IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

TUESDAY, THE 30TH DAY OF JUNE 2015/9TH ASHADHA, 1937

CRL.A.No. 626 of 2015 () IN Crl.L.P..204/2015

AGAINST THE JUDGMENT IN ST 2/2011 of THE COURT OF JUDICIAL FIRST CLASS MAGISTRATE-II,PATHANAMTHITTA DATED 28-03-2015

APPELLANT/COMPLAINANT:

K.K. HARIDAS, AGED 50 YEARS
S/O.KRISHNA PILLAI, CHITHIRA HOUSE,
KONNI P.O., KONNI.

BY ADVS.SRI.P.VIJAYA BHANU (SR.)
SRI.VIPIN NARAYAN
SRI.V.C.SARATH

RESPONDENTS/ACCUSED & STATE:

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1. ANURADHA K.R., AGED 56 YEARS
   K.K.B.VILASAM, KUMMANNOOR P.O.,
   KONNI - 689 691.

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

R2 BY PUBLIC PROSECUTOR SMT.P.MAYA

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 30-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T.RAVIKUMAR, J.

Crl.A.No.626 of 2015

Dated 30th June, 2015

JUDGMENT

This appeal is directed against the judgment in S.T.No.2 of 2011 passed by the Court of Judicial First Class Magistrate-II, Pathanamthitta dated 28.3.2015. The appellant herein was the complainant and the first respondent herein was the sole accused, therein. The accused was tried for an offence punishable under Section 138 of the Negotiable Instruments Act (for short `N.I. Act') based on a complaint filed by the appellant herein under Section 142, N.I. Act. The trial court after careful evaluation of the evidence on record and consideration of the arguments advanced arrived at the finding that the complainant had failed to prove the guilt of the accused beyond reasonable doubt and in the said circumstances found the accused/first respondent not guilty for the offence punishable under Section 138 of the Negotiable Instruments Act and consequently, acquitted him under Section 255(1), Cr.P.C.. Hence, this appeal.

2. The appellant herein filed a complaint which was taken on file and registered as S.T.No.2 of 2011 alleging that the first

respondent/accused had borrowed an amount of ₹ 2,00,000/- (Rupees Two lakhs only) from him from his residence on 6.9.2010 and in discharge of the said legally enforceable debt he issued Ext.P2 cheque dated 6.11.2010. The said cheque on its presentation for encashment got dishonoured owing to insufficiency of fund in the account maintained by the first respondent. Thereupon, the appellant issued statutory notice within the prescribed time limit intimating the first respondent regarding the dishonour of the cheque and calling upon him to pay the amount due. The first respondent failed to pay the amount due within the statutorily prescribed period. It was with such allegations that the complaint was filed.

3. On due process, the first respondent/accused appeared before the court and the particulars of the offence were read over and explained to him. He denied the same and pleaded not guilty. To prove the offence against the first respondent the appellant got examined only his Power of Attorney Holder as PW1. Ext.P1 is the Power of Attorney issued in his favour. The Power of Attorney Holder filed an affidavit in lieu of the chief examination in tune with the averments in the complaint. Exts.P1 to P7 were got marked on the side of the complainant. After closing the evidence of prosecution the first respondent/accused was questioned under Section 313 Cr.P.C. He denied all the incriminating

circumstances put to him. Though the accused did not mount the box he proved documentary evidence viz., Exts.D1 to D4 through PW1. It is after a careful evaluation of the evidence thus adduced by both sides and after considering the arguments advanced that the court below arrived at the conclusion that the complainant has failed to prove the guilt of the accused beyond reasonable doubt.

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

5. PW1, the Power of Attorney Holder of the appellant would depose that Ext.P2 cheque was issued by the first respondent in discharge of the liability of ₹ 2,00,000/- which he borrowed from the complainant. Ext.P2 cheque is dated 6.11.2010 and Ext.P3 is the dishonour memo dated 8.11.2010 and Ext.P4 is the intimation which the complainant received from his bank regarding the return of Ext.P2 cheque as unpaid. It is also dated 8.11.2010. Ext.P5 is the copy of the lawyer notice issued by the complainant dated 10.11.2010 pursuant to the receipt of Ext.P4 and Ext.P6 is the postal receipt relating the registration of Ext.P5 and Ext.P7 is the acknowledgement card dated 12.11.2010 in relation to the receipt of Ext.P5. It is to be noted that PW1 would further depose that in relation to the dishonour of Ext.P2 cheque and the proceedings initiated based on its dishonour there was a

talk between the parties and to settle the same the accused issued Ext.P8 cheque dated 21.6.2014 to the complainant. PW1 further deposed that the accused had agreed to pay the amount before the date of the cheque and she had failed to keep her promise. It is evident that during the cross examination PW1 deposed that he has given the evidence as a witness. The court below considered the question whether by virtue of Ext.P1 Power of Attorney PW1 was competent to depose on behalf of the complainant. The said question was considered by the trial court obviously, in the light of a decision of the Hon'ble Supreme Court in **Narayan** v. **State of Maharashtra** **(2013 (4) KLT 21 (SC))** in which it is held that though a Power of Attorney Holder would be entitled to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 of N.I. Act such a Power of Attorney Holder would not be entitled to prosecute the case and to give evidence in place of the complainant unless there is positive averment in the complaint to the effect that the Power of Attorney Holder has got personal knowledge regarding the transaction in question and also the issuance of the cheque. The court below further found that, in the case on hand, the complaint contained no such specific averments. It is to be noted that the complaint was filed by the complainant - K.K.Haridas himself and it carried no specific averment regarding the personal knowledge of PW1, the power of attorney holder regarding the transaction in question as also the issuance of the cheque. There is no dispute with respect to the fact that in the complaint the complainant Haridas alleged that the accused borrowed an amount of ₹ 2,00,000/- from him from his residence. Thus, admittedly, going by the averments in the complaint the alleged transaction between the complainant and the accused was a personal transaction and the accused came to the residence of the appellant/complainant on 6.9.2010 and borrowed an amount of ₹ 2,00,000/- and issued Ext.P2 cheque in discharge of the said legally enforceable debt. A scanning of the evidence tendered by PW1 as the Power of Attorney Holder of the complainant is that the complainant has been conducting a proprietorship concern in the name and style `Dhanavarsha Financiers & Chit Funds' and that in his capacity as its Manager he is aware of the transactions of the subscribers of the chitty conducted by the said proprietary concern. At the same time, it is to be noted that nowhere in the complaint it is stated that the debt or liability involved in this case arose out of a chitty transaction. So also, there is not even a whisper in the complaint that on 6.9.2010 PW1, the Power of Attorney Holder was present in the house of the complainant and he had witnessed the alleged borrowal by the accused. There cannot be any doubt with respect to the fact that the complainant or anybody legally entitled to give evidence on his behalf, could adduce evidence only in terms of the averments in the complaint. As noticed hereinbefore, the appellant did not have a case that he has stated anywhere in the complaint that the debt or liability arose out of the chitty transaction. In fact, paragraph 2 of the appeal also reveal the case of the appellant and conspicuously, even in the appeal there is no case for the appellant that the liability of the first respondent-accused arose out of a chitty transaction. Merely because the first respondent-accused produced some documents relating the chitty transaction is no ground for the power of attorney holder of the complainant from deviating from the case in the complaint and to adduce evidence to prove a totally different case. In such circumstances, the evidence of PW1 to the effect that the liability arose out of chitty transaction cannot be believed at all. The learned counsel for the appellant submitted that in fact, such a defence was taken by the accused. Even if it is taken that it was in such circumstances that PW1 deposed in relation to the chitty transaction of the accused, it is to be noted that the complainant/appellant had not produced any document to prove the chitty transaction from which a legally enforceable debt had occurred to the tune of ₹ 2,00,000/-. In fact, a perusal of the evidence would reveal that to prove the case of the complainant Exts.P1 to P8 alone were produced and indisputably they did not pertain to any chitty transaction. In other words, no document whatsoever was produced on behalf of the complainant/appellant in relation to the chitty transaction to prove that an amount of ₹ 2,00,000/-

