IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

CRL.A.No.890 of 2002 ( )

AGAINST THE JUDGMENT IN CC 782/1998 of J.M.F.C.-III,
PUNALUR, DATED 23-07-2002

APPELLANT(S)/COMPLAINANT:

NAZEER, S/O. YOSUF SAHIB,
SHERIN MANZIL, CHEMMANTHUR, PUNALUR.

BY ADV. SRI.S.MUHAMMED HANEEF

RESPONDENT(S)/ACCUSED:

BHASKARAN PILLAI,
AGED ABOUT 57, S/O. RAGHAVAN PILLAI, RADHA BHAVANAM,
HOUSE NO.314, NEAR SIVANKOVIL TEMPLE, PUNALUR.

BY ADVS. SRI.R.SURAJ KUMAR
SMT.GEETHA P.MENON
PUBLIC PROSECUTOR SRI.JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ss

K. RAMAKRISHNAN, J.

Crl. Appeal No.890 of 2002

Dated this the 28th day of October, 2015

JUDGMENT

Complainant in C.C.No.782/1998 on the file of the Judicial First Class Magistrate Court-III, Punalur, is the appellant herein. The case was taken on file on the basis of a private complaint filed by the complainant under Section 138 of the Negotiable Instruments Act (hereinafter called 'the Act').

2. The case of the complainant in the complaint was that the accused borrowed a sum of ₹1,25,000/- and in discharge of that liability, he had issued Ext.P1 cheque dated 27.05.1998 in favour of the complainant drawn on Canara Bank, Punalur Branch. The complainant presented the cheque for collection and the same was dishonoured for the reason 'funds insufficient' in the account of the accused evidenced by Ext.P2 dishonour memo. The complainant issued Ext.P3 notice dated 09.06.1998, vide Ext.P4 postal

receipt and the same was received by the accused evidenced by Ext.P5 postal acknowledgment. He had not paid the amount thereby he had committed the offence punishable under Section 138 of the Negotiable Instruments Act. Hence the complaint.

3. When the accused appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, the complainant himself was examined as PW1 and Exts.P1 to P7 were marked on his side. After closure of the complainants evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that, he had not borrowed any amount from the complainant. In fact he is a property broker and the complainant wanted to purchase 12 cents of property near Sivan Kovil belonging to one Gopinathan

Pillai and he had paid ₹25,000/- as advance, but later he could not purchase the property and he wanted the amount to be returned. He filed a complaint before the Circle Inspector of Police and he was called to the Circle Inspector's office several times and thereafter as instructed by the Circle Inspector, an account was opened with the money of the complainant in Canara Bank and a blank signed cheque was obtained and misusing the cheque, the present complaint was filed. He had sent a reply notice denying the transaction and he had filed a complaint before the Circle Inspector also. In order to prove his case, the accused himself was examined as DW1 and three witnesses were examined as DWs 2 to 4 and Exts.D1 to D8 were marked on his side. After considering the evidence on record, the court below came to the conclusion that the accused had rebutted the presumption and the complainant had not proved his case and no offence under Section 138 is committed by the accused and acquitted the accused under

Section 255(1) of the Code of Criminal Procedure. Aggrieved by the same, the above appeal has been preferred by the appellant along with special leave petition and leave was grated and appeal was admitted to file.

4. Heard Sri.R.Krishnakumar, counsel representing S.Mohammed Haneef, counsel for the appellant and Sri.R.Suraj kumar, counsel appearing for the respondent.

5. The counsel for the appellant submitted that, in the reply notice, the accused had a different case. According to the accused, in the reply notice, he borrowed only a sum of ₹15,000/- and since he did not pay the amount a complaint was filed before the Circle Inspector of Police and a cheque was obtained by putting an amount of ₹25,000/- and that was misused and the present complaint was filed. But at the time of trial, the accused had a different case. So the accused had no consistent case regarding the issuance of the cheque. So the court below

was not justified in disbelieving the case of the complainant and acquitting the accused. He had not rebutted the presumption and as such court below ought to have convicted the accused for the offence alleged.

6. On the other hand, the counsel for the respondent submitted that the accused need not prove his case beyond reasonable doubt and he can have inconsistent plea as well. But at the time when he adduced his evidence, he will have to stick the defence taken and the evidence adduced on the side of the accused will probabilise his case and disproved the case of the complainant. Further even according to the complainant, he had admitted the property transaction and filing of complaint before the Circle Inspector of Police and also it was proved by adducing evidence by examining DW2 and producing Ext.D7 that the account was opened at the instance of the complainant and except one cheque leaf, there is no other cheque leaf has been used. Further the evidence of PW1 will go to show

that, he has no capacity to raise so much amount and pay the same as well. So under the circumstances, court below was perfectly justified in acquitting the accused and no interference is called for.

