

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN**

**WEDNESDAY, THE 16TH DAY OF SEPTEMBER 2015/25TH BHADRA, 1937**

**CRL.A.No. 2140 of 2005**  
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**ORDER DATED 08-12-2005 IN CrI.L.P. 721/2005**

**JUDGMENT DATED 12-08-2005 IN CC 16/2000 OF JUDICIAL FIRST CLASS MAGISTRATE  
COURT, SASTHAMCOTTA**  
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**APPELLANT(S)/COMPLAINANT:**  
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**K. RAMACHANDRAN PILLAI,  
S/O. KOCHAN PILLAI, ALUVILA PUTHENVEEDU, EDAVATTAM,  
KARUVELIL P.O., EZHUKONE, KOLLAM.**

**BY ADVS.SRI.K.BABU THOMAS  
SMT.MARYKUTTY BABU**

**RESPONDENT(S)/ACCUSED:**  
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- 1. STATE OF KERALA, REP. BY THE  
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**
- 2. K. BALAKRISHNAN, S/O. KUNCHI PANICKER,  
DRIVER, PUTHEN VILAYIL HOUSE, ERAVICHIRAKIZHAKKU,  
SOORANAD P.O., SOORANADU SOUTH VILLAGE, KOLLAM.**

**R1 BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN  
R2 BY ADVS. SRI.R.SURAJ KUMAR  
SRI.P.KRISHNA KUMAR (ALAPPUZHA)  
SRI.SUNIL J.CHAKKALACKAL**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16-09-2015,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**msv/**

K.RAMAKRISHNAN, J.

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Crl. Appeal No.2140 OF 2005

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Dated this the 16<sup>th</sup> day of September, 2015

JUDGMENT

The Complainant in C.C.16/2000 on the file of the Judicial First Class Magistrate Court, Sasthamcotta is the appellant herein. The case was taken on file on the basis of a private complaint filed by the appellant against the 2<sup>nd</sup> respondent under Section 138 of Negotiable Instruments Act.

2. The case of the complainant in the complaint was that the accused borrowed a sum of Rs.65,000/- and in discharge of the liability he had issued the original of Ext.P1 cheque which when presented was dishonored for the reason funds insufficient in the account of the accused by the drawee Bank vide Ext.P2 dishonor memo. This was intimated to the complainant by his banker evidenced by Ext.P3 intimation letter. The complainant issued Ext.P5

notice evidenced by Ext.P4 postal receipt and the same was received by the accused evidenced by Ext.P6 postal acknowledgment. He had not sent any reply and he had not paid the amount as well. So he had committed the offence punishable under Section 138 of Negotiable Instruments Act. Hence the complainant.

3. When the accused appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, the complainant filed proof of affidavit, that he was not seen examined as per the proceedings paper. Thereafter the accused was questioned Section 313 of Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that he had not borrowed any amount from the complainant. No defence evidence was adduced on his side. But after considering the evidence on record, the court below acquitted the accused only on the ground that the complainant had not produced the original cheque relying

on the decision reported in Sharadkumar v Inspector of Police [2004 (2) KLT SN 27 (34) ] under Section 255(1) of Code of Criminal Procedure. Aggrieved by the same, the present appeal has been filed by the appellant/complainant in the lower court with Criminal Leave Petition in No.721/2005. The application was allowed and the leave was granted and the appeal was admitted to file.

4. Heard the counsel for the appellant Smt. Marykutty Babu, Smt. Deepa V, counsel representing the counsel for second respondent Sri. Suraj Kumar and Smt. Seena Ramakrishnan Public Prosecutor appearing for the 1<sup>st</sup> respondent.

5. The counsel for the appellant submitted that there was no dispute regrading the execution of the cheque. No reply notice was issued to the notice issued. Further the cheque was produced in civil suit filed by the complainant on the basis of the same cheque for realisation of the amount and certified copy taken from that court was produced. So even if, the court felt that the original

document is required, the court below ought to have given an opportunity to the complainant to produce the same or to take steps to summon the document from the civil court. The defence counsel raised the contention only at the time of hearing, not at the time of marking the document. So under the circumstances, the court below was not justified in acquitting the accused on that ground without going to the merits of the case. Further, if this court feels that original document has to be produced, she prays an opportunity and sought for remand of the case for that purpose. The counsel also submitted that the civil suit was settled in the Adalath on the basis of which civil suit has been decreed. So it cannot be said that there is any dispute regarding the issuance of cheque.

