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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

CRL.A.No. 673 of 2004 ()

AGAINST THE ORDER IN Cr1.L.P. 591/2003 of HIGH COURT OF KERALA DATED
01-12-2003

AGAINST THE JUDGMENT IN CC 296/2001 of JUDICIAL MAGISTRATE OF THE FIRST
CLASS, PAYYOLI DATED 21-07-2003

APPELLANT/COMPLAINANT:

T.BHASKARAN, S/O.CHATHAN, THAYULLATHIL
HOUSE, NADAKKUTHAZHE AMSOM, MEPPAYIL DESOM
KOZHIKODE.

ADDL.A2 TO A5 WERE IMPEADED:

ADDL.A2 SMT.SAROJINI T, W/O. LATE T. BHASKARAN,
AGED 49 YEARS RESIDING AT THAYULLATHIL HOUSE,
MEPPAYIL POST, VADAKARA, KOZHIKODE DISTRICT-673 104.

ADDL.A3.ROSHIT T, S/O. LATE TO. BHASKARAN, AGED 28 YEARS,
RESIDING AT THAYULLATHIL HOUSE,
MEPPAYIL POST, VADAKARA, KOZHIKODE DISTRICT-673 104.

ADDL.A4. SMT. PRIYESH T., S/O. LATE T. BHASKARAN,
AGED 27 YEARS, RESIDING AT THAYULLATHIL HOUSE,
MEPPAYIL POST, VADAKARA, KOZHIKODE DISTRICT-673 104.

ADDL.A5. SMT. HARSHA T., d/O. LATE T. BHASKARAN,
AGED 29 YEARS, RESIDING AT THAYULLATHIL HOUSE,
MEPPAYIL POST, VADAKARA, KOZHIKODE DISTRICT-673 104.

ARE IMPEADED AS PER ORDER DATED 6.11.15 IN CRL.M.A.NO.6060/15 IN
CRL.A.673/04.

BY ADVS.SRI.GOVIND K.BHARATHAN (SR.)
SRI.MANU MOHAN

RESPONDENTS/ACCUSED AND STATE:

1. M.P.MOHANDAS, S/O.SANKARAN, MEETHALE
PERIADATH HOUSE, PUNCHIRIMIL, ERAPURAM DESOM
KOZHIKODE.

2. STATE OF KERALA REPRESENTED BY PUBLIC
PROSECUTOR.

R1 BY ADV. SRI.P.V.KUNHIKRISHNAN

R2 BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.673 of 2004
.....

Dated this the 26th day of November, 2015

JUDGMENT

The complainant in C.C.No.296/2001 on the file of the Judicial First Class Magistrate Court, Payyoli is the appellant herein. The case was taken on file on the basis of a private complaint filed by the complainant against the first respondent 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 the accused borrowed a sum of Rs.1,28,000/- and in discharge of that liability, he had issued Exts.P1 and P2 cheques for Rs.78,000/- dated 14.9.2001 and Rs.50,000/- dated 6.9.2001 drawn on State Bank of Travancore, Vadakara branch in favour of the complainant, which when presented were dishonoured for the reason 'account closed' vide Exts.P3 and P4 dishonour memos. This was intimated to the complainant by his banker vide Ext.P5 letter. The complainant issued Ext.P6 lawyer notice vide Ext.P7 postal receipt and the same was received by the accused evidenced by Ext.P8 postal acknowledgment. He sent Ext.P9 reply notice denying the allegations and the liability.

So according to the complainant, since the accused had not paid the amount, he had committed the offence 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 P11 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 no transaction with the complainant and he joined a chitty with one Desabhimani Krishnan and two blank signed cheques were given as security, which were misused and the complaint was filed through the complainant. In order to prove the case of the accused, he himself was examined as DW1 and two witnesses were examined as Dws 2 and 3 on his side and Ext.D1 was marked on his side. After considering the evidence on record, the court below found that defence taken by the accused has not been established and

he had not rebutted the presumption but relying on the decision reported in **Joseph v. Philip Joseph** (2000 (2) KLJ 679) held that no offence under section 138 is attracted if the account was closed and the cheque was dishonoured for the reason otherwise mentioned in the section and acquitted the accused on that ground under section 255(1) of the Code. Aggrieved by the same, the above appeal was filed by the original complainant with leave petition as Crl.L.P.No.591/2003 and leave was granted and appeal was admitted to file.

4. During the pendency of the appeal, the original appellant died and his legal representatives were impleaded as additional appellants and permitted to prosecute the appeal as per the order in Crl.M.A.No.6060/2015.

5. Heard Sri.S.K.Madhu, counsel representing senior counsel Sri. Govindh K. Bharathan, appearing for the appellant and Sri.Aneesh Gurudas, counsel representing Sri.Kunhikrishnan, counsel appearing for the first respondent and Sri. Jibu P. Thomas, Public Prosecutor appearing for the second respondent.

6. Counsel for the appellant submitted that the dictum laid down in the decision relied on by the court below was overruled

by this Court in the decision reported in **Vathsan v. Japahari** (2003 (3) KLT 972) which was relied on by this Court in **Salim v. Thomas** (2004 (1) KLT 816) as well. Further, the court below also found that the case of the accused is not probable and that is not sufficient to rebut the presumption under section 139 of the Act. So, according to the learned counsel, the court below erred in acquitting the accused and ought to have convicted the accused for the offence alleged.

7. On the other hand, counsel for the first respondent submitted that the evidence adduced on the side of the accused will go to show that there was no possibility of any transaction between the complainant and the accused and the accused issuing the cheque as claimed. Further, the court below had not properly appreciated the evidence and the burden on the accused is only less and not onerous as in the case of complainant proving the case. He needs only to prove his case by preponderance of probabilities. He had also argued that it cannot be said that a complaint can be filed on the basis of two cheques with different amounts in view of section 219 (2) of the Code. The order of acquittal does not call for any interference.

8. Heard Public Prosecutor also.

9. The case of the complainant in the complaint was that the accused had borrowed a sum of Rs.1,28,000/- and in discharge of that liability, he had issued Exts.P1 and P2 cheques for Rs.50,000/- and Rs.78,000/- respectively with different dates. The case of the accused was one of total denial and his case was that he had some chitty transaction conducted by one Krishnan working in Desabhimani and two blank signed cheques were given as security for those transactions and that was misused and the present complaint was filed. Once accused denied execution of the cheque, then burden is on the complainant to prove the same. In order to prove the same, complainant himself has gone to the witness box and deposed in support of his case. He had denied the allegations mentioned in the reply notice in the complaint and reiterated that the cheques were issued for the amount due to him from the accused. He had also stated that accused had brought the cheques duly filled and signed the same in his presence. So the complainant had proved his case. Further, he had also stated that there was none present at the time when he paid the amount and cheques were issued by the accused and in such

cases except the evidence of the complainant no other evidence will be available to prove the transaction, execution and issuance of the cheque by the accused. Once the complainant had proved the transaction as well as issuance of the cheque, then the burden is on the accused to rebut the presumption under section 139 of the Act, which says that unless contrary is proved, the court shall presume that the cheque was issued in discharge of wholly or part of any debt or other liability. In order to prove the case of the accused, the accused himself was examined as DW1 and two witnesses were examined as Dws 2 and 3. All of them have admitted that there is no document in their possession to prove that Krishnan was conducting the chitty. Further, Dws 2 and 3 had stated that they do not know as to whether the accused had got any transaction with the complainant and he had issued any cheque to the complainant for that liability. They did not state that Exts.P1 and P2 cheques were the cheques given to the said Krishnan by the accused. PW2 had stated that two cheques were given by the accused to said Krishnan when Exts.P1 and P2 were shown to him, he had stated that he had seen those cheques earlier. But, in the cross examination, he had stated that he cannot state the details of

the cheques given to said Krishnan and he had also stated that he cannot say as to whether the accused has got any transaction with PW1 and he had issued any cheque to him. When a specific question was put to him whether if it is stated that Exts.P1 and P2 cheques were given to PW1 by the accused, then he had stated that he cannot say anything about that and these aspects were not further clarified in the reexamination as well. Further, even according to him, he was working as a salesman in the shop of the accused. DW3 is none other than the brother of the accused. He had only stated that his brother had joined in two chitties with Desabhimani Krishnan during the year 1996 and at that time certain cheques were given. But he cannot deny as to whether there was any transaction between the accused and the complainant and Exts.P1 and P2 cheques were given by the accused to the complainant. DW1 had categorically stated that he was not having any document to prove that he was a subscriber to the chitty conducted by Desabhimani Krishnan. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the evidence adduced from the side of the accused is not sufficient to come to the conclusion

that the cheques were not given to the complainant and it was given to one Krishnan, that was misused and the present complaint was filed through him and rightly held that the presumption under section 139 of the Act has not been rebutted by the accused.

10. But the court below had relied on the decision reported in **Joseph's case** (cited supra) and came to the conclusion that since the account was closed, the offence under section 138 will not lie and on that basis acquitted the accused. But the dictum laid down in that decision was overruled by the Division Bench of this Court in **Vathsan's case** (cited supra) and it has been held that even if a cheque is issued against an account which has been closed prior to the drawl of the cheque, it comes within the fold of section 138 of the Act. The same view has been reiterated in the decision reported in **Salims case** (cited supra). Further in the decision reported in *Lakshmi Dyechem v, State of Gujarath and others* [2012 (4) KHC 826 (SC)], the Hon'ble Supreme Court has held that even if the cheque was returned for any of the reasons such as "account closed, payment stopped, refer to drawer signature does not match," in each of such case offence under section 138 of the Act will be attracted.

So the reasonings given by the court below for acquittal of the accused relying on **Joseph's case (cited supra)**, which has been overruled by this Court in the subsequent decision and also in view of the decision of the Supreme Court mentioned above is unsustainable in law and the same is liable to be set aside. I do so.

11. The other contention raised by the counsel for the first respondent is that the complaint will not lie on the basis of two cheques with different amount as punishment will be different in view of section 219(2) of the Code. Section 219 of the Code reads as follows:

219. Three offences of same kind within year may be charged together:-

(1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2). Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code (45 of 1860) or of

any special or local law:

Provided that, for the purposes of this section, an offence punishable under section 379 of the Indian Penal Code (45 of 1860) shall be deemed to be an offence of the same kind as an offence punishable under any section of the said Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence”.

12. As per section 219 of the Code, even if several offence of similar nature has been committed, then it can be clubbed together to the extent of three such cases if it is committed within a period of twelve months. It is true that it is mentioned in section 219 (2) that the punishment must be same for both the offences. It may be mentioned here that two cheques were given in respect of the same transaction for a single amount of Rs.1,28,000/- which was borrowed by the accused. Merely because two cheques were given for discharge of a liability, it cannot be said that it was two offences of different nature. What is the offence committed is offence under section 138 of the Act and the punishment provided for both the offences is the same though what is mentioned is that court can impose double the cheque amount as fine. So it cannot

be said that different punishment is provided for the said offence so as to take it away from the purview of section 219(2) of the Code. It cannot be said to be a different offence as well as both will fall under section 138 of the Act. So under the circumstances, the submission made by the counsel for the appellant that the complaint is not maintainable as punishment is different also will not stand.

13. Further, the question as to whether a single prosecution on the basis of several cheques issued is maintainable, has been considered by this Court in **Mohammed v. State of Kerala** (2004 KHC 1129). In that case, single complaint was filed in respect of six separate cheques issued. While considering the scope of the same, this Court has held that if the offence was committed as part of the same transaction, then section 220(1) of Code will apply and single complaint on the basis of six cheques issued in respect of the same transaction is maintainable. The same view has been reiterated in the decision reported in **K.G. Udayakumar v. State of Kerala & Others** (2005 KHC 2061). That was also a case where single complaint was filed in respect of dishonour of five cheques issued and this Court has held that

the complaint is maintainable. The same question was considered by the Gujarat High Court as well in the decision reported in **S.J. Shah v. State of Gujarat** (1997 KHC 568). In that case also single complaint was filed in respect of four cheques given for different amounts in respect of the same transaction, in which larger amount was due and the cheques were issued in discharge of that liability and the Gujarath High Court has held that single complaint is maintainable and in such cases section 219 will not operate as a limitation and it will be covered by the provisions of section 220 of the Code. So, in view of the dictum laid down in the above decisions, the submission made by the counsel for the respondents that the complaint is not maintainable as two cheques were issued for different amount with different date has no force and the same is liable to be rejected as in this case cheques were issued in respect of a single transaction of Rs.1,28,000/- borrowed by the accused from the complainant in discharge of which these two cheques were issued. So the complaint is perfectly maintainable. In view of the discussions made above, the order of acquittal passed by the court below relying on the decision reported in **Joseph's case** (cited supra) is unsustainable in law and the

same is liable to be set aside and the accused is liable to be convicted for the offence under section 138 of the Act. So the order of acquittal passed by the court below is set aside and the accused is found guilty for the offence under section 138 of the Act and convicted thereunder.

14. As regards the sentence is concerned, because offence was committed prior to the amendment, in the decision reported in **Suganthi v. Jagadeeshan** (2002 (1) KLT 58 (SC)], the Supreme Court has held that the court can impose minimum substantive sentence and award cheque amount as compensation though at that time the court has no power to impose fine more than Rs.5,000/-. So considering these circumstances, this Court feels that imposing substantive sentence of imprisonment till the rising of court and also to pay cheque amount of Rs.1,28,000/- as compensation, in default to undergo simple imprisonment for three months under section 357 (3) of the Code will be sufficient and that will meet the ends of justice. So the first respondent is sentenced to undergo imprisonment till the rising of court and also to pay Rs.1,28,000/- as compensation to the complainant, in default to undergo simple imprisonment for three months under

section 357(3) of the Code .

In the result, the appellant succeeds and appeal is allowed. The order of acquittal passed by the court below against the first respondent is set aside and the first respondent is found guilty for the offence under section 138 of the Act and he is convicted thereunder and sentenced to undergo imprisonment till the rising of court and also to pay the cheque amount of Rs.1,28,000/- as compensation to PW1, in default to undergo simple imprisonment for three months under section 357 (3) of the Code. Four months time is granted to the appellant to pay the amount. The first respondent is directed to pay the amount on or before 26.3.2016 and surrender before the court below and serve the sentence as directed. Till then, execution of the sentence is directed to be kept in abeyance.

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

Sd/-
K. RAMAKRISHNAN, JUDGE.

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/true copy/

P.S to Judge