was outstanding on the date on which Ext.P2 cheque was issued and that the said cheque was issued to discharge any such liability. The appellant cannot be permitted to prove the transaction allegedly led to the issuance of Ext.P2 cheque solely by adducing evidence to prove the issuance of Ext.P8. For successful prosecution the complainant ought to have adduced evidence to establish that Ext.P2 cheque was issued in discharge of a legally enforceable debt or liability. The very action on the part of the appellant in concealing the chitty transaction itself would cast suspicion on the genuineness of the transaction. In the said circumstances, when the complaint lacks averments regarding the knowledge of PW1 in respect of the transaction and also of the issuance of Ext.P2 cheque and when there is nothing in the complaint that he was not very much present in the house of the complainant on 6.9.2010 when the accused turned up there to borrow the amount of ₹ 2,00,000/- the evidence adduced by PW1 would pale into insignificance. The evidence tendered by PW1 with respect to the chitty transaction would not sufficient to prove the transactions specifically referred to in the complaint. If that be so, I cannot find fault with the trial court in holding that PW1 was incompetent to depose on behalf of the complainant in the proceedings. The learned counsel attempted to clarify the position by contending that the complainant had not taken any contention with respect to the personal knowledge of PW1, the Power of Attorney Holder in the complaint as it was filed by the complainant himself. In the said circumstances, the learned counsel attempted to canvass the position that the decision in **Narayan's** case (supra) is not applicable in this case. Even in such circumstances, when PW1 did not depose to the effect that he was very much present in the house of the complainant on 6.9.2010 and witnessed the borrowal by the accused he cannot be permitted to depose on behalf of the complainant. It is to be noted that when the case of the complainant is that the accused came to his residence and borrowed an amount of ₹ 2,00,000/- on 6.9.2010 and the evidence of PW1 is to the effect that the liability of ₹ 2,00,000/- covered by Ext.P2 arose out of the chitty transaction of the first respondent - accused, they cannot be said to be one and the same case. In fact, they are distinct and different. In such circumstances, there cannot be any doubt with respect to the fact that the evidence of PW1 as Power of Attorney Holder of the complainant is absolutely insufficient to prove the case of the complainant. There was absolutely no material to prove that Ext.P2 cheque was issued for discharging a debt or liability for the amount covered by the same. The learned counsel appearing for the appellant also contended that the first respondent - accused had taken up a contention that the liability arose out of a chitty transaction and at the same time the accused/first respondent had failed to establish the same and in such circumstances, the court below was not justified in holding that the complainant has failed to prove the case against the accused. In the contextual situation, it is relevant to refer to the decision in Krishna Janardhan Bhat v. Dattatraya G. Hegde ((2008) 2 SCC (Crl.) 166) wherein the Hon'ble Apex Court had considered the question as to what exactly is the standard of proof of the evidence of the accused and also of the prosecution. In a criminal prosecution the prosecution must prove the guilt of the accused beyond reasonable doubt whereas, the standard of proof required on the part of an accused is only preponderance of probabilities. The Hon'ble Apex Court further held that inference of preponderance of probabilities could be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which the accused relies. After the production of Exts.D1 to D4 by the defence, evidently the complainant gave up the original case and attempted to establish that the liability arose out of a chitty transaction. It is relevant to note that even then, the documents relating the chitty transaction to establish how the first respondent - accused incurred the liability (if any) were not produced by the complainant. In view of the discussion as above, I am of the considered view that the conclusion arrived at by the court below that the complainant/appellant had failed to prove the guilt of the accused beyond any reasonable doubt is to be sustained and without all peradventure it can be said that the complainant- appellant had failed to establish the guilt of the first respondent - accused. It cannot be said that the order of acquittal is the outcome of a perverse appreciation of evidence or that such conclusion was arrived at against the weight of evidence. The appellant/complainant did not have a case that the evidence tendered by him through PW1 was incorrectly adverted to by the court and in fact, the case of the appellant is that the evidence was not properly appreciated rather, perversely appreciated. The appellant has also failed to establish that the judgment of the trial court is infected with an error of law. In such circumstances, I do not find any reason to interfere with the well-merited order of acquittal passed by the trial court. No prima facie case has been brought out by the appellant.

This appeal has to fail and accordingly, it is dismissed.

Sd/-
C.T.RAVIKUMAR
Judge

TKS