IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 19TH DAY OF NOVEMBER 2015/28TH KARTHIKA, 1937

CRL.A.No. 1991 of 2006

AGAINST THE JUDGMENT IN CC 177/2001 of JUDICIAL FIRST CLASS MAGISTRATE COURT-III, THIRUVANANTHAPURAM DATED 07-03-2006

APPELLANT/COMPLAINANT:

ALEX, EDEN GARDENS,
KALLAYAM P.O., TRIVANDRUM.

BY ADV. SRI.BECHU KURIAN THOMAS

RESPONDENTS/ACCUSED:
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1. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

2. VIJAYA KUMAR, S/O.S.ARAVINDAKSHAN NAIR,
ASWATHY, T.C.NO.9/240, JAWAHAR NAGAR,
KAWADIYAR WARD, SASTHAMANGALAM,
THIRUVANANTHAPURAM.
PRESENTLY RESIDING AT M-39, R P LANE,
KOWADIAR VILLAGE, THIRUVANANTHAPURAM.

R2 BY ADVS. SRI.V.AJAKUMAR
SRI.T.M.CHANDRAN
R1 BY SMT.MADHUBEN, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 1991 of 2006

Dated this the 19th day of November, 2015.

JUDGMENT

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

2. According to the complainant, the accused borrowed a sum of Rs.2,00,000/- from the complainant. When the money was sought back, Ext.P1 cheque was issued. On presentation of the cheque for encashment, it was bounced for want of funds. Statutory notice issued to the accused did not result in payment or did not invoke any 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. The

accused entered appearance and after furnishing copies of the documents to him, particulars of the offence were read out to him. He pleaded not guilty. Complainant was thereafter called upon to adduce evidence and the evidence of the complainant consists of the testimony of P.W.1 and the 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 him and maintained that he is innocent. He also filed a statement to the effect that one Dileep was his close friend and he had financial transaction with the said Dileep. Dileep, who was a money lender, was in the habit of extracting excess amount towards interest and used to obtain signed blank cheques and also signed stamp papers. The accused had borrowed some money from Dileep and gave the cheques as security. He would say that he had discharged the debt due to Dileep, but the cheques were not returned and they were misused. One of the cheques have been utilized by the complainant at the behest of Dileep to fasten liability on the accused. He denied having any financial transaction with the complainant or having issued any cheque to him.

4. However, the accused did not chose to adduce any evidence. On appreciation of the materials before it, the court below came to the conclusion that the primary ingredients necessary to attract the offence under Section 138 of the N.I. Act to take aid of the presumption under Section 139 of the N.I. Act had not been established by the complainant. For the said purpose, the court below relied on the fact that the date and place of payment was not mentioned in the complaint and also in the affidavit in chief. The court below also relied on the inconsistency in the pleadings and the evidence of P.W.1 regarding the issuance of the cheque to doubt the version given by the complainant. The accused had

produced Exts. D1 to D4 documents to show that he had to face criminal proceedings at the behest of certain persons who are stooges of Dileep to whom he had given blank cheques which were misused by Dileep. Holding that the complainant had failed to establish the prima facie case against the accused, the accused was acquitted.

5. Assailing the acquittal, learned counsel appearing for the appellant contended that the court below has erred itself both on facts and in law in acquitting the accused. It has given a total go-bye to the defence set up by the accused and has picked out some loopholes in the pleadings and the evidence of the accused to acquit the accused. It is significant to notice, according to the learned counsel, that had there been a case for the accused that he had not issued a cheque as claimed by the complainant, the first opportunity was when the accused was served with notice, to which he did not respond at all. Subsequent

defences set up therefore can be treated as an afterthought. Learned counsel also pointed out that the court below was not justified in placing reliance on Exts. D1 to D4 to show that the complainant had nothing to do with any of those matters and he was not a party to any one of the proceedings. Those proceedings have no bearing to the issue at hand wherein it is clearly shown that the amount was received by the accused and the cheque was issued by him. There has not been a proper appreciation of the evidence in the case and that has resulted in injustice. It is contended that he has discharged his burden since the accused had not adduced any evidence, and the court below has erred in its conclusion. In support of his contentions, learned counsel relied on the decisions reported in John K. Abraham v. Simon C. Abraham ((2014) 2 SCC 236) and Thomas P.J. v. Vijayakumari (2014(2) KHC 265).