7. The case of the complainant in the complaint was that, accused borrowed a sum of ₹1,25,000/- and in discharge of that liability, Ext.P1 cheque was issued. The case of the accused was one of total denial. According to him he was a property broker and through him complainant had entered into an agreement to purchase the property of One Gopinathan Pillai, for which an amount of ₹25,000/- was given as advance, but later he could not purchase the property and he wanted the amount to be paid by the accused and he filed a complaint before the Circle Inspector of Police and at the instance of the Circle Inspector of Police, a bank account was opened in the name of the accused at the instance of the complainant and a blank signed cheque was obtained and later it was misused and

the present complaint was filed. It is true that, there is a presumption under Section 139 of the Act that, once the issuance of the cheuqe is proved, then it can be presumed that the cheque was issued in discharge of a legally enforcible debt, unless the contrary is proved by the accused. But at the same time it is also settled law that if the execution of the cheque as well as the transaction itself was denied by the accused, there is no presumption regarding any existence of liability and the liability will have to be proved by the complainant by adducing cogent evidence. It is also settled law that the accused can take inconsistent defences and at the time of evidence he need only stick to one of the defences taken and if it is probable that can be considered by the court. Further accused need not adduce any independent evidence to prove his case and he can rely on the weakness of the complainant's evidence and also to prove his case by preponderance of probabilities.

8. The case of the complainant was that, accused borrowed a sum of ₹1,25,000/- and issued Ext.P1 cheque, but in the complaint it was not mentioned as to when the amount was borrowed and when the cheque was issued. He had admitted his evidence that he had entered into a property transaction through the accused and he gave ₹25,000/- as advance and the transaction could not be materialized and he had sent Ext.D1 notice to the accused demanding the amount of ₹25,000/-. It is also admitted by him that since the accused did not pay the amount, he filed a complaint before the Circle Inspector of police against the accused requesting him to take steps to repay the amount. It was also in away admitted by PW1 that since it is a case of civil dispute parties were directed to approach the civil court. In order to prove this fact, DW4 the Circle Inspector of police was examined and Ext.D8 was also marked through him. It will be seen from Ext.D8 that a complaint was filed on 19.01.1998 and as per Ext.D8 it will be seen

that parties were relegated to civil court as it is a civil dispute. So it cannot be said that there was good relationship subsisting between the complainant and the accused after Ext.D8 transaction. So it is unbelievable that the complainant will be paying an amount of ₹1,25,000/- to the accused, especially when an amount of ₹25,000/- was due to him from the complainant as per Ext.D1 notice.

9. Further in the evidence, he had stated that the amount was given by him as sent by his brother-in-law from Gulf country. But he had also admitted that it was not rooted through any bank account and his evidence will go to show that he is not having so much income to raise such an amount as well. It is true that Ext.D2 was the reply notice sent and the counsel for the appellant relies on the reply notice for the purpose of proving the fact that the accused had a different case in the reply notice where his case was that ₹15,000/- was borrowed and when a complaint was filed before the Circle Inspector of Police, a cheque for

₹25,000/- was given and it was only written in figure and it was misused and the present complaint was filed. It may be mentioned here that, the complainant had no case that except Ext.P1 cheuqe, he had obtained any other cheque from the accused. Further it will be seen from the evidence of DW2/ the bank manager that as per Ext.D7 application dated 26.03.1998, the account was opened in the name of the accused and he was introduced by the complainant himself for opening the account and Ext.D4 is the pass book issued which will go to show that except the amount deposited in the account for opening the bank account, there was no other transaction. Ext.D5 is the cheque book issued and except Ext.P1 cheque, no other cheque leaf was used by the accused as well. All these things probabilise the case of the accused that the account was opened at the instance of the complainant after Ext.D8 transaction culminating directing the parties to settle the issue by filing civil suit and a blank signed cheque was obtained, misusing the same, the present complaint was filed showing higher amount.

10. The case of the accused was that, a blank signed cheque obtained was later misused also appears to be probable under the circumstances of the case. The accused had rebutted the presumption by adducing cogent evidence and also by proving that the case put forth by the complainant is not probable and the case put forward by him is more probable than the case of the complainant. No further evidence was adduced on the side of the complainant to disprove this fact. On the other hand, these facts were in away admitted by the complainant in the evidence as well. So under the circumstances, court below was perfectly justified in coming to the conclusion that the accused had rebutted the presumption and the complainant had failed to prove his case that the cheque was issued in discharge of any legally enforcible debt as claimed by him and rightly came to the conclusion that no offence under

Section 138 of the Act was established by the complainant against the accused and rightly acquitted him giving him the benefit of doubt and the finding does not call for any interference.

In the result, the appeal fails and the same is hereby dismissed. The order of acquittal passed by the court below against the accused is hereby confirmed.

Office is directed to communicate this judgment to the court below at the earliest.

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge

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