IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 9TH DAY OF DECEMBER 2015/18TH AGRAHAYANA, 1937

CRL.A.No. 1902 of 2011 ( )

AGAINST THE ORDER IN Crl.L.P. 755/2011 of HIGH COURT OF KERALA DATED 12-10-2011

AGAINST THE JUDGMENT IN CC 58/2006 of JUDICIAL FIRST CLASS MAGISTRATE COURT-III,TRIVANDRUM DATED 14-10-2010

APPELLANT/COMPLAINANT:

RAMESH KUMAR,
SUDHA BHAVAN, KUNNINAKAM, KANIYAPURAM
THIRUVANANTHAPURAM.

BY ADV. SRI.K.P.SUJESH KUMAR

RESPONDENTS/ACCUSED AND STATE:

1. **SHAHIDA BEEVI,**
SHAJEER MANZIL, KUNNINAKAM, KANIYAPURAM
THIRUVANANTHAPURAM-695 014.

2. **STATE OF KERALA,**
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM-31.

BY PUBLIC PROSECUTOR: SRI.ABHIJITH LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.1902 of 2011

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Dated this the 9th day of December, 2015

JUDGMENT

The appellant laid a complaint against the first respondent on the basis of a dishonoured cheque for a sum of Rs.62,500/- dated 20.05.2005. It was alleged that the cheque was issued towards the discharge of an existing liability and on presentation, it was returned dishonoured. After issuing a statutory notice, which was not replied, a complaint was laid alleging that the amount due was not paid even after receipt of the notice. The accused appeared and denied the allegations. Both sides proceeded for trial. On the side of the complainant, PW1 was examined and Exts.P1 to P5 were marked. The court below, after a brief evaluation of the available inputs concluded that the complainant had failed to prove that the cheque was issued towards a legally recoverable debt and hence, acquitted the accused. This is under challenge in this appeal.

2. In spite of service of notice on the first respondent, she has not appeared to contest the proceeding. Heard the learned counsel for the appellant and examined the records.

3. The evidence of the complainant is essentially the oral testimony of PW1. According to him, the accused had offered a visa to him and towards that, a sum of Rs.60,000/- was paid on 03.01.2005. Towards the medical expenses, another sum of Rs.2,500/- was also paid. Since the visa could not be arranged, he started demanding return of the money and ultimately, cheque dated 20.05.2005 was delivered to him on 05.02.2005. He deposed in accordance with his complaint and stated that the accused had an intention to cheat him. He also asserted that in spite of service of notice, the amount was not repaid. His version was consistent and could not be demolished in cross examination.

4. The defence set up by the complainant as is evident from the trend of cross examination as well as from the reply to Section 313 Cr.P.C. questioning was that there was no transaction with the complainant. In the Section 313 Cr.P.C. reply, she asserted that she had no transaction with the complainant nor had she received any money from the complainant. She further stated that a cheque leaf of her was given to the complainant, without her knowledge. This seems to be the trend of defence set up in the cross examination also. There was no evidence on her side to

prove the above defence.

5. A perusal of the defence set up by the accused indicates that though she stated that a cheque was handed over, she has not specified as to who had handed over the cheque. She has also not disclosed as to whether it was a signed blank cheque or it was a signed filled up cheque or even that a blank cheque was later manipulated by the complainant. In other words, her defence is absolutely vague.

6. Had the contention of the accused that she had no transaction with the complainant, that it was a manipulated case and further that, her cheque was misused by the complainant been genuine, the normal course of conduct of any person would have been to reply to the lawyer notice. It was not done. PW1 in his evidence had stated that the cheque was executed and delivered by the accused. A reference to Ext.P1 cheque as well as the acknowledgment card which are available on record clearly shows that the signature on both the documents show striking similarity. In the absence of any definite allegation that the signature was manipulated, it can safely be presumed that the signature on Ext.P1 is not disputed. In other words, she has no case that the

signature is a forged one. Further, she has also no case that the cheque was not drawn on her account.

7. The court below had essentially relied on two factual aspects to acquit the accused. Firstly, the Court assumed that the oral testimony of the complainant indicated that the husband of the accused had assured that the visa would be provided. This appears to be factually incorrect since the available evidence only indicates that PW1 admitted that he had discussed with the husband of the accused. Court below proceeded on the basis that this admission of PW1 was contrary to the pleadings in the complaint. Secondly, the Court also stated that though the complainant had discussed with the husband of the accused, he did not explain as to why he gave Rs.60,000/- to the accused and not to the husband. This also appears to be factually incorrect. According to the court below, as seen at page 5 of the judgment, there was an admission by PW1 that the promise for visa was actually made by the husband of the accused. Evidently, the above conclusion arrived at by the court below on an appreciation of evidence was on a wrong premise. In fact complainant did not state that the promise for visa was made by the husband. Court has also failed

to appreciate the facts while analyzing this evidence. The available materials indicate that the complainant had succeeded in proving the existence of a legally enforceable debt and the due execution of the cheque. The cheque was presented for collection within time and statutory notice was also sent within time. Hence, he had succeeded in proving that Ext.P1 cheque was issued towards the discharge of a legally enforceable debt and was dishonoured on account of insufficiency of funds. Since the amount remained unpaid inspite of statutory notice, accused has committed an offence punishable under Section 138 of the Negotiable Instruments Act.

8. Since the order of acquittal by the trial court is proposed to be reversed and considering the fact that the accused is a women, I feel that a substantive sentence of imprisonment till rising of the Court will serve the interest of justice provided, it is coupled with an adequate direction for payment of compensation. A sum of Rs.55,000/- to be paid to the complainant by the accused with a default sentence of two months simple imprisonment will serve the interest of justice.

In the result, the appeal is allowed. The judgment of the court below is set aside and the accused is convicted to undergo simple imprisonment till rising of the Court. She shall appear before the court below within a period of one month from today and receive a substantive sentence. She shall also pay compensation of Rs.55,000/- (Rupees fifty five thousand only) to the complainant within two month's from today, failing which, she shall undergo default sentence of two month's. In the event of noncompliance of above, court below shall proceed with appropriate steps after the expiry of respective period.

Sd/-
SUNIL THOMAS
Judge

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P.A to Judge