IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 15TH DAY OF OCTOBER 2015/23RD ASWINA, 1937

CRL.A.No. 1651 of 2003 (D)

AGAINST THE JUDGMENT IN CC 1373/1996 of J.M.F.C.,PERUMBAVOOR DATED 31-01-2002

AGAINST THE ORDER IN Crl.L.P. 273/2003 of HIGH COURT OF KERALA

APPELLANT/COMPLAINANT:

P.M. JACOB, S/O. MATHAI,
PUTHUKUNNATHU HOUSE,
KOTTAPPADY VILLAGE.

BY ADV. SRI.K.K.CHANDRAN PILLAI

RESPONDENTS/ACCUSED 1 TO 4:
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1. M.JAMES JOHN, MANAGING PARTNER,
M/S.RUBICON THREAD RUBBER MANUFACTURERS,
THURUTHY, MANJUMAKUDIYIL HOUSE, KOTTAPPADY.

2.M.P. MERCY, W/O. JOHN K. PAUL,
PARTNER,M/S.RUBICON THREAD RUBBER MANUFACTURERS,
THURUTHY, MANJUMAKUDIYIL HOUSE, KOTTAPPADY.

3. K.P. SUBASH, PARTNER,
'BUBICON', THURUTHYU, KOTTALIL HOUSE,
PLAMUDY.

4. M/S.RUBICON THREAD RUBBER MANUFACTURERS,
THURUTHY.

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

R5 BY PUBLIC PROSECUTORSRI.JIBU P. THOMAS
R2 & 3 BY ADV. SRI.G.SREEKUMAR (CHELUR)
R1 BY ADV. SRI.R.SREEHARI

THIS CRIMINAL APPEAL H. AVING BEEN FINALLY HEARD ON 15-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

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Crl.A.No.1651 of 2003

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Dated this the 15th day of October, 2015.

JUDGMENT

The complainant in C.C.No.1376/1996 on the file of the Judicial First Class Magistrate Court, Perumbavoor is the appellant herein. The case was taken on file on the basis of a private complaint filed by the complainant against accused persons alleging offence under section 138 of the Negotiable Instruments Act (hereinafter referred to as the Act).

2. The case of the complainant in the complaint was that he was having transaction with the fourth accused firm of which the first accused was the managing partner and accused 2 and 3 are the partners and in discharge of an amount of Rs.2,40,000/- due from the 4th accused firm, the first accused had issued Ext.P1 cheque drawn on State Bank of Travancore, Perumbavoor branch maintained in the account of the 4th accused as Managing Director of that bank. The cheque when presented was dishonoured for the reason funds insufficient vide Ext.P2 dishonour memo by the drawee bank which was intimated to the complainant by his banker vide Ext.P3

intimation letter. He had issued Ext.P4 notice to accused 1 to 3 vide Ext.P5 postal receipt. Notice sent to the first accused was returned with the endorsement addressee not known and other accused persons received the same were evidenced by Ext.P7 series acknowledgment cards. The third accused sent Ext.P8 reply notice denying the allegations and transactions with the complainant. Since the accused did not pay the amount, according to the the complainant, they have committed the offence punishable under section 138 of the Act and hence the complaint.

3. When the accused appeared before the court below, particulars of offence were read over and explained to them and they pleaded not guilty. In order to prove the case of the complainant, complainant himself was examined as PW1. One witness was examined as PW2. The Bank Manger was examined as PW3 and Exts.P1 to P9 were marked on their side. After closure of the complainant's evidence, accused were questioned under section 313 of the Code and they denied all the incriminating circumstances brought against them in the complainant's evidence. They have further stated that there

was no transaction between the complainant and the accused and the cheque was not issued in discharge of liability of the firm and in fact, the company became defunct in the year 1994 itself and there was no possibility of any transaction and issuance of the cheque in the year 1996 as claimed by the complainant.

4. In order to prove the case of the accused, the third accused was examined as DW1 and Exts.D1 to D7 were marked on their side. After considering the evidence on record, the court below found that the complainant had failed to prove that so much amount was due from the 4th accused firm and as such, he had failed to prove the issuance of the cheque in discharge of any legally enforceable debt and acquitted the accused giving them the benefit of doubt under section 255(1) of the Code of Criminal Procedure. Aggrieved by the same, the above appeal was preferred by the appellant/complainant in the lower court with special leave petition and leave was granted and the appeal was admitted to file.

5. Heard senior counsel Sri. K.K. Chandran Pillai appearing for the appellant and Sri. G. Sreekumar (Chellur),

counsel appearing for accused 2 and 3, Sri. R. Hari, counsel appearing for the first accused and Sri. Jibu P. Thomas, Public Prosecutor representing the State.

