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. 291 of 2009 ( )

AGAINST THE ORDER IN Crl.L.P. 486/2008 of HIGH COURT OF KERALA DATED 12-01-2009

AGAINST THE JUDGMENT IN CC 622/2006 of JUDICIAL FIRST CLASS MAGISTRATE-I,PATHANAMTHITTA DATED 11-01-2008

APPELLANT/COMPLAINANT:

MULAMOOTTIL LEASING & HIRE PURCHASE LTD, KOZHENCHERRY, REP BY ITS MANAGING DIRECTOR, JACOB THOMAS, MULAMOOTTIL HOUSE, KOZHENCHERRY.

BY ADV. SRI.V.PHILIP MATHEW

RESPONDENTS/ACCUSED AND STATE:

1. PREETHI MANOHARAN, PAYYAMPALLIL HOUSE, VETTIYAR P.O, MAVELIKKARA.

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

R1 BY ADV. SRI.M.V.THAMBAN
R1 BY ADV. SRI.R.REJI
R1 BY ADV. SRI.B.BIPIN
R1 BY ADV. SMT.THARA THAMBAN
R2 BY ADV.SMT.T Y LALIZA

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.291 of 2009

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Dated this the 27th day of July, 2015

JUDGMENT

This appeal is preferred by the complainant in C.C.No.622 of 2006 of the Judicial First Class Magistrate-I, Pathanamthitta aggrieved by the acquittal of accused under Section 255(1) of the Code of Criminal Procedure.

2. The complainant, which is a leasing and hire purchasing company, filed a criminal complaint alleging that the accused, towards the discharge of a legally existing debt, executed and issued a cheque for Rs.55,000/-, which on presentation, was returned dishonoured. A statutory notice was issued. Since the amount was not paid in spite of notice, the complaint was laid, alleging commission of offence under Section 138 of the Negotiable Instruments Act.

3. Accused appeared and pleaded not guilty. Both sides adduced evidence. On the side of the complainant, PW1 was examined and Exts.P1 to P10 were marked. On the side of the accused, DW1 was examined and Exts.D1 to D5 were marked. After an evaluation of evidence, court below accepted the

defence set up by the accused. The court held that the complainant failed to prove the transaction and the execution of Ext.P3 cheque and hence, the accused was found not guilty and acquitted.

4. This is under challenge, with leave granted, in this appeal. Heard and examined the records.

5. The accused had set up a case that she was innocent of the allegations and the cheque was handed over at the time of availing a loan from the complainant firm. It was also contended that several payments were made to the complainant, which were not acknowledged. The specific allegation that Ext.P3 cheque for Rs.55,000/- was executed towards the existing liability was specifically denied.

6. On the side of the complainant, PW1 was examined who deposed in terms of the complaint. He denied the allegation that a blank cheque allegedly handed over at the time of sanctioning the loan was filled up to create the liability. He relied on Ext.P9 statement of accounts and Ext.P10, a voucher which was allegedly issued by the accused, at the time of receiving the loan amount.

7. The specific case of the complainant was that as per the vehicle loan transaction, a sum of Rs.42,000/- was advanced as loan on an undertaking to repay it in 26 EMIs of Rs.2,265/- each. After obtaining the loan, two installments totaling to Rs.4,530/- was remitted and the balance amount due was Rs.55,000/-. Towards the discharge of the above liability, a cheque was allegedly executed.

8. The court below seems to have gone into the evidence of DW1 and a passbook tendered in evidence by the accused and few of the receipts produced by the accused, to believe the version of the accused. The court below found that the version tendered by PW1 did not tally with the actual amounts due. The court below also held that PW1 had given evidence, which were either evasive or not correct. On an overall evaluation, the Court accepted the defence set up by the accused.

9. It is pertinent to note that in the nature of the specific denial of the execution of the cheque, the burden was heavily on the complainant to prove the due execution of the cheque. It is also pertinent to note that there were few essential facts which the court below did not take note of. It was admitted by the

accused that she had availed a loan of Rs.42,000/- from the complainant. It was also admitted by her that the disputed cheque bears her signature and was delivered by her to the firm and that due to financial difficulties, there was default. On the above admitted premise, the burden on the complainant was much less and the burden narrowed down to the question as to whether the cheque was delivered towards the discharge of the defaulted loan amount or was only given as a blank cheque as security, at the time of availing the loan. This being the crucial issue, the court below seems to have gone on a tangent and conducted a rowing enquiry into the correctness of the defence set up by the accused. The court below in the course of the above, held that the alleged passbook produced by the accused was reliable. In fact, it was the passbook issued by one Mulamoottil financiers, heading of which was corrected to tally with the name of the complainant/firm. The passbook showed entries @Rs.100/- per day. The complainant did not have a case that there was an arrangement of repaying the money on daily basis. The court also went into the question as to whether the version put forth by PW1 can be relied on. It is true that PW1 in his original deposition had mentioned that the loan was paid by way of cheque. When he was recalled thereafter and examined, he ventured to clarify that his version regarding the mode of payment was incorrect. The court below held that the version of PW1 was inconsistent. This appears to be wrong, since PW1 was only correcting a bona fide mistake that crept in while tendering the evidence.

10. It is also pertinent to note that the court enquired as to whether the statement of accounts mentioned in Ext.P9 tallied with the actual payment. The court also went into a rowing enquiry into the genuineness of Ext.P10, the voucher issued by the accused at the time of availing the loan. The court verified the signatures with reference to the admitted the signatures and disbelieved it. The court also considered the question whether the alleged seizure of vehicle by the complainant, as stated by the accused was true.

11. A reference to the judgment would show that evidently the crucial question regarding execution of cheque in the light of admission of signature, existence of liability, admission of default in repayment were not appreciated by the court below in its

correct perspective. Exts.P9 and P10 were only documents to support the claim of the complainant. Virtually the court did not go into the real question regarding the execution of the cheque. The conclusion arrived by the court below in the light of the above is palpably mistaken and the court seems to have virtually believed the defence of the accused in toto.

12. The various conclusions of the court below without deciding the main issue of execution of cheques does not appear to be correct and seems to be beside the main issue. In this appeal against acquittal, it appears that it may not be proper to arrive at any conclusion by an appreciation of evidence, especially, when the Court has not directed its attention to crucial questions involved. The only option available is to remand the matter to the court below for a fresh consideration in the light of the observations mentioned above.

In the result, the appeal is allowed. The impugned judgment is set aside and the matter is remanded to the court below for a fresh appreciation of evidence in the light of the observations mentioned above. The court below shall specifically consider the question as to whether the execution of Ext.P3 cheque was proved. The court below shall consider the entire evidence in the light of what is stated above untrammelled by any observation made above.

Both sides shall appear before the court below on **21.08.2015**. Court below shall thereafter consider the entire evidence on record and pass fresh judgment accordingly.

Sd/-
SUNIL THOMAS
Judge

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