IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 5TH DAY OF OCTOBER 2015/13TH ASWINA, 1937

CRL.A.No. 679 of 2004 ( )

IN CC 128/2001 of J.M.F.C.-I,THRISSUR DATED 25-09-2003

APPELLANT(S)/COMPLAINANT.:

VISWAMBHARAN,
S/O.MADHAVAN, IKKARAPARAMBIL HOUSE,
VEDIPPARA DESOM
THEKKUMKARA, THALAPPILLY TALUK.

BY ADVS.SRI.P.VIJAYA BHANU (SR.)
SRI.P.M.RAFIQ

RESPONDENT(S)/ACCUSED AND STATE.:
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1. SOMAN,S/O.MADHAVAN,
KULATHINKAN HOUSE, POOMALA DESOM, KILLANNUR
THRISSUR.

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

R1 BY ADV. SRI.P.SANTHOSH (PODUVAL)
BY ADV. SMT.R.RAJITHA
R2 BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

VS

K.RAMAKRISHNAN, J.

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Criminal.Appeal.No.679 of 2004

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Dated this the 5th day of October, 2015

JUDGMENT

The complainant in CC.No.128/2001 on the file of the Judicial First Class magistrate Court-I, Thirssur, is the appellant herein. The case was taken on file on the basis of a private complaint filed by the complainant under Section 138 of the Negotiable Instruments Act (hereinafter called 'the Act' for short).

2. The case of the complainant in the complaint was that the accused borrowed a sum of Rs.2,70,000/- and in discharge of that liability, issued Ext.P1 cheque dated 30.03.2000 drawn on Indian Overseas Bank, Thrissur Town Branch in favour of the complainant. The complainant presented the cheque for collection through his banker and it was dishonoured by the drawee bank for the reason 'funds insufficient' on 08.09.2000, evidenced by Ext.P2

dishonour memo. This was intimated to the complainant by his banker vide Ext.P3 intimation letter dated 11.09.2000. The complainant issued Ext.P3 notice dated 21.09.2000 on the same day vide Ext.P5 postal receipt and the same was received by the accused on 23.09.2000, evidenced by Ext.P6 postal acknowledgment. He had sent Ext.P7 reply notice, but he had not paid the amount. So he had committed the offence punishable under Section 138 of the NI 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 Exts.P1 to P8 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 called '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 but he had money transaction with the wife of the complainant and borrowed amounts on three occasions and executed sale deeds as security for the transaction. Though he has prepared to pay the amount and get back the documents, they were not amenable for the same, he filed OS.No.2376/2000 for declaring the sale deeds in favour of the wife of the complainant as security document and for consequential reliefs and also filed OS.No.2670/2000, when he came to know that the cheque given by him is likely to be misused for return of those cheques as well. It is after filing of the earlier suit that one of the cheques was misused and the present case was filed. In order to prove the case of the accused, he himself was examined as DW1 and Exts.D1 to D7 were marked on his side. After considering the evidence on record, the court below found that the accused had rebutted the presumption available under Section 139 of the Act and proved that there was no possibility of transaction as claimed by the complainant and acquitted the accused under Section 255(1) of the Code. Aggrieved by the same the present appeal has been preferred by the appellant/complainant before the court below along with Leave Petition as Crl.L.P.No.605/2003 and leave was granted and appeal was admitted.

4. Heard Sri.Vijaya Bhanu, learned senior counsel appearing for the appellant and Sri.Santhosh Poduval, learned counsel appearing for the first respondent and Sri.Jibu P.Thomas, learned Public Prosecutor appearing for the State of Kerala.

5. The learned counsel for the appellant submitted that there is no case for the accused that he had discharged the liability. Even in Ext.P7 reply notice, his case was that there was some money transaction between the accused and the complainant and the complainant's wife and as a security for the same certain blank signed cheques and also sale deeds were obtained in respect of the properties. Though, he is prepared to pay the amount they were not prepared to return the same, so he filed the suit. Even in the suit, there is no prayer for return of this particular cheque which is in

dispute. That favours the case of the complainant. This aspect has not been considered by the court below. Further even assuming that the cheque was given as a security, even then, if the amount was not paid, the complainant is entitled to use the cheque as cheque issued in discharge of liability if the further conditions are satisfied, then the offence under Section 138 is attracted. So the court below was not justified in acquitting the accused. He had also submitted that even in Ext.D3, nothing was mentioned about any amount due, but it was only mentioned that the amount was received to clear the debts on that date. So there is no improbability of the transaction as observed by the court below and the court below has not applied the presumption available under Section 139 of the Act, which has not been properly rebutted by the accused. So he prayed for allowing the appeal and convicting the appellant for the offence alleged.

6. On the other hand, the learned counsel for the first respondent submitted that the accused had sent

reply notice stating the circumstances under which this cheque happens to come into the hands of the complainant. In spite of that in the complaint, there was nothing mentioned about the date of the transaction and date of issue of the cheque etc. Further these things were mentioned by him only at the time of evidence and even at the time of evidence, his case was that no document was obtained at the time when the amount was paid. Further according to the complainant, the cheque was given by the accused on the promise that he will repay the amount immediately after the sale of his properties. But it will be seen from Exts.D1 to D3 that the properties belonging to him were sold to none other than the wife of the complainant. So under the circumstances there is no possibility of the accused issuing Ext.P1 cheque as claimed by the complainant. Further, if two views are possible, on the basis of the evidence the view taken by the court below is also possible, then merely because some other views are also possible, the appellate Court cannot substitute the other view to upset the order of acquittal passed by the court below, unless the appellate Court is satisfied that the view taken by the court below is not possible at all and it is perverse. So according to the learned counsel, the order of acquittal does not call for any interference.

7. Heard the learned Public Prosecutor also.

8. The case of the complainant in the complaint was that the accused borrowed a sum of Rs.2,70,000/- and issued Ext.P1 cheque in discharge of that liability. The case of the accused is one of total denial. His case was that there was no cheque issued as claimed by the complainant and one of the blank singed cheque leaves given in respect of the earlier money transaction between himself and the complainant's wife was misused and the present complaint was filed.

9. It is true that cases filed under Section 138 of the Act, it starts with the presumption under Section 139 of the Act that the cheque was issued in discharge of legally enforceable debt, unless it is rebutted by the accused, the court can base conviction on the basis of

that presumption. But once the accused had adduced some evidence to rebut the presumption and explained the circumstances under which the cheque had reached the hand of the complainant, then the burden shifts the complainant to prove the case beyond reasonable doubt. In this case, when the complainant issued Ext.P4 notice, intimating the dishonour and demanding payment of the amount, the accused had issued Ext.P7 reply notice, in which he had narrated the circumstances under which the disputed cheque happened to come into the hands of the complainant. He had not admitted the execution of the cheque. According to him, a blank signed cheque given was misused and the present complaint was filed. Further, when such a reply notice has been issued, there is a duty cast on the complainant to explain the date of borrowal and the date of issuance of the cheque. But unfortunately, in the complaint filed by him, he had not mentioned about the date of borrowal and the purpose for which the amount was paid etc. Only at the time of evidence, his case was that the amount was borrowed on

20.03.2000, promising to pay within 10 days and thereafter, the cheque was given on 30.03.2000 even at that time, he promised that he would pay the amount when his properties were sold. Though, the cheque was dated 30.03.2000, it was presented only on 08.09.2000.

