

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA, 1937

CRL.A.No. 1657 of 2011 ()

AGAINST THE JUDGMENT IN CC 103/2009 of CHIEF JUDICIAL MAGISTRATE,
ALAPPUZHA DATED 14-03-2011

AGAINST THE ORDER IN Cr1.L.P. 590/2011 of HIGH COURT OF KERALA DATED
02-08-2011

APPELLANT/COMPLAINANT:

VYPIN KURIES & FINANCE HAVING ITS
HEAD OFFDICE AT CHERAI AND BRANCHES AT FAREEDABAD
VARAPPUZHA, PATHIRAPALLY, KURUMASSERRY
VALAPPU REPRESENTED BY ITS POWER
HOLDER P.M.VENUGOPAL, S/O.MANIAN, PATTARUPARAMBIL
KEDAMANGALAM, NORTH PARAVOOR TALUK

BY ADV. SRI.M.P.RAMNATH

RESPONDENT/ACCUSED:

1. BINDU AJITH, W/O.AJITH KUMAR,
POKKATHAYIL VEEDU, PLASSUKULAM, AVALOOKUNNU P.O.
ALAPPUZHA DISTRICT.

2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR.

R1 BY ADV. SRI.R.SURAJ KUMAR

R1 BY ADV. SMT.V.DEEPA

R1 BY ADV. SMT.V.BEENA

BY PUBLIC PROSECUTOR:SMT.M.G.LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.1657 of 2011

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Dated this the 18th day of December, 2015

JUDGMENT

The appellant herein instituted a private complaint invoking Section 138 of the Negotiable Instruments Act, against the first respondent, on the basis of a dishonoured cheque for a sum of Rs.48,500/-. The case of the de facto complainant was that it was a partnership firm doing business including that of chitty and accused was a subscriber to the chitty. The payment of chitty installments were in arrears and towards the discharge of the liability, a cheque was executed and delivered. It was presented for collection but was returned dishonoured on ground of insufficiency of funds. A statutory notice was issued, which was not replied in spite of service. Hence, the complaint was laid.

2. Before the court below, the power of attorney holder of the complainant was examined as PW1. He tendered evidence in accordance with the case. Exts.P1 to P9 were marked. There was no defence evidence. However, the court below did not accept the claim of the complainant regarding the execution of the cheque, holding that the complainant failed to prove the due execution of

the cheque and also that, existence of a legally recoverable debt was not proved by cogent evidence. The Court acquitted the accused. This is challenged in this appeal.

3. Heard both sides and examined the records.

4. PW1 had deposed in accordance with the complaint touching upon the existence of a chitty transaction, the execution of a chitty agreement marked as Ext.P8 and the failure to remit the installments due. PW1 in his evidence had stated that Ext.P2 cheque was signed by the accused. To substantiate the case of the complainant regarding the existence of a legally enforceable debt, Ext.P9 copy of the chitty personal ledger was pressed into service. He tendered evidence touching upon both these documents. The suggestion of the accused that a blank signed cheque handed over at the time of execution of the chitty agreement was denied by him.

5. It is pertinent to note that the precise defence set up by the accused as is seen from the trend of cross examination and also the reply given by the accused in answer to Section 313 Cr.P.C. questioning was that a blank signed cheque was filled up to create a non-existing liability.

6. However, the court below rejected the case of the complainant by refusing to rely on Ext.P9 copy of the statement of accounts (mistakenly mentioned as Ext.P8 in the judgment). According to the court below, it was not produced in accordance with the Banker's Books Evidence Act. However, thereafter, in paragraphs 7 and 8 of the judgment, the court below referred to the above statement of accounts and disbelieved the version of the complainant on the ground that amount due was not shown on that account. It was further held that the amount due has not been properly reflected in the above statement of accounts. The court below further went to the extent of saying that PW1 did not know the interest charged on the amount due. Ultimately, the Court concluded by saying that unless the books of account for the chitty account confirming liability is produced, it was not possible to conclude that the cheque amount reflected a legally enforceable debt against the accused.

7. Evidently, court below has proceeded on a totally different angle without considering the evidence available on record. The court below failed to notice that the defence set up by the accused was that a blank signed cheque was handed over at

the time of execution of Ext.P8 chitty agreement. Court below failed to notice that accused has not denied Ext.P8, which was the agreement binding on the parties. The liability to pay the few installments and the right of the foreman to claim the amount in case of default in lump with interest arises from Ext.P8. In the course of the cross examination as well as in Section 313 Cr.P.C. questioning, the accused did not have a case that there was no chitty transaction, that there was no default or that, the accused had completely repaid the money. Ext.P9 the copy of the statement of accounts was only a copy of the personal ledger and evidence was tendered by PW1 orally touching upon the entries. The court below could have relied on Ext.P1 as a piece of evidence supporting the evidence of PW1. Even in Ext.P9, the balance outstanding as on 05.10.2008 was specifically referred to as Rs.48,587.50/-, which the court below omitted to take notice.

8. In the above background, the question of existence of a liability on the basis of the oral testimony of PW1, Exts.P8 and P9 should have been considered on a broad basis. Court below also did not appreciate the limited defence that was set up by the accused. Court also should have taken into consideration that

there was no reply and accused herself did not tender any other evidence. Evidently, without appreciating the evidence available on record, the Court proceeded on a tangent and arrived at a wrong conclusion. Since there has not been a proper evaluation of the evidence on record, judgment of the court below is not legally sustainable and hence, the matter is liable to be remanded. Since neither party had a case that they did not get sufficient opportunity to let in evidence, this remand is for a limited purpose. The judgment is liable to be set aside and the matter is remanded to the court below for a fresh consideration of the available materials in the light of the settled legal principles, after giving a reasonable opportunity to both sides to argue the case.

In the result, the appeal is allowed. The impugned judgment is set aside and the matter is remanded to the court below for a fresh consideration after hearing both sides on the basis of the evidence available on record. Both sides shall appear before the court below on 30.01.2016.

Sd/-
SUNIL THOMAS
Judge

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