

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 25TH DAY OF NOVEMBER 2015/4TH AGRAHAYANA,
1937

CRL.A.No. 1904 of 2006 ()

AGAINST THE JUDGMENT IN CC 471 /2005 of J.M.F.C.I, KOTTAYAM.

APPELLANT(S)/COMPLAINANT:

ANOJ.S.
SWAMIYAR MADOM,
THIRUNAKKARA P.O., KOTTAYAM.

BY ADV. SMT.SHERLY THOMAS

RESPONDENT(S)/ACCUSED:

1. ROSAMMA XAVIER.
KUNNUMPURAM HOUSE, VILLOONNY P.O.,
ARPOOKARA.
2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY ADV. SRI.JIJO JOSEPH
R2 BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
25-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 1904 of 2006

Dated this the 25th day of November, 2015.

JUDGMENT

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

2. According to the complainant, the accused borrowed a sum of Rs.87,000/- from him promising to repay within a month and on failing to do so, the accused issued Ext.P1 cheque. The cheque on presentation bounced for want of funds. Statutory notice was issued to the accused, which was returned unclaimed. Since the amount remained unpaid, 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.

On appearance of the accused before the court below, after furnishing copies of the documents, particulars of the offence were read out to him to which he pleaded not guilty and claimed to be tried. The evidence consists of the testimony of P.W.1 and documents marked as Exts.P1 to P6. After the close of the complainant's evidence, the accused was questioned under Section 313 Cr.P.C. wherein he denied all the incriminating circumstances brought out in evidence against her though she admitted her signature. It was her case that the cheque was given to her son-in-law for business purpose. The accused examined herself as D.W.1 and had Ext.D1 marked.

4. On an appreciation of the evidence in the case, the court below came to the conclusion that there is no evidence to show that the debt was actually incurred by the accused, for discharge of which the cheque was issued, thereby holding that necessary ingredients to attract Section 138 of N.I. Act has not been established. Consequently the

acquittal followed.

5. Learned counsel appearing for the appellant contended that the court below has erred both on facts and in law in acquitting the accused. It is very vehemently contended that as the signature is admitted, it goes a long way in favour of the complainant. Further, statutory notice was purposely returned unclaimed and it shows the complicity of the accused. The court below was not justified in holding that there is no proof of payment and the complaint should fail. According to the learned counsel, the presumption available under Sections 118 and 139 of the N.I. Act are not properly applied. For the above reasons, learned counsel pointed out that the order of acquittal is unsustainable.

6. Learned counsel for the respondent on the other hand contended that the primary burden to establish the ingredients necessary to attract the offence under Section 138 of N.I. Act is always rests on the complainant. There is no presumption that merely because the cheque was found in the

possession of the complainant, it was for discharge of a debt. Existence of a debt and that the cheque was issued for discharge of that debt are factors to be proved by the complainant. There is no such proof in this case. It is further contended that even assuming that the presumption applies, that has been duly rebutted by the accused by adducing evidence. Learned counsel pointed out that onus of proof on the accused is very light unlike in the case of complainant. Once he or she is able to create a dent in the evidence of the complainant, that would suffice. Accordingly, it is contended that it could not be said that the findings of the court below are perverse or unjustifiable warranting interference and that there is no merit in this appeal.

7. This Court at once may remind itself that it is exercising an appellate power from an order of acquittal. The accused in such case is armed with two presumptions, (i) that he is presumed to be innocent unless proved otherwise, and (ii) a court of law has found him not guilty. Under these

circumstances, the burden on the complainant is very heavy to show that the court below has grievously erred in appreciating the evidence or the finding of the court below is so perverse that it cannot stand. It may also be shown that the court below has taken totally irrelevant factors into consideration for determination of the issue. The mere fact that it may be possible to take a different view will not enable this Court to interfere with the order of acquittal.

8. Bearing the above principles in mind, an attempt shall be made to ascertain the facts of the case. In the complaint as well as in the affidavit in lieu of chief examination, all that is stated is that a sum of Rs.87,000/- was received by the accused and for the discharge of which Ext.P1 cheque was issued. Both in the complaint as well as in the affidavit in lieu of chief examination, the date of payment is conspicuously absent. The complainant is claimed to be a money lender and he had all the documents to run that business. If that be so, it is very easy for him to prove that a

sum of Rs.87,000/- was advanced to the accused. It has also come out in evidence that he had instituted proceedings both against the son-in-law and daughter of the petitioner on the very same allegations.

9. Presumption under Section 139 of the N.I.Act can apply only if the complainant proves the two essential ingredients to attract Section 138 of the Act. It has necessarily to be proved by the complainant that there is a debt and in discharge of the said debt, the cheque was issued.

10. The accused categorically denied that she had borrowed any amount from the complainant and that her son in law used to obtain signed blank cheques from her for his business purpose. She would say that one of those cheques might have been handed over to the complainant by her son in law which resulted in the complaint.

11. As already mentioned, details regarding payment are conspicuously absent. As regards the handing over of the cheque, there are different versions. One version

is that it is handed over at the Collectorate and another version is that it is handed over in the canteen.

12. The complainant says that he is a licensed money lender. If he had extended loan, he would have records to prove the same. It is significant to notice that no split up of the principal and interest is shown in the complaint. It is rather difficult to believe that a money lender would have simply lend money without interest. Further, the claim made by the accused that she had no transaction with the complainant remains unimpeached. Of course, she has stated that her son in law used to obtain signed blank cheques from her for his business purposes. The accused could have produced those cheques and bank account thus could have a better picture of the issue. Be that as it may, that would not reduce the burden cast on the complainant. As already stated, neither in the complaint nor in the affidavit in lieu of chief examination, there is any mention regarding the details of the payment and there is inconsistency in the evidence of

P.W.1 and complaint regarding the place at which the cheque was handed over.

13. The court below was therefore justified, in the light of the above materials, in coming to the conclusion that there is want of proof regarding the ingredients necessary to attract Section 138 of the N.I. Act. It could not be said that the finding is perverse. If that be so, no interference is called for with the order of the court below.

This appeal is without merits and it is accordingly dismissed.

P. BHAVADASAN,
JUDGE

sb.