IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

MONDAY, THE 27TH DAY OF JULY 2015/5TH SRAVANA, 1937

CRL.A.No. 238 of 2009 ( )

AGAINST THE ORDER IN Crl.L.P. 81/2009 of HIGH COURT OF KERALA DATED 27-01-2009

AGAINST THE JUDGMENT IN CC 223/2008 of JUDICIAL FIRST CLASS MAGISTRATE-II, KASARAGOD DATED 31-10-2008

APPELLANT/COMPLAINANT:

H.RAMA, AGED 56 YEARS,
RETD. LAB ASSISTANT, SHIVAKRIPA SHIVAPAL
NEAR KEERTHESHWAR TEMPLE, MANJESHWAR P.O.
KASARGOD TALUK, KASARGOD DIST.

BY ADVS.SRI.M.SASINDRAN
SRI.K.P.HARISH

RESPONDENTS/ACCUSED:

1. P.A. ABOOBACKER, S/O. ANDUNHI,
(PADYAR TRADING CO., POLICE STATION ROAD)
NEAR CO-OPERATIVE HOSPITAL, KUMBALA P.O., KUMBALA
KASARGOD TALUK, KASARGOD DIST.

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

R1 BY ADV. SMT.R.PADMAKUMARI
R2 BY ADV. PUBLIC PROSECUTOR:SMT.P.MAYA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.238 of 2009

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Dated this the 27th day of July, 2015

JUDGMENT

The complainant in C.C.No.223 of 2008 of the Judicial First Class Magistrate-II, Kasaragod, aggrieved by the dismissal of his complaint filed under Section 138 of the Negotiable Instruments Act, has preferred this appeal.

2. The allegation of the complainant was that the accused had borrowed a sum of Rs.1,65,000/- from him in June 2007. Towards the discharge of that liability, a cheque dated 10.09.2007 for the above sum was executed and delivered, making him believe that sufficient funds are available in the account. The cheque was presented for collection, but was dishonoured on ground of insufficiency of funds. A statutory notice was sent, which was replied later. Alleging that the accused has committed the offence punishable under Section 138 of the Negotiable Instruments Act, the complaint was laid.

3. The accused appeared and denied the allegations. On the side of the complainant, he himself deposed as PW1 and Exts.P1 to P6 were marked. Disputing the liability, accused got

himself examined as DW1 and two other witnesses were examined as DWs.2 and 3. Exts.D1 to D6 were marked. The court below, on an evaluation of the entire inputs, doubted the case set up by the complainant, dismissed the complaint and acquitted the accused under Section 255(1) of Cr.P.C. This is under challenge in this appeal.

4. Heard both sides and examined the records.

5. The complainant tendered evidence in support of his case as PW1. He deposed that Ext.P1 cheque dated 10.09.2007 was issued by the accused towards the discharge of a loan of Rs.1,65,000/-, which was advanced by him in June 2007. Exts.P2 and P3 evidenced the presentation of the cheque in the bank and its dishonour. Ext.P4 is the statutory notice, which was replied by Ext.P6.

6. The defence set up by the accused was that of a total denial. The consistent defence that he had taken up in the course of examination, the reply under Section 313 Cr.P.C., in the reply notice and in his own oral testimony as DW1, is that Ext.P1 cheque was one among the blank signed cheques given to the complainant on 23.10.2006 at the time of availing a loan of Rs.50,000/-. According to the accused, the complainant was a money lender.

When accused sought a loan for Rs.50,000/- on 25.10.2006, complainant gave a sum of Rs.2250/- in cash and cheque for Rs.42,250/-. According to him, the amount that he had received was Rs.45,000/- and the balance of Rs.5,000/- was retained by the complainant as future interest. It was also further alleged by the accused that the de facto complainant took him to Vijaya Bank, Kumbala where he had an account, got a cheque book and from it two signed cheques were taken. Accused disclosed the number of the cheques as cheque Nos.745431 and 745432. Three other blank signed cheques of the current account as well as few blank stamp papers were also obtained. His further defence was that principal amount with interest was repaid in three months, in the presence of two named persons. When the blank cheques and signed papers were sought to be returned, complainant did not return it. He alleged that one among the blank cheques was converted into Ext.P1 cheque for a huge amount and false case set up.

