

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 9TH DAY OF SEPTEMBER 2015/18TH BHADRA, 1937

CRL.A.No. 1787 of 2006 ()

**AGAINST THE ORDER IN Cri.L.P. 331/2006 of HIGH COURT OF KERALA
DATED 12-07-2006**

**AGAINST THE JUDGMENT IN ST 65/2006 of JUDICIAL FIRST CLASS MAGISTRATE-II,
VARKALA DATED 28-02-2006**

APPELLANT(S)/COMPLAINANT:

**SUNIL VASAVAN, S/O. VASAVAN,
K.V.COTTAGE, THODUWAY ROAD, CHERUKUNNAM
VARKALA.**

**BY ADVS.SRI.M.BALAGOVINDAN
SRI.M.R.SASITH PANICKER**

RESPONDENT(S)/ACCUSED AND STATE:

**1. ANIRUDHAN @ ANIL,
SREE NARAYANA VILASOM, THODUWAY ROAD, CHERUKUNNUM
VARKALA.**

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

**R1 BY ADV. SRI.R.ANILKUMAR,
BY PUBLIC PROSECUTOR SMT. S. HYMA**

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

ds

P.BHAVADASAN, J.

Crl.A. No. 1787 of 2006

Dated this the 09th day of September, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 138 of the Negotiable Instruments Act. Having found him not guilty, he was acquitted under Section 255(1) of the Criminal Procedure Code. The complainant, after obtaining special leave, has preferred this appeal.

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 ₹25,000/- from him and in order to discharge the debt, issued Ext.P1 cheque drawn on S.B.T. Vakkom branch dated 01.01.2004. When the cheque was sent for collection through the complainant's bank, namely, the Federal Bank, Varkala, the same was returned on the ground of insufficient funds in the account of the accused. The complainant received the returned cheque along with dishonour memo

on 13.07.2004. Ext.P3 notice was issued on 3.08.2004. Since he did not respond to the notice and also did not pay the amount, the complainant had no option but to lay the complaint.

3. Initially, the complaint was filed before the Judicial First Class Magistrate Court-I, Varkala which took cognizance of the offence. The accused had entered appearance. Later, particulars of offence were read out, to which he pleaded not guilty and claimed to be tried. Then the case was transferred to Judicial First Class Magistrate Court - II, Varkala for disposal. The case was renumbered as S.T.65/2006. Since the plea of not guilty had already been recorded, the latter court went on with the trial. The complainant was examined as PW1 and Exts. P1 to P6 were marked.

4. After the close of complainant's evidence, the accused was questioned under Section 313 of the Cr.P.C.. He denied all the incriminating circumstances brought out

against him and maintained that he is innocent. He came forward with an explanation that about 12½ years ago, he had borrowed a sum of ₹10,000/- from the father of complainant Vasavan. At the time of borrowal, he had given a cheque to the father of the complainant and later, after the death of the father of the complainant, the matter was settled between the complainant and the accused. It was agreed that the complainant will come to his shop on 01.12.2003 and obtain ₹10,000/- and return the cheque. Thus, on 02.12.2003 morning the complainant came to his shop and the complainant was given a cheque dated 02.12.2003 drawn on S.B.I. Varkala Branch for ₹5,000/- and another cash cheque dated 3.12.2003. When the earlier cheque was demanded back, it was not returned. The complainant is alleged to have told him that cheque was 13 years old. Since they were relatives, he did not bother to pursue the matter further. In one of the cheques issued to the complainant, on the reverse side, he has endorsed that

cheque is being issued in lieu of the earlier cheque given to Vasavan. He has also put his signature below it. These two cheques were encashed from his account. He therefore denied any liability.

5. In his defence, he examined DWs 1 and 2 and had Exts. D1 to D3 marked.

6. The court below on an appreciation of the evidence came to the conclusion that since the complainant had admitted that he had encashed two cheques of ₹5,000/- each, the case put forward by the accused is more probable and therefore, dismissed the complaint and the same is assailed.

7. The learned counsel appearing for the appellant contended that the reasoning of the court below is not logical and rationale and betrays common sense. The case put forward by the accused is that cheque was issued 12½ years ago to the father of the complainant and that has been misused. It is significant to notice, according to the

learned counsel, that the so called endorsement on which considerable reliance was placed by the court below is not put to the complainant and his explanation sought for, so it will not bind him. In fact, there is no evidence at all to show that who has actually made that endorsement. It is purely based on that endorsement the complainant had been non suited.

8. The learned counsel went on to point out that it was for the accused to prove that the endorsement alleged to have been made as Ext.D1(b) is by the complainant or with the acknowledgment of the complainant. There is no suggestion in this regard to the complainant when he was examined as PW1. More significant is the fact, according to the learned counsel, that there was no reply sent by the accused to the notice issued by the complainant on the dishonour of cheque. If as a matter of fact, the amount was only ₹10,000/- and the debt stood discharged by the two cheques now produced as Exts.D1(a) and D1(b), surely and

certainly, there would have been a reply notice by the accused. The absence of reply goes a long way to show the culpability of the accused and that the story now put forward is a cooked up one. Accordingly, it is contended that there is no proper appreciation of the evidence in the case and that has resulted in miscarriage of justice.

9. After having heard the learned counsel for the appellant and after having perused the records, there seems to be considerable force in the above submission. The case put forward is that Ext.P1, the cheque is one given to the father of the complainant for the amount borrowed from him. Admittedly, that amount was not repaid to the father of the complainant. The further case is that after the death of the complainant's father, when there were talk of compromise, two cheques were issued which are produced as Exts. D1(a) and D1(b). Each was for ₹ 5,000/-. It is true that the complainant had admitted encashment of two cheques. But Exts.D1(a) was a cash cheque. The

complainant has a case that those two cheques were for different transactions and has nothing to do with the debt for the discharge of which Ext.P1 was given. The endorsement on the reverse side of the cheque has been clandestinely made and the complainant had no knowledge of the same.

10. Further, the endorsement found on Ext.D1(b) is not proved in accordance with law. It is not discernible from the evidence as to who has made that endorsement. At any rate, it is not suggested to the complainant that it was he who was the author. Normally, if as a matter of fact, the cheque was issued in discharge of the debt, then endorsement should have been by the complainant himself. Somebody else cannot make an endorsement for and on behalf of the complainant. There is not even a suggestion to the complainant when he was examined as PW1 that the endorsement found on the reverse side of Ext.D1(b) is by him or with his knowledge.

11. It is also significant to notice that the case of the accused is that Ext.P1 cheque was filled up later by the complainant. If that be so, one fails to understand how the accused could say that Exts.D1(a) and D1(b) were in discharge of a debt covered by Ext.P1 cheque. Even according to the accused, the cheque was given to the father of the complainant.

12. These vital aspects have been omitted to be noticed by the court below and more significant is the fact that even though not replying to notice may not by itself be a ground to fasten liability, it has got a bearing on the issue involved in the case. If as a matter of fact, what the accused says is true, normally and certainly, he would have sent a reply stating all the facts. There is no such act on the part of the accused in this regard.

13. For the above reasons, this Court is unable to accept the finding of the court below that the complainant has not discharged his burden in showing that the cheque

was duly executed by the accused. At any rate, the finding of the court below, in all probabilities, cannot be accepted.

14. This appeal is allowed. The acquittal is set aside and the matter is remanded to the trial court for fresh consideration in accordance with law and in the light of the what has been stated above.

Parties will be allowed to adduce further evidence, if they so choose. Parties will appear before the court on **05.10.2015**. The court below may make every endeavour to dispose of the matter as expeditiously as possible, at any rate, within a period of three months from the date of appearance of the parties.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge