

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

SATURDAY, THE 21ST DAY OF NOVEMBER 2015/30TH KARTHIKA, 1937

CRL.A.No. 1908 of 2006 ()

**AGAINST THE JUDGMENT IN CC 1289/2002 OF JUDICIAL FIRST CLASS MAGISTRATE-
II, KOLLAM DATED 23-02-2006**

APPELLANT(S)/COMPLAINANT:

**BABU, SON OF UMMAN,
PUNNAVILA THEKKATHIL VEEDU, CHERIKKONAM
KANNANALLOOR P.O., KOLLAM.**

BY ADV. SRI.C.R.JAYAKUMAR

RESPONDENT(S)/ACCUSED AND STATE:

- 1. RAJESH RAJU, MECHANICAL A.P.P.FITTER,
C AND W C.D.O. OFFICE, RAILWAYS, THIRUVANANTHAPURAM.**
- 2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

**R1 BY ADV. SRI.C.RAJENDRAN
R2 BY PUBLIC PROSECUTOR SMT. S. HYMA**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 1908 of 2006

Dated this the 21st day of November, 2015

J U D G M E N T

Aggrieved by the acquittal of the accused for the offence under Section 138 of the Negotiable Instruments Act, the complainant before the court below has come up in appeal after obtaining leave of this Court.

2. According to the complainant, on 27.10.2001, the accused came to the house of the complainant and requested that he be given ₹1,25,000/- as loan which he would repay within a month and as security, a cheque was given by him. He also assured that the cheque may be presented at any point of time and it will be honoured. The amount was given and the cheque was received. On 27.11.2001, as per the agreement between the parties, since the amount remained unpaid, the cheque was presented for encashment. It was returned for want of funds in the account of the accused. A statutory notice issued to the accused by the complainant invoked no response. 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, issued summons to the accused. When the accused entered appearance, he was furnished with copies of the documents and particulars of offence were read out to him. He pleaded not guilty. The complainant therefore examined himself as PW1 and had Exts. P1 to P6 marked.

4. After the close of complainant's evidence, the accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. However he chose to adduce no evidence.

5. The court below on the sole basis that Ext.P2 the return memo shows the date as 07.12.2002, dismissed the complaint and acquitted the accused holding that the cheque was presented beyond six months.

6. Assailing the acquittal, the learned counsel appearing for the appellant contended that the court below ought to have seen that the date shown in the memo of return was an clerical error and the complainant ought to have been given an opportunity to prove the said fact. It was without putting the complainant on notice of the said fact that the acquittal was made. The learned counsel also pointed out that in all fairness, an opportunity at least now be given to the complainant to prove his case.

7. The learned counsel appearing for the respondent opposed the prayer by pointing out that the complainant had ample opportunity to prove his case and he did not utilize it. He cannot at this belated stage be heard to say that he was not given adequate opportunity to prove his case.

8. After having heard the learned counsel on both sides and after having perused the records, it is found that the sole basis on which the acquittal was made was that the date shown on Ext.P2 return memo was 07.12.2002. The

cheque is dated 27.12.2001. If the date shown in the memo of return is correct, then obviously, the finding of the court below that the cheque was presented beyond six months is correct. If it is otherwise, the finding is erroneous.

9. We get a clue regarding the fact that in all probability, the date shown in the return memo as 07.12.2002 is erroneous by looking at the endorsement on the reverse side of the cheque. The bank, which returned the cheque unpaid for want of funds, has made an endorsement that it has cancelled all its stamp and that is dated 07.01.2002. This endorsement fortifies the claim made by the complainant that in all probability, the date shown in Ext.P2, the return memo is a clerical mistake.

10. It would have been only fair on the part of the court below to put it to the complainant to explain this anomaly before disposing of the case. It is also significant to notice that there were no challenge to the statement made by the complainant in his chief examination that the unpaid memo was dated 07.1.2002 and the cheque was received by

him unpaid on 01.02.2002.

11. Taking note of the above facts, it is felt that it is only fair that the complainant be given an opportunity to establish his case and show that the date shown on Ext.P2, the return memo may be wrong.

12. For the above reasons, this appeal is allowed. The impugned order of acquittal passed by the court below is set aside and the matter is remanded to the trial court for fresh disposal in accordance with law and in the light of what has been stated above.

The party shall appear before the lower court on **18.12.2015**. Both parties will be at liberty to adduce further evidence, if they so choose. The court below may make every endeavour to dispose of the matter as expeditiously as possible.

Sd/-
P.BHAVADASAN
JUDGE

ds

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P.A. to Judge