IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 7TH DAY OF OCTOBER 2015/15TH ASWINA, 1937

CRL.A.No. 1920 of 2009 (D)

AGAINST THE JUDGMENT IN ST 242/2005 OF JUDICIAL FIRST CLASS MAGISTRATE-VIII, TRIVANDRUM DATED 24-12-2008

PETITIONER/COMPLAINANT::

G.RAMACHANDRAN, S/O. GOVINDAN,
T.C.NO.49/338, PARAPPASSERY VEEDU, KALLIPANKULAM
MANACAUD, THIRUVANANTHAPURAM
REPRESENTED BY POWER OF ATTORNEY HOLDER
K.SAKUNTHALA, T.C.NO.49/338, PARAPPASERY VEEDU
KALLIPANKULAM, MANACAUD, THIRUVANANTHAPURAM.

BY ADV. SRI.M.SREEKUMAR

RESPONDENT(S):ACCUSED & STATE:-

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1. CHANDRAN KUTTY, S/O. REGHAVAN PILLAI,
   T.C.NO.39/1258, MANACAUD, THIRUVANANTHAPURAM.

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

R1 BY ADV. SRI.S.RAJEEV
R2 BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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P.BHAVADASAN, J.

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Crl.A. No. 1920 of 2009

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Dated this the 07th day of October, 2015

JUDGMENT

Aggrieved by the acquittal of the accused for the offence punishable under Section 138 of the Negotiable Instruments Act, the complainant before the court below has come up in appeal.

2. Short case put forward by the appellant is that the accused being a close of friend of him, borrowed ₹2,75,000/- on 25.01.2004 and to discharge the said debt, he issued Ext.P2 cheque dated 25.02.2004. The cheque on presentation, bounced for want of funds. A statutory notice issued was returned unclaimed. Since the amount was not paid, the complaint was laid.

3. Cognizance of the offence was taken by the court below. After following the necessary procedures, summons was issued to the accused. On appearance of the accused and after completing the formalities, particulars of offence

were read out to him to which he pleaded not guilty and claimed to be tried. The complainant therefore examined PW1 and had Exts. P1 to P7 marked.

4. After the close of complainant's evidence, the accused was questioned under Section 313 Cr.P.C.. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He in fact stated that actually he had borrowed a sum of ₹2,25,000/- on 20.08.2001. Subsequently, an agreement was executed, namely, Ext.D2 and gave a blank cheque to the complainant. He further stated that he had paid nearly ₹3 lakhs by way of three cheques and that later he got back one cheque by paying a sum of ₹50,000/-. The accused in his defence had examined DWs 1 to 4 and had Exts. D1 to D7 marked.

5. The court below, on appreciation of the evidence, found the evidence of PW1 to be unreliable regarding the payments and there was only one transaction as claimed by

the accused and the amount borrowed in the said transaction has already been repaid. Holding so, the accused was acquitted.

6. Assailing the acquittal, the learned counsel for the appellant contended that there is no evidence regarding the payment of ₹50,000/- which is now claimed by the accused saying that the cheque has been lost by the Bank. There is no evidence to show that the said cheque was encashed by the complainant and in the absence of any such evidence, it could not be said that the complaint was wrong. Further, the learned counsel pointed out that by inadvertence, the complainant stated that he had received the cheque of ₹2,50,000/- whereas, actually the amount was only ₹1,50,000/-. This, according to the lower court, shows that the complainant is not speaking the truth and had taken it as a ground to acquit the accused. The learned counsel went on to point out that the transaction was of the year 2003 and the examination of the witnesses was in 2006. It

is unwise to insist for mathematical precision with regard to the evidence of witnesses. The learned counsel pointed out that once it is shown that the cheque was issued by the accused, it is for the accused to rebut the presumption available under Section 139 of the Negotiable Instruments Act. These vital aspects have been omitted to be noticed and that has resulted in a wrong acquittal being passed.

7. The learned appearing for the respondent on the other hand pointed out that the court below has meticulously analyzed the evidence and had come to the conclusion that PW1 is not speaking the truth. On the basis of the evidence adduced by the accused, who had examined four witnesses and also produced several documents, the court below reached the conclusion that there was only one transaction and that amount has been discharged. Cogent and convincing reasons have been given by the court below to find that there was only one transaction between the parties and that the entire debt has been satisfied. The

learned counsel also pointed out that it is significant to notice that the payee, who is the complainant, was not examined but his power of attorney holder, his wife of the complainant was examined on his behalf. This aspect was also taken note of by the court below. PW1 had stated that she is aware of all the financial transactions between the parties. She admitted that on two occasions, she had encashed cheque for ₹50,000/-. Read as a whole the evidence of PW1 taken along with the evidence of DW4 clearly show that no amount was outstanding towards the complainant. It is therefore contended that there are no grounds to interfere with the finding of the court below.

