

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937

CRL.A.No.2433 of 2006

AGAINST THE JUDGMENT IN CC 42/2005 of JUDICIAL FIRST CLASS
MAGISTRATE COURT-I, MANJERI DATED 07-01-2006

APPELLANT/COMPLAINANT:

MUHAMMED KUNHI MUSLIAR,
S/O. MOHAMMED HAJI, AGED 44 YEARS,
NARIKKATTUKUNNIL HOUSE, PATTARKULAM, P.O.NARUKARA.

BY ADVS.SRI.C.A.CHACKO
SMT.C.M.CHARISMA
SRI.N.A.SHAFEEK

RESPONDENTS/ACCUSED & STATE:

-
1. KUNHABDULLA, S/O. MAMMU,
HOUSE NO.VI.503, KUNNALAM,
P.O. MUNDAKUTTI, MANANTHAVADI.
 2. THE STATE OF KERALA, REP. BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

R1 BY ADV. SRI.BABU S. NAIR
R2 BY SMT.S.HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
18-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.2433 OF 2006

Dated this the 18th day of November, 2015.

J U D G M E N T

Aggrieved by the order of acquittal in a proceedings under Section 138 of the Negotiable Instruments Act, complainant before the court below, after obtaining leave of this Court, has come up in appeal.

2. The short case put forward by the complainant is that on 10.03.2004, accused went over to the house of the complainant and received a sum of Rs.1,50,000/- from the complainant agreeing to repay the same within one month. Since the amount was not paid within the stipulated time, money was demanded back. It is alleged that at that point of time, Ext.P1 cheque for Rs.50,000/- was handed over by the accused to the complainant promising to pay the balance amount within a short period. The complainant presented Ext.P1 cheque for encashment but was returned for want of funds. Statutory notice issued to the accused returned with the endorsement 'addressee out of

station". Since the amount remained unpaid, complaint was laid.

3. The court before which complaint was laid took cognizance of the offence and after following necessary formalities issued summons to the accused. The accused entered appearance and copies of the documents were given to him, and the particulars of offence were read out to him. He pleaded not guilty and claimed to be tried.

4. The complainant therefore examined himself as PW1 and Exts.P1 to P5 were marked.

5. After the close of the complainant's evidence, accused was questioned under Section 313 Cr.P.C wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He examined himself as DW1 and had Exts.D1 and D2 marked.

6. The court below accepted the claim put forward by the accused that the accused had only borrowed a sum of Rs.25,000/-, the discharge of which was evidenced by Exts.D1 and D2 and the complainant had miserably failed to establish that the accused had received a sum of Rs.1,50,000/- on 10.03.2004.

Accordingly, accused was acquitted.

7. Assailing the acquittal, learned counsel appearing for the appellant contended that the signature on the cheque and its issuance are admitted. If that be so, presumption under Sections 118 and 139 of the Negotiable Instruments Act are attracted and the burden is entirely on the accused to show otherwise. No evidence to that effect has been adduced by the accused and the trial court ought not to have accepted the case put forward by the defence.

8. Learned counsel appearing for the respondent-accused, on the other hand, contended that the accused had a definite case that he had borrowed a sum of Rs.25,000/- which he repaid and when the cheque which has been given as security was sought back, complainant insisted for more amount and that was also given as evidenced by Exts.D1 and D2. Learned counsel went on to point out that there was a specific contention taken that the complainant was incapable of raising an amount to the tune of Rs.1,50,000/-. He had no explanation for the two payments made by Exts.D1 and D2. Even though in cross

examination PW1 conceded that there was previous transaction, it was not the case of the complainant that two payments evidenced by Exts.D1 and D2 are in relation to any other transaction. Whatever that be, according to learned counsel, since the court below has accepted the case put forward by the defence as per Exts.D1 and D2, unless the findings are shown to be perverse, this Court may not be justified in interfering with the order of acquittal.

9. Before considering the rival contentions and the evidence on record, it may first useful to remember that this Court is exercising its appellate jurisdiction against an order of acquittal where the accused is entitled to two presumptions; 1) accused is presumed to be innocent unless proved otherwise and 2) he has been found not guilty by a court. As rightly pointed out by the learned counsel for the respondent, if, as a matter of fact, it is found that the view taken by the lower court is a possible view, then the mere fact that a different view is possible will not justify interference by this Court. In order to interfere with an order of acquittal, it has to be shown that the

finding is perverse or that irrelevant aspects are taken into consideration and relevant facts omitted to be noticed.

10. Learned counsel appearing for the appellant relied on the presumptions under Sections 118 and 138 of the N.I Act and contended that since the signature on the cheque is admitted, the burden is on the accused to prove otherwise. It is by now well settled that merely because the signature is admitted or that the cheque is handed over, that does not amount to execution. Proof of execution is a sine qua non for attracting Section 138 of N.I Act. Further, the words used in Section 139 of N.I Act are 'cheque of the nature referred to in Section 138'. The cheque of the nature mentioned in Section 138 means that there is a legal debt due and cheque was issued in discharge of the said debt. These two elements will have to be proved by the complainant. Even otherwise, on general principle when presumptions are available to a person, the factors which are necessary to attract the presumptions will have to be established. Therefore, it could not be said that merely because signature and issuance are admitted, complainant has no further burden and the entire

burden shifts to the accused. Apart from the fact that the burden of proof never shifts, only the onus of proof changes. It is also to be noticed that the burden of proof of accused is not so onerous as that of the complainant.

11. Bearing the above principles in mind, an attempt shall now be made to analyse the evidence in the case.

12. The evidence is rather limited. The complainant is examined as PW1. He says about borrowal and handing over of cheque. He further says about dishonour of cheque, issuance of notice etc. One aspect has to be noticed. There is no reply notice from the side of the accused. This, according to the learned counsel for the appellant, goes a long way in showing the complicity of the accused.

13. One has to remember that this is a criminal proceedings and merely because no reply is issued to the notice does not mean that the defence set up is untrue.

14. Coming to the defence set up by the accused, his definite case throughout has been that he had borrowed a sum of Rs.25,000/- from the complainant and at that time he issued two

blank cheques and also signed blank paper. After the principal amount was repaid, when the cheques were sought back, complainant insisted for more amount as interest on Rs.25,000/-. That was also deposited. Still the cheques were not returned. It cannot be disputed that going by Exts.D1 and D2, a sum of Rs.25,000/- each has gone to the account of the complainant. The complainant offers no explanation for those payments. It is here that one has to note that the complainant has no case that the said two payments were towards some other transaction and not for the transaction involved in this proceedings. There is total denial from the side of the complainant. If, as a matter of fact, there was no such amount in his account, he would have easily called for a statement from the Bank and established the said fact.

15. It was the above facts and circumstances which persuaded the court below to suspect the case put forward by the complainant. In the light of the evidence of PW1 that he was only a Teacher and his only means of income was from that institution, court below formed the opinion that it is not possible

for the complainant to raise such a huge amount. Of course, complainant had a case that he kept the said amount for construction of a building. It is difficult to believe that he would have kept the amount in his house for such a purpose. He will usually deposit that amount in a Bank and withdraw money as and when required. On an analysis of the evidence, it could not be said that the findings of the court below are perverse or are based on irrelevant facts. It is a possible view. If that be so, interference by this Court exercising its appellate jurisdiction is not warranted.

In the result, this appeal is without merits and it is accordingly dismissed.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

// True Copy //

P.A to Judge.