic averment in the deed or

complaint to the effect that power of attorney holder had knowledge about the transaction. Further details may be possible for the power of attorney holder to provide to the court. But the necessary averments should be there either in the complaint or in the power of attorney or in the affidavit in lieu of chief examination filed by the power of attorney holder. Nowhere in those documents there is an averment that the power of attorney holder was present or aware of the transaction. Learned counsel pointed out that it is not as if the complainant is not in station or due to any reason unable to give evidence in person. A perusal of the power of attorney does not disclose the reason as to why the power of attorney was executed at all. Relying on the decision reported in *Narayanan v. State of Maharashtra* (2013(4) K.L.T. 21) it was contended that the power of attorney holder is incompetent to speak about the matters within the personal knowledge of the grantor. Accordingly, it is contended that there is no ground made out to interfere with the finding of the court below.

8. Taking the question of notice first, it is difficult to accept the finding of the court below. In the complaint the address shown is what is shown in the notice. Of course, there is a difference in the address shown in Exts. D1 and D2. Further, it is to be noticed that the accused received summons in the address shown in the complaint which is identical to the address in the statutory notice. The court below was therefore not justified in its conclusion that there is no statutory notice.

9. But as regards the second point urged by the counsel for the appellant, there is considerable force in the submission made by the learned counsel for the respondent. Power of attorney is not a matter of course. There has to be reasons for the same. Absolutely no reason is given in Ext.P1 as to why power of attorney is given, and what was the occasion for the same. There is nothing to show that the power of attorney holder was aware of the transaction.

10. Even assuming that the power of attorney need not contain that recital, atleast one would have expected the

complainant to mention as to how the power of attorney holder is in the know of things. That is also not discernible from the complaint at all. The power of attorney holder simply says that Rs.5,00,000/- was given to the accused and a cheque was given for the discharge of a debt and as to how he came to know about the fact is not discernible either from the complaint or from the power of attorney or evidence of P.W.1. One would have expected the power of attorney holder to mention these facts in the affidavit filed in lieu of chief examination. There too, it is absent. The result is that there is no evidence at all to show that the power of attorney holder was in any way aware of the transaction. He had no case that he was either told about the transaction or he was either present at the time or he knew about the transaction between the complainant and the accused.

11. It is true that in cross-examination, P.W.1, the power of attorney stated that he was present at the time of granting money to the accused. This statement cannot be

given undue importance in the absence of any averment in the complaint or in the affidavit in lieu of chief examination. One would have expected at least to mention the manner in which he came to know about the transaction and his knowledge about the same. There is total absence of averment regarding this aspect in the deed of power of attorney or in the complaint. In the above circumstances, the court below was perfectly justified in holding that there was no evidence of the transaction.

12. The prayer that an opportunity may be given to examine the complainant is too belated. If there was some averment to show that the power of attorney holder was aware of the transaction or he had anything to do with the transaction, probably there may be a chance in giving the complainant an opportunity to adduce evidence. In the absence of any averment about the knowledge of the power of attorney holder regarding the transaction, it is clear that the power of attorney was simply executed so as to avoid box.

The court below was therefore perfectly justified in not accepting the evidence of P.W.1 with regard to the transaction.

No grounds are made out to interfere with the finding of the court below. This appeal is without merits and it is accordingly dismissed.

P. BHAVADASAN,
JUDGE

sb.