IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 1ST DAY OF OCTOBER 2015/9TH ASWINA, 1937

CRL.A.No. 753 of 2003 (A)

AGAINST THE ORDER/JUDGMENT IN Crl.MC 1887/2003 of HIGH COURT OF KERALA DATED 28-02-2003

&

AGAINST THE JUDGMENT IN CC 597/1998 of C.J.M., KASARAGOD, DATED 24-12-2002

APPELLANT/COMPLAINANT(S):

M/S.KASARAGOD SELF EMPLOYEES FINANCING COMPANY,
KASARAGOD, REPRESENTED BY ITS POWER OF ATTORNEY HOLDER,
K.SATHEESHAN.

BY ADV. SRI.K.JAJU BABU

RESPONDENT(S)/ACCUSED & STATE:

1. K.M.ASHRAF,
   S/O.T.P.MOHAMMEDKUNHI,
   TAIBA MANZIL, NEAR T.K. FURNITURE SHOW ROOM,
   THAYALANGADI.

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

R1 BY ADVS. SRI.GRASHIOUS KURIAKOSE
SRI.K.A.LALAN
R2 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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K. RAMAKRISHNAN, J.

Crl. Appeal No.753 of 2003

Dated this the 1st day of October, 2015

JUDGMENT

Complainant in C.C.No.597/1998, on the file of the Chief Judicial Magistrate Court, Kasaragod, is the appellant herein. The case was taken on file on the basis of a private complaint filed by the complainant claims to be the power of attorney holder of M/s.Kasaragod Self Employees Financing Company 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 issued Ext.P2 cheque in discharge of a liability of ₹3,50,000/- due from him to the complainant, which when presented was dishonoured for the reason 'funds insufficient' evidenced by Ext.P3 dishonour memo. The same was intimated to the complainant by their banker vide Ext.P4 intimation letter. The complainant issued Ext.P5 notice to the accused intimating dishonour and demanding

payment, which was received by the accused evidenced by Ext.P6 postal acknowledgment. Ext.P7 is the copy of the registration certificate of the firm of the complainant of which the complainant is the power of attorney holder. The accused had not paid the amount. So 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 Ext.P1 to P7 were marked on their side. After closure of the complainant's 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 ₹3,50,000/- and issued a cheque as claimed. In fact he had

borrowed only ₹1,50,000/- earlier and that transaction was completed and as the security for the same, a blank signed cheque was obtained. Though he had paid the amount, the complainant told that since in another loan of one Kunhikannan, he stood as surety, that transaction also be closed for the purpose of handing over of the cheque. In order to prove his case, the accused himself was examined as DW1 and Ext.D1 to D8, D2(a) and D3(a) were marked on his side. After considering the evidence on record, the court below found that the case of the accused is probable and the case of the complainant had not been established and the complainant had failed to prove the transaction and acquitted the accused under Section 255(1) of the Code of Criminal Procedure. Aggrieved by the same, the present appeal has been preferred by the appellant /complainant along with leave petition as Crl.M.C.No.1887/2003 and the leave was granted and then the appeal was admitted.

4. Heard the Sri.Shyam Prasanth, representing

the senior counsel, Sri.Jaju Babu, appearing for the appellant and Sri.Gracious Kuriakose, Senior counsel appearing for the 1st respondent and Smt.Seena Ramakrishnan, Public Prosecutor appearing for the 2nd respondent.

5. The counsel for the appellant submitted that, the signature in Ext.P2 cheque was admitted. His case was that, the cheque was given as a security for the earlier transaction evidenced by Ext.D3(a), but Ext.D7 and D8 applications relating to that will go to show that, it was not on the basis of any security by way of document that the loan was sanctioned, but it was on the basis of personal security that the loan was granted. So there is no possibility of the accused giving Ext.P2 cheque at that time. Further they sent a notice when the cheque was dishonoured, but no reply notice was sent. He had not taken any steps to get back the cheque as well. So under the circumstances, the court below was not justified in coming to the conclusion

that the complainant had failed to prove the case and wrongly held that the presumption was rebutted and the acquittal was not proper.

6. On the other hand, learned senior counsel appearing for the first respondent submitted that, there is no possibility of giving such a huge amount as loan at a time when admittedly an amount of ₹1,50,000/- was due to them in the transaction mentioned in Ext.D4 notice. Further there are corrections in D2 register which was not properly explained by PW1 also, as it was not done by him. Further he had denied the execution and issuance of the cheque in this case and in spite of that, no independent witnesses were examined to prove the transaction. Further in spite of evidence adduced on the side of the accused denying the execution of the cheque and also submitting loan applications produced by them, no other evidence was adduced to rebut the evidence given by the accused. So under the circumstances, the court below was perfectly

justified in coming to the conclusion that the evidence of PW1 is not sufficient to rely on for the purpose of convicting the accused and rightly acquitted him. Further the learned counsel for the first respondent also argued that in an appeal against the acquittal, if cogent reason has been given by the court below on the basis of evidence, even if a different finding is possible, this court cannot substitute that finding, unless the finding arrived at by the court below is perverse and no such finding could be possible on the basis of evidence. The appellate court should always slow in reversing the order of acquittal.

