IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 15TH DAY OF SEPTEMBER 2015/24TH BHADRA, 1937

CRL.A.No. 2044 of 2006 ( )

AGAINST THE ORDER IN CC 586/2001 of JUDICIAL FIRST CLASS MAGISTRATE COURT, CHERTHALA DATED 03.05.2005

APPELLANT/COMPLAINANT:

D.K.PRASAD
KALATHITHARAYIL VEEDU, (UDAYABHAVAN)
VALAMANGALAM NORTH, THURAVOOR P.O., CHERTHALA.

BY ADV. SRI.JOHN JOSEPH(ROY)

RESPONDENT/ACCUSED AND STATE:

1. V.R.BABU S/o.RAGHAVAN
MANGALATHUVEEDU, PATTANAKKAD P.O., CHERTHALA.

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

R1 BY ADV. SRI.J.OM PRAKASH
R2 BY GOVERNMENT PLEADER: SMT M G LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-09-2015, THE COURT ON 15.09.2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.2044 of 2006

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Dated this the 15th day of September, 2015

JUDGMENT

This appeal is at the instance of the de facto complainant challenging the dismissal of the complaint filed under Section 138 of the Negotiable Instruments Act before the Magistrate Court.

2. The case of the de facto complainant was that the accused had borrowed a sum of Rs.35,000/- from him on 04.05.2001 at about 4 p.m. Towards the discharge of the above liability, he simultaneously delivered a cheque for the said amount dated 05.05.2001 making him believe that there are sufficient funds in the account to honour the cheque. The cheque was presented for collection but was returned dishonoured on account of insufficiency of funds. After issuing Ext.P4 lawyer notice, which was replied by Ext.P7, the complaint under Section 138 of the Negotiable Instruments Act was laid.

3. Before the court below, PWs.1 and 2 were examined and Exts.P1 to P7 were marked. On the side of the accused, DW1 was examined and Exts.D1 to D4 were marked. Court below on an evaluation of the available inputs concluded that the accused had

failed to prove the due execution and consideration in relation to Ext.P1 cheque. Consequently, the accused was found not guilty and acquitted. This was challenged before this Court with leave granted.

4. Heard both sides and examined the records.

5. The complainant essentially relied on his oral testimony as PW1, supported by the oral testimony of PW2 who was claimed to be a witness to the entire transaction. The available materials indicate that PW1 and the accused are not unknown to each other. According to PW1, he knew the accused for about 5 - 8 years. PW2 stated that he had casually gone to the house of the PW1 on 04.05.2001, witnessed both the amount being paid and the cheque being delivered by the accused.

6. The accused set up a defence of total denial. The specific case was that he had borrowed a sum of Rs.5,000/- from the brother-in-law of the complainant, who was a money lender. A sum of Rs.750/- was deducted and the balance alone was paid. It was agreed to be repaid in 100 days by installments. Even though, substantial amount with interest was repaid, there arose a dispute. The cheque that was delivered at the time of availing the loan with the brother-in-law was later misused to set up the present claim.

Raising the above defence, Ext.P7 reply was sent simultaneously with a letter dated 10.07.2001 marked as Ext.D4 sent to the brother-in-law, who was examined as DW1. A reply was given by the brother-in-law as Ext.D3 denying the allegations in Ext.D4.

7. To substantiate the defence of the accused, the brother-in-law of the de facto complainant was summoned and examined as DW1. He denied the defence set up by the accused, but admitted Ext.D1 transaction. He denied the allegation that a blank cheque was handed over to him, which was later converted as Ext.P1 cheque.

8. In the light of specific denial by the accused regarding the execution of Ext.P1 cheque, the legal obligation was cast on the complainant to prove the due execution of the cheque and passing of consideration. The complainant relied on his own testimony for the above purpose. A perusal of the judgment of the trial court indicates that the Court generally evaluated the evidence on either side as in a civil case and applied the principle as to which case appeared to be more probable. Evidently, in the proceeding under Section 138 of the Negotiable Instruments Act, a primary responsibility was cast on the court below to consider as to whether on the available materials, the execution stood proved.

9. However, while analyzing the question of due execution of Ext.P1 cheque, in the nature of the defence set up by accused, the burden was lesser in view of the fact that signature was admitted and the fact that Ext.P1 was a cheque drawn on the account of the accused was also admitted. Evidently, the falsity of the defence set up by the accused can also attribute to lessening the burden of the complainant, in proving the due execution.

10. Regarding the case set up by the complainant, one question that may naturally come up is that even according to the complainant, the money was advanced on 04.05.2001 and the cheque was delivered on the same day payable on the next day with an assurance that sufficient funds were already available in the account. The question that will arise is, if the accused had sufficient funds in his account as on 04.05.2001, why should he seek a loan and in turn handover a cheque to be drawn on the next day. PW1 in his evidence has deposed that since the bank time was over on 04.05.2001, the cheque was received. However, the evidence of PW2 was relied on by the court below to disbelieve the above version, since PW2 in his reply had stated that the accused had informed that he had talked to the complainant on the previous day regarding the money. This fact need also to be considered while

appreciating the question as to whether the execution is proved.

11. One of the ground relied on by the court below to disbelieve the version of PW1 was relying on Ext.D1. It is pertinent to note that the specific defence set up by the accused was that he had a money transaction with the brother-in-law of the de facto complainant and a loan was taken from him. Ext.D1 was pressed into service to prove that it evidenced repayment of loan in 100 instalments. Not only that DW1 denied the above defence, but Ext.D1 also does not show that it related to a loan transaction and repayment of it. Ext.D1 on the other hand, proved to be an installment scheme in relation to house hold articles. Hence, the court below could not have relied on Ext.D1 to accept the defence case. It was also pertinent to note that accused himself did not enter the box to give evidence. The case set up by the accused also did not get any support from the evidence of DW1.

12. It is evident that the court below has not considered the available materials in its correct perspective and arrived at wrong conclusions. The court below ought to have considered the question of execution of the cheque initially. In the light of the above, impugned judgment is not legally sustainable and is liable to be set aside. The matter is liable to be remanded to the court below for

fresh consideration in the light of the above observations, untrammelled by any of the observations made above.

In the result, revision is allowed. Impugned judgment is set aside. The court below is directed to take back the case on file and after giving reasonable opportunity to both sides, to be heard to decide afresh, in the light of the above observations. Both sides shall appear before the learned magistrate on 17.10.2015.

Sd/-
SUNIL THOMAS
Judge

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