

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 15TH DAY OF OCTOBER 2015/23RD ASWINA, 1937

CRL.A.No.1720 of 2006

AGAINST THE JUDGMENT IN ST 950/2003 of JUDICIAL MAGISTRATE OF
FIRST CLASS-I, KOZHIKODE DATED 07-12-2005

APPELLANT/COMPLAINANT:

P.T. JOSE, S/O.THOMAS,
PANAMATTOM HOUSE, CHEVAYUR AMSOM AND DESOM,
KOZHIKODE.

BY ADVS.SRI.JACOB ABRAHAM
SMT.KOCHUMOL KODUVATH

RESPONDENTS/ACCUSED:

-
1. NADUCHAL PARAMBIL SAROJINI AMMA,
W/O. N.P. BALAN NAIR (MANAGING PARTNER,
MALABAR TRADES AND EXPORTERS), RESIDING IN
CHEERIYA CHOYIOTTIL HOUSE, MELOOR, QUILANDY,
KOZHIKODE.
 2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY ADVS. SRI.VINOD SINGH CHERIYAN
SRI.R.SUDHISH

R2 BY SRI.C.K. JAYAKUMAR, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
15-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.1720 OF 2006

Dated this the 15th day of October, 2015.

J U D G M E N T

Aggrieved by the order of acquittal of the accused of the offence under Section 138 of the Negotiable Instruments Act, the complainant before the court below has come up in appeal.

2. The short case put forward by the complainant is that the accused was familiar to him and due to the acquaintance with her with regard to a chitty transaction with Gokulam Chits and Finance Company Ltd, of which he was an employee, he gave Rs.4 lakhs as loan to the accused on 24.11.2002 who agreed to repay the same within six months. His further case is that as security, a bond was executed by the accused. The money was not repaid and when demand was made by the complainant, the accused is alleged to have issued Ext.P1 cheque. That cheque, on presentation, bounced for want of funds. Notice issued to the accused invoked a reply which, according to the complainant, contained false allegations. Since the amount remained unpaid,

complaint was laid.

3. The court before which complaint was filed took cognizance of the offence and after following the procedures, issued summons to the accused. On appearance of the accused, particulars of offence were read out to her, to which, she pleaded not guilty.

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

5. After the close of the complainant's evidence, accused was questioned under Section 313 Cr.P.C wherein she denied all the incriminating circumstances put to her and maintained that she is innocent. Her case was that she used to have chitty transactions with Gokulam Chits and Finance Company Ltd and whenever amounts were bid by the subscribers, Company used to insist for signed blank cheques and blank papers and the accused used to entrust them to the complainant who was the Business Manager of the Balussery branch of Gokulam Chits and Finance Company Ltd. It is her case that one of those cheques had been misused by the complainant. In the defence, she was examined

as DW1.

6. The court, on analysis of the evidence, came to the conclusion that even though the documents from Gokulam Chits and Finance Company Ltd. was summoned, due to the influence exerted by the complainant, they were not produced and also that even going by the evidence furnished by PW1, the complainant, one Balan Master had knowledge about the transaction and his non examination is also fatal. Further ground taken by the court below was that the averment in the complaint was that it was a personal loan to the accused whereas cheque is issued for an on behalf of the firm. Therefore, court below drew an inference that cheque was not issued from the account of the debtor. For the above reasons, court below found that the offence had not been established and accordingly acquitted the accused.

7. Assailing the order of acquittal, learned counsel appearing for the appellant contended that the court below has misdirected both on facts and in law. Once it is admitted that the cheque is issued by the accused and it contains the signature of

the accused, presumption under Section 139 of Negotiable Instruments Act is automatically attracted and the burden is on the accused to show otherwise.

8. For the above proposition, learned counsel for the appellant relied on the decision in **T. Vasanthakumar** vs. **Vijayakumari** (2015 (2) KLJ 850). Learned counsel also pointed out that even assuming that the cheque was issued for and on behalf of the firm, though the loan was a personal loan, nothing prevents the firm from taking over the obligation to discharge the liability incurred by the accused personally and viewed from that angle also, the finding of the court below cannot be sustained. For the said proposition, learned counsel relied on the decision in **Alexander** vs. **Joseph Chacko** (1993 KHC 336). Learned counsel took strong objection to the observation made by the lower court that it was due to his manipulation that the records of the company were not produced which is contrary to facts. As the affidavits filed by the respective officers speak about this fact, the complainant had no role to play in non production of the documents of the company. At any rate, according to the

learned counsel, court below ought not to have ignored the presumption under Section 139 of the Negotiable Instruments Act and should have found in favour of the complainant.

9. Learned counsel appearing for the respondent-accused, on the other hand, contended that the court below has analysed the evidence in considerable detail and has come to the conclusion that the offence has not been established. There is no case for the complainant that the liability incurred by the accused was agreed to be discharged by the firm and therefore he had accepted the cheque issued from the account of the firm. There is no case, according to the learned counsel, that the amount was advanced to the firm. In fact, his case is that it was a personal loan.

