

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 23RD DAY OF NOVEMBER 2015/2ND AGRAHAYANA, 1937

CRL.A.No.1694 of 2006

AGAINST THE JUDGMENT IN ST 385/2005 of JUDICIAL FIRST CLASS
MAGISTRATE COURT - I, PEERMADE DATED 02.05.2006

APPELLANT/COMPLAINANT:

T.O.THOMAS,
S/O.JOSEPH, THAIPPARAMBIL HOUSE, PEERMADE KARA,
PEERMADE VILLAGE.

BY ADV. SMT.A.K.PREETA

RESPONDENTS/ACCUSED & STATE:

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1. P.K.SASIDHARAN, S/O.KRISHNAN,
PUTHENPURACKAL HOUSE, KOCHUKARUNTHARUVI KARA,
ELAPPARA VILLAGE, PEERMADE.
 2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY SRI.S.SREEKUMAR (SENIOR ADVOCATE)
ADVS. SRI.P.PRIJITH
SRI.ANEESH JAMES
SRI.P.MARTIN JOSE
R2 BY SMT.S.HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
23-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.1694 OF 2006

Dated this the 23rd day of November, 2015.

J U D G M E N T

Aggrieved by the acquittal of the accused under Section 255(1) of the Code of Criminal Procedure for the offence under Section 138 of Negotiable Instruments Act by the Judicial First Class Magistrate, Peermade, complainant before the court below has come up in appeal after obtaining leave of this Court.

2. The short case put forward by the complainant is that having borrowed a sum of Rs.2,50,000/- on 26.02.2005, accused issued Ext.P1 cheque. The cheque, on presentation, bounced for want of funds. Statutory notice issued invoked a reply containing false allegations. Since the amount remained unpaid, complaint was laid.

3. The court before which complaint was laid took cognizance of the offence and after following necessary procedures, summons was issued to the accused. When the accused entered appearance, copies of relevant documents were

furnished to him and particulars of offence were read out to him. He pleaded not guilty and claimed to be tried.

4. The complainant examined himself as PW1 and had Exts.P1 to P5 marked.

5. After the close of the complainant's evidence, accused examined himself as DW1. He also examined DW2. He had Exts.D1 to D9 marked.

6. The court below, on appreciation of evidence, found the defence case to be more probable and came to the conclusion that the case put forward by the complainant regarding payment on 26.02.2005 cannot be believed. The transaction, going by the records, was as claimed by the accused and holding so, he was acquitted.

7. Learned counsel appearing for the appellant-complainant, assailing the acquittal, contended that issuance of Ext.P1 cheque is an admitted fact and the signature is also not disputed. Under those circumstances, presumptions available under Sections 118 and 139 of N.I Act are automatically attracted and the burden is on the accused to show that it is otherwise. This cardinal

principle has been lost sight of by the court below and that has resulted in an unmerited acquittal.

8. Learned counsel appearing for the respondent-accused, on the other hand, contended that the defence has set up a transaction as early as in the reply notice issued to the notice of dishonour issued by the complainant stating the circumstances under which Ext.P1 cheque was issued and also how the monetary transaction between the accused and the complainant arose. According to the learned counsel, Ext.D2 paper slip was presumed to be an admitted document by the complainant and that fortifies the case of the accused. It was further contended that even going by the evidence furnished by the complainant, one Surendran was a witness to the transaction, in which case, the best evidence would have been to examine him. For reasons best known to the complainant, he desisted from doing so. Learned counsel also referred to the number of the cheque alleged to have been given by the accused and drawing attention of this Court to Ext.D6 cheque book, it is contended that it is virtually inconceivable that Ext.P1 cheque would have been

issued as alleged in the complaint and as claimed by the complainant.

9. Learned counsel appearing for the accused also pointed out that existence of debt and issuance of cheque for discharge of that debt are two necessary ingredients to be proved by the complainant for the presumptions to apply. The court below found that these essential ingredients have not been established by the complainant. Even assuming that the presumptions apply, learned counsel pointed out that accused has been successful in effectively reverting the presumptions and showing that the claim made by the complainant is false. Learned counsel reminded this Court that the burden of proof on the accused is much lighter than that on the complainant and if the accused is able to cast a doubt in the mind of court regarding the transaction, that would suffice.

10. Learned counsel appearing for the accused cautioned this Court that this Court is exercising its appellate jurisdiction against an order of acquittal where the accused is available two presumptions. The initial presumption is that unless proved

otherwise, a person is held to be not guilty and the second is the court has found his evidence to be convincing. It needs much higher degrees of persuasion and it should be shown that the findings are so perverse that no reasonable conclusion would have arrived at or that conclusions are based on irrelevant materials so as to justify an interference by this Court. Learned counsel then went on to contend that even assuming this Court finds it possible to take a view on the materials, that may not justify this Court in reversing an acquittal passed by the trial court.

11. It has to be said that though the appellate powers are very wide in nature, the court has restrictions in case of appeal from acquittal. As rightly pointed out by the learned counsel for the respondent, accused in such cases is available with two presumptions. It is also true that while the burden on the complainant is that it is one of beyond reasonable doubt, the burden of proof of accused is one of preponderance of probabilities or even suffice accused is able to create a doubt in the mind of court. These principles are well settled.

12. Bearing the above principles in mind, an attempt shall now be made to find out whether the order of the court below calls for interference.

13. On a cheque being dishonoured, notice was sent to the accused which was received by him. Ext.D1 is the reply. Therein the accused had detailed the circumstances under which the cheque came to be issued and pointed out that by virtue of the power of attorney executed in favour of the complainant, amounts due under the contract work which were undertaken by the accused were collected by him and thereby the debt was discharged. No further amount was due. In spite of this specific statement in the reply notice, there was no allegation in the complaint that what is stated in the reply notice is not true and the amounts collected as per the power of attorney executed by the accused related to a different transaction. There is neither pleadings nor evidence in that regard. The attempt of the complainant was to show that a sum of Rs.2,50,000/- was borrowed on 26.02.2005 and for the discharge of that debt, cheque was issued. Here, one may notice that PW1 has stated in

his evidence that one Surendran was a witness to the transaction. In the light of the reply notice by which the complainant was put on guard regarding defence, it was only proper for him to examine Surendran to establish his case. Here again, for reasons best known to the complainant, he desisted from doing so.

14. Yet another significant aspect is that the cheque leaf Ext.P1 is issued from Ext.D6 cheque book. The cheque number of Ext.P1 is 664790. A perusal of Ext.D6 shows that subsequently several cheques have been issued in the year 2002. It is rather difficult to believe that accused would have deliberately retained a cheque leaf to be given to the complainant in 2005 so as to cheat him. This aspect also probabilises the version given by the accused that the cheque was given when the first loan was taken for the contract work from the complainant and that amount has been discharged by permitting the complainant to collect the amount due under the work as per the power of attorney granted by the accused.

15. It was the above factors which had weighed with the

court below in coming to the conclusion that the accused, even assuming that the presumptions apply, had successfully reverted the same. This Court goes a step further. Even the initial ingredients necessary to attract the presumptions themselves are found wanting. Merely because signature on the cheque and its issuance is admitted, that does not mean that cheque was issued as claimed by the complainant. Execution of cheque is different from issuance of cheque. Whatever that be, accused has been able to show that the cheque in question i.e. Ext.P1 was not issued under the circumstances mentioned by the complainant. If that be so, court below was perfectly justified in coming to the conclusion that no credence can be given to the complainant's case. Acquittal is rightly done.

Result is that, this appeal is without merits and it is liable to be dismissed. I do so.

Sd/-

**P.BHAVADASAN
JUDGE**

smp