IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 10TH DAY OF DECEMBER 2015/19TH AGRAHAYANA, 1937

CRL.A.No. 2273 of 2009 (D)

AGAINST THE JUDGMENT IN CC 38/2009 of JUDICIAL FIRST CLASS MAGISTRATE COURT-II, ALAPPUZHA DATED 09-10-2009.

APPELLANT/PETITIONER:

CHANDRASEKHARA PILLAI
"JAYAVIJAYA BHAVANAM", NORTH ARYAD P.O., MANNANCHERRY.

BY ADVS.SRI.R.BINDU (SASTHAMANGALAM)
SRI.M.SUNILKUMAR

RESPONDENTS/ACCUSED & STATE:
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1. B.BIJU,
   U.D.CLERK, T.D.MEDICAL COLLEGE, NURSING COLLEGE,
   VANDANAM, ALAPPUZHA.

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

R1 BY ADV. SRI.C.A.CHACKO
R2 BY SMT. S. HYMA, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

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Crl. Appeal No.2273 OF 2009

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Dated this the 10th day of December, 2015.

J U D G M E N T

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

2. According to the complainant, on 23.02.2008, the accused borrowed a sum of Rs.80,000/- from him and to discharge the said debt, Ext.P1 cheque dated 10.04.2008 was issued to him. The cheque was presented for encashment. But it was returned with the endorsement 'account closed'. Statutory notice issued yielded no result. When the amount remained unpaid, complaint was laid.

3. Cognizance of the offence was taken after following necessary procedures and summons was issued to the accused. The accused entered appearance and copies of the records were given to him and thereafter particulars of offence were read out

to him, to which, he pleaded not guilty.

4. The complainant therefore examined himself as PW1 and had Exts.P1 to P6 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 put to him and set up a case that in 2006, he borrowed a sum of Rs.15,000/- from the complainant and at that point of time he had given a blank cheque as security and he was continuing to pay interest for the amount borrowed. Since he defaulted payment of interest for two months, complainant had filled up the cheque and presented it for encashment. In support of his evidence, he had DW1 examined and Ext.D1 marked.

6. The court below held that the complainant had failed to prove his case mainly on two grounds; 1) he did not establish his source of income and 2) he had in his cross examination stated that his wife and one Vasudevan was present at the time of transaction and none of them were examined. Holding so, accused was acquitted.

7. Assailing the acquittal, learned counsel appearing for the appellant contended that there was no serious challenge to the source of income of the appellant to pay the amount to the accused. A passing query was put to the complainant as to from where he had got money for paying Rs.80,000/- to the accused. He had told that he had sold his property. There was no further probe and it was left there. Even otherwise learned counsel pointed out that accused admits having borrowed a sum of Rs.15,000/- and he had no case that the complainant had no source to pay the amount to him.

8. As regards the second ground, learned counsel appearing for the appellant pointed out that there was no reply received by the complainant to the notice issued by him and that he was not aware of the defence of the accused. It was only when he was cross examined as to whether any person was present at the time of transaction, he replied that his wife and one Vasudevan was present. Their non examination cannot be given undue importance. Learned counsel pointed out that the court below has not appreciated the evidence in the proper

perspective and that has resulted in a wrong judgment being passed.

9. Learned counsel appearing for the respondent-accused, on the other hand, contended that the court below has appreciated the evidence in the proper perspective and found that the burden of proof casts on the complainant has not been duly discharged. The presumption under Section 139 of the Negotiable Instruments Act is attracted only when due execution of cheque is proved and learned counsel contended that due execution of cheque remains to be proved. If that be the position, there is no burden cast on the accused to show that transaction was not as alleged by the complainant.

10. That there was monetary transaction between the complainant and the accused is admitted by the accused also. The case put forward by the accused was that in 2006, Rs.15,000/- was borrowed by him and at that time he issued Ext.P1 cheque to the complainant. He continued to pay interest at a huge rate from that date onwards till February 2008 when he defaulted payment of interest. That had resulted in the cheque

being presented. Notice was sent for return of cheque.

11. It must be noticed at once that a monetary transaction as early as in 2006 is admitted by the accused. His definite case is that cheque was issued then. That means cheque was issued nearly 1½ years ago from the date claimed by the complainant. Yet the accused did not feel it necessary to produce the counterfoil or statement of accounts to show that cheque could not have been issued as claimed by the complainant. This aspect has been lost sight of by the court below. As rightly pointed out by the learned counsel for the appellant, even the accused did not have a case that the complainant did not have source to pay the amount. Even though in cross examination complainant had stated that he had sold his property and kept money with him, that was not pursued further and there was no occasion for the complainant to explain what is his source of income to pay the amount to the accused.

12. It is here that non receipt of reply, even assuming there needs to be one, assumes importance. The complainant was not in the know of defence that is going to be taken up by

the accused. It is not to say that reply notice is must in all cases. But that has to be appreciated in the light of facts and circumstances of each case. Here, monetary transaction is admitted and the accused contends that he has been continuing to pay interest for about two years. There is no evidence regarding payment of interest. He does not dispute the signature on the cheque nor does he dispute the issuance of cheque. As already mentioned, he must have counterfoils of cheques issued with him or at least he could have sought for production of statement of accounts to show that cheque could not have been issued as claimed by the complainant. These vital aspects have been omitted to be noticed by the court below and as rightly pointed out by the learned counsel for the appellant, it could not be said that the findings of the court below can be sustained in law.

For the above reasons, this appeal is allowed. The impugned order is set aside and the matter is remanded to the trial court for fresh disposal in accordance with law and in the light of what has been stated above. The parties will appear before the trial court on 14.01.2016. The parties are at liberty to adduce fresh evidence if they so choose. The trial court shall expedite the disposal of the case.

Sd/-

P.BHAVADASAN
JUDGE

smp

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P.A to Judge.