6. Countering the above argument, learned counsel appearing for the respondent pointed out that even assuming

that the signature is admitted, and even assuming that the cheque is issued, that does not amount to execution of the instrument. For the above principle, learned counsel relied on the decisions reported in Shaju v. Paulose (2009(4) KLT SN 49) and in Bhaskaran Nair v. Mohanan (2009(3) K.L.T. 580). Learned counsel drew the attention of this Court to the complaint and pointed out that the complaint is totally silent regarding the date and time of payment. So also the affidavit in lieu of chief examination. In fact a reading of the complaint, according to the learned counsel, would indicate that money was given initially and later it was not returned and when the money was demanded back, the cheque was issued. But the complainant had a totally different case at the time of giving evidence, that is, the taking of Rs.2,00,000.- and issuance of Ext.P1 cheque were simultaneous. This inconsistency along with the vague statement made in the complaint weighed with the court below and the finding of the court below is justified going by the evidence on record and if that be so, the accused is entitled to benefit of doubt.

7. Learned counsel for the respondent cautioned this Court that this Court is exercising appellate jurisdiction against an order of acquittal where the accused is armed with two presumptions, (1) the accused is presumed to be not guilty unless proved, and (2) the court which has tried the matter has found him not guilty. In such circumstances, the burden is very heavy on the complainant to show that the court below has erred grievously in appreciating the evidence in the case or in other words, it has to be shown that the findings are perverse or are based on irrelevant factors or evidence. There is no such infirmity in the case on had and therefore, interference is not warranted.

8. As rightly pointed out by the learned counsel for the respondent, and as rightly noticed by the lower court, the complaint is totally silent regarding the date and time of

payment. All that is stated in the complaint is that a sum of Rs.2,00,000/- was received by the accused and when the money was demanded back, the cheque was issued. It is also not stated as to when exactly the cheque was issued.

9. Much was argued about the defence set up by the accused and his failure to establish the defence. True, the accused did not reply to the notice. But that cannot be taken as an admission of the liability as is well established in law. Accused is not bound to put forward his case at that time and he can rest contented and wait for the trial.

10. Even assuming that the accused admits his signature, still the requirements are not made out to attract Section 138 of the N.I. Act. Section 138 of the Act deals with a situation where the cheque is issued in discharge of a debt. That means, two ingredients will have necessarily to be established by the complainant, and they are, (i) there is a subsisting debt and (ii) that the cheque was issued to

discharge the said debt. It is also significant to notice that the words used in Section 139 of the N.I.Act are 'a cheque of the nature mentioned in Section 138'. That means, in order to take aid of the presumption available under Section 139 of the Act, necessarily the ingredients to constitute the offence under Section 138 will have to be established. Or in other words, the due execution, payment etc will have to be established by the complainant.

11. Bearing the above principles in mind, an attempt shall now be made to ascertain from the evidence on record whether the court below was justified in acquitting the accused. Apart from the fact that the complaint is silent regarding the date of payment and place of payment and also says that the cheque was issued when the money was demanded back, the affidavit filed in lieu of chief examination also suffers from the same infirmities. However, when P.W.1, the complainant was cross-examined, he stated that the

amount was received from his house and when the payment was made, the cheque was immediately given by the accused. That means the passing of consideration and the issuance of cheque was simultaneous. This is totally inconsistent with the pleadings and so also the affidavit filed in lieu of chief examination. The fact that in cross examination a question was asked as to from where money was paid amounts to an admission of receipt of amount cannot be accepted. The accused is entitled to probe into the claim made by the complainant and the answer given by the complainant could be taken only in that respect. One cannot omit to notice that a vague statement is made by the complainant that he is not sure as to who had written cheque and whether the signature was that of the accused himself. All that is stated is that the cheque was brought to him when the money was demanded. It is here that execution of the cheque assumes importance. It may be possible to say that it is not necessary to establish that the cheque was written in the presence of the complainant and signed in his presence. But there should be something to show that the cheque was duly executed to discharge a debt thereby meaning that the complainant was sure about the issuance of the cheque and also about the signature.

