IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

FRIDAY, THE 26TH DAY OF JUNE 2015/5TH ASHADHA, 1937

CRL.A.No. 584 of 2015 ()

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AGAINST THE JUDGMENT IN CC 553/2010 of THE COURT OF JUDICIAL FIRST CLASS MAGISTRATE-VII, ERNAKULAM DATED 11-07-2013

APPELLANT/COMPLAINANT:

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TENNY DEVASSY
PROPRIETOR, M/S.TRIPUNITHURA CEMENT CENTRE
MARKET JUNCTION, PALLIPARAMBUKAVU ROAD, TRIPUNITHURA
ERNAKULAM DISTRICT-682 301.

BY ADVS.SRI.VIVEK VARGHESE P.J.
SRI.VARUGHESE M EASO

RESPONDENTS:

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1. MR.P.K.VENU
S/O.T.K.KONNAN, C/O.SUPRAN, MOLOTH HOUSE
COMPANY PADI, MAMALA-682 305.

2. STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM - 682 031.

R1 BY ADV. SRI.K.R.MOHANAN
R1 BY ADV. SRI.K.M.SANAL
R2 BY PUBLIC PROSECUTOR SMT.P.MAYA

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 26-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**C.T.RAVIKUMAR, J.**

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Crl.A.No.584 of 2015

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Dated 26th June, 2015

**JUDGMENT**

This appeal is directed against the order of acquittal passed by the Court of Judicial First Class Magistrate-VII, Ernakulam in C.C.No.553 of 2010. The appellant herein was the complainant therein and the first respondent herein was the accused. The appellant filed a complaint which was taken on file and registered as C.C.No.553 of 2010 alleging commission of an offence punishable under Section 138 of the Negotiable Instruments Act. His case was that he was the proprietor of `Tripunithura Cement Centre' engaged in the business of wholesale cement marketing and the accused/first respondent was also engaged in the business of selling cement. The accused used to purchase goods on credit basis from the complainant and for part payment of the price of goods purchased he issued Ext.P1 cheque dated 10.5.2005 drawn on Catholic Syrian Bank Ltd., Ponnurunni Branch for ₹ 30,312/-. When Ext.P1 cheque was presented for encashment it was dishonoured owing to the reason `account closed'. The appellant issued Ext.P3 lawyer notice dated 21.5.2005 intimating him of the dishonour of the cheque and also calling upon him to pay the amount due. Despite the receipt of Ext.P3 notice the accused did not respond to the same or paid the amount within the statutorily permissible time. In fact, it was with such allegations that the complaint was filed. On due process, the accused/first respondent appeared before the court. The particulars of the offence were read over and explained to him. He denied the same and pleaded not guilty. To bring home the offence punishable under Section 138, N.I. Act against the accused/first respondent the appellant got himself examined as PW1 and got marked Exts.P1 to P5. After the closure of the evidence of the complainant the accused/first respondent was questioned under Section 313, Cr.P.C.. He denied all the incriminating circumstances put to him. However, the accused did not adduce any evidence in defence. After appreciating the evidence on record the learned Magistrate found that the appellant/complainant has failed to prove the transaction and the due execution of the cheque. Consequently, the accused was found not guilty of the charge under Section 138, N.I. Act and he was acquitted under Section 255(1), Cr.P.C. Hence, this appeal.

2. I have heard the learned counsel for the appellant.

3. It is not in dispute that the appellant filed the complaint claiming himself to be the proprietor of `Tripunithura Cement Centre'. The appellant did not have a case that the evidence tendered by him

were incorrectly adverted to by the trial court in the judgment. The grievance of the appellant is only with respect to the manner of appreciation of the evidence tendered by him and not with respect to the evidence discussed in the judgment, in detail. The trial court found that the appellant did not produce any document to show that he is the proprietor of `Tripunithura Cement Centre'. The specific case of the appellant herein was that the accused/first respondent used to purchase the goods on credit basis from `Tripunithura Cement Centre' and it was in part payment of the price of goods purchased from there that Ext.P1 cheque was issued. In such circumstances, I do not find any infirmity in the conclusion arrived at by the court below that for a successful prosecution of the first respondent the appellant should have established that he is the proprietor of `Tripunithura Cement Centre'. The appellant failed to adduce any evidence to show that he was its proprietor during the relevant period. Section 142 of the N.I. Act provides that no court shall take cognizance of any offence punishable under Section 138 of the N.I. Act except upon a complaint, in writing, made by the payee or as the case may be, the holder in due course of the cheque. In short, the appellant has failed to show that he was the payee of the cheque. PW1 had also deposed to the effect that he was an assessee of income tax and also claimed possession of documents revealing the fact that the accused/first respondent used to purchase goods from `Tripunithura Cement Centre' on credit basis. Nonetheless, no documents to establish the aforesaid aspects were produced. The appellant did not dispute the said position. When the specific case of the appellant was that the accused used to purchase goods from `Tripunithura Cement Centre' of which he is the proprietor, on credit basis and that such documents revealing the purchase of goods by the first respondent on credit basis are available with him, the appellant was bound to produce such documents for a successful prosecution besides the documents showing his proprietorship. The cheque in question would not reveal that he is the payee of the said cheque and there is absolute absence of any case of draw down, as well. When the admitted position is that he has failed to produce any such documents to establish those facts I am of the view that the court below has arrived at only the irresistible and inevitable conclusion from the evidence on record. It is the appreciation of the aforesaid circumstances obtained from the evidence on record that constrained the trial court to arrive at the finding that the appellant had failed to prove that Ext.P1 cheque was issued in discharge of a legally enforceable debt and that the appellant had failed to prove the execution of the cheque. Evidently, the first respondent/accused has denied the execution of a cheque for discharging any legally enforceable debt in favour of the appellant. During the cross examination PW1 deposed that Ext.P1 was produced before him after writing and putting signature, thereon. At the same time, he would state that he was not familiar with the signature of the accused. It was taking into account such circumstances that the trial court arrived at the conclusion that PW1 had not witnessed the execution of Ext.P1 by the accused. As noticed hereinbefore, despite the specific case that the accused used to purchase goods from the complainant on credit basis and possession of documents revealing such transaction the complainant had not produced any such documents, is the specific finding of the trial court. The appellant did not have a case that he had produced any such documents. It was considering all such relevant aspects that the trial court found that the appellant had failed to discharge the onus to get the benefit of the presumption available under Section 139 of the N.I. Act. In view of the aforesaid circumstances, I am of the considered view that the appellant had failed to make out a prima facie case warranting any interference with the order of acquittal. The presumption even otherwise available in a criminal trial was reinforced in this case by the order of acquittal passed by the Court of Judicial First Class Magistrate-VII, Ernakulam. In such circumstances, a re-appreciation of the evidence is possible only if the appellant makes out a case of perverse appreciation of the evidence or that the conclusions were arrived at without any evidence at all or that the judgment is infected with an error of law. The appellant had failed to establish any such ground.

In the result, this appeal fails and accordingly, it is dismissed.

Sd/-
C.T.RAVIKUMAR
Judge

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