IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 13TH DAY OF OCTOBER 2015/21ST ASWINA, 1937

CRL.A.No. 2126 of 2006 (F)

AGAINST THE JUDGMENT IN ST CASE No.974/2004 of JUDICIAL FIRST CLASS MAGISTRATE COURT-II, PALAKKAD DATED 27.03.2006

APPELLANT/COMPLAINANT:

ZEENATH, AGED 26 YEARS,
W/O.ABDUL SAMAD, BADUSHA, POOCHIRA,
PUDUPPARIYARAM P.O., PALAKKAD DISTRICT.

BY SRI.C.C.THOMAS (SENIOR ADVOCATE)

RESPONDENTS/ACCUSED AND STATE:
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1. PANKAJAM, AGED 40 YEARS,
   W/O.SUKUMARAN, PADATH HOUSE, POOCHIRA,
   PUDUPPARIYARAM P.O., PALAKKAD DISTRICT.

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

   R2 BY SRI. C.K. JAYAKUMAR, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.2126 OF 2006

Dated this the 13th day of October, 2015.

J U D G M E N T

Aggrieved by the acquittal of the accused of 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.20,000/- on 02.04.2003, Rs.25,000/- on 30.05.2003, Rs.20,000/- on 07.08.2003 and Rs.15,000/- on 10.08.2003 totalling to Rs.80,000/- agreeing to repay as and when demand is made. Since the complainant was in need of money, she informed the accused to return the money and then the accused is said to have issued Ext.P1 cheque. Cheque, on presentation, bounced for want of funds. Notice was issued but the amount remained unpaid. Therefore, the complainant was constrained to lay the complaint.

3. Cognizance of the offence was taken by the court before which complaint was laid and after following necessary

procedures, summons was issued to the accused. On appearance of the accused, particulars of offence were read out to her. She pleaded not guilty and claimed to be tried.

4. The complainant examined herself as PW1 and had Exts.P1 to P5 marked.

5. After the close of the complainant's evidence, accused was questioned under Section 313 Cr.P.C wherein she denied all the incriminating circumstances brought out in evidence against her and maintained that she is innocent. She, in her defence, examined DW1 and had Exts.D1 to D7 series marked.

6. The court below, on appreciation of material before it, found the case set up by the defence to be probable one and accordingly acquitted the accused holding that the complainant had failed to prove the existence of debt, for the discharge of which the cheque was issued.

7. Assailing the acquittal, learned counsel appearing for the appellant contended that the court below seems to have been forgotten about the two presumptions available to the complainant i.e. the presumption under Sections 118 and 139 of

Negotiable Instruments Act. The burden is on the defence to show otherwise and that fact has been lost sight of by the lower court. In fact, the case set up by the defence is that the complainant had managed to obtain a cheque issued to a third person and filed a complaint against the accused. If that be so, relying on the decision in ***Krishnankutty*** *vs.* ***State of Kerala and another*** (2011 (1) KLD 59), learned counsel pointed out that the burden is on the accused to show that the cheque was issued to somebody else and not to the complainant. Learned counsel went on to point out that the signature on the cheque is admitted. At any rate, according to the learned counsel, if the accused had a case that the cheque was given to a third person, it was the bounden duty of the accused to examine that person. That is also not done. It is therefore contended that the acquittal is bad in law.

8. The court below considered the evidence in considerable detail and came to the conclusion that the defence set up is probabilised by documentary evidence as well as oral evidence. It may be remembered that the definite case of the complainant

was that on four days, the accused borrowed various amounts totalling to Rs.80,000/-. The complainant's case is that when the money was sought back, cheque was issued. The case of the accused is that she had borrowed a sum of Rs.20,000/- to redeem the gold ornaments which she pledged with the Bank. After redeeming the same, complainant took possession of the same as security for the amount due from the accused. When the accused sought return of the gold ornaments, the complainant insisted for a huge amount which the accused could not afford to pay. Therefore, after obtaining cheque from the person to whom cheque leaves were entrusted by the accused, the complainant had laid the complaint.

