IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

CRL.A.No. 823 of 2003 ( )

AGAINST THE ORDER/JUDGMENT IN Crl.MC 1485/2003 of HIGH COURT OF KERALA
&
AGAINST THE JUDGMENT IN CC 1705/1998 of J.M.F.C.-II(MOBILE), KOTTAYAM, DATED 16-05-2002

APPELLANT(S)/COMPLAINANT:

DR.P.S. GEORGE, PEEDIYAKAL HOUSE,
VEROOR MURI, CHETHIPUZHA VILLAGE, CHANGANACHERY TALUK.

BY ADV. SRI.K.SURESH

RESPONDENT(S)/ACCUSED AND STATE::

1. M.J. THOMAS, MUKKADA HOUSE,
   NALUNACKAL P.O., NALUNAKKAL KARA, VAKATHANAM VILLAGE.

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

R1 BY ADVS. SRI.P.M.SEBASTIAN
SMT.K.SHANTHI
R2 BY PUBLIC PROSECUTORSRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-09-2015 ALONG WITH CRL.APPEAL NOS.1865/2003, 1262/2004 AND 824/2003, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

Crl. Appeal Nos.823/2003, 1262/2004,
824/2003 and 1865/2003

Dated this the 8th day of September, 2015

COMMON JUDGMENT

Complainant in C.C.No.1701/98, 1703/98, 1704/98, 1705/98 on the file of the Judicial First Class Magistrate Court-II (Mobile), Kottayam at Changanassery, are the appellants herein. All these cases were taken on file on the basis of a private complaint filed by the same complainant against the same accused along with another case C.C.No.1702/1998 between the same parties 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.P1 series cheques five in number each for ₹1,05,740.60 in favour of the complainant drawn on Kottayam District Co-operative Bank Limited, Evening Branch, Changanassery, towards payment of the amount due to the complainant with date 14.07.1998. On

presentation of these cheques through South Indian Bank Ltd., Changanassery Branch, they were dishonoured on 20.08.1998 for the reasons 'funds insufficient' evidenced by Ext.P3 series dishonour memos. The same was intimated to the complainant by his banker vide Ext.P2 series intimation letters. The complainant issued Ext.P4 series notices vide Ext.P5 series postal receipts which were received by the accused evidenced by Ext.P6 series postal acknowledgments. The accused had not paid the amount, but sent a reply with false allegations. So he had committed the offence punishable under Section 138 of the Negotiable Instruments Act. Hence the complaints. The complainant had filed five different complaints on the basis of each cheque against the accused which were numbered as C.C.No.1701/98 to 1705/98.

3. When the accused appeared before the court below in all these cases, particulars of offence were read over and explained to him and he pleaded not guilty. Since

all these cases were arising out of a common transaction, according to the complainant, joint trial was allowed as per order in Crl.M.P.No.36/2002. Though the application was filed seeking joint trial of three cases, namely C.C.No.1701/98 to 1703/98, later other two cases namely C.C.No.1704/98 and 1705/98 were also allowed to be tried jointly and evidence was recorded in C.C.No.1701/98. The complainant and his power of attorney holder were examined as PWs 1 and 2 respectively and Exts.P1 to P10 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 and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that, for the amount due to the complainant and others insolvency proceedings were initiated and he had entered into an agreement to settle claims for an amount of ₹5,98,400/- in the insolvency proceedings and agreed to deposit that amount within a particular period, but he could not do the same. So later a promissory note was executed for the entire amount agreed to be paid in the insolvency proceedings and later there was another settlement regarding payment made to all the creditors and as a security for the same and in which the amount was reduced and a security for the same blank signed cheques were given which were misused and the present complaints were filed. In fact the amount due to the complainant was deposited in the insolvency proceedings and he had withdrawn the same as well and there is no legally enforcible debt available as well. In order to prove these case, the accused himself was examined as DW2 and one witness was examined as DW1 and Exts.D1 to D8 were marked on his side. After considering the evidence on record, the court below found that the complainant had failed to prove that the cheques were issued in discharge of a legally enforceable debt due to him and also found that there are material alteration in three cheques and in fact the amount due to the complainant has been paid in the insolvency proceedings and the case of the accused was that, the cheque was issued as a security is more probable and acquitted the accused in all these cases. Aggrieved by the same he filed the above appeals along with Crl. Appeal No.1778/07 against C.C.No.1702/1998 with leave petition and leave was granted and appeals were originally admitted. Later Crl. Appeal No.1778/07 was dismissed for non-prosecution as per order dated 04.11.2011. Since all these cases were disposed of by a common judgment, this court also disposing the appeals by a common judgment.

4. Heard the senior counsel Sri.Gopalakrishna Kurup appearing for the appellant in all these cases and Sri.P.M.Sebastian appearing for the first respondent and Sri.Jibu P.Thomas, Public Prosecutor appearing for the 2^{nd} respondent in all these cases.

5. Senior counsel appearing for the appellant in

all these cases submitted that, the court below was not justified in acquitting the accused for the reasons stated. There is no evidence to prove the material alteration as claimed. Further the observation made by the court below that the claims are barred by limitation and as such the complaint under Section 138 of the Negotiable Instruments Act cannot be maintained on the cheque issued is also not sustainable in law, in view of the later decisions of this court and the Hon'ble Supreme Court. Further the evidence adduced by the complainant has not been controverted by the accused. According to the complainant, the cheques were issued for the amount due to his relatives which was deposited on his request and which was due and he is responsible for getting the amount paid to the depositors and as such undertaking to pay the liability issuance of the cheque by the accused will amount to a cheque issued in discharge of a legally enforcible debt and so the court below was not justified in acquitting the accused for the reasons stated in the impugned judgment as issuance of the cheque, dishonour of cheque, notice issued and nonpayment of the cheque amount covered by these cheques were proved by the complainant.

6. On the other hand, the counsel for the first respondent submitted that the complainant had no case in the evidence that the cheques were issued in discharge of any liability to the complainant by him. He is claiming that the amounts were due to others for which cheques were given. Further three cheques mentioned in the judgment will go to show that there is alteration of the date, but according to the complainant all these cheques were issued on the same day with same date, that improbabilise the case of the complainant. Further the case of the accused was that the amount due to him was deposited in the insolvency proceedings and the amount due to him is much less than the amount claimed by him in these proceedings and those amounts were withdrawn by him also. So under the

circumstances there is no liability existed. So according to the learned counsel, the court below was perfectly justified in acquitting the accused.

7. As regards the appeal against the acquittal is concerned, though this court is a court of appeal entitled to re-appreciate the evidence is not expected to substitute is findings for the findings of the court below or reverse the findings of the court below, if the findings arrived at by the court below is also possible on the basis of the evidence. It is also settled law that if two views are possible on the same set of evidence and one view possible is taken by the court in favour of the accused and acquitted the accused, then merely because another view is also possible drawn by the appellate court is not a ground to upset the order of acquittal passed by the court below. With this principle in mind, the case in hand has to be considered.

8. It is an admitted fact that the first respondent had conducted a finance company and the

complainant and several others were depositors of that company and since he did not pay the amount insolvency proceedings were initiated evidenced by Exts.D1, D5 and D8 produced by the accused himself. It is also an admitted fact that in order to have a settlement for the claims of the depositors, Ext.D6 agreement was executed and thereafter certain amounts were deposited in court in the insolvency proceedings and they were withdrawn by the respective parties and this fact was in away admitted by the complainant also by producing Ext.P10 judgment of the Additional District Court, Kottayam in C.M.A.No.25/99 filed by him against the order passed by the Sub Court, rejecting the application for withdrawal of the amount deposited by the accused in those proceedings.

9. The case of the complainant in all these complaints will go to show that five cheques were issued by the accused in favour of the complainant for the amount due to him. No where in the complaint it was mentioned as to

how the amount was due and in discharge of what liability the cheques were issued, but only at the time of evidence, he got a case in order to overcome the reply notice issued by the accused namely Ext.D2, that the amount deposited in the insolvency proceedings is nothing to do with the amount covered by the cheques in dispute. According to him apart from the complainant several relatives of the complainant were also deposited amounts in the finance company run by the accused as introduced by the complainant and they were not party to the insolvency proceedings and in order to settle the claim of the complainant he insisted for settlement of claims of his relatives as well and as part of that a settlement was arrived in the presence of his power of attorney holder/PW2 and Ext.D6 agreement was executed and a promissory note was also executed for that purpose. Subsequently when he was not able to pay the amount, he had issued Ext.P1 series cheques five in number with date 14.07.1998. But such a case was not there in the complaint.

10. Further in order to attract an offence under Section 138 of the Negotiable Instruments Act, it must be proved by the complainant that the cheque was issued in discharge of a legally enforcible amount which was due to him from the accused which when presented was dishonoured and in spite of notice issued he did not pay the amount. But the complainant had no case either in the complaint or at the time of evidence that he had paid the amounts due to the other depositors and in discharge of that liability the accused had undertaken to pay the amount to the complainant and issued these cheques. So under the circumstances, even going by the allegations in the complaint and also the evidence adduced by the complainant, it cannot be said that the cheques were issued in discharge of a legally enforcible debt for the amount due from him to the complainant which when presented was dishonoured and the amount was not paid. So on that ground also it cannot be said that the complainant is

entitled to initiate proceedings against the first respondent under Section 138 of the Negotiable Instruments Act and the order of acquittal passed by the court below against the appellant has to be sustained on that ground.

11. As regards the other contentions are concerned, it will be seen from Ext.D6 admittedly executed by the power of attorney holder of PW1 along with others, in which the accused had agreed to settle the claim of several persons including the defacto-complainant for an amount of ₹5,28,703/-. Further it will be seen from the insolvency petition and suit filed also that the amount mentioned as due to the complainant is much less then the amount claimed as per the cheques. There is no explanation forth coming from the side of the complainant as to why complainant also joined in Ext.D6 agreement, if that did not relate to settlement of his claim in the insolvency proceedings, which were initiated by him against the accused along with some other creditors. Neither PW1 nor

PW2 has got any explanation for the same as to why several persons including the complainant had joined the execution of agreement. If really the cheques were issued in discharge of that liability, then also it cannot be said that the cheque was issued for the amount legally due to the complainant from the accused, so as to initiate proceedings under Section 138 of the Negotiable Instruments Act on the basis of the cheques issued by him.

12. Further it will be seen from the evidence that, in all these cheques there is over writing seen in the 'year' of the date, namely 1998. There is over writing in the letter '8'. That will go to show that, some other date mentioned in the cheque was corrected and the cheques were presented later. In some of the cheques, over writing is very evident. Further there is no authentication made by the accused on those over writings so as to come to a conclusion that, that was done by him, so as to validate the cheque to be presented on a future date. So under the

circumstances, court below was perfectly justified in coming to the conclusion that there is material alteration of the date made by the complainant and as such no complaint under Section 138 of the Negotiable Instruments Act will be maintainable on the basis of these cheques as there is material alteration making the instrument void and the accused is entitled to get acquittal on that ground.

13. As regards the other ground that the complainant cannot maintain an action on the basis of time barred debt, in discharge of this cheque was issued relying on the decision of this court in **Joseph v. Devasia (2000 (2) KLJ 447)** is not sustainable in view of the subsequent decision of this court and also by the apex court [see **Ramakrishnan v. Parthasarathy (2003(2) KLT 613), A.V.Murthy v. B.S.Nagabasavanna (2002(2) Supreme Court Cases 642)** and **Ramakrishnan v. Gangadharan Nair (2006(3) KLT (SN) 100 (Case No.144)**]. But in view of the other findings of this court that the complainant has

failed to prove that the cheques were issued in discharge of a legally enforcible debt due to him from the accused. The court below was perfectly justified in acquitting the accused finding that no offence under Section 138 of the Negotiable Instruments Act was committed by him and the order of acquittal passed by the court below in these cases do not call for any interference. So the appeals fail and the same are hereby dismissed. The order of acquittal passed by the court below against the accused in all these cases are hereby confirmed.

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

Sd/-
K. Ramakrishnan, Judge

// True Copy//

P.A. to Judge

ss