IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

TUESDAY, THE 9TH DAY OF JANUARY 2024 / 19TH POUSHA, 1945

CRL.A NO. 2489 OF 2006

AGAINST THE ORDER IN CC NO.263/2004 DATED 12.10.2006 ON THE FILE OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT, MAVELIKKARA

APPELLANT/COMPLAINANT:

SASIDHARAN A., PLAVILAYIL
IDEKUNNAM P.O., NOORANADU.
BY ADV SRI.M.R.SARIN

RESPONDENTS/ACCUSED AND STATE:

1 VIJAYAN UNNITHAN
PARAMIL VEEDU, THATTAN MANNA, NOORNADU,
NOW RESIDING AT MEDATHIL THEKETHIL PALAMEL,
PADANILAM P.O., NOORNADU.

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

SR GP..PUSHPALATHA MK

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 09.01.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 09th day of January, 2024

This is an appeal against acquittal. The 1st respondent was the accused. The offence is punishable under Section 138 of the Negotiable Instruments Act, 1881. As per the judgment dated 12.10.2006, the 1st respondent was acquitted by the Judicial Magistrate of the First Class, Mavelikkara. Aggrieved by the same, the complainant preferred this appeal.

2. Despite serving notice, the 1st respondent did not choose to appear before the Court.

3. Heard the learned counsel for the appellant and the learned Public Prosecutor.

4. The complaint was filed with the allegation that the cheque dated 23.12.2003 issued by the 1st respondent in discharge of a debt of Rs.50,000/- owed by him to the appellant was returned unpaid by the banker, when it was presented for encashment. A demand notice was sent and in spite of receipt of the same, the amount due under the cheque

was not paid back. Hence, the prosecution was initiated. At the trial, the appellant was examined as PW1. Exts.P1 to P5 were marked. The stand taken by the 1st respondent during his examination under Section 313(1)(b) of the Code was one of total denial. No evidence was let in by him.

5. The court below after appreciating the evidence on record took the view that the evidence was insufficient to prove that Ext.P1 cheque was dishonoured for want of sufficient funds with the account of the 1st respondent, which is an essential ingredient for a prosecution under Section 138 of the NI Act. Ext.P2 is the cheque return memo dated 31.12.2003. The reason stated for returning the cheque in Ext.P2 is 'referred to drawer'. Ext.P5 is a copy of the demand notice. It is stated in Ext.P5 that the cheque in question was returned by the banker noting the reason, 'refer to drawer' and further that the cheque was issued not fully knowing that no sufficient fund was in the account of the 1st respondent.

6. The learned counsel for the appellant would submit that when the reason for return of the cheque was stated in the demand notice as insufficiency of funds, the court below

should not have entered a finding that the insufficiency of funds as the reason for dishonour of cheque was not proved. Accordingly, it is contended that the order of acquittal is liable to be reversed.

7. The learned counsel in order to fortify his contention in that regard places reliance on the decision of the Apex Court in **Laxmi Dyechem v. State of Gujarat and Ors. [2012 (13) SCC 375]** and **Rajan v. Sharafudheen [2003 (2) KLT 377].** In **Laxmi Dyechem** the Apex Court held that even if the cheque was returned for the reasons such as, "account closed", "payment stopped", "referred to the drawer", etc. the prosecution under Section 138 of the NI Act is legally possible. In **Rajan** (*supra*) this Court took a similar view. But in both the cases it was further held that in order to sustain the charge, it shall be proved that the cheque was returned for insufficiency of funds with the account of the accused. Sufficiency of funds is a question of fact which is to be proved by adducing reliable evidence.

8. In this case, except stating that the cheque was issued by the 1st respondent knowing that there was no

sufficient funds with his account, no evidence in that regard has been adduced. PW1 did not state before the court regarding that fact. He is not a competent witness also to prove that fact. No official from the bank was examined. No document evidencing that fact has been brought in evidence also.

9. Section 138 of the NI Act reads:

"Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both."

Here, the appellant failed to prove the fact that the cheque was dishonoured for want of sufficient funds with the account of the 1st respondent. Therefore, it cannot be said that the view taken by the trial court is against the evidence, much less it is perverse.

10. In an appeal against acquittal, powers of appellate Court are as wide as that of the Trial Court and it can review, re-appreciate and reconsider the entire evidence brought on record by the parties and can come to its own conclusion on fact as well as on law. But it is well-established that if two views are possible on the basis of evidence on record and one favourable to the accused has been taken by the Trial Court, it ought not to be disturbed by the appellate Court. So long as the view of the trial court can be said to be reasonably formed, regardless of whether the appellate court agrees with the same or not, the verdict of the trial court cannot be interdicted and the appellate court cannot supplant the view of the trial court. (See: **Chandrappa and Ors. vs. State of Karnataka, [(2007) 4 SCC 415] ; Shyam Babu vs. State of U.P.[(2012) 8 SCC 651]; Central Bureau of Investigation vs. Shyam Bihari and Ors**

[(2023) 8 SCC 197].

In the light of the law laid down in the aforesaid decisions the findings of the trial court leading to the acquittal of the 1st respondent are not liable to be interfered with.

In the result, this appeal is dismissed.

Sd/-

P.G.AJITHKUMAR
JUDGE

SMF