7. Heard the Public Prosecutor as well.

8. The case of the complainant in the complaint was that, the accused issued Ext.P2 cheque in discharge of an amount due namely ₹3,50,000/-, which according to complainant at the time of evidence was loan transaction. Further he had no case in the complaint that the loan transaction was secured by promissory note and when the

promissory note was returned the cheque was obtained. But the case was developed only at the time when he was examined before court. Further it will be seen from the evidence of PW1 that though Exts.D2, D3, D5, D6, D7 and D8 were produced as the document of the complainant, no attempt was made by them to prove the same when PW1 was examined. But at the same time, those documents were marked through PW1 in the cross examination at a later stage after the documents were produced by the complainant on the side of the accused to prove the case. It will be seen from the evidence of PW1 that in Ext.D2 register in Ext.D2(a) page, that there was correction in nature of security given as promissory note. Further it was also written in that page that present Ext.P2 cheque was given on 22.09.1998 towards the balance principal amount of ₹3,50,000/- and the promissory note returned on 22.09.1998. But PW1 had stated that it was not he who had made the entries in Ext.D2(a) and he had also stated that he did not know in whose handwriting those entries were made as well.

9. According to PW1, earlier the nature of security was shown as post dated cheque, but since the accused did not bring the cheque, it was corrected as promissory note. But that could not be possible because the entries ought to have been made at the time when the loan was sanctioned and the documents were executed by the borrower. That disproves the case of the complainant that the entry was made later when the accused did not bring the post dated cheque as promised by him.

10. Further the accused had denied his signatures in Exts. D5, D6, D7 and D8, the loan application said to have been submitted on an earlier occasion as well as on the later occasion in respect of which the present cheque was alleged to have been issued by the accused as blank cheque as security. Further it will be seen from Ext.D4 that there was an earlier property transaction

between the accused and the complainant and an amount of ₹1,50,000/- was due from him in respect of that transaction and as per Ext.D4 notice the agreement was dated 27.11.1996 and the sale deed ought to have been executed on or before 26.02.1997. Further it was brought out in the evidence of PW1 that, though such an amount was due on the basis of Ext.D4, they have not taken any steps against the accused either for getting the document executed or to realise that amount. He had no case that, that amount was later settled also. So under such circumstances, the submission made by the learned senior counsel for the first respondent appears to be probable that when such an amount was due, no person will advance such a huge amount to the tune of ₹3,50,000/- as claimed by PW1.

11. Further in the complainant nothing was mentioned about the date of borrowel and also the date of issuance of the cheque. Further when PW1 was cross examined also stated that, he did not know the date of

sanctioning of the loan as well. So all these things will go to show that PW1 is not competent to give the evidence on behalf of the complainant firm in respect of the transaction so as to come to the conclusion that they have proved the case against the accused as required under law. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the complainant had failed to prove the case against the accused that the cheque was issued in discharge of any legally enforceable debt and rightly acquitted him giving him that benefit.

12. Further the court below also compared the admitted signature of the accused in Ext.P2 cheque with the disputed signatures in Exts.D5 and D7 loan applications and it was also admitted by PW1 that there are differences in the signature. In spite of that, no steps were taken by the complainant to prove that the signature in Exts.D5 and D7 were put by the accused, when the loan applications were submitted. Further the manner in which the registers were

maintained also commented by the court below to come to the conclusion that they were not properly maintained as required to be maintained in accordance with law. So on the basis of entries in the registers, it cannot be said that the case of the complainant is probable and that benefit was also given to the accused. So under the circumstances from the nature of discussions made by the court below for arriving at a conclusion that the complainant had failed to prove their case, cannot be said that the finding arrived at by the court below is perverse and such a finding could not be possible on the basis of the evidence available so as to interfere with the order of acquittal passed by the court below in favour of the accused.

13. It is settled law that, even if two views are possible and one view taken by the court below is also possible on the basis of evidence available, even if another view possible on the basis of the same evidence, the appellate court is not entitled to substitute its new finding

so as to reverse the order of acquittal passed by the court below, unless the appellate court is satisfied that the appreciation made by the court below is perverse and no such finding could be arrived at on the basis of evidence available on record. That is not the case in hand. It cannot be said that, the finding arrived at by the court below cannot be possible on the basis of evidence adduced. It is true that there is presumption under Section 139 of the Act, but it is a rebuttable presumption. It is true that the accused had not sent a reply notice. That alone is not sufficient to disbelieve his case, if there are other evidence to disbelieve the case of the complainant as a ground to prove the case of the accused. In this case, the accused had gone to the witness box and disproved the case of the complainant by using the discrepancies in the documents maintained by complainant in their office itself. 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 their case so as to attract the offence under Section 138 of the Negotiable Instruments Act and rightly acquitted the accused and that 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 appellant is hereby confirmed.

Office is directed to communicate this judgment to the concerned court, immediately.

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge

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