12. Probably, learned counsel for the appellant, to some extent, may be justified in finding fault with the lower court in placing slightly heavy reliance on Exts.D1 to D4. But on going through those documents, it could not be said that whatever be the degree of reliance placed on those documents, it is totally misplaced. It is here that one has to peep into the defence set up by the accused. The accused has a case that he had transaction with one Dileep and he had issued blank cheques to Dileep. Exts.D1 to D4 show that there was a complaint filed by the stooges of Dileep regarding the issuance of those cheques. As far as the involvement of the complainant is concerned, that is confined to Ext.D3.

Ignoring Exts. D1 to D4 altogether, the question still remains whether the complainant has discharged his burden.

13. One must remember here that it is not necessary for the accused to adduce evidence in support of his defence. He can rely on the evidence adduced by the complainant himself and show that the pleadings and the evidence adduced by the complainant is insufficient to attract the penal provisions. Further, the burden of proof cast on the accused is far of a lesser degree than that of the complainant. While the complainant has to establish the case beyond reasonable doubt, all that the accused has to done is to create a dent in the evidence of the complainant or to create a doubt in the mind of the court. In the decision reported in Bhaskaran Nair v. Mohanan (2009(3) K.L.T.580) the issue regarding execution of the cheque was considered, so also in the decision reported in Shaju v. Paulose (2009(4) K.L.T. SN 49). In both the decisions, it was held that mere admission of

signature does not amount to issuance of cheque. We need not labour much on this aspect, since on the facts and evidence, that question does not arise.

14. In the decision reported in John K. Abraham v. Simon C. Abraham ((2014) 2 SCC 236) it is observed as follows:

> "9. It has to be stated that in order to draw the presumption under Section 118 read along with Section 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had the required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant.
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> 10. Keeping the said statutory requirements in mind, when we examine the facts as admitted by the respondent complainant, as rightly concluded by the learned trial Judge, the respondent was not even aware of the date when substantial amount of Rs.1,50,000 was advanced by him to the appellant, that he was not sure

> as to who wrote the cheque, that he was not even aware when exactly and where exactly the transaction took place for which the cheque came to be issued by the appellant. Apart from the said serious lacuna in the evidence of the complainant, he further admitted as P.W.1 by stating once in the course of the cross-examination that the cheque was in the handwriting of the accused and the very next moment taking a diametrically opposite stand that it is not in the handwriting of the accused and that it was written by the complainant himself, buy further reiterating that the amount in words was written by him."

15. It is extremely doubtful how far this decision will help the complainant in the case on hand. A reading of the decision shows that the date of payment, place etc were given and all particulars necessary to attract the offence were available in that case. In the paragraph relied on by the learned counsel for the appellant, it is observed that the burden is heavy on the complainant to show that he had the required funds and that issuance of cheque in support of the

payment advanced was true. So, in fact a close reading of the decision would show that it does not make a departure from the normal rule that the initial burden is on the complainant to show that the existence of a debt and the issuance of the cheque was in discharge of that debt. Of course, there is no direct challenge regarding the capacity of the complainant to raise Rs.2,00,000/-. But one shall not forget that the defence is that the accused had no transaction with the complainant at all.

16. One cannot omit to notice that there is no averment in the complaint nor is there any mention in the affidavit filed in lieu of chief that the complainant was either familiar to the accused or known to him. It would appear that simply a sum of Rs.2,00,000/- was given to the accused without any security whatsoever. This also creates some sort of doubt in the mind of the court.

17. Each factor taken by itself may not create serious doubt. But the cumulative effect is that a reasonable doubt is created in the mind of the court regarding the case set up by the complainant. At any rate, it could not be said that the view arrived at by the court below is totally perverse and is based on irrelevant aspects. It is a possible view. If that be so, interference against an order of acquittal in appeal is not warranted.

For the above reason, this appeal fails and it is dismissed.

P. BHAVADASAN,
JUDGE

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