IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 1ST DAY OF SEPTEMBER 2015/10TH BHADRA, 1937

CRL.A.No. 1336 of 2003 ( )

AGAINST THE ORDER IN Crl.L.P. 264/2003 of HIGH COURT OF KERALA DATED 01-08-2003

AGAINST THE JUDGMENT IN CC 427/1999 of C.J.M.,TRIVANDRUM/SPL.COURT FOR TRIAL OF CYBER CRIME DATED 19-06-2003

APPELLANT/COMPLAINANT:

C.C.KANNAN, SANDHYA NIVAS,
PARAVOOR, KANNAMAMOODU,
THIRUVANANTHAPURAM.

BY ADV. SRI.D.KISHORE

RESPONDENTS/ACCUSED & STATE

1. ALEXANDER VADAKEDAN,
1ST FLOOR, PANICKER BHAVAN,
N.H. ROAD, KAZHAKUTTOM,
THIRUVANANTHAPURAM.

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

R2 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

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Crl.A.No.1336 of 2003

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Dated this the 1st day of September, 2015.

JUDGMENT

The complainant in C.C.No.427/1999 on the file of the Chief Judicial Magistrate Court, Thiruvananthapuram is the appellant herein. The case was taken on file by the Chief Judicial Magistrate on the basis of a private complaint filed by the appellant against the first respondent alleging offence under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act'). The case of the complainant in the complaint was that the appellant borrowed a sum of Rs. 2 lakhs and in discharge of that liability, he had issued Ext.P1 cheque dated 1.12.1998 which when presented was dishonoured for the reason funds insufficient vide Ext.P2 dishonour memo and the same was intimated to the complainant by his banker vide Ext.P3 intimation memo. The complainant issued original of Ext.P4 notice dated 19.2.1999 on 20.2.1999 evidenced by Ext.P5 postal receipt and the same was received by the first respondent evidenced by Ext.P5 postal acknowledgment. He had not paid the amount.

So he has committed the offence punishable under section 138 of the Act. Hence the complaint.

2.When the accused appeared before the court below, particulars of offences were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, complainant himself was examined as PW1 and Exts.P1 to P7 were marked on his side. After closure of the complainant's evidence, appellant 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 for the purpose of starting a company, he had borrowed a sum of Rs. 4 lakhs from the father of the complainant during 1995 and all these amounts were paid by him before 1998, but the cheques were not returned as it was told that it was lost. At the time of borrowing the amount, he had obtained two blank signed cheques. After the death of the father, misusing those cheques the complainant had filed the complaint. One witness was examined as DW1 on the side of the appellant and Exts.D1 to D5 were marked on his side. After considering the evidence on record, the court below found that the complainant had failed to prove his case and that the complaint was filed as a prematured one and acquitted the accused under section 255 (1) of the Code. Aggrieved by the same, the present appeal has been filed by the appellant/complainant before the court below.

3. Though notice was served on the first respondent, he did not appear.

4. Heard counsel for the appellant and Smt. Seena Ramakrishnan, learned Public Prosecutor.

5. Counsel for the appellant submitted that the accused did not go to the witness box. Further Exts. D3 to D5 do not relates to the present transaction and those transactions related to the company of which the accused was the President. It is a personal transaction for which the cheque was issued from his personal account. So the court below was not justified in coming to the conclusion that the case of the complainant cannot be believed. In fact the complainant had proved his case

and the legal presumption is always in favour of the complainant which has not been rebutted by the accused. So, according to the learned counsel, the order of acquittal passed by the court below is not proper and the same is liable to be set aside.

