IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 1ST DAY OF DECEMBER 2015/10TH AGRAHAYANA, 1937

CRL.A.No. 38 of 2011 ( )

AGAINST THE ORDER IN Crl.L.P. 1184/2010 of HIGH COURT OF KERALA DATED 06-01-2011

AGAINST THE JUDGMENT IN CC 229/2009 of THE JUDICIAL FIRST CLASS MAGISTRATE-III, PALAKKAD DATED 09-09-2010

APPELLANT(S)/COMPLAINANTS::

SADASIVAN, S/O.R.RAGHAVA MENON,
RAMANIKA, 14/119, KADAMKODE
KARINGARAPULLY POST, PALAKKAD.

BY ADVS.SRI.JACOB SEBASTIAN
SRI.S.SANTHOSH KUMAR (BALARAMAPURAM)
SMT.SHAMSEERA C.ASHRAF

RESPONDENT(S)/APPELLANT/ACCUSED & STATE::

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1. V.RADHA, D/O.GOPALAN, AGED 39 YEARS,
PROPRIETRIX, SREE KRISHNA AUTO FUELS, OLAVAKKODE
PALAKKAD.

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

R2 BY PUBLIC PROSECUTOR SMT.M.G.LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Pn

SUNIL THOMAS, J.

Crl. Appeal No. 38 of 2011

Dated this the 1st day of December, 2015

JUDGMENT

The complainant is the appellant herein. He laid a complaint alleging that the accused borrowed a sum of ₹2,00,000/- from the complainant on 06.05.2009 undertaking to repay it within 3 days. When the amount was demanded, the accused executed and delivered a cheque dated 12.05.2009 for ₹2,00,000/-. The cheque was presented for collection, but was returned dishonoured on the ground that the payment was stopped by the drawer. A statutory notice was issued to which a reply was sent. Hence the complaint was laid before the trial court.

2. The accused appeared and contested the proceedings by pleading not guilty. On the side of the complainant, he was examined as PW1 and Exts.P1 to P7 were marked. On the side of the accused, she got herself examined as DW2 and one witness was examined as DW1. Exts.D1 to D3 were marked on the side of the accused. The court below, on an evaluation of the entire evidence disbelieved the version of PW1 and held that the defence set up by the accused was believable by applying the principles of preponderance of probability. The accused was

acquitted. This is challenged in this appeal.

3. Heard Smt.Shamseera C. Ashraf, learned counsel for the appellant. In spite of service of notice on the 1st respondent, she has not appeared to contest the proceedings. Examined the records.

4. The complainant himself stepped into the box to tender his evidence. He deposed that, he is a businessman and had income from the property. He deposed that the money was paid on the date on which it was sought. According to him, he withdrew ₹1,50,000/- from the Bank and the remaining amount was available with him. He denied the various suggestions offered by the accused.

5. Evidently, the defence set up by the accused which is seen disclosed in the reply notice as well as evident from the trend of cross examination is that of a case of total denial. The accused had a consistent case that she had borrowed a sum of ₹2,97,000/- from one Sreenivasan and few blank signed cheques and blank papers and other documents were entrusted with Sreenivasan. The cheque numbers are specifically mentioned in Ext.P7 reply notice. According to the accused, using one of the

cheques entrusted with Sreenivasan, he withdrew huge money from her Bank. Even thereafter he continued to threaten and coerce the accused. Hence she laid a complaint before the Police pursuant to which Sreenivasan was called to the Police Station and except two cheques, three other cheques were returned by him. Thereafter Ext.D1 stop payment dated 21.04.2009 was issued to the Bank. Ext.D2 is stated as the petition given by the accused before the Police on 03.03.2009. This trend of defence is seen discernible substantially in Ext.P7 reply notice, D2 petition as well as in the trend of cross examination. It is true that, this defence was not set up by the accused, while she was questioned under Section 313 Cr.P.C. questioning. The accused had a specific case that the complainant was not known to her. At the time of chief examination itself, PW1 answered this suggestion by stating that he knew the accused for the past 3 to 4 years. He also deposed that, he also had an earlier transaction with the accused. He further deposed that, at that time no documents were demanded from the accused. In the cross examination, a vague question was put to the complainant suggesting that he did not know the accused, which was denied by him. Evidently, the defence set up by the accused that the complainant was a total stranger to the accused was not thereafter pursued. This eminently shows that the defence that the complainant was not known to the accused was not seriously pursued thereafter.

6. It is also pertinent to note that, the capacity of the complainant to pay the money was not challenged. In fact the suggestion regarding the payment of the amount was also not seriously challenged in the cross examination. Hence the accused cannot take up a contention that the complainant did not have the financial capacity to pay the money or the source from which the alleged payment was made. The evidence of PW1 in so far as it touches upon his case seems to be not demolished in the cross examination.

7. In this back ground, the evidence tendered by the accused and the defence set up by her has to be appreciated. No doubt, in a case of total denial, it is essentially on the complainant to prove the case by cogent substantial evidence. For the accused, the defence need only be established by applying the yardstick of preponderance of probability. The definite contention of the accused was that, as seen from the petition, few cheques

were handed over. The learned counsel for the complainant contended that, even though in the reply notice five cheques are mentioned with numbers, in Ext.D2 complaint only four cheques are mentioned. It was further contended that, there is inconsistency regarding the number of cheques given. It is pertinent to note that, the accused is essentially relying on Ext.D2 which is purported to be the complaint. However, the Police to whom it was given was not examined to prove that such a complaint was in fact submitted. Ext.D2 also raises several doubts also. Even though she claims that Ext.D2 was the complaint submitted to the Police, it appears to be in the form of the original complaint itself. She has no explanation as to how she obtained the complaint which was allegedly given to the Police. On the other hand, there is an endorsement on it that she had got returned three cheques. It is attested by accused acknowledging the receipt of three cheques. She has a further contention that two cheques were not returned on the ground that they were missing. Essentially such an endorsement should have been given by the accused to Sreenivasan, rather than she herself endorsing on Ext.D2. Further, the most crucial aspect is that, if two cheques are not received, the accused normally would have got it endorsed on Ext.D2 complaint. She has no explanation as to why no such endorsement was obtained from Sreenivasan, at the time of the alleged settlement of the dispute.

8. The most crucial part is that, the submission of such a complaint is not proved by summoning the concerned Police or the Police Register. The fact that, there was a settlement or even a return of three cheques by Sreenivan is not proved by any other evidence. Evidently, Ext.D2 raises several doubts. As mentioned above, most crucial aspect is not the return of the three cheques but it is the not returning of two cheques which ought to have been endorsed on the complaint if she had submitted such a complaint. This is not forthcoming.

9. It is also pertinent to note that, even though such an agreement was entered into on 03.03.2009 on a complaint purported to have been given on the same day, the stop payment was given much days thereafter on 24.04.2009. These facts cast serious doubt on the genuineness of Ext.D2. The only point that she could prove through DW1 was that a stop payment was given. Hence Ext.D2 appears to be a self serving document

alone.

10. The defence set up by the accused suffers from another crucial infirmity also. The specific contention of the accused was that a sum of ₹2,97,000/- was received from Sreenivasan on various occasions and towards the discharge of that liability few cheques were given. In the course of cross examination of PW1, a definite suggestion was put to her that no amount was due from the complainant and he along with Rahul and Sreenivasan a false complaint was set up against her. In fact this suggestion is belied by the version of the accused herself as DW2. In her evidence she admitted that, she had money transaction with Rahul as well as Sreenivasan. She admitted that she had borrowed ₹1,00,000/- from Rahul. This clearly shows that, one part of the suggestion put by the accused in the cross examination itself was false. The evidence of DW1 clearly shows that she was heavily indebted during the relevant time. She admitted that she had a debt of ₹10,00,000/- during the relevant period. Admitted transaction with Sreenivasan was for a sum of ₹2,97,000/-. She had another admitted liability of ₹1,00,000/- with Rahul. It eminently shows that there were several other

debts beyond the above two admitted liabilities. The defence set up by the accused has to be appreciated in this back ground.

11. The finding of the Court below that the defence set by the accused is believable cannot be accepted in the above circumstances. The most crucial part is that, the best person who could have spoken on the defence set up by the accused was Sreenivasan. He was not examined. In the above circumstance, I am not inclined to accept the defence set up by the accused. In the absence of any definite evidence to show that the defence set up by the accused is substantiated, the only fact that remains now is regarding the dishonour of cheque.

12. This leads to the available evidence of PW1 regarding the execution of the cheque. The admission of the signature, the undemolished evidence of PW1 and the falsity of the defence set up by the accused leads to an irresistible conclusion that the complainant has succeeded in proving the existence of a legally enforceable debt due to the complainant and that Ext.P7 cheque was executed towards the discharge of a legally enforceable debt. The finding of the Court below to the contrary is not legally sustainable and is liable to be reversed. Since the cheque was

presented and was returned dishonoured, the complainant has complied with all statutory formalities. In the light of the above, it is only to be held that the cheque was dishonoured for insufficiency of funds and the accused has committed an offence punishable under Section 138 of the Negotiable Instruments Act.

In the result, the appeal is allowed. The judgment of the Court below is set aside and the accused is sentenced to undergo simple imprisonment till the rising of the Court and to pay a compensation of ₹2,00,000/- (Rupees two lakhs only), to the complainant failing which she shall undergo Simple Imprisonment for four months. The accused is granted two months time to remit the amount. If the compensation is not paid within two months, the Court below shall initiate appropriate proceedings. Accused shall appear before the Court below within a month from today to undergo the substantive sentence till rising of the Court, failing which Court below shall initiate appropriate proceedings.

Sd/-

SUNIL THOMAS, JUDGE.

/true copy/

P. A. to Judge

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