10. It is significant to notice, according to the learned counsel for the respondent-accused, that the accused had a definite case that the complainant did not have financial means to pay Rs.4 lakhs. This is proved by the fact that when examined as PW1, complainant admitted that he did not have money and that he borrowed it from his brother Mohanan. The said person

has not been examined. Further, in spite of best efforts made by the accused, Gokulam Chits and Finance Company Ltd. refrained from producing documents and that has caused prejudice to the defence. It was the above facts which weighed with the court below in holding that the offence has not been established.

11. Learned counsel for the respondent-accused reminded this Court that this Court is exercising its appellate jurisdiction against an order of acquittal and interference is very rare unless and until it is shown that the finding of the court below is perverse or based on totally irrelevant materials.

12. Learned counsel for the respondent is justified in his submission that the scope of interference in an appeal against an order of acquittal is rather restricted and limited though the court has got wide powers as an appellate court. Unless it is shown that the findings of the court below are wholly unsustainable or are so very perverse or there are no reasonable materials to reach such a conclusion, interference against an order of acquittal is not justified. Even assuming that a different view is possible, the court does not interfere with the order of

acquittal as long as the order passed by the lower court is not perverse.

13. May be the finding of the court below that the complainant had a major role to play in seeing that the documents summoned are not produced by the Company is not justified. The affidavits filed by the respective Managers show that the chitty transaction of the accused was originally with the Balussery branch. When a branch is opened at Quilandy, documents relating to her chitty transactions were transferred to the Quilandy branch and that is the reason as to why the Manager of Balussery branch could not produce the documents. When the Manager of Quilandy branch was asked to produce documents, he pointed out that the documents have been forwarded to Madras for initiating arbitration proceedings.

14. Learned counsel for the appellant brought to the notice of this Court that the accused has filed a petition to summon the documents from the Madras office and in which no final orders have been passed. Whatever that be, the accused had a definite case that the complainant did not have means to pay the

amount. The complainant admits this fact in his cross examination and says that he borrowed money from his brother Mohanan. As rightly noticed by the lower court, if that be so, it is inconceivable that no interest would have been insisted by the complainant for the amount given as loan to the accused in this case. It is also pointed out that one Balan Master who turned out to be the husband of the accused had dictated the wordings of a bond to the accused and she wrote in her own writing at the time of borrowing the amount. Of course, complainant had come forward with an explanation that when the cheque was issued, he believed that it will be honoured and therefore the bond was returned.

15. Coming to the decision relied on by the learned counsel for the appellant i.e. in **T. Vasanthakumar** vs. **Vijayakumari** (2015 (2) KLJ 850), it is seen that it was a case where issuance of cheque and signature on the cheque is admitted. It was in that context the court had occasion to observe that presumption under Section 139 of the Negotiable Instruments Act applies.

16. In the case on hand, it may be remembered that the

accused had disputed the issuance of cheque to the complainant as claimed in the complaint. But her case was that cheque was issued to Gokulam Chits and Finance Company Ltd with which she had chitty transactions. Therefore, the principles laid down in the above decision can have no application to the facts of the case.

17. As regards the decision in **Alexander** vs. **Joseph Chacko** (1993 KHC 336), it is no doubt true that this Court had occasion to hold that a third person could take on the liability of a debtor and agree to repay the amount which will then be binding on him. Based on the principles laid down in the said decision, it is contended that even if the cheque had been issued by the firm, accused cannot be escaped from the liability. As rightly pointed out by the learned counsel for the respondent, the complainant had no case that the firm had undertaken to discharge the debt and therefore Ext.P1 cheque was issued for and on behalf of the firm. The evidence of PW1 is that it is a personal loan to the accused.

18. Even though the main ground relied on by the court

below cannot be sustained, there are other suspicious circumstances which create a doubt regarding the transaction claimed by the complainant. Even assuming that the presumption under Section 139 of Negotiable Instruments Act applies, the accused had been able to discharge her burden which needs to be only preponderance of probabilities.

19. It may be remembered that the accused had a definite case that she subscribed to the chitty run by Gokulam Chits and Finance Company Ltd and it is also a fact that the complainant was a Business Manager attached to Balussery branch. In the reply notice, it is stated that when the chitty amount was bid and received, the complainant used to collect cheques and signed blank papers from the subscribers. It is the case of the accused that one of such cheques have been misused by the complainant.

20. It is in this context one will have to view the contention of the accused that the complainant had no means to pay the amount. This aspect has already been dealt with.

21. In the light of the above facts, it becomes difficult to hold that the final conclusion of the court below is unjustified.

May be the main ground relied on by the court below will not be justified. But that does not mean that the complainant can succeed. On evaluation of the evidence in the case, it is clear that the complainant has not been able to establish the case against the accused beyond reasonable doubt and the finding in that respect entered into by the court below is confirmed.

Result is that, this appeal is without merits and it is accordingly dismissed.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

// True Copy //

P.A to Judge.