6. Heard the Public Prosecutor as well.

7. It will be seen from the complaint that it was a transaction between the accused and the complainant for an amount of Rs. 2 lakhs. It cannot be inferred from the complaint that the accused had borrowed a sum of Rs. 4 lakhs and in discharge of that liability, he had issued two post dated cheques as claimed by him in his evidence. That was a new case developed by the complainant when he was in the box. Further, according to the complainant, the accused borrowed the amount on 10.6.1998 and at that time, there was no amount due either from him or from the company of which accused was the President. So, according to the complainant, it was a fresh loan transaction between the accused and the complainant. But in the cross examination, he had admitted that he did not know the business of the complainant, his

residential address and he had acquaintance with the accused only through his father. Though the accused had a case in the 313 examination that the entire transaction was with the father of the complainant, it will be seen from the evidence that the cheques mentioned in Ext.D3 were issued in the name of the complainant and it is the complainant who had encashed the cheque as well. Though the complainant had received reply notice evidenced by Ext.D1, he did not mention about the same in the complaint. He did not explain the defence taken by the accused in his reply notice in the complaint as well so as to infer that the transaction mentioned by the accused in Ext.D1 reply is a different transaction not connected with Ext.P1 cheque transaction.

8. Once accused had issued reply notice, then there is a duty cast on the complainant to explain the entire transaction in the complaint as to when the amount was borrowed and when the cheque was issued etc. In spite of the reply notice issued, he suppressed that fact in the complaint and he had not explained the defence taken by the accused in the reply notice

as well. On the other hand, evidence of DW1 coupled with Exts.D3 to D5 will go to show that the accused borrowed a sum of Rs. 4 lakhs for the purpose of the company and he had issued four cheques from the company's account with Nos.121051 dated 23.5.2998 for Rs.One lakh, 121052 dated 30.5.1998 for Rs. One lakh, 121053 dated 30.6.1998 for Rs. Two lakhs and with No.12104 dated 30.6.1998 for Rs. One lakh for total amount of Rs.5 lakhs and this fact was admitted by the complainant when he was examined. Further, if the accused had borrowed an amount of Rs. Four lakhs again on 10.6.1998, there was already an amount of Rs.4 lakhs still due from him as seen from Ext.D3 payment voucher. He had no case that those cheques were dishonoured and had not encahsed the amount. If that be the case, there is no possibility for the accused borrowing a further amount of Rs.4 lakhs in his personal capacity from the complainant as claimed by him.

9. Further, it will be seen from Ext.P1 that except the signature, other entries are in different ink. If really the cheque was issued as claimed by the complainant as post dated

cheque, then there is no necessity to write entries in the cheque in different ink and put the signature in different ink by the accused. That probablises the case of the accused that blank signed cheques given was subsequently misused and the present complaint was filed. The accused need not prove his case beyond reasonable doubt. He needs only to prove his case by preponderance of probabilities. Once he had given evidence in support of his case which is probable and believable, than the presumption under section 139 of the Act has been rebutted by him and then the burden on the complaint is to prove his case beyond reasonable doubt which he had not established in this case. Further in the appeal against acquittal, if two view are possible on the basis of evidence, if the view taken by the court below on the basis of evidence in favour of the accused is also possible, then this Court cannot interfere with the order of acquittal substituting the view of this Court. It is true that the appellate court can re appreciate the evidence and come to a different finding only if the view taken by the court below is perverse and no such view could be possible on the basis of evidence. Otherwise the appellate court should not normally interfere with the order of acquittal merely on the basis that another view is also possible. In this case it cannot be said that the view taken by the court below in favour of the accused could not be possible on the basis of evidence requiring interference at the hands of this Court. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the case of the accused is more probable and he had discharged his burden and the complainant had not proved his case beyond reasonable doubt and rightly acquitted the accused giving him the benefit of doubt which does not call for any interference at the hands of this Court.

10. The observation made by the court below while answering Point No.2 that the complaint was premature is not correct because accused had sent Ext.D1 reply on 26.2.1999. If that be the case, he might have received the notice prior to that and not on 3.3.1999 as observed by the court below in the judgment. If that be the case, the complaint filed on 17.3.1999

cannot be said to be a premature one as observed by the court below. But in view of the finding that the complainant had failed to prove his case, the order of acquittal passed by the court below is perfectly justifiable and that does not call for any interference and the appeal fails and the same is hereby dismissed.

In the result, the appeal is dismissed.

Sd/-

K. RAMAKRISHNAN, JUDGE.

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P.S to Judge

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