7. The defence was disclosed by the accused in his evidence as DW1 also. The accused has a specific case that the de facto complainant is the money lender. He asserted it in his course of cross examination. PW1 admitted that he was working

as a Lab Assistant and has since retired. According to him, he received the sum of Rs.4,90,000/-as retirement benefits, which he had advanced to four persons. According to him, he did not charge any interest for that. He admitted that for the recovery of amounts paid by him to his friends, he had initiated legal proceedings. The above version gives an indication that the allegation of the accused is that the complainant is a money lender, cannot be completely rejected.

8. One of the specific case of the accused was that at the time of availing the loan on 25.10.2006, he did not have blank cheques with him, to be given as security. Hence, complainant took him to the branch and got a cheque book issued. This version is proved through DW2 and Ext.D2 which is the cheque book itself. The cheque issue register maintained by the bank disclosed that a cheque book was issued to the accused on 25.10.2006. Ext.D2 cheque book shows that two of the cheques with numbers mentioned above by the accused are missing from the cheque book. One among it is Ext.P1.

9. The trump cards of the accused are Exts.D1 to D3. Ext.D3 is a copy of a lawyer notice issued to the complainant at the instance of the accused on 10.03.2007. In that letter, it was

disclosed that the accused had availed a loan of Rs.50,000/- from the de facto complainant on 23.10.2006, that he was paid a sum of Rs.45,000/- and that as a security five blank cheques were handed over. He has disclosed the cheque numbers of all the five cheques. It includes the cheque number of Ext.P1 also. Ext.D1 shows that the above letter was issued in the address of the de facto complainant by registered post, but was returned unclaimed.

10. The definite contention of PW1 was that he has not received that envelope. The address shown in Ext.D1 is H.Rama, R/at Shivapal, Church Beach Gate, Manjeswar. The address of the complainant shown in the complaint is slightly different as H.Rama, Retd.Lab Assistant, Shivakripa Shivapal, Near Keertheshwar Temple, Manjeshwar. Even though there is a minor difference in the address, the complainant did not have a case that it was a wrong address or that address was not that of the de facto complainant.

11. Ext.D1 shows that the Postman had endorsed that the address was incomplete and hence, returned. There is a further endorsement by another Postman that door was locked, intimation was given and thereafter, it was returned. DW3, Postman of that concerned post office identified the Postman who had made the

endorsement. There is slightly divergent version as to whether the notice was returned on the ground of incomplete address or whether it was unclaimed after intimation. However, I feel that in the facts and circumstances of the case, the issue whether it was attempted to be served on the de facto complainant has not much relevance. The only relevance of Ext.D1 coupled with Ext.D3 is that while the complainant claims that Ext.P1 cheque was handed over in June 2007, three months prior to that, the accused had shot a registered letter mentioning the same cheque number and disclosing the defence now set up. It shows that the registered letter was issued by the accused in March 2007, which undoubtedly show that the de facto complainant was in possession of the cheque in March 2007. Evidently, if the case set up by the de facto complainant that Ext.P1 cheque was issued to him in June 2007 is believed, it is unimaginable as to how three months prior to that, when the parties had not even thought of entering into the alleged loan transaction, the accused could have visualized that blank cheques would be handed over to the de facto complainant. This cuts at the very root of the case of the complainant that he received a cheque of Rs.1,65,000/- in June 2007, and it completely falsifies the case set up by the complainant. Another fact to be noticed is that even according to the complainant, he had availed a loan from accused, few months prior to this transaction.

12. In the light of the above, the only conclusion that is possible is that the version of the complainant is not believable. Consequently, the case of execution of a cheque for Rs.1,65,000/- towards the discharge of the liability for the said amount is only to the rejected as false. The court below has precisely done that, which is unassailable. The complainant has thoroughly failed in proving the due execution of Ext.P1 and that it is supported by consideration. Hence, no offence is made out against the accused. The finding of the court below is upheld.

In the result, the appeal is dismissed confirming the judgment of the court below acquitting the accused.

Sd/-

SUNIL THOMAS
Judge

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