

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 10TH DAY OF SEPTEMBER 2015/19TH BHADRA, 1937

CRL.A.No. 1062 of 2007 ()

**AGAINST THE JUDGMENT IN CC 827/2003 of JUDICIAL MAGISTRATE OF I CLASS
KODUNGALLUR**

APPELLANT(S)/COMPLAINANT:

**SAIDUMUHAMMED, S/O. YOUSEPH,
AIRATT PARAMBIL, AYSHA COTTAGE, CHANDAPURA
KODUNGALLUR., (FOR MODERN HOSPITAL, KODUNGALLUR).**

BY ADV. SRI.T.H.ABDUL AZEEZ

RESPONDENT(S)/ACCUSED & STATE:

- 1. B.SAINUDEEN, S/O. BEERAVU,
AIRACHAN HOUSE, SAJ NIVAS, NALLANKARA
VAILOPPILLY NAGAR, P.O.NETTISSERY, THRISSUR.**
- 2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 1062 of 2007

Dated this the 10th day of September, 2015

J U D G M E N T

This appeal is directed against the order of acquittal dated 11.08.2006 in C.C.827/2003 whereby, the accused was acquitted under Section 255(1) of Cr.P.C. for the offence punishable under Section 138 of the Negotiable Instruments Act.

2. The accused is alleged to have been given ₹62,000/- for supply of certain equipments to the complainant hospital on 27.11.2002. Contrary to the assurance given to the hospital, when no equipments were delivered, the amount was sought back and then the accused is alleged to have issued Ext.P1 cheque. That on presentation, it bounced for want of funds and Ext.P4 notice was sent. The accused sent a reply notice denying the transactions as alleged in the notice and offered his explanation as to how the cheque happened to be given to

the hospital. When the amount remained unpaid, the complaint was laid.

3. The Judicial First Class Magistrate-I, Kodungallur took cognizance of the offence and after completing the formalities, issued summons to the accused and he entered appearance. The particulars of offence read over to him to which he pleaded not guilty and claimed to be tried. The complainant examined PW1 and had Exts. P1 to P9 marked.

4. After the close of complainant's evidence, the accused was questioned under Section 313 Cr.P.C.. He denied the transaction as alleged in the complaint and offered his explanation as to how the cheque happened to be given to the hospital. In his defence, he had DWs 1 and 2 examined.

5. The lower court, on appreciation of the evidence, found that the complainant hospital was unable to establish that the cheque happened to be given to the hospital under the circumstances claimed by the hospital and finding that the complainant has not been able to establish the same,

dismissed the complaint and acquitted the accused.

6. The said acquittal is assailed in this appeal.

7. The learned counsel appearing for the appellant contended that the court below was not justified in acquitting the accused, especially when it is admitted by him that he is ready to repay the amount and had admitted that the cheque was issued by him. The learned counsel relied on the presumption available under Section 139 and 118 of the Negotiable Instruments Act and pointed out that the burden was on the accused to show that the cheque was not issued as alleged in the complaint. Once the issuance of a cheque is admitted, it is contended by the learned counsel for the appellant that the burden on the complainant is considerably diluted. The court below has taken irrelevant matters into consideration and that has resulted in a wrong order being passed. It is therefore contended that the acquittal may be set aside.

8. The case of the complainant was that they had paid an advance amount of ₹62,000/- to the accused for purchase of certain hospital equipments which was promised to be supplied by the accused. The accused failed to do so and when the money was sought back, Ext.P1 cheque is alleged to have been given. The cheque was presented and it bounced for want of funds. Ext.P4 notice was issued to which the accused replied by way of Ext.P7. In Ext.P7, he had set out in detail the circumstances under which the cheque happened to be issued and denied the transactions as alleged in the complaint.

