

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

THURSDAY, THE 3RD DAY OF DECEMBER 2015/12TH AGRAHAYANA, 1937

CRL.A.No. 1833 of 2011 ()

AGAINST THE ORDER/JUDGMENT IN CrI.L.P. 865/2011 of HIGH COURT OF KERALA
DATED 23-09-2011

AGAINST THE ORDER/JUDGMENT IN ST 238/2010 of J.M.F.C.-X, TRIVANDRUM
DATED 00-00-0000

APPELLANT/COMPLAINANT:

SREEJITH V.P.,
S/o.PARAMESWARAN NAIR
RESIDING AT 42/460(1), SHIVASREE
NEAR PARAMBIL JUNCTION
MUPPATHARA, VALLAKKADAVU P O
TRIVANDRUM - 8

BY ADVS.SRI.M.M.HUSAIN
SRI.K.B.ARUNKUMAR

RESPONDENT/STATE AND ACCUSED:

1. STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM
2. SHAJI S. NAIR, S/o.SUKUMARAN NAIR
T C 41/1676, SHIVAKALA
OPP.SHINKARATHOPPU COLONY
MANACAUD P.O, THIRUVANANTHAPURAM-695009

BY PUBLIC PROSECUTOR:SRI. ABHIJITH LESLIE
R2 BY ADV. SRI.G.SUDHEER

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.1833 of 2011

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Dated this the 03rd day of December, 2015

JUDGMENT

Appellant as the complainant, laid S.T.No.238 of 2010 before the Judicial First Class Magistrate Court-X, Thiruvananthapuram on the basis of a dishonoured cheque for a sum of Rs.50,000/-. In the complaint, it was stated that towards the discharge of a loan received by the accused, he executed and delivered a cheque for a sum of Rs.50,000/- which on presentation was dishonoured on the ground of insufficiency of funds. After issuing a statutory notice, a complaint was laid since the amount remained unpaid.

2. Before the court below, the accused appeared and pleaded not guilty. Both parties faced trial. On the side of the complainant, he was examined as PW1 and Exts.P1 to P5 were marked. On the side of the accused, DWs.1 and 2, both the bank managers were examined and Exts.D1 to D9 were marked. The court below, after appreciation of the entire evidence, accepted the defence set up by the accused and concluded that the complainant failed to prove the due execution of the cheque and also the

existence of a legally enforceable debt. This is under challenge in this appeal.

3. Heard. Examined the records.

4. Before appreciating the evidence tendered, it is essential to discuss the defence set up by the accused. Admittedly, the complainant and the accused are close relatives, being cousins. According to the accused, he had borrowed a sum of Rs.50,000/- in the year 2004 and towards the discharge of that liability, issued cheque No.99369 in 2005. Subsequently, the complainant approached him and informed that the cheque has been irrevocably lost. Consequently, a new cheque bearing No.99380 was executed and delivered to the complainant. When the passbook was updated, it was found that cheque No.99369 had been presented and a sum of Rs.50,000/- was collected. In the meanwhile, it is alleged that the father of the complainant threatened with unnecessary claims on the strength of cheque No.99369. Consequently, the accused issued a lawyer notice in anticipation stating the above facts and demanding that the cheque may not be misused.

5. The complainant to prove his case got himself examined as PW1. He deposed generally in terms of his complaint. The

crucial feature of the evidence tendered by PW1 was that the actual date of the transaction that resulted in Ext.P1 cheque and the date of delivery of that cheque were not revealed by him. Specific suggestions were put in the cross examination touching upon the defence set up by the accused. He denied all the allegations and stuck to his case.

6. To prove the defence evidence, both the bank managers were examined essentially to prove two aspects. Firstly cheque Nos.99369 and 99380 formed two cheque leaves of a single cheque book and secondly that, all the cheques were being issued and collected in a sequential order. The evidence tendered by DWs.1 and 2 on the basis of the bank records produced by them was in accordance with the above. It is pertinent to note that it has come on record Ext.P1 cheque as well as cheque No.99369 were also presented by the complainant. The evidence of DW1 indicates that cheque book containing cheque Nos.99369 and 99380 were issued on 25.05.2005. The most crucial aspect is that Ext.D9 which is cheque No.99369 as well as Ext.P1 cheque were for the same amount of Rs.50,000/-. Another crucial aspect in the evidence of PW1 was that in spite of this defence set up by the accused being disclosed in Ext.D1 and D4 notices and also in the cross

examination, the witness did not have a case that Exts.P1 and D1 related to two entirely different transactions. This eminently shows that both relate to one and the same transaction.

7. The genuineness of the defence set up by the accused is also evident from another aspect. The first shot was laid by the complainant by sending Ext.D1 lawyer notice on 12.03.2008. It is true that it was not addressed to the complainant but to the father of the complainant. In that letter, a specific reference was made to the defence set up by the accused. It was also stated that the son of the addressee of that letter namely, the complainant herein had a transaction with the accused in the beginning of 2005 for a sum of Rs.50,000/-. The issuance of cheque No.99369 dated 19.07.2005 towards the discharge of that liability was disclosed in that letter. It was asserted that the son had represented that the cheque was irrevocably lost and consequently, cheque No.99380 was executed later. This is the consistent defence set up from the beginning even before the claim in relation to the present cheque was set up by the complainant. The father, who received that letter, replied by Ext.D3 vaguely denying the allegations but without touching upon the specific allegation mentioned in Ext.D1. It was followed by Ext.P3 notice which is the notice issued before invoking Section

138 of the Negotiable Instruments Act. It is pertinent to note that the date of reply of the father tallies with the date on which the disputed cheque was presented for collection in the bank. Though it may be an accidental coincidence, it can also be taken note of in the facts and circumstances of the case.

8. In the light of the above specific defence set up by the accused, the complainant did not offer any valid explanation. It is evident that the accused had set up a valid defence which could not be answered by PW1. When the evidence tendered by PW1 is analyzed against the defence set up by the accused, it is only to be held that the complainant had miserably failed to prove the due execution of Ext.P1 cheque and that, it was executed by the accused towards the discharge of a legally enforceable debt. That naturally leads to a conclusion that the complainant is not entitled to succeed and the finding of the court below in this regard is only to be sustained.

In the result, the appeal fails and is dismissed confirming the judgment of the court below.

Sd/-
SUNIL THOMAS
Judge

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True Copy /

P.A to Judge