6. On the other hand the counsel for the 2<sup>nd</sup> respondent submitted without producing the original cheque it cannot be said that it was properly executed or not. Further no opportunity was given to the accused to cross examine PW1. The procedure adopted by the court below is also not proper.

7. The case of the complainant in the complaint was that the accused borrowed a sum of Rs.65,000/- and in discharge of the liability, he had issued the original of Ext.P1 cheque. It is also seen from the documents produced that the complainant had issued notice to the accused when the cheque was dishonored intimating dishonour and demanding payment of the amount and though the same was received by him, he did not sent any reply as well. Further it was mentioned in the proof affidavit that the original cheque was produced before the Civil Court and he was producing the certified copy of the cheque taken from that court which has to be marked as Ext.P1 and he was not even seen cross examined.

8. The dictum laid down in the decision reported in Sharadkumar v Inspector of Police [2004 2 KLT SN 27 34] of Madras High Court has been wrongly interpreted by the court below. In that case what was produced along with the complaint was a Photostat copy and not a certified copy taken from any court. In such circumstances, the Madras High Court observed that before entertaining the complaint

along with the Photostat copy of the cheque produced, court must verify the original cheque that only after satisfaction of the original cheque that the complaint can be received on the basis of the Photostat copy produced. The Madras High Court has not gone into the question as to whether the secondary evidence can be relied on at that stage as the court was only considering the question of granting anticipatory bail in a case under Section 138 of the Act matter where non bailable warrant was issued against the accused when he did not appear. So the court below was not justified in relying on that decision for the proposition that without producing the original cheque, case under Section 138 of the Act cannot be proceeded with.

9. Further in this case, it is seen that though a proof affidavit was filed it is not seen from the proceedings paper that the complainant was examined as PW1 and the proof affidavit was admitted in evidence before marking the documents which ought to have been done by the court below for that purpose. Further it is seen from the

proceedings paper that complaint was present and proof affidavit was produced and it is not even noted in the proceedings paper that documents sought to be marked on the basis of proof affidavit were marked by the court below as well, before proceeding with the case further. But it was posted for evidence and it was adjourned from time to time for that purpose and though complaint was present and his evidence was not recorded. But later it was posted for examination of the accused under Section 313 of Code of Criminal Procedure and the accused was questioned and posted for defence evidence and thereafter disposed the matter on technical ground of non production of the original cheque without giving an opportunity to the complainant to produce the same if the other side objects the marking of the certificate copy produced. Further if the complainant can establish the reason for non production of the original document and producing the certified copy of the document taken from the court in which it was produced there is nothing wrong for the court to rely on that certified copy of the cheque produced unless the marking of the

document was objected by the other side and this court feels that original of that document is required for proper adjudication of the case. Further it is submitted by the counsel for the appellant before this court that the matter has been settled in the Adalath in the Civil case and on that basis decree has been passed and execution petition is pending for realisation of the balance amount as he had paid only Rs.25,000/- after the decree was passed by the civil court. But the counsel for the respondent submitted that they were not aware of the same. Though certified copy of the judgment in OS No.162/2000 was produced for perusal of this court, it is not clear from the judgment of the Munsiff court as to whether the amount was arrived at between the parties on the basis of amount mentioned in the cheque or it was settled for a lessor amount. So under the circumstances, this court feels that the entire procedure adopted by the court below in disposing the case is illegal and as such an opportunity has to be given to the parties to adduce evidence and the matter has to be decided on merit. So the order of acquittal passed by the court below is set

aside and the matter is remitted to the court below for fresh disposal in accordance with law. So the appeal is allowed and the order of acquittal passed by the court below in C.C.No.16/2000 is set aside and the matter is remitted to the court below for fresh disposal in accordance with law. The court below is directed to take the complaint on file and give an opportunity to the complainant to adduce evidence and if the court wants the original cheque to be produced, give an opportunity to the complainant to call for the original from the Civil court for the purpose of marking same in the case and then after conducting fresh examination of the accused under Section 313 of the Code of Criminal Procedure and after giving an opportunity to adduce defense evidence if any, then dispose of the case on merit afresh in accordance with law. Parties are directed to appear before the court below on 26.10.2015. Considering the fact that the case is of the year 2000, the court below is directed to expedite the disposal of the case as expeditiously as possible, at any rate, within a period of three months from the date of receipt of this judgment.

Office is directed to communicate this order to the concerned court immediately and send back the records at the earliest.

Sd/ –

K.RAMAKRISHNAN, JUDGE

SKV