

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 30TH DAY OF OCTOBER 2015/8TH KARTHIKA, 1937

CRL.A.No. 2136 of 2004 ()

AGAINST THE ORDER IN CrI.L.P. 721/2004 of HIGH COURT OF KERALA

AGAINST THE JUDGMENT IN CC 464/2003 of J.M.F.C.-I, THAMARASSERY DATED
30.6.2004

APPELLANT/COMPLAINANT::

M/S.MALABAR CHIT FUNDS PVT.LTD.
JAYANTHI BUILDING, PALAYAM ROAD, KOZHIKODE
REPRESENTED BY ASSISTANT MANAGER, M.V. ALIAS.

BY ADVS.SRI.R.SUDHISH
SMT.M.MANJU

RESPONDENTS/ACCUSED & STATE::

1. K.HASSAN KOYA,S/O. S.V. ALIKOYA,
REXINE CORNER, M.M. ALI ROAD, KOZHIKODE.

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

R2 BY PUBLIC PROSECUTOR SRI.JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.2136 of 2004
.....

Dated this the 30th day of October, 2015

JUDGMENT

The complainant in C.C.No.464/2003 on the file of the Judicial First Class Magistrate Court, Thamarassery is the appellant herein.

2. The complaint was taken on file on the basis of a private complaint filed by the complainant company through its Assistant Manager under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act'). The case of the complainant in the complaint was that the complainant is a registered company conducting chitty business and the accused joined a chitty with No.GVC 6/2000 for an amount of Rs.1,18,000/-, which he bid and thereafter he had committed default and he came to the concern and issued Ext.P4 cheque for an amount of Rs.91,800/- in discharge of that liability, with date 7.5.2003, which when presented was dishonoured for the reason funds insufficient evidenced by Ext.P5 dishonour memo. This was intimated to the complainant by their banker vide Ext.P6 intimation letter. The complainant issued Ext.P7

notice vide Ext.P8 postal receipt and the same was received by the accused evidenced by Ext.P9 postal acknowledgment. He had sent Ext.P10 reply with false allegations. He had not paid the amount. So he had committed the offence punishable under section 138 of the Act. Hence the complaint.

3. When the accused appeared before the court below, particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, an authorized agent of the complainant concern was examined as PW1 and Exts.P1 to P10 were marked on their side. After closure of the complainant's evidence, accused was questioned under section 313 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that he had joined the chitty for an amount of Rs.1,18,000/- and he was a guarantor for some other chitty also. At that time, the complainant company has obtained some blank signed cheques and also certain blank signed documents. He had paid the amount in the chitty bid by him and so much amount was not due in the account claimed by the complainant. He had not

issued the cheque claimed by the complainant. Exts.D1 to D4 were marked on his side in defence through PW1 to prove his case.

4. After considering the evidence on record, the court below found that the complainant had failed to prove that the cheque which was issued was in discharge of a legally enforceable debt as claimed by the complainant and acquitted the accused under section 255(1) of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant with special leave petition as Crl.L.P.No.721/2004 and leave was granted and appeal was admitted to file. Though notice was served on the first respondent, he did not appear.

5. Heard counsel for the appellant Sri. R. Sudhish and Public Prosecutor Sri. Jibu P. Thomas, appearing for the second respondent/State.

6. Counsel for the appellant submitted that the complainant had proved the execution of the cheque and the accused also admitted that he is having liability not only as a subscriber to the chitty but also as a guarantor to another chitty transaction and it was the combined amount due from the accused in two transactions and as such, the court below was

not justified in acquitting the accused merely on the ground that so much amount was not due in the chitty in which he was a subscriber. So, according to him, the court below was not justified in acquitting the accused and court below ought to have convicted the accused for the offence alleged.

7. Heard Public Prosecutor also.

8. The case of the complainant in the complaint was that the complainant was conducting a chitty business and the accused was a subscriber to chitty N.GVC.6/2000 for an amount of Rs.1,18,000/- and he bid the chitty and later he committed default in payment of the amount. When the complainant wanted him to discharge the liability, the accused came to the concern and issued Ext.P4 cheque for an amount of Rs.91,800/- due in the chitty in which he was a subscriber. The accused had admitted that he was subscriber to a chitty for an amount of Rs.1,18,000/- and he was a guarantor in some other chitty for some other person by name Hashim. At the time when he stood as a guarantor, some blank signed cheques were obtained. He was regularly making payment in his chitty and as such amount is not due as claimed in the complainant. This fact was mentioned in Ext.P10 reply notice sent by him also.

So when the accused had sent reply notice taking a specific defence that so much amount is not due and the cheque was not issued in discharge of a legally enforceable debt and a blank signed cheque was misused, then burden is on the complainant to plead and prove the transaction stating so much amount is due and how the amount was due etc in the complaint and also by adducing cogent evidence on this aspect. Further, it will be seen from Ext.D3 notice sent by the complainant to the guarantor of the accused in the chitty in which the accused was a subscriber for an amount of Rs.1,18,000/-, the amount due shown was only Rs.24,650/- and that notice was dated 28.4.2003 and this was admitted by PW1 when he was in the box. Further, the case of the complainant at the time when authorized agent was examined as PW1 was that an amount of Rs.91,800/- mentioned is not the liability of the chitty account in which the accused was a subscriber but it is inclusive of the amount due in the chitty of Hashim for which the accused stood as a guarantor as well but no such case was stated in the complaint by the complainant. The case of the complainant in the complaint was that the accused was subscriber of a chitty for an amount of Rs.1,18,000/-, though chitty number was wrongly

mentioned, and his case was that cheque was issued in discharge of that liability, no other liability was mentioned in the compliant which was said to have been undertaken by the accused and issued the cheque covering up total liability of the accused including liability as a guarantor. Further, the complainant had not produced any documents to show that so much amount was due from the accused as on the date of issuance of the cheque. Further, the allegations in the complaint and also the documents produced by the accused will go to show that the amount mentioned in the cheque was not really due and the amount really due in the chitty in which he was a subscriber was much less than the amount claimed in the cheque. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the complainant had failed to prove that the cheque was issued in discharge of a legally enforceable debt and the accused had proved his case by producing documents and he had rebutted the presumption and as such court below was perfectly justified in acquitting the accused holding that the complainant had failed to prove his case that the cheque was issued in discharge of a legally enforceable debt for the amount due from him to the complainant as

claimed in the complaint and rightly acquitted the accused which does not call for interference at the hands of this Court. So, the appeal lacks merit and the same is liable to be dismissed.

In the result, the appeal fails and the same is hereby dismissed. The order of acquittal passed by the court below against the first respondent is hereby confirmed.

Office is directed to communicate a copy of this order to the court below at the earliest.

Sd/-

K. RAMAKRISHNAN, JUDGE

/true copy/

P.S to Judge

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