

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. 1485 of 2006 ()

**IN C.C. NO. 172/2001 OF JUDICIAL FIRST CLASS MAGISTRATE COURT - I,
VADAKARA DATED 22.02.2003**

**AGAINST THE JUDGMENT IN CRA 126/2003 of ADDITIONAL SESSIONS COURT - I,
KOZHIKODE, DATED 25-11-2005**

APPELLANT(S)/COMPLAINANT::

1. JANU AMMA, W/O.LATE ACHUTHAN NAIR,
AGED 56 YEARS, CHATHYATH HOUSE, P.O. MAYYANNUR
VADAKARA.
2. PRAMODKUMAR, S/O.LATE ACHUTHAN NAIR,
AGED 34 YEARS, CHATHYATH HOUSE, P.O. MAYYANNUR
VADAKARA.
3. PRAJISHA, D/O.LATE ACHUTHAN NAIR,
AGED 30 YEARS, CHATHYATH HOUSE, P.O.MAYYANNUR
VADAKARA.
4. PRADEEPKUMAR, S/O.LATE ACHUTHAN NAIR,
AGED 28 YEARS, CHATHYATH HOUSE, P.O.MAYYANNUR
VADAKARA.

**BY ADVS.SRI.C.VALSALAN
SRI.K.RAKESH ROSHAN**

RESPONDENT(S)/ACCUSED & STATE:

1. T.P. RAJAN, S/O.KELAPPAN VAIDYAR,
AGED 42 YEARS, THEKKEPARAMBATH HOUSE, P.O.MAYYANNUR
VADAKARA TALUK, KOZHIKODE DISTRICT.
2. STATE OF KERALA, REP. BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, COCHIN-31.

BY PUBLIC PROSECUTOR SMT. S. HYMA

**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. 1485 of 2006

Dated this the 18th day of November, 2015

J U D G M E N T

This appeal arises out of the judgment in Crl.A.No. 126/2003 of the Sessions Court, Kozhikode wherein the appeal filed by the accused was allowed and the accused was acquitted of the charges levelled against him for the offence under Section 138 of the Negotiable Instruments Act.

2. The facts fall within a very narrow compass. According to the complainant, the accused had borrowed a sum of ₹1,20,000/- from him and in order to discharge the debt, issued Ext.P1 cheque. When Ext.P1 cheque was presented for encashment, it was returned for want of funds in the account of the accused. A statutory notice issued by the complainant to the accused invoked no reply. Since the amount remained unpaid, the 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, 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 himself as PW1 and had Exts. P1 to P6 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. However, he did not choose to adduce any evidence in support of his case.

5. The trial court, on an evaluation of the evidence found that the two contentions urged during defence namely, (1) the cheque was given to one Sreedharan from whom it had been taken by the complainant and misused

and (2) in Ext.P3 notice, the number of the cheque is not properly shown and that caused prejudice to the accused, were found to be untenable at all. He was found guilty. Accordingly, the accused was convicted and sentenced to suffer simple imprisonment for six months and to pay a sum of ₹1,20,000/- as compensation under Section 357 of Cr.P.C.

6. The aggrieved accused preferred appeal as Crl.A.No.126/2003 before the Sessions Court, Kozhikode. During the pendency of the appeal, the complainant died and his legal heirs came on record as additional respondents. The lower appellate court holding that there is material alteration in the instruments acquitted the accused. It is the said order of acquittal that is challenged in this case which has been filed after obtaining leave of this Court.

7. The learned counsel appearing for the appellant contended that only two contentions which the defence had at the time of trial were that one that the cheque was not issued to the complainant and they had no transaction with

the complaint at all. The cheque was issued to one Sreedharan from whom a sum of ₹5,000/- had been borrowed and same had been discharged, but the cheque was not returned by Sreedharan. The complainant managed to obtain the cheque from Sreedharan and has misused the cheque to lay a complaint against the accused. The second contention was that in Ext.P3 notice, the number of the Cheque was shown as 937861 instead of 037861 and the case of the accused was that serious prejudice was caused to him. Finding that both these contentions were found to be untenable, the trial court came to the conclusion that offence had been made out.

8. Quite surprisingly, according to the learned counsel for the appellant, even though there was no ground urged before the trial court and no ground in the appeal memorandum to the effect that there was material alteration and therefore, the instrument was not proper, the lower appellate court seems to have raised a ground *suo*

motu to acquit the accused. The learned counsel for the appellant contended that if there was any such doubt, the proper course would have been to remand the matter and to give an opportunity to the parties to establish their case instead of acquitting the accused without giving an opportunity to the complainant to explain his position. This has caused serious prejudice to the complainant, who now stands to lose. The lower appellate court was not justified in taking a ground which was not urged at all to acquit the accused.

9. After having heard the learned counsel for the appellant and after having perused the records, there seems to be considerable force in the above submission. Nowhere in the judgment of the trial court, it is seen reflected that the accused had a case that there was material alteration of the instrument and therefore the instrument was invalid. The only two contentions raised were the contentions referred to by the learned counsel for the appellant which were found to

be untenable.

10. The lower appellate court referred to the fact that there was no suggestion to the complainant that there was material alteration in the instrument. But the court says that it is very apparent on the face of the instrument that there have been alteration and the court below relies on certain decisions cited by the court below to understand the meaning of alteration. Relying on the decisions reported in **Capital Syndicate v. Jameela** (2003 (1) KLT 604), it was found that Ext.P1 cheque was vitiated by material alteration.

11. One can have no quarrel with the proposition relied on by the lower appellate court nor with the rest of the decisions cited therein. No suggestion was put to PW1 regarding the material alteration of the instrument. One may here remember that the definite case of the accused was that the cheque was not issued to the complainant but to one Sreedharan when he had borrowed a sum of ₹ 5,000/-. If the material alteration had been made by the

complainant, it must necessarily follow that the cheque must have been issued to him.

12. Whatever that be, if the accused had a case that there has been material alteration of the instrument, it ought to have brought to the notice of the complainant and his explanation sought for. It was without giving an opportunity to the complainant to explain his position, the lower appellate court acquitted the accused. It does not appear to be justifiable in law.

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 order of acquittal passed by the lower appellate court is set aside. The matter is remanded to the trial court for fresh disposal in accordance with law and in the light of what has been stated above.

The parties shall appear before the trial court on **10.12.2015**. The court below shall make every endeavour to dispose of the matter as expeditiously as possible, at any rate, within a period of four months from the date of appearance of the parties.

Sd/-
P.BHAVADASAN
JUDGE

ds

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P.A. to Judge