8. It is by now well settled that power of court in exercising in a appellate jurisdiction is restricted in the case of an acquittal by a court below. Unless it is shown that the appreciation of the evidence is perverse or that the findings are based on irrelevant materials and that material evidence had been discarded, the appellate court may not be justified

in interfering with the finding of the acquittal merely on the ground that a different view is possible. In an appeal against an acquittal, the accused is fortunate to be acquitted on two presumptions; (1) unless otherwise the accused is innocent and (2) the court on appreciation of the evidence in the case found the accused to be not guilty. Therefore the task for the appellant/complainant is formidable in the case of an appeal against the acquittal. Unless there are compelling reasons to interfere, it may not be proper for this Court to upset the finding of the trial court.

9. Bearing the above principle in mind an attempt shall now be made to see whether any perverse finding has been entered into by the court below.

10. As rightly pointed out by the learned counsel for the respondent, the complainant was not examined and his power of attorney holder, his wife was examined. She claimed to have knowledge about all the financial transaction between the parties. She indeed says that there

were several transactions between the parties and the issue involved in the present case is distinct and different.

11. However, she denied having knowledge about the accused having borrowed ₹2,25,000/- from the complainant. She also denied the existence of Ext.D2 agreement between the parties. Even though she denied that she had encashed the cheque of ₹1,50,000/-, she denied the first payment and as regards the second payment, she faint ignorance regarding the date on which the cheque was encashed. As rightly pointed out by the learned counsel for the accused, she in fact admits having received two cheques for ₹50,000/- each. She also admitted in cross examination that four cheque leaves were given by the accused to the complainant.

12. The presumption under Section 139 of the Negotiable Instruments Act is available only when the two ingredients mentioned in Section 138 are established. Section 138 requires that the holder of a cheque or payee to

establish that there is an enforcible debt and that cheque was issued to discharge the debt. This initial burden is on the complainant and only when it is proved that the cheque was duly executed, the presumption under Section 139 comes to the aid of the complainant. The existence of debt itself is in doubt. The complainant cannot fall back upon Section 139 and seek the court to start with a presumption that there is an enforcible debt. It is clear from the wording of Section 139 which says that "when a cheque of the nature made mention of in Section 138 is issued." It means a cheque as mentioned in Section 138. The cheque mentioned in Section 138 is a cheque which is issued for discharge of a debt which means that there is a debt and that the cheque was executed by the accused.

13. In all criminal cases where the burden of proof is shifted on to the accused, still the initial burden to prove the necessary ingredients to attract the presumption is always on the prosecution/complainant as the case may be. In the

case on hand also the position is not different.

14. Except for saying that the accused had borrowed a sum of ₹2,75,000/- and issued Ext.P2 cheque, PW1, the complainant is not sure about anything else. She bungles regarding the repayment made and she is unable to sustain the claim made by her that there were more than one transaction between the parties.

15. It is here that the effort taken by the accused to prove his innocence will have to be appreciated. He examined four witnesses and documents produced to show that amounts were in fact paid to the complainant and there was only one transaction. What is significant is that Ext.P2 cheque bears the No.032955 and it is dated 25.02.2004. Going by the complaint, the amount was borrowed on 25.01.2004. On a perusal of Ext.D3, passbook, which shows the various transactions in the account, says the very interesting fact. As on 29.01.2003 a cheque bearing No.33271 seen to have been encashed. On 13.03.2003,

cheque No.33276, 13.03.2003, cheque No. 33276, 28.03.2003 cheque No. 33279 and on 31.03.2003 chque No. 33280 are seen encashed.

16. One may recall here that number of the cheque alleged to have been issued to the complainant is 32955. Obviously, on going by the passbook, that cheque must have been issued prior to 29.01.2003 normally. There is nothing to show that the accused had any occasion to keep a leaf in an earlier cheque book to be given to the complainant at a later date.

17. The above circumstance coupled along with two payments of ₹50,000/- each which is accepted by the court complainant persuaded the court below to come to the conclusion that the claim made by the complainant is not supported by evidence on record.

18. It is true that the notice issued to the accused was returned with the endorsement unclaimed. But that by itself is not a ground to hold that the complainant's case is true.

19. The accused has examined DW3 to prove execution of Ext.D2 document. Of course, the complainant has denied the execution of the said document. However, keeping Ext.D2 aside, the statement of accounts furnished and the Ext.D3 passbook create a considerable doubt regarding the version given by the complainant as to the issuance of Ext.P2 cheque and also the receipt of ₹2,75,000/- as on 25.01.2004.

20. It could not be said that finding of the court below is perverse or based on simply irrelevant materials on records. It is a possible and plausible view. If that be so, this Court, even assuming a different view is possible, cannot be justified in interfering with finding of the court below.

The result is that the order of acquittal has to stand. This appeal is without merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

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