IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 15TH DAY OF SEPTEMBER 2015/24TH BHADRA, 1937

CRL.A.No.1115 of 2009 (D)

AGAINST THE JUDGMENT IN ST Case No.27/2008 of JUDICIAL FIRST CLASS MAGISTRATE - IV, KOLLAM DATED 17-03-2009

APPELLANT/COMPLAINANT:

P.RAGHAVAN NAIR,
LAKSHMI SREE, CHEMMAKKAD P.O., PANAYAM VILLAGE,
KOLLAM.

BY ADV. SRI.B.SURESH KUMAR

RESPONDENTS:ACCUSED AND THE STATE:
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1. NARENDRANATH, CHEMMAKKAD,
NOW RESIDING AT MAZHIYATH BUILDING,
BEHIND MAZHIYATH MEDICAL STORES, THANNIKKAMUKKA
PERINAD P.O.

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

R1 BY ADVS. SRI.P.R.MILTON
SRI.GEORGE VARGHESE (MANACHIRACKEL)
R2 BY PUBLIC PROSECUTOR SMT.S. HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.1115 OF 2009

Dated this the 15th day of September, 2015.

J U D G M E N T

Aggrieved by the acquittal of the accused by judgment dated 17.03.2009 in S.T.Case No.27/2008 before the Judicial First Class Magistrate Court-IV, Kollam, for the offence under Section 138 of the Negotiable Instruments Act, complainant before the court below has come up in appeal.

2. The complainant alleged that the accused had received a sum of Rs.1 lakh from him on 23.08.2005 promising to repay the same within a short span of time. When the period expired and demands were made, he postponed the payment under one pretext or other. Ultimately, on 09.05.2006, Ext.P1 cheque was issued and that, on presentation, bounced for want of funds. Even though a lawyer's notice was issued by the complainant and it was received the accused, he did not repay the amount. Since the amount remained unpaid, complaint was laid.

3. Cognizance of the offence was taken by the court below and necessary formalities were completed. On appearance of the accused, particulars of offence were read out to him to which he pleaded not guilty and claimed to be tried.

4. The complainant had PW1 examined and Exts.P1 to P6 marked.

5. After the close of the complainant's evidence, accused was questioned under Section 313 Cr.P.C wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He in his defence examined himself as DW1. DW2 was also examined on his side. Exts.D1 to D6 were marked.

6. The court below, on appreciation of evidence, found that the story put forward by the defence that cheque issued by the accused in all probability might have been misused by the complainant seems to be a probable and reasonable one and that the complainant had failed to show that the accused had received a sum of Rs.1 lakh from him. Accordingly, complaint was dismissed and the accused was acquitted.

7. Learned counsel appearing for the appellant, assailing the acquittal, contended that the court below has not appreciated the evidence in the proper perspective and the presumption available under Section 139 of Negotiable Instruments Act has been bypassed. It is pointed out that the signature of the cheque is admitted and once signature is admitted, it is for the accused to show under what circumstance the cheque came into the hands of the complainant. The accused has put forward a story which is unbelievable and if, as a matter of fact, the claim made by the accused is true, Ext.P1 cheque should have been drawn in the name of Sreeja and she should have been in possession of the cheque. There is nothing to show that the complainant had clandestinely obtained the cheque from Sreeja. Learned counsel contended that once signature in the cheque has been admitted, Section 139 of N.I Act comes into play and the burden is on the accused to show that there is no such debt as alleged by the complainant. This burden has not been discharged and therefore the court below was not justified in acquitting the accused.

8. Learned counsel appearing for the contesting

respondent, on the other hand, contended that the accused has made a statement as to how possibly Ext.P1 cheque has come into the possession of the complainant. The definite case of the complainant was that on the date of handing over of money, he had withdrawn money from the Bank, in which case, according to the learned counsel, there may be some document to prove the same and for reasons best known to the complainant, no such document was produced.

