IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

FRIDAY, THE 20TH DAY OF MARCH 2015/29TH PHALGUNA, 1936

CRL.A.No. 62 of 2015 () IN Crl.L.P..395/2014

AGAINST THE JUDGMENT IN CC 704/2008 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-II,ATTINGAL DATED 20-09-2014

AGAINST THE ORDER/JUDGMENT IN Crl.L.P. 395/2014 OF HIGH COURT OF KERALA DATED 03-12-2014

APPELLANT/COMPLAINANT:

SATHEESHKUMAR
S/O.SEKHARAN, THOTTATHIL VEEDU, PEDIKULAM
VAMANAPURAM DESOM, PULIMATH VILLAGE
THIRUVANANTHAPURAM DISTRICT.

BY ADV. SRI.R.ANILKUMAR

RESPONDENTS/ACCUSED AND STATE:
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1. BINESHKUMAR
   S/O.RETNAKARAN PILLAI, BINESH BHAVAN
   KODUVAZHANNOOR P.O.
   THIRUVANANTHAPURAM DISTRICT-695 612.

2. STATE OF KERALA
   REPRESENTED BY THE PUBLIC PROSECUTOR
   HIGH COURT OF KERALA, ERNAKULAM, KOCHI-682 031.

R2 BY PUBLIC PROSECUTOR SMT. REMA R.

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 20-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

shg/

K. ABRAHAM MATHEW, J.

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Crl.A. No.62 of 2015

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Dated this the 20th day of March, 2015

J U D G M E N T

On the allegation that to repay the amount of Rs.5 lakhs the first respondent/accused borrowed from him on 25.12.2007 and to discharge the liability he issued a cheque in his favour and it was returned dishonoured for want of sufficient fund in his account and in spite of demand by notice he failed to pay the amount covered by the cheque and thus he committed the offence under Section 138 N.I. Act the appellant filed the complaint. The learned Magistrate came to the conclusion that the appellant failed to prove execution of the cheque and that he had the means to pay the amount and that his case is unbelievable. Accordingly, she acquitted the first respondent.

2. Heard the learned counsel for the appellant.

3. In the affidavit filed by the appellant who was examined as PW1 in lieu of his examination-in-chief he asserted that the first respondent filled up and signed a

cheque and gave it to him on the date on which the first respondent borrowed the amount of Rs.5 lakhs from him. But in the cross-examination he made a somersault. He said that the first respondent had brought a written up and signed cheque. This is the version given by PW2 also. Thus the appellant himself has no consistent case as to the execution of the cheque. His averment in the affidavit has been proved false by his statement in the cross-examination. There is no evidence to prove execution of the cheque as rightly held by the learned Magistrate. The appellant's case is that the promise was to repay the amount within ten days. The transaction was on 25.12.2007. But Ext.P1 cheque allegedly issued on that day bears the date 17.1.2008. If the promise was to pay the amount within ten days why he accepted the cheque bearing date 17.1.2008. There is no explanation.

4. Questions were put to the appellant (PW1) with regard to his means to pay Rs.5 lakhs. In the examination-in-chief his case was that Rs.5 lakhs was the amount he had

kept to meet the expenses of the construction of his house. But in the cross-examination he gave different versions as to the source. He said that he had four buses. PW2 also has a case that the appellant had in his ownership some buses. But in the cross-examination of PW1 he admitted that there was not even a single bus in his ownership. Evidence of both PW1 and PW2 in this regard is absolutely false. PW1 has another version also. He said that his elder brother had given him the money. Yet another version is that he had income from his property. He produced Exts.P7 to P9 to prove his capacity to pay the amount. All these documents came into existence long after the transaction alleged in the complaint. I have no doubt that the appellant had no capacity to pay Rs.5 lakhs as loan. It is also unbelievable that merely because the first accused had been known to him he lent Rs.5 lakhs free of interest.

5. The definite case of the appellant was that the first respondent had wholesale business in kerosene. But he was compelled to admit that the first respondent was not

a licensee. He did not deny when it was suggested to him that the first respondent had no such business. In unequivocal terms subsequently he admitted that the first respondent was an accountant in a shop of a kerosene dealer. Nobody can believe that the appellant would advance a loan of Rs.5 lakhs without ascertaining the capacity of the borrower to repay it.

6. The learned Magistrate rightly held that the appellant failed to prove execution of the cheque and he did not have the capacity to pay Rs.5 lakhs as loan. The case put forward by the appellant is absolutely false.

In the result, this appeal is dismissed.

Sd/-
K. ABRAHAM MATHEW
JUDGE

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P.A. TO JUDGE

shg/