10. The case of the complainant was that the accused was postponing the payment of the amount on the pretence that he will be selling his property and pay the amount. But this aspect of the complainant's evidence was falsified by the accused by examining himself as DW1 and producing Exts.D1 to D3 documents, namely the sale deeds executed by him in favour of the wife of the complainant, namely the sale deed Nos.4439/99 dated 05.08.1999 and 2643/99 dated 07.05.1999 and 639/00 dated 01.02.2000 and in Ext.P3 it was specifically mentioned that the documents were executed for the purpose of clearing certain debts and it was admitted by PW1 above mentioning in Ext.D3 that the amounts were paid for discharging the liability. It is only thereafter that according to the complainant, Ext.P1

cheque was given by the accused. Further it will be seen from Ext.D4 plaint in O.S.2376/2000 that when he anticipated some action of dispossession from the property covered by Ext.D1 to D3 by the complainant and his wife, he filed the suit on 05.09.2000 for declaring Exts.D1 to D3 as security documents and for injunction restraining them from dispossessing him from the property and it was thereafter that Ext.P1 cheque was presented in bank and got it dishonoured and Ext.P4 notice was issued. So it is clear from this that only after Ext.D4 suit was filed, the cheque was presented for collection and the present complaint was filed later. This fact was mentioned in Ext.P7 reply notice itself. So under the circumstances, there is a burden on the complainant to explain that the transactions covered by Exts.D1 to D3 and Exts.D4 and D5 suits are different and that is nothing to do with Ext.P1 cheque transaction. Such an attempt was not made by the complainant in the complaint.

11. Further, Ext.D5 will go to show that the accused had filed another suit for return of other security

documents said to have been given by him to the complainant and complainant's wife, in respect of some money transaction between them, anticipating that they were also likely to be misused and further complaints are likely to be filed. That shows that there is no possibility for the accused issuing a cheque on 30.03.2000, after borrowing an amount on 20.03.2000 as claimed by the complainant.

12. It is settled law that there is no presumption regarding the existence of any debt. If the existence of the debt claimed by the complainant is denied, then the burden is on the complainant to prove the entire transactions starting from the origination of the debt and issuance of the cheque. In this case from the circumstances, it cannot be said that the complainant had discharged his burden especially when the accused had sent Ext.P7 reply notice, denying the allegation in Ext.P4 notice and the circumstances under which the cheque happened to come in the hands of the complainant and the possibility of misusing the cheque and immediately on

that he filed a suit even before the cheque was presented by the complainant. Only after Ext.D4 suit was filed, the complainant had presented the cheque said to have been given by the accused for an amount borrowed on 20.03.2000 alleged to have been issued on 30.03.2000. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the accused had rebutted the presumption available under Section 139 of the Act and the complainant had failed to prove the transaction as claimed by him that Ext.P1 cheque was issued in discharge of any legally enforceable debt due from him for an amount claimed by the complainant in the complaint.

13. It is settled law that in an appeal against acquittal, the appellate court is not expected to reverse the findings of the court below, merely on the ground that another view is also possible on the basis of evidence. It is settled law that if two views are possible on the basis of the same set of evidence and one view taken by the court below is also probable and possible, then merely because

another view is also possible, according to the appellate court, is not a ground to upset the order of acquittal passed by the court below substituting its another view in the place of the view taken by the court below. This can be possible only if the appellate court is satisfied that the view taken by the court below is not at all probable and it is perverse. From the way in which the evidence was adduced and appreciated by the court below and on the basis of that documentary evidence adduced by the accused, it cannot be said that the finding arrived by the court below is perverse, so as to reverse the order of acquittal passed by the court below and such a view is also possible on the basis of the evidence available. 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 rebutted the presumption available under Section 139 of the Act and the complainant has not proved his case beyond reasonable doubt, so as to attract the offence of Section 138 of the Act and the order of acquittal passed by the court below does not call for any interference. So the appeal lacks merits and the same is liable to be dismissed.

In the result, appeal fails and the same is hereby dismissed. The order of acquittal passed by the court below against the 1st respondent in CC.No.128/2001 of Judicial First Class Magistrate Court-I, Thrissur is hereby confirmed. Office is directed to communicate this order to the concerned courts immediately.

Sd/-
K.RAMAKRISHNAN
JUDGE

vs