6. Counsel for the appellant submitted that the evidence of DW1 will go to show that though the company was declared as a sick unit, they were continuing the business and firm has not been dissolved and it was he, who was managing the affairs of the firm. Further, though the third accused had a case that he is the managing partner and the first accused had no authority to sign the cheque, the evidence of PW3, the Bank Manger will go to show that the first accused is also authorized to sign the cheque of the firm and it can be deemed to have been issued by the firm through partner and the action of the partner will be binding on the firm as well. Once issuance of the cheque has been proved, then the presumption under section 139 of the Act will be attracted and it is for the accused to rebut the presumption and the evidence adduced on the side of the accused is not sufficient to rebut the presumption. Further, merely because there was some inter arrangement between partners regarding their liability, unless it was published as

required under section 32 of the Indian Partnership Act and also under section 63 of the Indian Partnership Act and necessary entries were made in the register of firms regarding inter arrangement, that will not affect the right of the third party to proceed against the firm or its partners. So under the circumstances, the court below was not justified in acquitting the accused for the offence alleged and court below ought to have convicted them and sentenced them accordingly.

7.On the other hand, counsel for respondents 1 to 3 submitted that no notice was issued to the firm, the fourth accused, and the fourth accused was deleted from the party array as well. Further, the case of the complainant was that the entire transaction was with the firm and unless liability of the firm is established and notice was issued to the firm, the compliant is not maintainable. They have relied on the decision reported in ***Fakrudhin v State of Kerala*** (2015 (1) KLT SN2 C.No.2) in support that proposition. They also argued that the evidence of Pws 1 and 2 is not sufficient to come to the conclusion that there was any transaction between the accused and the complainant and the details of the transaction were not mentioned in the complaint though a reply notice has been issued denying the transaction by the accused and issuance of the cheque also. So under the circumstances, the court below was perfectly justified in acquitting the accused and that finding cannot be interfered with. Further, in an appeal against acquittal, the appellate court will be slow in reversing the acquittal unless appreciation made by the court below is found to be perverse and no such finding could be arrived at on the basis of the evidence available and that was not the case in this case.

8. Heard the Public Prosecutor as well.

9. The case of the complainant in the complaint was that he was having transaction with the fourth accused firm M/s. Rubicon Thread Rubber Manufactures Ltd and an amount of Rs.2,40,000/- was due and in discharge of that liability, the first accused as managing partner issued Ext.P1 cheque. The third accused sent a reply notice denying the entire transaction between the complainant and the fourth accused firm. Once existence of liability itself was denied by the accused, then presumption under section 139 of the Act will not be attracted

as it is for the complainant to allege and prove the transaction by himself. In spite of the fact that the third accused had sent a reply stating that there was no transaction between the complainant and the 4th accused firm, the complainant had not mentioned in the complaint as to when was the transaction between the complainant and the fourth accused had taken place, when the supplies were made and when the cheque was issued etc. Such details were not mentioned in the complaint. Further, only at the time when he was examined in court as PW1, he had stated that during 1994-95, on seven occasion he had supplied rubber and in discharge of that liability that Ext.P1 cheque was issued. According to him, at the time when the supply was made, receipts for supply of rubber sheets were given and he had handed over the same to the first accused when the cheque was given by him. But such an allegation was not made in the complaint in spite of the fact that the entire transaction was denied by one of the partners and also stated that there was no possibility of any transaction as it was declared as sick unit and the factory was closed in the year 1994 and the property was attached by the Government and the same was sold in auction even at that time. Further they were not maintaining any account in the bank as bank has already filed suit for recovery of the amount from the fourth accused firm impleading accused 1 to 3 also as partners of the firm. So under the circumstances burden is heavy on the complainant to prove the transaction as such so as to come to the conclusion that there was an existing liability for the 4th accused firm in respect of which or in discharge of which Ext.P1 cheque was issued by the first accused in his capacity as the managing partner. Further, it was brought out in the evidence of PW3, the Bank Manger that the first accused was not managing partner and managing partner was one K.P. Ouseph, who was not even made an accused in this case. But it is true that PW3, the Manager had stated that even if one of the partner had signed the cheque on behalf of the firm, it is a valid cheque and they will honour the same. But that alone is not sufficient to come to the conclusion that the complainant had proved the case.

10. It will be seen from the evidence of PW1 that except his oral testimony and presentation of Ext.P1 cheque before

court, he had no other document with him to prove the supply of rubber to the fourth accused firm or he had any transaction with the fourth accused firm as claimed by him. To get an amount of Rs.2,40,000/- in the year 1994-95, the quantity of rubber sold would have been much higher. It is very difficult to believe that he may not be maintaining any account for showing the supply and payment if any made by the fourth accused firm earlier. According to him, he was having regular transaction with the fourth accused firm. If that be the case, there must be some document available with him. But he has not produced documents to prove this fact. It is difficult to believe that he would be supplying such huge quantity of rubber without maintaining any account.

11. The evidence of PW2 is not at all convincing as it is brought out in evidence that he is a close friend of complainant and he did not know all the transactions between the complainant and other customers. He had also stated that he had got only hearsay knowledge about the transaction between the fourth accused and the complainant and he came to court to give evidence as requested by the complainant. So under

the circumstances, the court below was perfectly justified in not relying on the evidence of PW2 to prove the transaction as claimed by the complainant.

12. Further it will be seen from the evidence of DW1 coupled with Exts.D1 to D7 documents produced by the accused that the factory belongs to the fourth accused became defunct in the year 1994 itself and it was auctioned by the Government for realization of the dues to them. Further, it is also brought out in the evidence of PW3 that bank also filed a suit for realization of the amount due from the 4^{th} accused firm and that was pending. So under such circumstances it is highly improbable to believe the case of the complainant that he will be supplying such huge quantity of rubber to a firm which is not functioning at that time.

13. It is true, DW1 had admitted in his evidence that though the firm was closed, the partnership was not dissolved and the accounts of the firm has not been settled so far. But that alone is not sufficient to come to the conclusion that a person knowing about the sinking state of the firm will be supplying rubber to a huge quantity without obtaining any

document as claimed by PW1. Further, it is seen from the evidence that there is interse dispute between the partners and that started in the year 1994 itself. So under the circumstances, it cannot be believed for a moment that even if Ext.P1 cheque was issued by the first accused claiming to be the managing partner, it cannot be said that it was with the consent and connivance of other partners namely accused 2 and 3 so as to bind them of any act done by the other partner. Further, possibility of the first accused giving cheque to defeat the right of the firm without any liability in collusion with the complainant also cannot be ruled out. So under the circumstances burden is heavy on the complainant to prove the origin of the transaction which resulted in alleged issuance of Ext.P1 cheque for and on behalf of the firm, which has not been established in this case. So there is nothing mentioned in the complaint that accused 2 and 3 were doing day to day management of the firm though it was brought out in evidence of DW1 that it was he who was really managing the firm after the first accused had given Ext.D2 letter. But the complainant had no case that the cheque was issued with the connivance of the third accused as well. So, under the circumstances, the court below was perfectly justified in coming to the conclusion that the case of the accused is more probable as there was no possibility of cheque being given as claimed by the complainant and the complainant had failed to prove the existence of any liability from the fourth accused firm to the complainant in discharge of which Ext.P1 cheque was issued from the account maintained by the fourth accused firm and rightly came to the conclusion that offence under section 138 has not been established by the complainant against accused persons and giving that benefit, acquitted the accused persons.

14. Further, there is some force in the submission made by the counsel for respondents 1 to 3 that there was no statutory notice issued to the fourth accused firm, who is the drawer of the cheque. In the case of a registered firm, it can be represented in its own name and if the firm is having transaction with the party and the account is maintained by the firm and the cheque was issued from the account of the firm, then notice must be issued to the firm as such and if notice is not issued to the drawer of the cheque, then it cannot be said

that a statutory notice required under section 138 of the Act has been issued in this case so as to make the firm liable. If the firm is not liable to pay the amount, then the complaint cannot be said to be maintainable against partners as well. In the decision reported in ***Fakrudhin's case*** (cited supra), this Court has held that there cannot be a prosecution under section 138 of the Act without drawer of the cheque in the array of accused and where the company is the drawer, no prosecution will lie against the managing director or persons employed in different categories of company unless prosecution against company is maintainable. In this case admittedly statutory notice to be issued to the firm has not been issued. It was admittedly a transaction between the fourth accused firm, and the complainant. Even according to the complainant, the cheque was issued from the account of the fourth accused firm and not from the individual account of the partners undertaking the liability of the firm by them. So under the circumstances, since no notice has been issued to the fourth accused firm, the drawer of the cheque, then it cannot be said that the complaint against the fourth accused is maintainable and if complaint against the fourth accused is not maintainable, then the complaint against partners cannot be maintained in view of the dictum laid down in ***Fakrudhin's case*** (cited supra). On that ground also order of acquittal passed by the court below can be sustained by this Court.

15. It is settled law that appellate court will be slow in reversing the order of acquittal passed by the court below unless the appellate court is satisfied that the view taken by the lower court is not possible on the basis of evidence and it is perverse. Even if two views are possible, on the basis of some evidence, appellate court cannot substitute its view in the place of view taken by the court below so as to reverse the order of acquittal and if the view taken by the court below is also possible on the basis of evidence and that favourable view taken by the court below has to be given benefit in favour of the accused. In this case, it cannot be said that the view taken by the court below is perverse or such a view cannot be possible on the basis of evidence available. So it cannot be said that the order of acquittal passed by the court below is unsustainable in law as claimed by the counsel for the appellant 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 and the order of acquittal passed by the court below against the accused is hereby confirmed.

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

Sd/-
K. RAMAKRISHNAN, JUDGE.

/true copy/
P.S to Judge

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