IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

TUESDAY, THE 11TH DAY OF AUGUST 2015/20TH SRAVANA, 1937

CRL.A.No. 753 of 2015 (A)

AGAINST THE JUDGMENT IN CC 166/2011 of COURTOF JUDICIAL FIRST CLASS MAGISTRATE -II, CHENGANNUR DATED 30-01-2015

APPELLANT/COMPLAINANT:

KOSHY GEORGE, AGED 56 YEARS
S/O.LATE K.K. GEORGE, KUNNUMPURATH HOUSE
PUTHANKAVU P.O, CHENGANNUR VILLAGE
ALAPPUZHA DISTRICT.

BY ADVS.SRI.S.SHANAVAS KHAN
SMT.S.INDU

RESPONDENTS/ACCUSED AND STATE:
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1. JOHN THOMAS, AGED 66 YEARS
S/O. THOMAS
HI TECH ENGINEERING ECO SOLUTIONS (P) LIMITED
INDUSTRIAL DEVELOPMENT AREA, MUPPATHADAM, ALUVA -10
NOW RESIDING AT MANNUVILAYIL
CHENGAMPUZHA NAGAR P.O., KALAMASSERI
ERNAKULAM-683184.

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

R2 BY PUBLIC PROSECUTOR SMT.LALIZA.T.Y.

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 11-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T.RAVIKUMAR, J.

Crl.A.No.753 of 2015

Dated 11th August, 2015

JUDGMENT

This appeal is directed against the order of acquittal passed by the Court of Judicial First Class Magistrate-II, Chengannur in C.C.No.166 of 2011. The appellant was the complainant and the first respondent herein was the accused therein. The appellant filed a private complaint against the first respondent, which was later taken on file and registered as C.C.No.166 of 2011, alleging commission of offence under Section 138 of the Negotiable Instruments Act. His case was as follows:-

The first respondent/accused issued cheque bearing No.007596 dated 6.4.2011 (Ext.P1) for ₹ 5,00,000/- drawn on Ernakulam (Main) Branch of Union Bank of India for discharging a legally enforceable debt to the appellant/complainant. The said cheque, on its presentation, got dishonoured owing to paucity of fund in the account maintained by the first respondent/accused. Thereupon, the appellant issued statutory notice within the statutorily prescribed time to the first respondent/accused intimating him regarding the dishonour of the cheque and calling upon him to pay the amount due. Despite the receipt of the notice he did not repay the amount within the statutory period. Essentially, carrying such allegations that the aforementioned private complaint was filed.

2. On due process the first respondent entered appearance and therefore, particulars of the offence under Section 138 of N.I. Act were read over and explained to him by the court. The fist respondent pleaded not guilty and claimed to be tried. To prove his case the appellant got himself examined as PW1 and Exts.P1 to P7 were got marked. After closing the evidence of the appellant the first respondent was examined under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances put to him. After careful evaluation of the evidence on record the trial court found that the drawer of the cheque is M/s.Hi-Tech Engineering and Eco Solutions Pvt. Ltd. and it was not made as an accused and the appellant had failed to establish that the amount in question was borrowed by the first respondent in his personal capacity. In the said circumstances, it was found that the appellant/complainant has failed to establish the guilt of the accused beyond any reasonable doubt and consequently, the first respondent was acquitted under Section 255(1) Cr.P.C. This appeal has been filed in the said circumstances.

3. I have heard the learned counsel for the appellant and also the learned Public Prosecutor.

4. Evidently, the appellant gave evidence as PW1 to the effect that he had given ₹ 5,00,000/- to the first respondent/accused from his residence at Puthencavu and in discharge of the said legally enforceable debt Ext.P1 cheque was issued by the first respondent. He has also deposed regarding the presentation of the cheque and the procedures and steps taken by him in terms of the statutory mandate and also in accordance with his pleadings in the complaint. The precise case of the first respondent was that the cheque in question was not signed in his personal capacity whereas it was signed in his official capacity as the Managing Director of M/s.Hi-Tech Engineering and Eco Solutions Pvt. Ltd. He has also taken up the contention that the appellant had not arrayed the company as an accused and in such circumstances, he raised objection regarding the very maintainability of the complaint. The learned counsel appearing for the appellant vehemently contended that it is the utter, perverse appreciation of the evidence by the trial Court that resulted in the acquittal of the first respondent/accused. It is to be noted that there is no case for the

appellant that the evidence was incorrectly adverted to by the trial Court. True, he is having grievance with respect to the manner of appreciation of evidence. In such circumstances, the question is, with the evidence on record as discussed by the trial court, whether it can be said that the trial court has not properly appreciated the evidence and the acquittal of the first respondent is an outcome of a perverse appreciation of the evidence. As noticed hereinbefore, in Ext.P1 cheque the first respondent signed in his official capacity as the Managing Director of M/s.Hi-Tech Engineering and Eco Solutions Pvt. Ltd. At the same time, the precise case of the appellant is that the cheque was issued by the first respondent in his personal capacity. Though it was the specific pleading of the appellant Ext.P1 reveals, as held by the trial Court, that it was signed by the first respondent in his capacity as the Managing Director of M/s.Hi-Tech Engineering and Eco Solutions Pvt. Ltd. That fact is not disputed before me. The appellant also did not have a case that M/s.Hi-Tech Engineering and Eco Solutions Pvt. Ltd. is not a company for the purpose of Section 141 of the Negotiable Instruments Act. When the said fact is indisputable in terms of the provisions under Section 141 of N.I. Act more particularly, the explanation to Section 141 of the said Act for a successful prosecution the appellant ought to have arrayed the company as an accused. Another aspect also to be looked into in this case. When once it is found that the drawer of the cheque is the said company the question is whether notice as contemplated under Section 138(b) of N.I. Act was served on the drawer of the cheque. In view of the provisions therein, within 30 days from the date of intimation received from the bank regarding the return of the cheque as unpaid, the payee or the holder in due course has to make a demand in writing to the drawer of the cheque. This should be done within the aforesaid period of 30 days. In this case, evidently, the appellant did not have such a case. That apart, it is to be noted that there is no case for the appellant that he has very specifically taken up the contention that the day today affairs of the company has been managed by the first respondent/accused. In such circumstances, when once it is evident from Ext.P1 that such a cheque was issued by the first respondent in his capacity as the Managing Director of M/s.Hi-Tech Engineering and Eco Solutions Pvt. Ltd., prior to the filing of the complaint the appellant ought to have served a notice on the company as also on the Director who is responsible for the day today affairs of the company within the statutorily prescribed period of 30 days prescribed under Section 141 of N.I. Act. The question of payment of the amount due in terms of the provisions under Section 138(c) would arise only after receiving such a notice. If there is no notice, there is no question of committing any failure to effect payment within the statutorily prescribed period. In such circumstances, though this aspect was not gone into by the trial court the evidence in this case as discussed above, undoubtedly reveals such aspects. The trial court has placed reliance on two decisions in **Aneeta Hada and others** v. **M/s.Godfather Travels and Tours Pvt. Ltd. and another (2012 KHC 4244)** and **Chacko Mathai** v. **State of Kerala and Another (2014 (4) KHC 112)**. Going by the decision in **Aneeta Hada's** case (supra), it was held therein that in order to maintain the prosecution for the offence punishable under Section 138 of the Negotiable Instruments Act against a company in view of the specific provisions under Section 141 of N.I. Act, it is imperative to make the company as an accused and without the company being in the array of accused the Directors could not be prosecuted. In **Chacko Mathai's** case (supra) the Managing Director who signed the cheque on behalf of the company alone was made as an accused in a prosecution under Section 138 of N.I. Act and it was ultimately found that a prosecution with the Managing Director only as an accused *sans* the company as an accused would not be maintainable. In view of the facts and circumstances involved in this case and the discussion of the evidence on record as aforesaid, I do not find any reason to interfere with the order of acquittal passed by the learned Magistrate. In fact, the impugned judgment is a well merited one and it was after considering the evidence on record in their true perspective and in accordance with law that an order of acquittal was passed by the trial Court. In the circumstances, I have no hesitation to hold that the appellant has not made a prima facie case or any ground whatsoever so as to compel this Court to invoke the appellate jurisdiction.

This appeal is liable to fail and accordingly, it is dismissed.

Sd/-
C.T.RAVIKUMAR
Judge

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