IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 8TH DAY OF DECEMBER 2015/17TH AGRAHAYANA, 1937

CRL.A.No. 1450 of 2006 ( )

IN CC 125/2003 of CHIEF JUDICIAL MAGISTRATE COURT, KOZHIKODE
DATED 29-07-2005

APPELLANT(S)/COMPLAINANT:

M.K.RAMACHANDRA MENON,
S/O.SANKARA MENON,
KIZHAKKE KOVILAKAM PARAMBA, 24/1112
MANAKAV, CALICUT.

BY ADVS.SRI.M.ASOKAN
SRI.DEVAPRASANTH.P.J.

RESPONDENT(S)/ACCUSED AND STATE:
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1. K.JANARDHANAN,
S/O.KRISHNANUNNI PANICKER, SREE NILAYAM
P.O.THIRUVANNUR, KOZHIKODE-29.

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE
R1 BY ADV. SRI.P.SANJAY
R1 BY ADV. SMT.A.PARVATHI MENON

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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P.BHAVADASAN, J.

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Crl.A. No. 1450 of 2006

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Dated this the 08th day of December, 2015

<u>J U D G M E N T</u>

Aggrieved by the judgment dated 29.07.2005 in C.C.No.125/03, whereby, the accused stood acquitted for the offence punishable under Section 138 of the Negotiable Instruments Act, the complainant before the court below after obtaining leave of this Court has come up in appeal.

2. The short case put forward by the complainant was that having borrowed a sum of ₹4 lakhs by the accused coming to his house, in order to discharge the said debt, Ext.P1 cheque dated 18.06.2003 was handed over to the complainant making him believe that there would be sufficient fund as on that date to honour the cheque. The cheque was duly presented for encashment, but it was returned with the endorsement 'account was closed'. Ext.P3 lawyer's notice was issued which invoked a reply containing false contentions. As the amount remained unpaid, the

complaint was laid.

3. The court before which the complaint was laid took cognizance of the offence and after following the necessary procedures, summons was issued to the accused. When the accused entered appearance, he was furnished with copies of the documents and particulars of offence were read out to him. He pleaded not guilty. The complainant examined PWs 1 to 3 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. In his 313 statement, he stated that the complainant was a relative of his and in 1994, he had borrowed a sum of ₹25,000/- from the complainant. As a security for the said loan, three blank cheques and two signed blank papers were given to the complainant. A few months after the borrowal, the entire amount of ₹25,000/- and its interest were paid and

the account was settled. Repeated request to hand over the cheque back, did not yield result. Since the complainant was a relative of the accused, he could not go beyond a limit and demand the cheques back. He denied having borrowed the sum of ₹4 lakhs. In his defence, he had DWs 1 and 2 examined and Ext. D1 marked.

5. On an appreciation of the evidence in the case, the court below came to the conclusion that there was considerable variation in the case put forward by the complainant in his complaint at the time of the evidence and there was no consistency in his case. Further, the court below also found that going by the evidence of PW2, the accused handed over three blank cheques to the complainant, a case which even the complainant did not have. The lower court also noticed that there was difference in hand writing among the entries in the body of the cheque and in all probability, the plea put forward by the defence that the cheque was given in 1994 and it was not returned

even though the debt was cleared is more probable. On the basis of the above findings, the lower court acquitted the accused.

6. Assailing the acquittal, the learned counsel appearing for the appellant contended that the issuance of the cheque having been admitted, the presumption under Section 139 of the Negotiable Instruments Act follows and the burden is entirely on the accused to show that the cheque was given not for discharge of a debt, or that the debt has been discharged. In fact, according to the learned counsel for the appellant, it is a plea of discharge in which case the burden is on the accused. The learned counsel went on to point out that there has not been a proper appreciation of evidence in the case and that had resulted in a wrong acquittal. Though the cheque was returned with endorsement 'account was closed' it falls within the ambit of Section 138 of the Negotiable Instruments Act and the learned counsel went on to point out that the matter

requires re-consideration at the hands of the trial court.

