IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

CRL.A.No. 1095 of 2011 ( )

AGAINST THE ORDER IN Crl.L.P. 501/2011 of HIGH COURT OF KERALA DATED 30-06-2011

AGAINST THE JUDGMENT IN CC 36/2007 of JUDICIAL FIRST CLASS MAGISTRATE -V, THIRUVANANTHAPURAM (SPL.COURT-MARKLIST CASES) DATED 25-04-2009

PETITIONER/COMPLAINANT:

M/S.SREE GOKULAM CHIT & FINANCE COMPANY
Pvt.Ltd., COLLECTION CENTRE, S.S.PLAZA
N.H.ROAD, ATTINGAL, THIRUVANANTHAPURAM REPRESENTED BY
PRASANTH G.S., S/O.GOPALAKRISHNA PILLAI, LEGAL
ASSISTANT, DIVISIONAL OFFICE
T.C.4/1037 (2) (3), HEERA PALACE
KOWDIAR, THIRUVANANTHAPURAM - 695 003

BY ADVS.SRI.K.S.BABU
SMT.N.SUDHA

RESPONDENTS/ACCUSED & STATE:

1. E.SHAJAHAN (AGE 42)
S/O.IBRAHIM RAWTHER, AL-NOOR HOUSE, KOMALLOOR P.O.
CHUNAKKARA.

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

R1 BY ADV. SRI.B.MOHANLAL
BY PUBLIC PROSECUTOR: SRI. ABHIJITH LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16-11-2015, THE COURT ON 26.11.2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.1095 of 2011

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Dated this the 26th day of November, 2015

JUDGMENT

The complainant in C.C.No.36 of 2007 aggrieved by the acquittal of the accused in a complaint under Section 138 of the Negotiable Instruments Act is the appellant herein. The case of the prosecution was that the accused had joined a chitty run by the complainant for a sum of Rs.2,00,000/- which was prized by him and received a prize money of Rs.1,50,000/-. He defaulted repayment of the monthly installments and towards the payment of the amount due that was quantified at Rs.1,60,070/-, he executed and delivered a cheque to the complainant. It was presented for collection but was returned dishonoured on ground of insufficiency of funds. A statutory notice was issued to the accused which was received by him but replied raising untenable contentions. Consequently, the complaint was filed alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act.

2. The accused appeared and denied the allegations. On the side of the complainant, PW1 was examined and Exts.P1 to P6

were marked. On the side of the accused, there was no oral evidence, but Exts.D1 to D4 were marked. The court below, on an evaluation of the available inputs, concluded that the complainant failed to prove the existence of a legally enforceable debt to the extent of money mentioned in Ext.P1 cheque and thereby failed to prove its due execution. Consequently, the accused was acquitted. This is assailed in this appeal.

3. Heard both sides and examined the records.

4. It is an admitted fact that the accused had joined a chitty for a sum of Rs.2,00,000/- run by the complainant. It was further admitted that it was auctioned and the prize money of Rs.1,50,000/- was received by him. To prove the due execution of Ext.P1 cheque for a sum of Rs.1,60,070/-, PW1 who was the Assistant Legal Officer of the complainant/company was examined. He deposed that the monthly installments payable was Rs.10,000/- and towards the outstanding liability, Ext.P1 cheque was issued. He deposed that the cheque was given in the first week of 8th month of 2006. He asserted that the correctness of the amount due was satisfied by the accused, who brought the cheque and delivered it in his presence. He further admitted that towards the above transaction, a chitty agreement and borrowal note were also

given. In the cross examination, he admitted the entry of Rs.66,000/- seen in Ext.D1 passbook. He further admitted that the chitty terminated on 21.02.2005. Regarding the last payment of remittance, PW1 stated that he has to verify the records.

5. The defence set up by the accused as is evident from Ext.D4 reply, the trend of cross examination and the reply given in Section 313 questioning is that of a case of total denial of execution of Ext.P1 cheque. The specific case of the accused was that at the time of entering into the kuri transaction, two blank signed cheques were handed over to the de facto complainant. It was alleged that the amount mentioned in the cheque was not due and that he has not executed the cheque for the amount mentioned in Ext.P1. It was contended that a blank signed cheque handed over was filled up without authority and a huge amount was claimed. However, in the reply notice, he had admitted that the actual amount due was Rs.76,000/- and expressed his willingness to pay the money with 6% interest.

