

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

SATURDAY, THE 21ST DAY OF NOVEMBER 2015/30TH KARTHIKA, 1937

CRL.A.No. 1561 of 2006 ()

**AGAINST THE JUDGMENT IN CC 88/2001 OF JUDICIAL FIRST CLASS MAGISTRATE -II,
NEDUMANGAD DATED 20-04-2004**

APPELLANT(S)/COMPLAINANT:

**BAIJU,
THREETHANKARA PUTHEN VEEDU, MONNANAKUZHYP.O
VEMBAYAM.**

BY ADV. SRI.D.KISHORE

RESPONDENT(S)/ACCUSED AND STATE:

**1. SHAN, S/O.SHOUKATHALY,
PLAKKALA VEEDU, VENKAMALA, MUKKUDIL.P.O
VENJARAMOODU.**

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

**BY PUBLIC PROSECUTOR SMT. S. HYMA
R1 BY ADV. SRI.D.AJITHKUMAR**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 1561 of 2006

Dated this the 21st day of November, 2015

J U D G M E N T

Aggrieved by the acquittal of the accused for the offence under section 138 of the Negotiable Instruments Act, the complainant in C.C. 88/2001 before the Judicial First Class Magistrate-II Nedumangadu has come up in appeal after obtaining leave of this Court.

2. The facts necessary for the purpose of disposal of this appeal are as follows:

According to the complainant, the accused borrowed a sum of ₹14,000/- from him at his house on 10.05.2000. When the money was demanded back, on 01.07.2000, the accused is alleged to have issued Ext.P1 cheque dated 10.08.2000. The cheque on presentation bounced for want of funds. A statutory notice issued to the accused invoked a reply containing false allegations. Since the amount was not paid, 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 therefore examined PWs 1 and 2 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. The accused denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He added that he was running a rubber shop at Kalliyode and it was at the behest of one Madhavan Nair that he had taken the room on rent. He also stated that Madhavan Nair had given some amount as loan to him. Due to financial stringency, he was not able to pay the interest and the amount due to Madhavan Nair at the appropriate

time which forced Madhavan Nair to break open his shop. He took away the weighing balance, table, chair and the cheque leaves which were inside the drawer of the table and he gave those cheque leaves to the few people one of which was given to the complainant in this case also. He examined DW1 in his defence.

5. The court below found that since the execution of the cheque is not proved, the signature ought to have been specifically proved by the complainant and since there was no proof of signature on the cheque, the complainant should fail. It was also found that there is no evidence to show that the cheque was in fact issued to the complainant by the accused. On the basis of those findings, the accused was acquitted.

6. Assailing the acquittal, the learned counsel appearing for the appellant pointed out that none of the reasons given by the court be can be sustained either on facts or in law. There is no justification for the court below

to hold that the signature ought to have been proved by independent evidence for the reason that the cheque was not returned by the bank for difference in signature, but for want of funds. Merely because the accused disputed the issuance of the cheque, it does not mean that signature is disputed. To that extent, the court below was erred in holding that the signature ought to have been proved. As regards the issuance of the cheque, the learned counsel for the appellant pointed out that there is the evidence of PW1 who had specifically stated in his complaint the place and the date on which the amount was borrowed by the accused. It is significant to notice, according to the learned counsel, that the case of the accused was that one Madhavan Nair with whom he had monetary transactions being bitter about the accused not paying him the interest and money due to him broke into the shop of the accused and took away several things including cheque leaves. If that be true, the learned counsel for the appellant pointed out that there

would have been some complaint to some authorities in that regard, but there is no evidence regarding the same. It can thus be seen that it is only a cock-and-bull story. On facts and on the basis of evidence, the learned counsel pointed out that the court ought to have found in favour of the complainant.

7. The learned counsel appearing for the respondent on the other hand pointed out that even in the reply notice, the accused had set up his defence pointing out that he had no monetary transaction with the complainant whatsoever and that the cheque used by the complainant is the one obtained by him from Madhavan Nair, who forcibly took away the cheque leaves after breaking open the shop. It was therefore pointed out that the complainant was put on guard regarding the defence that is going to be set up by the accused and still no efforts were taken by the complainant to prove the due execution of the cheque and its issuance to the complainant. It is necessary for the

complainant to prove the existence of a debt and also the issuance of the cheque to discharge the said debt. The evidence in this regard is found wanting and therefore, the court below was justified in dismissing the complaint.

8. The learned counsel appearing for the appellant may be fully justified in his submission that the finding of the court below that the complainant ought to have adduced evidence regarding the signature of the accused is unfounded. Of course, the accused had denied having issued a cheque to the complainant. But it is significant to notice that the bank where the cheque was presented did not return the cheque for difference in signature, but for want of funds in the account of the accused. If there was any difference in the signature, it was for the bank to specify the same and if the accused had a case that the signature was forged, the burden is on him to establish that fact and not on the complainant to prove that the signature was that of the accused. Here one shall notice that in the complaint,

it was specifically mentioned that the cheque was signed in his presence. Therefore the said ground cannot stand.

9. But the position may be different with regard to the execution and issuance of the cheque. There is some substance in the contention raised by the learned counsel for the appellant that the story of Madhavan Nair forcing himself into the shop run by the accused and taking away the cheque leaves, it will be open to doubt in the light of the fact that no complaint has been laid. But how far it can help the complainant is a different question. It is true that the complainant has stated in his complaint as far as in his evidence that the accused signed the cheque in his presence.

10. But one significant aspect cannot be omitted to be noticed. In cross examination, PW1 stated that the amount and the name in the cheque have been written by one Shanavas. As to what was the occasion for Shanavas to be present at the place and what was the occasion for him to

write the details in the cheque are not explained by the complainant. In the complaint, he has no case that at the time of issuance of the cheque, Shanavas was present. It is therefore quite evident that the handwriting with respect to the name of the payee as well as the amount is not in the handwriting of the accused.

11. One has to notice that the definite stand of the complainant is that the cheque was signed in his presence. If that be so, one fails to understand what prevented the accused from filling up the amount and the name of the payee. This remained unexplained. To that extent, the court below was justified in holding that Ext.P1 cheque is not proved.

12. This Court should remind itself that it is exercising its separate jurisdiction against the order of acquittal where the accused is armed with two presumptions. Unless it is shown that the findings are so very perverse or is based on totally irrelevant materials, the mere fact that a different

view may be possible, it will not justify this Court from reversing the finding of the court below.

This appeal is without any merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

ds

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P.A. to Judge