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. 100 of 2011 ( )

(AGAINST THE ORDER/JUDGMENT IN Crl.L.P. 1029/2010 of HIGH COURT OF KERALA DATED 29-10-2010 AGAINST THE ORDER/JUDGMENT IN ST 56/2010 of J.F.C.M.COURT-II, TIRUR)

PETITIONER(S)/COMPLAINANT:

VARIKKODAN ABOOBACKER,
S/O.KUNHAHAMMED, AGED 82, KATTIPPARUTHI AMSOM,
THOZHUVANUR DESOM, TIRUR TALUK, MALAPPURAM DISTRICT.

BY ADVS.SRI.K.C.ELDHO
SRI.JIJO THOMAS

RESPONDENT(S)/ACCUSED & STATE:

1. ABDUL KAREEM ALIAS BAVA, AGED 49,
S/O.MUHAMMED ALIAS KUNHAPPA, KIZHAKKETHIL,
KAVUMPURAM AMSOM, THOZHUVANUR DESOM, VALANCHERY
TIRUR TALUK, MALAPPURAM DISTRICT, PIN CODE-676552.

2. STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM
COCHIN-682011.

R,R1 BY ADV. SRI.JAMSHEED HAFIZ
R BY PUBLIC PROSECUTOR SMT.M.G.LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-10-2015, THE COURT ON 29/10/2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.100 of 2011

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Dated this the 29th day of October, 2015

JUDGMENT

This appeal arises from the dismissal of S.T.No.56 of 2010 of the Judicial First Class Magistrate-II, Tirur for offence punishable under Section 138 of the Negotiable Instruments Act.

2. The case of the complainant was that the accused had borrowed a sum of Rs.40,000/- on a date about one year prior to the complaint, undertaking to return it by December 2005. A cheque dated 02.12.2005 was delivered. It was presented for collection but was returned dishonoured on ground of insufficiency of funds. After issuing a statutory notice, the complaint was laid. Accused appeared and denied the charge. On the side of the complainant, PW1 was examined and Exts.P1 to P5 were marked. There was no defence evidence. Learned magistrate on an evaluation of the available materials concluded that the complainant failed to prove his case and hence acquitted the accused.

3. Heard and examined the records.

4. The specific case of the complainant as deposed by him as PW1 was that a loan of Rs.40,000/- was given to the accused. Even though the exact date of loan was not mentioned, in the course

of cross examination, he deposed that he remembered it to be on 02.12.2005. Ext.P1 was the cheque which was delivered by the accused. It was returned dishonoured as evidenced by Ext.P2 memo. Notice was sent, a copy of which was marked as Ext.P3, service of which was evidenced by Ext.P5. In his evidence, he asserted that the cheque was signed by the accused in his presence towards the discharge of a legally recoverable debt.

5. The defence set up by the accused as evident from the trend of cross examination and his reply to Section 313 Cr.P.C. questioning was a case of total denial. According to him, his brother Mohammadali had joined a kuri run by the complainant. When the kuri was prized, towards the receipt of the money, one cheque each of the accused and his brother were handed over as security. Even though the kuri amount was paid off, in spite of request, the cheques were not returned. Another case was instituted against his brother, for the recovery of the money.

6. In the course of the cross examination, PW1 admitted that he had a money transaction with the brother of the accused, by name Mohammadali. He had also admitted that a cheque of the brother and that of the accused were received. He hastened to add that the present transaction was a distinct and separate transaction.

He further deposed that a case was instituted against Mohammadali and the money was recovered.

7. Court below, relying on the difference in the handwriting as seen from Ext.P1 and also on the ground that the evidence of PW1 indicated that he was in the habit of receiving blank papers from his debtors concluded that the version of PW1 regarding the existence of the debt could not be believed. The judgment shows that the Court in fact initially arrived at a finding that the execution was proved, but held that the rebuttal evidence of the accused was more believable.

8. One of the main findings of the court below was that there was a patent difference in the ink and handwriting of various entries in the cheque. According to the court below, the name of the complainant and the amount in words were written in a handwriting different from the handwriting, with which the name of the accused was written at the signature portion. The date and amount in words were written with an ink, which was darker than the other entries. On the above premise, the Court concluded that it cannot be believed that it was written and signed by the same person at a stretch. This finding of the court below has to be appreciated on the basis of the available evidence on record. In

fact, PW1 in his evidence had admitted that only the signature portion and the amount alone were written by the accused. He specifically asserted that the date was not entered. Evidently, in the cheque, the most crucial parts of entries which are the signature and the amount were in the handwriting of the accused. Though he indicated that the date was not written by the accused, court below disbelieved that part of the evidence of PW1 in the light of a specific averment in the complaint. In the notice as well as in the proof affidavit, he had specifically stated that a cheque “dated 02.12.2005” was delivered. This part of the version has to be read with the entire averment which relates to the date, amount and the details of the cheque. It cannot immediately be assumed that he had mentioned that the date was written by the accused. He has not specifically mentioned that the date of the cheque was entered by the accused. It can only be interpreted that a cheque dated 02.12.2005 was delivered. Hence, his version in the complaint is not contrary to his oral testimony that the date was not written by the accused. It is true that a thorough perusal of Ext.P1 indicates that three different writings are seen on Ext.P1. Complainant has no case that the date and the name were written by the accused. Hence, if a cheque is signed and delivered for a sum of Rs.40,000/-

an implied authority to fill up the remaining entries can be presumed. It cannot be legally said that it is an invalid document. This has to be appreciated with the testimony of PW1 in his evidence that the cheque signed by the accused with amount written was handed over.

9. It has also come out in evidence that the transaction with the brother was in 2004 or prior to that. It is the case of the complainant that the present transaction took place in 2005. When the present transaction took place, a case had already been instituted against the brother by the complainant. According to the court below, after having instituted a case against brother it was unlikely that further amount would be advanced by the complainant. This finding is not legally sustainable since even according to the accused, his own cheque was given as an assurance to his brother's transaction. This is admitted by PW1, though, he denies that both were two distinct transactions. Even from the case of the accused, it is clear that though money was advanced to the brother of the accused, the complainant had insisted for a cheque from the accused, which in turn indicates, that the complainant was more confident with a cheque from the accused. That being the position, even if the brother has committed default, that does not preclude

the complainant from further advancing the amount on the assurance of the accused himself.

10. It is also brought out in evidence that the complainant had received two signed stamp papers from the accused. The evidence of PW1 also indicates that he had obtained signed instruments towards various other transactions. The court below, on the above basis, concluded that the complainant was in the habit of getting blank papers and the possibility of he having misused the cheque given by the accused as suggested by him cannot be ruled out. I cannot agree with this finding since the complainant had only admitted that signed instruments were received towards the respective transactions, and not towards liability of others.

11. The defence set up has to be appreciated on the basis of certain other factors which the court below did not take into consideration. If the accused had a genuine contention that his blank signed cheque was misused by the complainant, the normal reaction of such person would be to issue a reply notice. In the present case, it was not done. Further, the very defence itself indicates that accused had admitted money transactions with the complainant. Further, even his own brother, in spite of having received a loan, did not pay the money and the complainant was

compelled to initiate legal proceedings for recovery of money. It evidently shows that neither the accused nor the brother discharged their monetary liability voluntarily. Even though the accused contended that the money was repaid, there is absolutely no evidence to prove that. There is no explanation as to why, in spite of return of money, the cheque was not demanded in writing. It is also pertinent to note that there is absolutely no contra evidence from the side of the accused and he choose to rely on the cross examination of the complainant alone.

12. This leads to a definite conclusion that the defence set up by the accused is thoroughly unsustainable and unbelievable, except making a cloud over the case set up by the complainant. On the other hand, the evidence of PW1, in so far as it touches upon the case set up by the complainant, seems to be unassailable. Hence, it is only to be concluded that the complainant had succeeded in proving the due execution of the cheque and non-payment of money in spite of repeated demands. On the other hand, the defence set up by the accused seems to be unsustainable and not reliable. In the above circumstances, the complainant is entitled to succeed and the finding of the court below to the above extent is liable to be set aside.

In the result, the appeal is allowed. The impugned judgment is set aside and the accused is convicted to undergo sentence till rising of the Court and to pay a compensation of Rs.40,000/- (Rupees Forty Thousand Only) to the complainant, failing which, he shall undergo simple imprisonment for two months. The accused is granted one month from today to pay the money as ordered above and on expiry of one month, he shall appear before the court below to undergo the sentence.

Sd/-

SUNIL THOMAS
Judge

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True Copy /

P.A to Judge