7. The learned counsel appearing for the respondent/accused on the other hand contended that the court below has considered all aspects of the case and has found the case of the complainant to be suspicious. The learned counsel pointed out that even in the reply notice, the accused had clearly denied the transactions set up by the complainant and even thereafter, in the complaint, the complainant did not choose to name the eye witness to the transaction and the eye witness brought as PW2 bungled. He comes forward with a case that three blank cheques were issued. Even the complainant had no such case. Further, the documents produced do not go hand-in-hand and it varies with each other. These aspects have considered by the court below and found that the case put forward by the complainant is open to serious doubt and therefore the court below acquitted the accused.

8. This Court must remind itself that it is exercising

its appellate jurisdiction against an order of acquittal. In the case of an order of acquittal, the accused is armed with two presumptions; (1) unless otherwise the accused is innocent and (2) the court on appreciation of the evidence in the case found the accused to be not guilty. Unless there are compelling circumstances and reasons to interfere with the order of acquittal, the mere fact that a different view may be possible, it may not be proper for this Court to upset the finding of the trial court.

9. Bearing the above principles in mind, an attempt shall now be made to analyse the evidence in this case to find out whether the court below has committed any error either on facts or in law.

10. That there were money transactions between the accused and the complainant is admitted by both sides. He accused had a case that the complainant being a close relative of his, when he borrowed ₹25,000/- in 1994, he handed over three blank cheques and two signed papers.

This was the definite stand of the accused. This case of the defence of the accused was projected even in the reply notice. It must be noticed here that the reply notice was never produced.

11. The complainant was thus put on guard regarding the case set up by her. There was a clear denial in the reply notice of having received ₹4 lakhs as claimed by the complainant. Still it is significant to notice that neither in the complaint nor in his evidence, the complainant is certain about the date on which the borrowal was made. Further, it is also interesting to note that the presence of PW2, at the time of payment and handing over of cheque, the eye witness is conspicuously absent in the complaint.

12. The court below has considered the difference in dates regarding the issuance of cheque spoken to by the complainant on various occasions at the time of examination. Assume that it is an inadvertent mistake, one fact remains unexplained.

13. The definite case of the complainant was that the amount was borrowed from the house. However, in sworn statement, there was a twist brought about and it was sworn to by the complainant that it was received from his business establishment. Here one has to notice that the complainant is engaged in the business of money lending, a fact admitted by him. If that be so, surely and certainly, he must be maintaining accounts. In the teeth of the denial of transactions made by the accused, it would have been only appropriate for the complainant to produce his accounts and to establish the fact that the amount has been paid to the accused, for, one should remember it was no small amount, a sum of ₹ 4 lakhs in 2003.

14. Even more baffling are the documents produced by the complainant and marked as Exts. P6 and P7. Ext.P7 is the extract of the account maintained by the accused and his wife. Interestingly enough, the endorsement by the Bank is that 'the above account was closed on 29.12.2004'. One

may at once refer to Ext.P2, which is a dishonour memo. That is dated 20.06.2003. The reason given is 'the account closed'. If as a matter of fact, the account was closed only on 29.12.2004, certainly the endorsement dated 20.06.2003 that the cheque is being returned on account of the account being closed cannot be true. This anomaly remains unexplained.

15. It was not solely on the basis of difference in the entries that the court below had come to the conclusion that the complainant has not established his case.

16. In order to attract the presumption available under Section 139, it is by now well settled that the ingredients necessary to attract Section 138 have to be proved by the complainant. It is more so because, the words used in Section 139 are <u>a cheque of the nature mentioned in Section 138.</u> That means, there is a debt and the cheque is issued in discharge of that debt. It also follows therefrom that the proof regarding the existence of a debt and the issuance of a

cheque to discharge the debt is squarely on the complainant and unless those two ingredients are proved, there is no question of the presumption being attracted to the facts of the case. Therefore, the so called formidable contention based on Section 139 has to fail.

17. Though these reasons have not as such been adverted to by the court below, it can be seen that the ultimate finding of the court below that the complainant has not proved the case beyond reasonable doubt is fully justified. One must remember here that the burden of proof on the accused is very slight and all that the accused needs to create a doubt in the mind of the court and that would amount to discharge of burden cast on the accused.

18. It could not be said that the finding of the court below is perverse or is contrary to facts or is based on irrelevant materials. As already stated, even assuming a different view is possible, this Court will not be justified in interfering with the order of acquittal where it is a possible

and a reasonable view in the facts and circumstances of the case.

For the above reasons, this appeal is without merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge