IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

THURSDAY, THE 29TH DAY OF OCTOBER 2015/7TH KARTHIKA, 1937

CRL.A.No. 85 of 2011 (A)

(AGAINST THE ORDER/JUDGMENT IN CRA 632/2009 of ADDL. DIST. COURT (ADHOC) III, PALAKKAD DATED 07-10-2010 AGAINST THE ORDER/JUDGMENT IN ST 2409/2005 of J.M.F.C.-III,PALAKKAD DATED 25-09-2009)

APPELLANT(S)/RESPONDENT/COMPLAINANT:

RAJ,S/O. CHANDRAN, MUKRAMKD HOUSE,
KOTTEKKAD, PALAKKAD.

BY ADV. SRI.V.A.JOHNSON (VARIKKAPPALLIL)

RESPONDENT(S)/APPELLANT/ACCUSED AND STATE:
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1. V.SUNIL, S/O. VISWANATHAN,
KADAMBADI HOUSE, DHONI P.O., PALAKKAD.678 009

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

R1 BY ADV. SRI.JACOB SEBASTIAN
R BY PUBLIC PROSECUTOR SMT.M.G.LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 8-10-2015, THE COURT ON 29/10/2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.Appeal. No.85 of 2011

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Dated this the 29th day of October , 2015

JUDGMENT

The complainant in S.T.No.2409/2005 in a proceeding under Section 138 of the Negotiable Instruments Act, aggrieved by the acquittal of the accused by judgment in Criminal Appeal No.632/2009 of the Court of Session(Adhoc III, Palakkad) is the appellant herein.

2. The case of the complainant before the court below was that the accused had borrowed a sum of Rs.80,000/- from the complainant in October 2004. Towards the discharge of the above liability, he issued a post dated cheque for the above sum. It was presented for collection, but was returned dishonoured on the ground of insufficiency of funds. A statutory notice was issued, which was replied and thereafter the complaint was laid.

3. The accused appeared and contested the proceedings.

The trial court on an evaluation of the available materials found the accused guilty and convicted him. It was carried in appeal before the Sessions Court, which, on a revaluation of the evidence, differed with the conclusions arrived at by the trial court and held that the complainant failed to prove the due execution of the disputed cheque. The accused was thereupon acquitted.

4. This is challenged in this appeal. Heard and examined the records.

5. The allegation of the complainant was sought to be proved through his own testimony as PW1. According to the complainant, he was a contractor and knew the accused for the past two years. Accused had sought a loan of Rs.80,000/- and the amount which was available with him from a contract work was given. He admitted that the amount was given without any other documents. Thereafter, on demand, he brought the signed cheque and delivered it to the complainant. The cheque was dishonoured on presentation.

6. The evidence on the side of the complainant unequivocally proved that Ext.P1 cheque on presentation was

returned dishonoured. The fact that the lawyer notice was issued and was replied also stands admitted by both sides.

7. The crucial question that arises is whether the complainant had succeeded in proving his case. The defence set up by the accused, as seen disclosed from the trend of cross examination and the reply statement filed in answer to Section 313 Cr.P.C. questioning, was that he had not borrowed any money from complainant and the signature in Ext.P1 was not that of the accused. According to the accused, he had a manager by name Jayakrishnan. Few cheques were found to be missing from his firm and a complaint was lodged against the said Jayakrishnan. Ultimately, Jayakrishnan agreed to indemnify the accused towards the loss of three cheques and executed Ext.D2 agreement. One of the cheque covered by Ext.D2 was manipulated by the complainant in collusion with said Jayakrishnan to create Ext.P1 cheque. He further contended that the relationship with Jayakrishnan got strained resulting in his removal from service in 2005. To substantiate the above contention, Jayakrishnan was examined as DW1. He deposed in terms of execution of Ext.D2 agreement. Ext.D2 is an agreement

dated 16/6/2004, which refers to missing of three cheques with reference to their numbers, and had indemnified the accused against any misuse of the cheques.

8. Relying on Ext.D2, the accused contended that one of the cheque, which was mentioned in Ext.D2 agreement, was now manipulated and produced as Ext.P1 cheque. However, a perusal of Ext.D2 raises several doubts regarding its genuineness. It is prepared on a stamp paper dated 16/6/2004 itself. However, Ext.D2 reveals that it was pursuant to a police complaint that it was got executed. However, according to the version of the accused, relationship got strained resulting in his dismissal in 2005. This defence seen set up in Section 313 Cr.P.C. statement does not tally with contents of Ext.D2. Evidently, even after the police complaint and the execution of Ext.D2, though the relationship got strained, DW1 allegedly continued to be in service till 2005.

9. Another important aspect to be noticed is that though Ext.D2 refers to Ext.P1 cheque, the link as to how PW1 got possession of the cheque is not proved. Even though DW1 was in the dock, not even a suggestion was put to him touching upon

Ext.P1 or the allegation that DW1 had colluded with DW1 to forge Ext.P1 cheque. Above all,even though the basic contention of the accused was that Ext.P1 cheque was misused by the complainant and DW1 had undertaken to indemnify him, no action was taken against DW1 on the strength of Ext.D2. Further DW1, who was alleged to have a strained relationship with the accused, tendered evidence in support of the accused.

10. Another important aspect to be noticed is that in reply to Ext.P4 lawyer notice, Ext.P7 reply was sent by the accused. However, in the reply, there is no reference to Ext.D2. The trial court had held that, had such a genuine defence been available, definitely the accused would have referred to it in Ext.P7. Suppression of Ext.D2 in Ext. P7 was held as a main ground for disbelieving the defence of accused. However, this reasoning was not appreciated by the appellate court, which held that merely for reason that Ext.P7 reply notice did not mention anything about Ext.D2 agreement, it cannot be held that the plea of the accused was not probable. However, non mentioning of Ext.D2, in Ext.P7, being the basis of the defence set up by the accused, cannot be lightly viewed.

11. Another defence set up by the accused was that the complainant had borrowed a sum of Rs. 88,000/- on 23/3/2005 from him and a cheque dated 28/4/2005 was executed in favour of the accused which was dishonoured. After receipt of Ext.P4 lawyer notice, the accused issued Ext.D1 lawyer notice dated 12/5/2005 to PW1 referring to the dishonour of the above cheque. This was admittedly received by the complainant, but it was not replied. The most crucial part is that had such a transaction being there, it would have also been reflected in Ext.P7 reply. The normal course of conduct in case of receipt of a notice in the nature of Ext.P4 would have been to deny the transaction and also to set up the cheque alleged to have been executed by the complainant as a defence. Suppression of the above cheque in Ext.P7 coupled with the fact that even after sending such a notice, no further action was taken against the complainant cast strong doubt on the defence set up by the accused on the strength of Ext.D1. There are reasons to believe that Ext.D1 notice was issued in retaliation to Ext.P4. Further, the amount mentioned in Ext.D1 is higher than the amount claimed in Ext.P4. Above all in the statement under Section 313

Cr.P.C., the contention of the accused was that a sum of Rs.80,000/- was due from the complainant and not Rs.88,000/- as claimed in Ext.D1. This shows that accused has no consistent defence. The accused has also not mounted the box to prove this case.

12. An appreciation of the above facts, lead to a conclusion that the lower appellate court was not justified in reversing the well considered findings of the court below. The defence set up by the accused is totally unreliable and inconsistent. Hence, what remains is only the evidence of PW1, which is sufficient to inspire the confidence about the due execution of Ext.P1 cheque.

13. In view of the above findings, it is only to be held that the trial court has correctly held that accused committed offence punishable under Section 138 of the Negotiable Instruments Act. He is liable to be convicted. Since the appellate court judgment of acquittal is reversed, imprisonment till rising of the court will serve the interest of justice along with a fine of Rs.80,000/-, in default of which the accused shall undergo simple imprisonment for two months. If the fine amount is realized, it shall be paid to the complainant as compensation

payable under Section 357(3) of Cr.P.C .

The appeal is allowed accordingly. The judgment of the lower appellate court is set aside. Accused is granted one month time from today to remit fine. After the expiry of that period, he shall appear before the trial court to undergo sentence and to sentence and to remit the fine as above.

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.