6. In the light of the defence set up by the accused, it is clear that the signature on the cheque is not disputed though the execution is denied. The kuri transaction with the complainant, the receipt of money, the default and the existence of an admitted

liability of Rs.76,000/- were also admitted.

7. In the light of the above defence, the evidence tendered by PW1 has to be evaluated. PW1 has stated that Ext.P1 was executed towards the discharge of an existing liability. He asserted that the amount mentioned in the cheque was due to the complainant. In the light of the defence set up by the accused, court below proceeded to conduct a roving enquiry to find the actual amount due. In that process, the Court concluded that though PW1 claimed that accused is not entitled for the dividends due to the default in payment of the monthly installments, it was negatived. The Court further held that since the payment of Rs.66,000/- was admitted by PW1 and the total amount of chitty was Rs.2,00,000/-, the balance payable was Rs.76,000/-. It was further held that the complainant has no case that the accused was charged with interest on the balance outstanding from the termination of the chitty. The Court held that the admitted amount due was less than the "magical figure" of Rs.1,60,070/-. The Court held that though the foreman of the transaction was entitled for charging interest on the outstanding money, complainant had no case that the accused was charged with interest on the balance amount. Hence, the Court arrived at a conclusion that the money

as claimed in Ext.P1 was not the amount actually due.

8. Evidently, in a case wherein the execution of the cheque is denied and the existence of a legally enforceable debt is in dispute, the duty of the Court is to decide whether execution is proved and whether, there is existence of a legally enforceable debt. Definitely, for the purpose of ascertaining the due execution of the cheque, the Court can also consider whether there is existence of a legally recoverable debt, since both are closely interlinked in any transaction. However, that does not enable the Court exercising jurisdiction under Section 138 of the Negotiable Instruments Act to conduct a roving enquiry as in a civil suit and to quantify the actual amount due. Even the Court concluded that the actual principal amount due was Rs.76,000/- with interest. It has also concluded that as per Ext.D1, the default was committed in 2003, which is the year of last remittance. Hence, from 2003 onwards till 2006 when Ext.P1 cheque was executed, interest is due on the principal amount. Having considered this and in the absence of any other material, the Court should have directly concluded that there was a legally enforceable debt. Even though the accused disputed the due execution, the admission of the signature, the admission regarding the existence of a liability and

the admission regarding entering into the chitty transaction goes a long way in supporting the case of the execution of Ext.P1 cheque as stated by the complainant. This was sought to be established through the oral testimony of PW1. There is absolutely nothing in the evidence of PW1 to doubt the due execution of the cheque. This assumes more significance in the absence of any other contra evidence. The finding of the court below regarding the amount due is based on assumptions and surmises.

9. In the light of the above, it is only to be held that the court below went totally wrong in discarding all available materials and arriving at perverse conclusions. The impugned judgment is not legally sustainable.

10. Even though there is a finding by the court below that the complaint was not sustainable since the complaint was filed in a Court within whose jurisdiction the drawee bank was situated, both sides fairly conceded that as per the existing legal position, the Court has jurisdiction. Hence, I am not inclined to accept the finding of the court below.

11. In the light of the above finding, it is only to be held that the complainant has succeeded in proving the due execution of the cheque, existence of the liability and that the cheque was returned

dishonoured on ground of insufficiency of funds. There is absolutely no material to show that blank signed cheques were handed over at the time of money transaction.

12. In the light of the above, the accused is liable to be convicted. Having regard to the entire facts and considering the fact that acquittal of the accused is reversed, I feel that a sentence of one day's simple imprisonment till rising of the Court will satisfy the interest of justice, if it is coupled with the sentence of fine also. The accused is imposed with a fine of Rs.1,70,000/- (Rupees one lakh seventy thousand only) and in default of it, he shall undergo substantive sentence of simple imprisonment for three months. If the amount is remitted, it shall be paid to the complainant as compensation under Section 357 of the Cr.P.C. The accused is granted two months time to pay the fine. He shall appear before the court below after two months to undergo sentence and to remit the fine.

The appeal is allowed as above.

Sd/-
SUNIL THOMAS
Judge

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P.A to Judge