IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 14TH DAY OF OCTOBER 2015/22ND ASWINA, 1937

CRL.A.No. 2232 of 2006

AGAINST THE JUDGMENT IN CC 181/2004 of J.M.F.C.,RANNY.

APPELLANT(S)/COMPLAINANT::

KATTUPURAYIDOM BANKERS,
REPRESENTED BY MANAGING PARTNER
R.CHANDRACHOODAN NAIR, RANNY, PAZHAVANGADI.

BY ADV. SRI.MVS.NAMBOOTHIRY

RESPONDENT(S)/ACCUSED & STATE::
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1. A. VIJAYAN, S/O. AYYAPPAN,
   PROPRIETOR, ANESWARA JEWELLERY, PAZHAVANGADI,
   RANNY.

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

R1 BY ADV. SRI.K.SHAJ
ADV. SRI.SAJJU.S

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

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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Crl.Appeal. No. 2232 of 2006

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Dated this the 14th day of October, 2015.

JUDGMENT

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.

2. The case of the complainant was that the accused, who runs a jewellery, had borrowed for his business purpose a sum of Rs.2,00,000/- from the complainant. To discharge the said debt, Ext.P2 cheque was issued. The cheque on presentation bounced for want of funds. The statutory notice invoked a reply containing false contentions. Since the amount remained unpaid, the complaint was laid.

3. Cognizance of the offence was taken and after following the necessary procedures, summons was issued to the accused and the accused entered appearance and particulars of the offence were read out to him. He pleaded

not guilty and claimed to be tried. The complainant examined P.W.1 and marked Exts.P1 to P10. After the close of the complainant's evidence, the accused was questioned under Section 313 Cr.P.C. Apart from denying the incriminating circumstances brought out in evidence, he also pointed out that he had subscribed to a daily chitty run by the complainant's concern and had paid Rs.150/- per day. According to the accused, he had issued several blank cheques and received the chit amount. He was unable to pay the instalment that fell due as a result of drop in business. He claimed that the arrears due were later cleared, but the cheques were not returned so also the signed blank paper. He also pointed out that a civil suit was filed and that was settled with an undertaking to withdraw this case. However, the accused had adduced no evidence.

4. The trial court, on evaluation of the evidence found that though the case set up by the complainant is that

the accused had borrowed a sum of Rs.2,00,000/-, in paragraph 8 of the complaint, it is stated that amount was due from both the accused and his wife and at the time of evidence, the complainant deposed that amount was actually due from the wife of the accused. The court below also found that there was a compromise in which they agreed to withdraw the present case. In the light of the inconsistency in the complaint and evidence, the court below found that the complainant had failed to establish that debt is due from the accused and accordingly acquitted the accused.

5. Assailing the acquittal, learned counsel for the appellant contended that even assuming that amount was due from the accused, if the accused had undertaken to discharge the debt, he is liable under law. Here, it has to be noticed that the cheque issued by the accused was returned for want of funds in the account of the accused. It is to be noted that Ext.P7 promissory note was also produced. In the light of

these facts, learned counsel submits that presumption under Section 139 of the N.I.Act ought to have been drawn and the court below was in error in acquitting the accused.

6. The complainant examined himself as P.W.1. In the complaint filed, initially it is stated that the debt has been incurred by the accused. The further averment is that to discharge the said debt cheque has been issued. The cheque was returned with the endorsement 'account closed'. The main thrust of the complaint was regarding the allegation of cheating. It is no doubt true that even assuming that a cheque is returned on the ground 'account closed', the presumption under Section 139 of the N.I. Act has to be attracted.

7. When examined as P.W.1, the complainant had stated that the accused had borrowed Rs.2,00,000/- from the complainant and when the amount was demanded, the cheque was issued. However, in paragraph 8 of the affidavit in chief, the averment is to the effect that Rs.2,00,000/- covered by

Ext.P2 cheque is the amount due from the accused and his wife. Further, it is also stated in the chief affidavit that there was a suit between the parties which was compromised and it was agreed that this case would be withdrawn as soon as terms of the compromise is honoured. However, in cross-examination, the complainant conceded that the amount was borrowed by the wife of the accused and the cheque was issued by the accused. The promissory note produced by the complainant as Ext.P7 is also issued by the wife of the accused.

8. Obviously, the above facts made the trial court to come to the conclusion that the complainant had no consistent case and therefore he has failed to establish the necessary ingredients of Section 138 of the N.I.Act.

9. It is significant to notice that the lower court was aware of the fact that it is possible for a person to undertake to discharge the liability of another person. The lower court

felt that for the debt due from the wife of the accused, if the accused had issued the cheque, the position would have been different. But that is not the case pleaded and sought to be established in the present case. It has already been mentioned that in the affidavit in chief filed in lieu of chief examination, initially it was stated that the amount was borrowed by the accused. Later on, there was a slight change in the method of borrowel and the complainant stated that Rs.2,00,000/- covered by Ext.P2 cheque was the amount due from the accused as well as his wife and in cross-examination his case was that the amount was due only from the wife of the accused.

10. Admittedly, the burden to establish the two ingredients necessary to attract Section 139 of N.I. Act is on the complainant. They are (1) the existence of a debt and (2) the cheque was issued to discharge the debt. Only on establishing the above two ingredients, it is necessary to

attract Section 138 of the N.I.Act.

11. In the case on hand, the complainant has no consistent case regarding the debt. It is in that context the court below was inclined to hold that presumption under Section 139 of the N.I. Act has been squarely rebutted by the accused.

12. It could not be said that the view taken by the court below is perverse. One shall not forget that the complainant also accepted that there has been a compromise wherein it has been agreed that the present case will be withdrawn. However, the compromise has not been honoured. The fact remains that there was a compromise entered in the case is admitted.

13. In the light of the above circumstances, it cannot be said that the view taken by the court below is contrary to the evidence on record. It is a possible view. If that be so, interference in appeal is not warranted.

This appeal is without merits and it is accordingly dismissed.

P. BHAVADASAN,
JUDGE

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