IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

CRL.A.No. 353 of 2011 ( )

(AGAINST THE ORDER/JUDGMENT IN STC 65/2010 of J.M.F.C.II, PAYYANNUR)

APPELLANT(S)/COMPLAINANT:

ANIL KUMAR K.V.,
S/O.BHASKARAN, 35 YEARS, KANDOTH VALAPPIL HOUSE,
KOLATHUVAYAL, ANCHAMPEEDIKA P.O., MOTTAMMAL VIA.
KANNUR.

BY ADV. SRI.GRASHIOUS KURIAKOSE

RESPONDENT(S)/ACCUSED AND STATE:

1. MAHESH P.,
S/O.VALIYA PURAYIL BALAKRISHNAN, 33 YEARS, KOZHI BAZAR,
MADAYI P.O., KANNUR DISTRICT.670 304

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

R,R1 BY ADV. SRI.ZUBAIR PULIKKOOL
R,R1 BY ADV. SRI.P.S.BINU
R BY PUBLIC PROSECUTOR ABJHIJITH LESLI

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 2-12-2015, THE COURT ON 15/12/2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.353 of 2011

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Dated this the 15th day of December, 2015

JUDGMENT

The complainant in S.T.No.65 of 2010 of the Judicial First Class Magistrate-II (Munsiff), Payyannur, aggrieved by the dismissal of the complaint under Section 138 of the Negotiable Instruments Act and the consequent acquittal of the accused, is the appellant herein.

2. According to the complainant, he and the accused were in Sharjah and on 01.08.2005, the accused had borrowed a sum of Rs.8,00,000/- from him. It was offered that the amount would be repaid when he returns to India in 2008. Since the amount was not paid, on 03.04.2008, complainant and his brother went to the house of the accused in Kerala wherein, accused issued Ext.P2 cheque for the sum of Rs.8,00,000/-. It was returned dishonoured and consequently, a notice was issued on 18.04.2008. This was replied raising false allegations and hence, a complaint was laid invoking Section 138 of the Negotiable Instruments Act.

3. The accused appeared and contested the proceeding. Learned magistrate, on an evaluation of the oral evidence tendered by the complainant through PWs.1 and 2, documentary evidence in

the nature of Exts.P1 to P5 and the oral testimony of DW1 on the side of the accused and Exts.D1 to D8, held that the complainant failed to prove the existence of a liability and the due execution of Ext.P1 cheque. Consequently, the accused was acquitted. This is assailed in this appeal.

4. Heard the learned senior counsel Mr.Grashious Kuriakose for the appellant and Ms.Rufaija A.P. on behalf of the accused.

5. The complainant himself was not examined on a reasoning that he was abroad at the time of trial. His power of attorney was examined as PW1. Though, he deposed generally in terms of the complaint touching upon the existence of a legally recoverable debt and execution of Ext.P1 cheque, in the cross examination, he admitted that he had no direct knowledge either regarding the transaction or regarding the execution of the cheque. He deposed that the complainant was in Kuwait at that time and he knew that the money was paid to the accused at Sharjah. He also admitted that he does not know the details of the transaction, and the issue of the cheque and its details. Evidently, the evidence of PW1 will not help the complainant in any manner.

6. The brother of the complainant was examined as PW2. He deposed that the complainant was in Kuwait at that time. He further stated that while the complainant and the accused were in Sharjah, a sum of 61538 Dirhams was paid as loan by the complainant to the accused. The undertaking was to repay it in 2008. Though, he initially deposed in terms of the complaint, admittedly, he also had no direct knowledge regarding the transaction that took place at Sharjah. It was a fact that in the exclusive knowledge of the complainant and the accused. PW2 has direct knowledge in relation to the execution of the cheque alone. He deposed that on 04.04.2008 he along with his brother/complainant went to the house of the accused and a cheque for Rs.8,00,000/- dated 04.04.2008 was signed by the accused in his presence and delivered to the complainant. He admitted that he had seen only the writing of the name and the signature by the accused, but did not know the further details regarding the person who had filled up the cheque. He denied the suggestion of the accused that the complainant had complained to the police, pursuant to which, the accused was called to the police station. He denied the suggestion that the cheque was misutilized

and filled up to claim huge amount.

7. The defence as revealed from Ext.D1, reply to Section 313 Cr.P.C. questioning and also the trend of cross examination is a case of complete denial. According to him, there was no loan transaction and no amount was due to the complainant. He asserted that Ext.P1 cheque was not issued by him. According to him, both the complainant and the accused had worked in Sharjah from 1997 to 2005. In 2004, both of them started a partnership firm. Consequently, his visa was cancelled on 12.06.2005 and he returned to India on 18.06.2005. Thereafter, he returned to Sharjah only in January 2006. He further stated that thereafter, when he was in India, he was summoned to the police station by the Taliparamba police by Ext.D2 notice on the basis of a complaint laid by the complainant on the ground that a sum of Rs.50,000/- was due from the accused. He went to the police station, disclosed the facts and hence, the complaint was found to be baseless, he was released. He further stated that before his return to Kerala, one of the blank cheque leaf was found missing. On enquiry with the complainant, he disclosed that he feigned ignorance. He asserted that Ext.P1 cheque was stolen by the complainant and

signature was forged. Ext.D1 reply contains the above contention. His yet another contention was that he was in India from 18.05.2005 to January 2006 and was not in Sharjah on 01.08.2005 when the amount was allegedly given by the complainant.

8. The available materials indicate the close relation between the complainant and the accused. Both had been in Sharjah at the same time. Even though the accused had a case that he had partnership business with the complainant, this was stoutly denied by the complainant. Suffice to say that the close transaction between them is not in dispute.

9. The evidence tendered by PW1 and PW2 on behalf of the complainant is insufficient to prove the existence of a liability. However, the evidence of PW2 is confined to the essential ingredients of execution of the cheque.

10. Regarding the execution of cheque, the available materials are the oral testimony of PW2 on behalf of the complainant and that of DW1, the accused himself. The specific case of the accused was that a blank cheque was misused. However, there is absolutely no evidence to show that the signature on Ext.P1 cheque was a forged one. On the other hand,

in the light of the denial of the accused in the cross examination, the complainant filed C.M.P.No.236 of 2010 to sent the cheque for comparison by the handwriting expert. This application dated 28.05.2010 had another prayer to call upon the accused to offer his admitted signatures. The court below allowed the above application and directed the accused to be present to furnish his signature. On request, he was granted one months' time more to appear. He did not appear. On the other hand, he filed the statement on 13.09.2010 stating that he was abroad at that time and he was aware of the consequence of his non-appearance and that, an adverse inference may also be inferred. Evidently, when the person is given a reasonable opportunity to offer his signature to compare with the disputed signature, a refusal to comply with the order may visit with an adverse inference.

11. The accused has a case that pursuant to the complaint given to the police, one Vijay acted as a mediator. But he was not examined. Though, he claimed that himself and the complainant were running a joint business, which was denied by the complainant, there is absolutely no material to prove joint business. The accused has no information regarding the income,

profits and statement of accounts. It is also pertinent to note that even though the complainant has a specific case that he had gone to the house of the accused on 03.04.2008 along with his brother, this fact was not seriously disputed by the accused.

12. Accused has yet another case that after the alleged execution of the cheque, complainant had lodged a complaint before the Taliparamba police alleging that a sum of Rs.50,000/- was due from the accused. This contention was pressed into service to show that even prior to the issuance of the lawyer notice, the complainant had a case that a sum of Rs.50,000/- alone was due. According to the accused, pursuant to the complaint, he was called to the police station by Ext.D2 notice. He went to the police station explained the details and the police were satisfied. According to the accused, he was thereafter released. He pressed into service Exts.D3 to D5 which were the documents, according to him would show that the complainant had in fact submitted a complaint. However, Ext.D6 is a document which would cut at the root of the case of the accused that the complaint was laid by the complainant. Ext.D6 is a reply given by the concerned police station stating that they have not received any complaint from the

complainant as mentioned in the application filed under the RTI Act. Hence, contention of the learned counsel for the accused that the complainant had earlier filed a complaint claiming Rs.50,000/- only is not supported by any legal evidence.

13. Yet another contention of the accused was that he was not in Sharjah at the time when the amount was allegedly paid. According to the complainant, the money was paid on 01.08.2005. The specific case of the accused was that he had returned to India on 18.06.2005 and thereafter, left India only in January 2006. To substantiate it, he produced his passport along with Ext.D8 photocopy. It is true that there is a stamp and seal dated 18.06.2005. The court below, relied on it and held that the accused was not in Sharjah during the relevant time. It is pertinent to note that the entries seen in passport only shows certain seals and the entries which appear to be in a foreign language. Hence, it cannot be conclusively held that the seal on it dated 18.06.2005 relates to the entry of the accused to any country. By a mere seal, it cannot be presumed about the purpose of that, unless, cogent evidence is tendered touching upon the above relevant dates. In the absence of anything to show the

actual purport of the relevant entries, the court below was not justified in concluding that the accused was in India from 18.06.2005 to January 2006.

14. An evaluation of the entire facts lead to the conclusion that there is insufficient evidence to prove the existence of legally recoverable debt. However, there is evidence in the form of oral testimony of PW2, regarding the execution of cheque. The learned senior counsel contended that in the light of the admission of signature on the cheque, that it was drawn on the account of the accused, the light of the evidence of PW2 and also in the absence of a convincing evidence to believe the defence set up by the accused, necessarily, the presumption under Section 139 of the Negotiable Instruments Act ought to have been drawn in the light of the decision reported in **Vasanthakumar T. v. Vijayakumari (2015(3) KHC SN 4 (SC**)). However, it is pertinent to note that one crucial evidence which would touch upon on the existence of the liability was the oral testimony of the complainant, who was abroad at that time. PW2 is claimed to be a witness only to execution of the cheque. On the other hand, the accused though tendered evidence was not available for giving the specimen

signature and he had to concede for drawing an adverse inference. Further, for the reasons mentioned above, I am not inclined to rely only on the entries on the passport. No conclusion can be arrived at regarding the defence that the accused was not available in Sharjah during the relevant time. The passport alone will not advance the contention of the accused, unless the entries thereon are properly brought on record through cogent evidence.

15. Learned senior counsel in the above situation pleaded for a remand to enable the complainant to adduce his own evidence. It was submitted that the complainant would be available if an opportunity is given. I feel that regarding the entries on the passport also, evidence is lacking. Further, the statement made by the accused that an adverse inference may be drawn was made presumably, because he was abroad and due to job constraints, I feel that one more opportunity can be granted to either side for the limited purposes as mentioned above.

In the result, the appeal is allowed. The impugned judgment is set aside. The matter is remanded to the court below for a fresh consideration after giving a reasonable opportunity to the complainant to offer himself for examination, if available and not for any other purpose. It is made clear that his examination shall be touching upon the existence of a liability, if any, and also due execution of the cheque. The accused will be entitled to bring in rebuttal evidence touching upon the above evidence. The accused will in addition be free to adduce evidence through himself or through other evidence touching upon the entries on the passport and may also offer specimen signatures, if he so chooses. The remand is limited for the above purpose only. Thereafter, the Court shall proceed with fresh judgment on the basis of the materials on evidence. Both sides shall appear before the court below on 06.01.2016.

Sd/-
SUNIL THOMAS
Judge

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P.A to Judge