9. The contention based on the two presumptions is misconceived. Section 139 of the Negotiable Instruments Act says about a cheque of the nature mentioned in Section 138 of the Negotiable Instruments Act. Section 138 makes mention of existence of debt for the discharge of which cheque is issued. Therefore, two things will have to be established under Section 138. They are, i) there is an existing debt and ii) cheque

was issued for the discharge of the said debt.

10. The initial burden to prove the above two facts rests on the complainant. Only when it is proved that cheque was duly executed, burden shifts to the accused and presumption under Section 139 will apply. Issuance of blank cheque, as has been held by this Court, does not amount to execution of cheque.

11. The complainant has given evidence in terms of the complaint. The accused has a case that the complainant and her persons used to threaten her in the matter and that made her life miserable and that lead her to file Exts.D5 and D6 complaints before the police authorities. The fact that the complainant was called to the Police Station is admitted by the complainant in her cross examination. That is on the basis of the complaints dated 21.07.2003 and 25.07.2003. The lower court noticed that if, as a matter of fact, the complainant was called to the Police Station in pursuance to the above said complaints, it is rather inconceivable that on the subsequent dates i.e. on 07.08.2003 and 10.08.2003, complainant would have given amounts to the accused. It is contended that Exts.D5 and D6 cannot be looked into for the

reason that they are only photostat copies and the original of which are not sought to be produced. In cross examination of PW1, it was brought out that a reply notice was sent by the accused to the statutory notice issued on behalf of the complainant and the complaints were appended to the reply notice. The reply notice has not been produced by the complainant. It is admitted by the complainant that in pursuance to the complaints so laid, she was called to the Police Station. Under these circumstances, it cannot be said that Exts.D5 and D6 have no relevance at all. The evidence shows that the accused opened an account in a Bank on 01.10.2003, i.e. the date on which the last payment is alleged to have been made by PW1. It is contended that when the accused sought to redeem the ornaments from PW1, she insisted for huge amount which the accused could not pay. Then the complainant managed to obtain cheque leaves from the cheque book in respect of the account belonging to the accused and misused the same. As rightly noticed by the lower court, since the complainant has admitted that she was called to the Police Station in furtherance to the complaints filed by the accused, it is difficult to believe that after such an incident, the complainant would continue to lend money to the accused. Two payments alleged to have been made on 07.08.2003 and 01.10.2003 are admittedly after PW1 was called to the Police Station.

12. Learned counsel appearing for the appellant refers to the decision already cited and contends that the burden is on the accused to prove that the cheque was issued to a third person. That decision can have no application to the facts of the case. It was specifically averred that the cheque has been issued to a third person and from whom the complainant has obtained the cheque. Here the story put forward by the defence is that the person who had cheque leaf of the account belonging to the accused was one of the associates of the complainant and the complainant and his team were harassing the accused for repayment. The accused was made to open an account in a Bank and the cheque book was taken by one of the associates of PW1. The case on hand stands on an entirely different footing. It was the above facts and circumstances which have persuaded the

court below to come to the conclusion that the transaction is not as alleged in the complaint and that the complainant had failed to establish the case that a sum of Rs.80,000/- was borrowed as alleged in the complaint.

13. After hearing the learned counsel on both sides and also after having perused the records, it is difficult to say that the conclusion reached by the court below is perverse or is contrary to the evidence on record. It appears to be a possible view. This Court should remind itself that it is dealing with an appeal against acquittal and the scope of interference is limited unlike a case of appeal from conviction. In the case of acquittal, unless there are compelling circumstances, the court will not interfere. There is no such compelling reason to upset the finding of the court below.

The result is that, this appeal is without merits and it is liable to be dismissed. I do so.

Sd/-

P.BHAVADASAN
JUDGE

smp

// True Copy //
P.A to Judge.