IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

THURSDAY, THE 12TH DAY OF MARCH 2015/21ST PHALGUNA, 1936

CRL.A.No. 179 of 2015 ()

AGAINST THE JUDGMENT IN CC 527/2013 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-I, KOCHI DATED 30-12-2014

AGAINST THE ORDER IN Crl.L.P. 57/2015 OF HIGH COURT OF KERALA DATED 9.2.2015

APPELLANT/COMPLAINANT:

FRANCIS ANTONY K.G. AGED 59 YEARS
S/O.GEORGE, KARUKAPARAMBIL HOUSE
CHILAVANOOR KADAVANTHARA P.O, KOCHI-682 020

BY ADV. SRI.M.A.ASIF

RESPONDENTS/ACCUSED & STATE:
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1. **JOHN MATHEW**
   KYNATTUMPILLY HOUSE, ELENJERIL
   CHILAVANOOR KADAVANTHARA P.O, KOCHI-682 020.

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

R2 BY PUBLIC PROSECUTOR SMT. BINDU GOPINATH

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 12-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

shg/

K. ABRAHAM MATHEW, J.

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Crl.A. No.179 of 2015

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Dated this the 12th day of March, 2015

J U D G M E N T

In this appeal the order of acquittal passed by the learned Judicial First Class Magistrate Court-I, Kochi in C.C.No. 527/2013 is challenged. The appellant was the complainant and the first respondent the accused. The allegation was that on 21.2.2012 the first respondent borrowed from the appellant Rs.15 lakhs, and later to discharge the liability he issued a cheque bearing date 27.8.2012 and it was returned dishonoured by the bank for want of sufficient fund in his account and in spite of demand by notice he failed to pay the amount and thus he committed the offence under Section 138 N.I. Act. The trial court found that there is no evidence to prove execution of the cheque and accordingly, he acquitted the first respondent.

2. Heard the learned counsel for the appellant.

3. The appellant's definite case is that on 21.2.2012 he lent Rs.15 lakhs to the first respondent, who promised to repay it within four months. In January 2011 the appellant advanced a loan of Rs.20 lakhs to the wife of the first respondent. Both these transactions were entered into because of the appellant's friendship with the first respondent and his wife, who were doing real estate business. The appellant would say that he, and the first respondent and his wife helped each other providing financial assistance; their families had cordial relationship. He claimed that the first respondent is a family friend, which is the reason why he advanced the huge amount of Rs.20 lakhs to the wife of the first respondent and Rs.15 lakhs to the first respondent without taking any document to evidence the transaction and that also free of interest.

4. Certain facts regrading the relationship between the parties were brought out in the cross-examination of the appellant, who was examined as PW1. He said that he knew

the first respondent for eight years. Though they reside in the same locality he (PW1) has never gone to his house; he has never talked to him on phone. The first respondent resides in a rented house. The appellant does not know the native place of the first respondent. There cannot be any doubt that the allegation that the appellant and the first respondent were family friends is false. At best, the appellant had only a nodding acquaintance with the first respondent. The reason for the appellant's giving Rs.15 lakhs to the first respondent free of interest and without obtaining even a scrap of paper to evidence the transaction appears to be false.

5. It came out in the evidence of the appellant (PW1) that he lent Rs.20 lakhs to the wife of the first respondent in January 2011; she had promised to repay the amount within three months. But there was no payment. It cannot be believed that when the first respondent's wife failed to repay the amount even after one year, the appellant advanced another huge amount of Rs.15 lakhs to the first

respondent that also without obtaining any document to evidence the transaction and free of interest.

6. Coming to the execution of cheque, in the examination-in-chief PW1 stated that the first respondent issued him a cheque. Thereafter, PW1 said that he brought a filled up cheque; but he did not see the first respondent writing anything in the cheque. There is no mention about signing the cheque. But for the admission of the first respondent that the cheque bears his signature there is no evidence to prove execution of the cheque. The attempt of the appellant is to compel the first respondent to prove non-execution of the cheque without discharging his burden to prove its execution.

7. When PW1 was questioned about his income tax returns and bank accounts he smelt rat and said that he did not know whether the payment to the first respondent was shown in the income tax return. He added that he did not deposit any big amount in the business account maintained by him with the bank.

8. The defence version is that the first respondent had borrowed Rs.25 lakhs from K.G. Thomas brother of the appellant who obtained from him a cheque for Rs.25 lakhs and signed blank cheques from himself and his wife as security; when Thomas committed foul play, the first respondent refused to pay further installments. According to the first respondent the cheque relied on by the appellant is one of those signed blank cheques given to Thomas. He has a case that in fact K.G. Thomas is conducting this litigation.

9. There are some circumstances which indicate that the appellant is only a hired litigant. Evidence proves that K.G. Thomas has filed complaint against the first respondent and his wife alleging that they had borrowed huge amounts from him and failed to repay them in spite of demand by notice. In the cross-examination PW1 admitted that he did not know the name of the advocate who sent notice to the first respondent in this case before the complaint was filed. His further statement that the cheque

was issued one year and eight months after the loan transaction is admittedly wrong. He could not mention the date of the cheque relied on by him in the case. He said that it is a date in the 9^{th} month of the year. All these facts go to show that he has no idea about the facts of the case. This makes probable the defence version that he is conducting the litigation on behalf of K.G.Thomas.

10. Learned counsel for the appellant relies on the decision of this Court in **Lekha v. Manickan [2006 (4) KLT 800]** in support of his argument that the defence version should be discarded. That was a case in which the court of the opinion that there was no reason to doubt or suspect the statements on oath of PW1. There was no probable explanation as to how the cheque happened to be in the possession of the complainant. In the case on hand the appellant's version is unbelievable and the first respondent's defence is probable.

11. To sum up, the appellant failed to prove the execution of the cheque. The facts and circumstances of

the case revealed in the evidence are sufficient to rebut the presumption, if any, under Section 139 N.I. Act. The learned Magistrate was fully justified in acquitting the first respondent. No interference is called for.

In the result, this appeal is dismissed.

Sd/-
K. ABRAHAM MATHEW
JUDGE

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P.A. TO JUDGE

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