9. PW1 was examined on behalf of the complainant. He deposed that the accused had promised to supply certain hospital equipments and received ₹62,000/- as advance for the said purpose. In his affidavit in chief, he has stated that on 27.11.2002, the accused received an amount of ₹62,000/- by promising to supply the hospital equipments. But the accused did not do so. Therefore, the amount was sought

back and then, the cheque was issued. PW1 then speaks about the dishonour of cheque etc. In his cross examination, PW1 was unable to give the details of the materials that the accused had undertaken to supply. There was a suggestion to PW1 that the amount was paid to Peter, the same was denied by PW1. It is surprising to note that this witness, in his cross examination, says that after the audit is over, the accounts are not retained. It was also suggested to him that the hospital wanted to get a nursing course for which a person by name Peter was approached through the accused and it was also suggested that the amount was actually paid to Peter. Since that did not materialize and since Peter was introduced by the accused, it was suggested to PW1 that he was being pressurized to return the amount. Of course, all these suggestions had been denied by PW1.

10. It is also interesting to note that DW1, who was one of the Directors of the Hospital and DW2, who was the then accountant of the hospital, were examined. The

evidence of DW1, to say the least, is miserable. He has absolutely no idea about the transaction and also about the accounting practice of the hospital. DW2, the then accountant produced the extracts of the account maintained by the hospital. But it was not marked.

11. The court below was of the opinion that it is extremely difficult to believe that a hospital of that stature claimed could run an institution without keeping proper accounts. The court below found that no evidence whatsoever was produced to show that the amount has been in fact paid to the accused to supply materials. The lower court felt that it is inconceivable that there would not have been a purchase order and there will be some documents to show that amount was paid to the accused.

12. The learned counsel appearing for the appellant contended that all the above observations are baseless in the light of the fact that the accused had admitted the issuance of Ext.P1 cheque and if that admission stares at the

face of the accused, then there was no need for the complainant to produce documents.

13. It is not so. It must be remembered that after the cheque was dishonoured, a notice was issued to the accused. In the notice, there is absolutely no whisper about the delivery of equipments or order being given to the accused for the same and payment of ₹62,000/- as advance. Notice is totally silent about these facts. The accused has sent a reply detailing the circumstances under which the cheque happened to be issued and pointing out that he, in fact, had not received a single pie from the hospital though he ultimately undertook to repay the amount.

14. When the complainant had been put on alert by the accused by way of reply notice, one would have expected the complainant to be more careful in filing the complaint and giving evidence. The complainant had full knowledge that the accused was denying the transaction. It is in that context, the issuance of cheque will have to be

viewed.

15. Merely because a cheque is signed and its issuance was admitted by the accused, that does not automatically lead to a liability or the presumption available under Section 139 of Negotiable Instruments Act, especially when the accused has offered an explanation. The explanation so offered by the accused could have been easily controverted by the complainant by adducing proper evidence. As rightly noticed by the court below, it is extremely difficult to believe that the complainant would not have maintained records of payment. One fails to understand the shyness shown by the complainant in producing the accounts. In fact, they had a best evidence with them which had been withheld.

16. It is also interesting to note that it was the accused who had summoned the Director and the then accountant of the hospital and they had also sought for production of certain documents.

17. The learned counsel appearing for the appellant complained that even though those documents were produced, it was not marked only because it would go against the accused and the court should have taken note of that fact. To understand the nature of the document, this Court perused the two documents produced by the witnesses summoned by the defence. They are print outs from a computer. Surprisingly enough, the certification as contemplated under Section 65(B) of the Indian Evidence Act is conspicuously absent and if that be so, those documents are of no worth and value. It was precisely due to that reason why those documents were not marked.

18. True, the accused had undertaken to repay the amount, but the circumstances under which that undertaking was made is also specified by him. When the complainant had documents to disprove the claim made by the accused and when they were put on guard as early as when the reply notice was sent, the lethargy on the part of

the hospital to produce the relevant document led to their failure. They have only themselves to blame. The court below was therefore perfectly justified in coming to the conclusion that the transactions as alleged have not been proved and there is not debt as claimed by the hospital.

19. It is not shown that the findings of the court below are either perverse or contrary to the evidence on record. It is a possible view. Even two views are possible, it is well settled that the view in favour of the accused should be taken. If that be so, there is nothing to interfere with the acquittal passed by the court below.

This appeal is without merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge