IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 17TH DAY OF SEPTEMBER 2015/26TH BHADRA, 1937

CRL.A.No. 562 of 2003 ( )

AGAINST THE ORDER IN Crl.MC 2613/2013 of HIGH COURT OF KERALA

AGAINST THE JUDGMENT IN CC 592/2001 of J.M.F.C.-III,PALAKKAD DATED 04-12-2002

APPELLANT/COMPLAINANT:

SRI.E.M. PAVITHRAN,
S/O. E.P. MADHAVAN, 15/223,
PATTU NIVAS, KUNNATHUMEDU,
PALAKKAD.

BY ADV. SRI.T.K.CHINNAN
ADV.SRI. PLESANT T. SAMUEL

RESPONDENTS/ACCUSED & STATE:

1. K. ARUMUGHAM,
S/O. KUNJU, 15/579,
KUNNATHURMEDU,
PALAKKAD.

2.STATE OF KERALA REP. BY THE PUBLIC PROSECUTOR,
HIGH COAUT OF KERALA, ERNAKULAM.

,R1 BY ADV. SRI.SAJAN VARGHEESE K.
R1 BY ADV. SRI.LIJU. M.P
R2. BY P.P.SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

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Crl.A.No.562 of 2003

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Dated this the 17th day of September, 2015.

JUDGMENT

The compliant in C.C.No.592/2001 on the file of the Judicial First Class Magistrate, Court-III, Palakkad is the appellant herein.

2.The case was originated on the basis of a private complaint filed by the complainant against the first respondent under section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act'). The case of the complainant in the complaint was that in discharge of a liability of Rs.75,000/- due from the accused, he had issued Ext.P1 cheque dated 28.5.2001 drawn on the Nedungadi Bank Limited in favour of the complainant. The complainant presented the cheque for collection through Vijaya Bank and it was dishonoured by the drawee bank with the reason 'funds insufficient' evidenced by Ext.P2 dishonour memo. This was intimated to the complainant by his banker vide Ext.P3 intimation letter. The complainant issued Ext.P4 notice on 1.6.2001 evidenced by Ext.P5 postal receipt and the same was received by the accused evidenced by Ext.P6 postal acknowledgment. He had sent Ext.P7 reply notice and the allegations in the reply notice are not correct. He had not paid the amount and so he had committed the offence punishable under section 138 of the Act. Hence the complaint.

3. When the accused appeared before the court below, 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 P8 were marked on his side. After closure of the complainant's evidence, the accused was questioned under section 313 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that he had not borrowed Rs.75,000/- from the complainant but he had borrowed an amount of Rs.10,000/- on 12.11.2000 and at that time two blank signed cheques and blank signed stamp receipt were obtained and the complainant had misused one of the cheques and filed the complaint and misusing the blank signed stamped receipt

he created a promissory note and filed a suit through his brother. Since he was not amenable to pay the exorbitant interest claimed, the present complaint has been filed misusing the cheque. Though no oral evidence was adduced on his side, he had marked Exts.D1 and D2 through PW1 to prove his case. After considering the evidence on record, the court below found that the case of the complainant is not probable and case of the accused is more probable and acquitted the accused under section 255(1) of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant by filing special leave petition as Crl.MC.No.2613/2003 and leave was granted and the appeal was admitted to file.

4. Heard Sri.Pleasant T. Samuel representing counsel for the appellant Sri. T.K.Chinnan and Sri.Liju, counsel appearing for the first respondent and Smt.Seena Ramakrishnan, Public Prosecutor representing the second respondent State.

5. Counsel for the appellant submitted that the court below was not justified in relying on Ex.D1 receipt to come to a conclusion that the case of the complainant is not probable.

He had categorically stated in the evidence that Ext.D1 related to some other transaction and not related to the transaction in which the cheque was issued. After discharging that liability, he had borrowed the amount and issued the cheque. The signature in the cheque is admitted. So the presumption under section 139 of the Act has to be drawn and that presumption has not been rebutted by the accused. The court below was not justified in acquitting the accused and the court below ought to have relied on the statutory presumption and convicted the accused for the offence under section 138 of the Act.

6. On the other hand, counsel for the first respondent submitted that though a reply notice was issued, he had not explained in the complaint that the transaction was a different transaction and he did not mention the date of borrowal also in the complaint. Only in the cross examination he developed a new case that the amount was borrowed on 10.1.2001 and the cheque was issued on the subsequent date. He had no such case in the complaint. Further, his evidence will go to show that he is money lender as he has filed several cheque cases of

similar nature and if that be the case, it cannot be believed that he will be paying that without obtaining any document. That problises the case of accused that the cheque given earlier as security was misused and a complaint was filed and the court below rightly acquitted the accused and this court cannot reverse the finding merely because another view is also possible.

7. Heard the Public Prosecutor.

8. The case of the complainant in the complaint was that accused issued Ext.P1 cheque in discharge of an amount of Rs.75,000/- that was said to be due from him. He had not mentioned the date of borrowal of the amount and also date of issuance of the cheque in the complaint. He had no case in the complaint that he had made demands on several occasion and it is only thereafter that Ext.P1 cheque was issued by him as deposed by him in the cross examination as PW1.

9. The case of the accused was that on 12.11.2000, he borrowed a sum of Rs.10,000/- and at that time the complainant had obtained two blank signed cheques and also some signed revenue stamped blank papers. He had paid the amount. Since he was not amenable to pay the exorbitant amount claimed by

him, misusing the signed stamp paper a suit was filed through his brother and misusing one of the cheques, the present complaint was filed. Even in the chief examination PW1 had not stated that when amount was borrowed and when the cheque was issued. He had only stated that the accused issued Ext.P1 cheque in discharge of the amount of Rs.75,000/-due from him. In the reply notice Ext.P7 sent by the accused, he had categorically stated that he had only one transaction with the complainant and he had borrowed Rs.10,000/- on 12.11.2000 and later the amount was paid. At the time of borrowing the amount, two blank signed cheques and some blank signed revenue stamp papers were obtained and misusing the cheque, the complaint was filed. So it is clear from this that even at the time when he received the notice, he promptly sent reply stating the circumstances under which the cheque had come to the hands of the complainant. In spite of that, the complainant had not narrated the entire transaction in the complaint as to when the amount was paid and when the cheque was issued. But he only mentioned in the complaint that what is stated in the reply notice is not correct.

10. Normally when the accused had projected a case as defence in the reply notice itself, there is a duty cast on the complainant to explain the same and narrate the circumstances under which the subsequent amount was paid and cheque was issued in the complaint.

11. Further, in the cross examination his case was that the date and entries were written by the accused and brought and signed in his presence. He had no case that the entries were in the handwriting of somebody else. But a perusal of Ext.P1 cheque will go to show that entries are in different ink and signature was in another ink. Further, a perusal of the manner in which the signature was put by the accused it can be inferred that there is no possibility for him to write the writings in Ext.P1 cheque and that could not be in the handwriting of the accused.

12. Pw1 had further admitted in his evidence that Ext.D1 receipt was given by him when the amount mentioned therein was paid. It was also admitted by him that his brother had filed Ext.D2 suit against the accused and he was also complainant

in several cheque cases filed by him against other persons on the basis of cheque said to have been given by them to him. So it is clear from his own evidence that it is not a single transaction entered into between the accused and the complainant as a private transaction, but he is a money lender paying amount to others on the basis of obtaining cheques. If that be the case, it cannot be believed for a moment that he will be paying amount of Rs.75,000/- without obtaining any document on the date of payment of the amount as claimed by him.

13. It is true that once signature in the cehque is admitted, there is a presumption under section 139 of the Act that the cheque was issued by the accused in discharge of a legally enforcible debt and the burden is on the accused to rebut the same. It is also settled law that there is no presumption as to existence of the cheque and execution of the cheque and if execution of the cheque is disputed, then the burden is on the complainant to prove the same especially when the accused had sent reply notice denying the transaction and projecting the case of borrowal of lessor amount and issuance of blank

signed cheque and discharge of that amount which was admitted by the complainant when Ext.D1 was shown to him. It is settled law that the accused need not adduce independent evidence to rebut the presumption and he can rebut the presumption by adducing independent evidence or brought out circumstances disproving the case of the complainant by cross examining him and he need only prove his case by preponderance of probabilities. So, the finding arrived at by the court below on the basis of available evidence that the case of the accused is more probable than the case of the complainant and he has discharged his burden rebutting the presumption and that the complainant had failed to prove his case and as such the accused is entitled to get acquittal appears to be justifiable.

14. Further in the case of appeal against acquittal, if two views are possible on the basis of the same set of evidence and one view taken by the court below is also possible merely because another view is also possible is not a ground for the appellate court to substitute that view to upset the order of acquittal passed. Unless the appellate court is satisfied that

appreciation of evidence by the court below is perverse and there is no possibility of coming to such a conclusion as drawn by the court below on the basis of evidence, normally the appellate court is not expected to interfere with the order of acquittal passed by the court below. In this case on the basis of evidence and also the manner in which appreciation was made by the court below, it cannot be said that the view taken by the court below on the basis of evidence is not possible and it is perverse so as to upset the same by substituting another view possible by this court. So the order of acquittal passed by the court below is perfectly justifiable which do not call for any interference at the hands of this court and the appeal lacks merit and the same is liable to be dismissed.

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

Office is directed to communicate a copy of this judgment to the concerned court immediately.

Sd/-
K. RAMAKRISHNAN, JUDGE.

/true copy/

cl P.S to Judge

K. RAMAKRISHNAN, J.

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Crl.A.No.562 of 2003

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17th September, 2015.

JUDGMENT