IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

WEDNESDAY, THE 11TH DAY OF FEBRUARY 2015/22ND MAGHA, 1936

CRL.A.No. 994 of 2008 ( )

AGAINST THE JUDGMENT IN CC 165/2005 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-I,KOCHI DATED 19.3.2008

AGAINST THE ORDER/JUDGMENT IN Crl.L.P. 349/2008 OF HIGH COURT OF KERALA DATED 26.5.2008

APPELLANT/COMPLAINANT::

K.A.SHAHEER, S/O. K.S. ABDULLA
C.C.2/798, KONCHERY, FORTKOCHI. (REPRESENTED BY
POWER OF ATTORNEY HOLDER K.A.KABEER).

BY ADV. SRI.C.P.PEETHAMBARAN

RESPONDENTS/ACCUSED AND STATE::
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1. V.A.SAINABA, W/O, NAVAS
HOUSE NO.IX/188, KALATHIL HOUSE, NEAR MASJID
KODAMTHURUTH, ERAMALLOOR.

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

R2 BY PUBLIC PROSECUTOR SRI. GITHESH R.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

shg/

K. ABRAHAM MATHEW, J.

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Crl.A.No.994 of 2008

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Dated this the 11th day of February, 2015

J U D G M E N T

In this appeal the complainant in C.C.No.165/2005 on the file of the Judicial Magistrate of First Class-I, Kochi challenges the order by which the learned Magistrate acquitted the accused/first respondent of the offence under Section 138 N.I. Act.

2. The allegation in the complaint was that to discharge a debt the first respondent had owed the appellant she issued Ext.P2 cheque and it was returned dishonoured for want of sufficient fund in her account and in spite of demand by notice she failed to pay the amount. The complaint was filed through the appellant's power of attorney who gave evidence in support of the appellant's case. The learned Magistrate has observed that the power of attorney, who was examined as PW1, is “only a proxy” of the appellant and he had no direct knowledge about the

transactions alleged in the complaint. Moreover, he took the view that the facts which have come out in the evidence necessarily indicate that the allegations in the complaint are false. Accordingly, he acquitted the first respondent.

3. Heard the learned counsel for the appellant.

4. The appellant was a fish vendor. His brother is the power of attorney holder, who was examined as PW1. He is an employee of the B.S.N.L. It came out in his evidence that it was the appellant who gave instructions to the Advocate to issue notice to the first respondent and to file the complaint. PW1 does not know anything about the averments in the complaint; he has not even read it. He does not know the address at which Ext.P4 notice was sent to the first respondent. Nor does he know anything about the original transaction. He said that the appellant told him that Ext.P2 cheque was issued in June 2004, which means that his knowledge about it is only hearsay. Ext.P2 cheque bears the date 10.09.2004. The claim of PW1 that the cheque was with the appellant in June 2004 speaks

volumes. If the cheque was issued only on 10.09.2004, how PW1 could have found it with the appellant in June 2004. PW1 stated that when he saw Ext.P2 cheque, it had only the name and signature of the first respondent and the amount written in it. It follows that the payee's name and the date were not in the cheque. Moreover, in Ext.P2 cheque the name of the first respondent is not written. The cheque is drawn on a Co-operative Bank. But PW1 deposed that it was drawn on Indian Bank, which was only a collecting bank. It is true that in correction he said that it was drawn on Co-operative Bank.

5. In the cross-examination PW1 stated that the entries and the signature in Ext.P2 cheque are in the same ink, which is false. The signature alone is in black ink. When he was confronted with this fact, there was no explanation on his part. His response to the suggestion that the entries in the cheque are not in the handwriting of the first respondent was that only the appellant could give the details. In fact, he pleaded ignorance.

6. The defence version is that the first respondent's husband was a fish vendor and at his request she opened an account with the Co-operative Bank; he obtained a few signed blank cheques from her. When she received lawyer notice, she gave it to him. He left the place and thereafter his whereabouts are not known. The first respondent, who was examined as DW1, has deposed to these facts. I find no reason to reject her evidence as false. The facts brought out in the cross-examination of PW1 definitely indicate that the version of the first respondent that at the time of its issuance Ext.P2 cheque was a signed blank cheque is true.

7. In the complaint the nature or other particulars of the transaction are not revealed, which also is a suspicious circumstance as observed by the Supreme Court in **Vijay v. Laxman & Anr. [(2013) 3 SCC 86]**.

8. I have no doubt that the view taken by the learned Magistrate that PW1, the power of attorney holder of the appellant, has no idea about the transaction and he is not competent to depose to the facts of the case. The finding

that the facts brought out in the complainant's evidence are not sufficient to prove his case also is reasonable. There is no merit in the appeal.

In the result, this appeal is dismissed.

Sd/-

K. ABRAHAM MATHEW
JUDGE

//True copy//

P.A. TO JUDGE

shg/