IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

CRL.A.No. 2756 of 2009

AGAINST THE JUDGMENT IN ST 2/2009 of J.M.F.C.-IV, KOLLAM.

APPELLANT(S)/COMPLAINANT:

K.SALAHUDHEEN,
KAKKANATAZHIKATHU THEKKATHIL, VADAKKEVILA P.O.
KOLLAM-10.

BY ADV. SRI.K.SUBASH CHANDRA BOSE

RESPONDENT(S)/ACCUSED AND STATE:
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1. S.M.HANEEFA,
ASKAR MANZIL, THEJUS NAGAR, VADAKKEVILA P.O.,
KOLLAM, NOW RESIDING AT THENGAZHIKATHU,
KIZHAKKATHIL, IKYA NAGAR, VADAKKEVILA P.O.,
KOLLAM-10.

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

R1 BY ADV. SRI.DILEEP P.PILLAI
R2 BY ADV. PUBLIC PROSECUTOR SMT. LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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Crl.Appeal. No. 2756 of 2009

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Dated this the 15th day of December, 2015.

JUDGMENT

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

2. The facts absolutely necessary for the disposal of this appeal areas follows:

The allegation in the complaint was that for partial discharge of a debt due from the accused to the complainant, Ext.P1 cheque dated 21.7.2005 was issued by the accused. The cheque on presentation was returned for want of funds. Notice issued to the accused did not invoke any reply nor was the amount paid. Hence the complaint was laid.

3. Cognizance of the complaint was taken by the court below and after following the necessary procedures,

summons was issued to the accused. He entered appearance. After furnishing copies of the documents, particulars of the offence were read out to the accused, to which he pleaded not guilty. The complainant examined himself as P.W.1 and had Exts.P1 to P6 marked. After the close of the complainant's evidence, the accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances put to him. He in turn examined D.Ws. 1 and 2 and had Exts. D1 and D2 marked.

4. The court below, on appreciation of the evidence found that the complainant has failed to establish a debt due to him for which the cheque is alleged to have been issued and accordingly acquitted the accused.

5. It is contended on behalf of the appellant that the signature on the cheque has not been disputed and in such a case, presumption under Section Section 139 of the N.I.Act applies. Learned counsel also contended that the

defence set up is strange and curious. The defence set up is that three cheques were issued to one Haneefa as security for the chitty amount collected by the subscriber. That is to say that Haneefa was a subscriber to the chitty run by the accused and when Haneefa bid the amount, the accused issued the cheque as security. This, according to the learned counsel, is inconceivable and that no such practice can exist. Further, it is contended that there is no reply to the notice issued by the accused and therefore, it is almost like an admission that there exists a debt. These facts have not been considered by the courts below and that resulted in a wrong decision.

6. After having heard learned counsel for the respondent and after having considered the evidence on record, it is seen that there is no material to interfere with the order of the court below. It is true that the signature on the cheque is admitted. But it is by now well established that admission of the signature on the cheque does not mean

execution of the cheque and it has to be proved by adducing evidence by the complainant.

7. It is significant to notice that there is clear averment by the complainant that in partial discharge of a debt, the accused had issued a cheque for Rs.1,50,000/-. As to what exactly was the debt due, when it fell due, when the amount was given etc are not seen mentioned in the notice or in the affidavit in lieu of chief examination of P.W1, the complainant.

8. It is by now well settled that the burden to prove the two ingredients to attract the offence under Section 138 of N.I. Act, i.e., the existence of a debt and that the cheque was issued in discharge of that debt, is on the complainant. Merely because signature is admitted, presumption does not automatically apply.

9. May be that the defence set up may not be convincing and may appear to be strange and curious. But

that does not help the complainant who has the initial burden to prove the ingredients. It looks strange that it was the foreman who gave the cheques to the subscriber. That does not mean that the execution of the cheque in favour of the complainant is admitted. Any how, the accused had denied any transaction with the complainant and under those circumstances, it is for the complainant to establish the existence of a debt.

10. The fact that no reply was sent to the notice does not have much significance. Though it may be a favourable circumstance, there must be other materials to come to the conclusion regarding the debt. Apart from the above aspect, it was brought to the notice of this Court that the complainant had only Rs.60,000/- at the relevant time and the balance amount was borrowed by him from his brothers. On this defence, the accused had succeeded in showing that the complainant did not have sufficient funds to

give to the accused. As to the circumstance under which he borrowed the amount from his brothers and gave it to the accused is not disclosed by him. The court below was inclined to take the view that in the light of the absence of essential pleadings and evidence to show that there existed a debt and in the absence of materials to show that the complainant had the capacity to pay, it may not be possible to come to the conclusion that Ext.P1 was issued to discharge a debt.

11. It is not the issuance of the cheque which creates the debt. The cheque should be issued in discharge of a debt. So proof of debt is a primary requirement. It is felt that there is some significance to the lower court's observation that total debt due to the complainant is not disclosed in the notice or in the affidavit in lieu of chief examination. When P.W.1 was cross-examined, he says that the accused had borrowed a sum of Rs.3,00,000/- from him. As to why he felt shy to mention the total debt due in the complaint is not

understandable. The accused had a contention that the complainant did not have the necessary funds at the relevant time. The complainant himself had conceded that he had borrowed amounts from his brothers. Under these circumstances the court below felt suspicious about the transaction.

12. The onus of proof shifts to the accused only if the complainant establishes the two ingredients. As already stated, it is for the complainant to establish that there did exist a debt and the cheque was issued in discharge of the said debt. It is only after he discharges that burden, the onus shifts to the accused to show otherwise. Here the words used in Section 139 of the N.I. Act assumes importance. The words used in Section 139 of the N.I. Act are a <u>cheque of the nature made mention of in Section 138 of the N.I.Act</u>. Which means that there should exist a debt and the cheque was issued in discharge of the said debt. It is abundantly made clear that

the initial burden of proving the two ingredients is on the complainant. The court below has come to the conclusion that the initial burden was not discharged. This Court finds no grounds to interfere with the said finding of the court below.

This appeal is without merits and it is accordingly dismissed.

P. BHAVADASAN,
JUDGE

sb.