

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA, 1937

CRL.A.No. 1225 of 2007 ()

**AGAINST THE JUDGMENT IN ST 720/2006 OF JUDICIAL FIRST CLASS MAGISTRATE-
I,THAMARASSERY**

APPELLANT(S)/COMPLAINANT:

**A.R.C.BABU, S/O.AUGUSTINE,
SUCCESS INDUSTRIES, KODUVALLY.**

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENT(S)/ACCUSED & STATE:

- 1. K.M.ABDUL RAHIMAN, S/O.AHAMMED,
ELETTIL AMSOM, VATTOLI DESOM.**
- 2. STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

**R1 BY ADV. SRI.K.A.SALIL NARAYANAN
BY PUBLIC PROSECUTOR SMT. LILLY LESLIE**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 1225 of 2007

Dated this the 18th day of December, 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 before the court below has come up in appeal after obtaining leave of this Court.

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

According to the complainant, the accused borrowed a sum of ₹30,000/- in the month of October, 2005 promising to return the same within two months thereof. The accused did not return the same. When he demanded the money, Ext.P1 cheque was issued. When the cheque was presented for encashment, it was returned with the endorsement 'funds insufficient'. A statutory notice was issued which invoked no reply. 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 PW1 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. The accused examined himself as DW1 and Exts. D1 to D3 were marked.

5. The court below, on an evaluation of the evidence, found that the claim put forward by the accused is more probable and acceptable and the burden of proof that is cast upon the complainant has not been discharged. Holding so, the accused was acquitted.

6. Assailing the acquittal, the learned counsel appearing for the appellant pointed out that if the cheque happened to accidentally come into the possession of the complainant, he would not have known the address of the accused to send a notice and further communications regarding the same. It must be remembered, according to the learned counsel, that the accused characterizes the complainant as a total stranger which may not be true in the light of the documents produced in the case. The court below has therefore committed a fundamental error and that has resulted in injustice.

7. The learned counsel appearing for the respondent on the other hand attempted to justify the finding of the court below. He would say that the burden is on the complainant to establish two facts; (1) the existence of a debt and (2) the issuance of a cheque to discharge the debt. The accused had pointed out that he had no relationship with the complainant and he had not given any cheque to

the complainant. The complainant did not examine anybody else to establish the transaction.

8. One cannot omit to note that the initial burden of proof is that there is a debt and the cheque was issued for discharge of debt is squarely on the complainant and the accused had no role to play at that point of time. In this case, the accused had also adduced evidence. The attempt of the accused was to show that he had lost the cheque in question along with other documents and he had intimated the bank about the said aspect. However, it must be noticed that a stop memo was given after the cheque was issued. It seems that before the court below, aid of Section 118 was taken by the appellant. That can have no application to the facts of the case, especially, in the light of the fact that the accused had specifically stated that he has not executed any cheque in favour of the complainant.

9. Due execution therefore had to be proved by the complainant himself. Except for the interested testimony,

there is no evidence to show that the cheque was issued by the accused for discharge of any debt due from him to the complainant.

10. After having through the evidence of the case and after having gone through the records, it is felt that the view taken by the lower court is a possible view. If that be so, the mere fact that a different view may be possible is not a ground for this Court to interfere in appeal.

This appeal is without merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

ds

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P.A. to Judge