9. Relying on the evidence of DW2, document writer who prepared Ext.D6, learned counsel contended that the story put forward by the complainant has to fail. At any rate, according to the learned counsel, the view taken by the lower court is a possible and probable view and being an acquittal, unless it is shown that the evidence adduced by the accused is very perverse, interference in appeal may not be justified.

10. After having heard the learned counsel appearing for the appellant, learned counsel appearing for the contesting respondent and also after having perused the records, there seems to be some substance in the contention raised by the

learned counsel for the respondent.

11. It is not disputed that Ext.P1 cheque contains the signature of the accused. The accused says about how possibly Ext.P1 cheque could have come into the hands of the complainant. He says that the property belonged to the accused and to his tarwad was purchased by the daughter in law of the complainant named Sreeja and her father and later on the daughter of the accused decided to purchase that property for a consideration of Rs.5,90,000/- from them and for that purpose, she approached Sreeja and her father and requested that the property may be reconveyed. The accused has a case that for discharging an outstanding liability, a sum of Rs.1 lakh was demanded from the daughter of the accused and in order to help Sreeja, he gave a blank cheque namely, Ext.P1. Thereafter, Sreeja demanded that a sum of Rs.1 lakh is insufficient to discharge the debt and at least Rs.2 lakhs is required. That was also paid.

12. According to the learned counsel for the respondent, the burden to show that the cheque was issued to discharge a

debt is initially on the complainant. The ingredients necessary to attract Section 139 of N.I Act will have to be established by the complainant and that is due execution of cheque. The court below has found that there is want of evidence to come to the conclusion that the debt has been incurred by the accused towards the complainant.

13. According to the complainant, on the date of handing over of money, he had drawn money from the Bank. As rightly noticed by the court below, there must be some document to show withdrawal of money from the Bank and for reasons best known to the complainant, he chose not to produce the same to establish the said fact. It is not disputed that there was property dealings between the daughter of the accused and the daughter in law of the complainant and her father. The case put forward by the defence is that when that transaction was going on, Sreeja, daughter in law of the complainant, indicated that for discharging a liability, a sum of Rs.1 lakh is required and therefore, Ext.P1 cheque was issued. Later the accused was informed that Rs.1 lakh will not be sufficient and at least

Rs.2 lakhs is required. That was also paid. That is spoken to by DW2, document writer who prepared Ext.D6. Ext.P1 cheque has been later misused. The presumption under Section 139 of N.I Act is not automatic. It is connected with Section 138 of N.I Act. Neither Section 138 nor Section 139 uses the word 'execution of cheque'. What that Sections contain is whether the cheque was drawn by the accused for the amount due from him. That means, the complainant will have to show that the cheque was drawn by the accused and it was for the amount due from the accused to the complainant. These facts form basic materials and if those facts are established, presumption under Section 139 of N.I Act is attracted.

14. In the case on hand, the court below has chosen to believe the evidence of DWs 1 and 2. DW1 is the accused and DW2 is the document writer. They uniformly stated that Ext.P1 cheque has been issued by the accused. True, the accused has no case that he has not issued the cheque. His case is that it was issued to Sreeja who is none other than the daughter in law of the complainant. It is difficult to believe that under the above

circumstances the appellant was unaware of the transaction between his daughter in law and the daughter of the accused.

It was under the above circumstances that the court below found that as the daughter of the accused had money with her to purchase the property, it was not necessary to borrow money from the complainant. The complainant failed to prove the necessity of the accused for borrowing a sum of Rs.1 lakh from him. On re-evaluation of the evidence, it is felt that the view taken by the court below is a possible view and could not be characterised as perverse or contrary to the evidence on record. If that be so, being a case of acquittal, interference in appeal is considerably limited. There are no grounds made out to interfere with the acquittal.

This appeal is without merits and it is accordingly dismissed.

Sd/-

P.BHAVADASAN
JUDGE

smp

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P.A to Judge.