IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

WEDNESDAY, THE 29TH DAY OF JULY 2015/7TH SRAVANA, 1937

CRL.A.No. 694 of 2004 ( )

AGAINST THE JUDGMENT IN CC 880/2002 of J.M.F.C.-I, KANNUR
DATED 28-08-2002

APPELLANT(S)/COMPLAINANT:

V.PURUSHOTHAMAN, S/O.SANKARAN
ELIYAMBRA HOUSE, NARATH P.O., KANNUR.

BY ADVS.SRI.GEORGE VARGHESE PERUMPALLIKUTTIYIL
SRI. V.P.K. PANICKER

RESPONDENT(S)/STATE AND ACCUSED:

----

1. STATE OF KERALA
   REPRESENTED BY PUBLIC PROSECUTOR,
   HIGH COURT OF KERALA.

2. AYSHA UMMA E.P., D/O.MAMMAD,
   D.NO.11/328, ETTAMMAL PIDARIYIL HOUSE
   PAPPINISSERY WEST P.O., KANNUR.

R1 BY PUBLIC PROSECUTOR SMT.MAYA P.
R2 BY ADV. SRI.K.R.AVINASH (KUNNATH)
R2 BY ADV. SRI.ABDUL RAOOF PALLIPATH
R2 BY ADV. SRI.E.MOHAMMED SHAFI

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 29-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T. RAVIKUMAR, J.

=========================

Crl.Appeal No.694 of 2004

=========================

Dated this the 29th day of July, 2015

JUDGMENT

This appeal is directed against the order of acquittal passed by the Court of Judicial First Class Magitrate-I, Kannur in C.C.No.880 of 2002. The appellant herein was the complainant and the second respondent herein was the accused therein. The appellant/complainant filed a private complaint against the second respondent/accused alleging commission of offence under section 138 of the Negotiable Instruments Act pursuant to the dishonour of cheques bearing Nos.691127 dated 18.9.1998 and 691126 dated 18.10.1998 drawn on Canara Bank, South Bazaar branch, Kannur and on the failure of the accused to pay the amount due despite the receipt of the statutory notice intimating her of the dishonour of the said cheques and to pay the amount covered by them. The complaint was taken on file and registered as C.C.No.880 of 2002 in respect of the aforesaid cheques after complying with the procedures. On due process the second respondent appeared before the court and on being read over and explained the particulars of the offence she pleaded not guilty. To prove the case against the second respondent, the appellant/complainant was examined as PW1 and he got marked Ext.P1 series of cheques to Ext.P5. Ext.P1 series are the cheques bearing Nos.691127 dated 18.9.1998 and 691126 dated 18.10.1998. Upon closing the evidence of the complainant, the second respondent was examined under section 313 of the Code of Criminal Procedure and she denied all the incriminating circumstances put to her. Exts.D1 to D4 were marked through PW1 while he was being cross examined. Apart from that, the accused has not adduced any other evidence in defence. After considering the evidence on record, the trial court found that the second respondent/accused is entitled to get the benefit of doubt and that in the light of the evidence on record it could only be said that the appellant/complainant had failed to prove the case beyond any reasonable doubt. Consequently, the second respondent was found not guilty of the offence under section 138 N.I Act and she was acquitted under section 255(1) Cr.P.C. This appeal is filed in the said circumstances.

2. I have heard the learned counsel for the appellant, the learned counsel for the second respondent and the learned Public Prosecutor. The learned counsel for the appellant contended that the trial court erred in holding that the appellant had failed to prove the commission of offence under section 138 N.I Act by the second respondent conclusively. It is submitted that the order of acquittal is nothing but an outcome of utter perverse appreciation of the evidence and the court below had failed to grant the benefit of presumption available under sections 118 and 139 N.I Act in favour of the appellant. It is submitted that the oral evidence adduced by the appellant as PW1 with Exts.P1 to P3 was sufficient to make him entitled to get the benefit of presumption available under sections 118 and 139 N.I Act and that the documentary evidence adduced by the

defence consisting of Exts.D1 to D4 were not sufficient to dislodge the presumptions available under sections 118 and 139 N.I Act. Per contra, the learned counsel for the second respondent contended that the learned Magistrate had considered the evidence on record appropriately and it is such well-merited consideration that resulted in the impugned order of acquittal. In short, the appellant has failed to bring out any perverseness or illegality or error of law to invite an appellate interference and therefore this appeal is liable to fail, it is further contended.

3. As noticed hereinbefore, the evidence of the appellant consists his oral evidence as PW1 and Exts. P1 to P5 and on the side of the second respondent and the documentary evidence she got marked Exts.D1 to D4 through PW1, the complainant. The case of the appellant/complainant is as follows:- The second respondent who was the owner of an extent of 26 cents of land comprised in Re.sy.Nos.304/5A, 304/5C and 304/6 in Pappinissery village agreed

to sell the said extent of property to the appellant for a consideration of ₹4,00,000/- (Rupees four lakhs). Accordingly, an agreement was executed between them to that effect. However the second respondent accused failed to effect the transaction and to register the property in favour of the appellant. Though he approached the complainant for getting the agreement executed and to effect the transaction of the property in question, the second respondent expressed her inability in registering the property in the name of the appellant and promised to repay the amount viz., ₹4,00,000/- and an amount of ₹10,000 towards interest and cost. It is to discharge the said liability that the aforementioned cheques were issued which on dishonour led to the registration of C.C.No.880 of 2002. PW1 deposed that he had purchased 26 cents of landed property comprised in the aforesaid survey numbers in Pappinissery village from the second respondent/accused for a sum of ₹4,00,000/- pursuant to an agreement executed between them. He would further depose that the second respondent failed to register the property in his name in terms of the sale agreement and therefore, he had to cause for the issuance of Ext.D1 notice. On receiving the notice, the second respondent/accused approached him and expressed her inability in registering the property and promised to repay the amount with an additional payment of ₹10,000/- towards interest and cost. It is to discharge the said liability that Ext.P1 series of cheques were issued. Evidently, he has also deposed that the said cheques on presentation got dishonoured owing to the insufficiency of funds in the account maintained by the second respondent and pursuant to the dishonour of the cheques he issued Ext.P3 notice within the statutorily prescribed period and pursuant to the failure on the part of the second respondent to pay the amount due within the statutorily prescribed period the complaint was filed. The contention of the appellant is that in view of the evidence thus adduced by him he is entitled to get the presumption available under sections 118 and 139 of the N.I Act. But at the same time, it is to be noted that even if it is found that he was entitled to get the benefit of the presumptions available under those provisions the said presumptions are rebuttable. In such circumstances, the question is whether the appellant has succeeded in discharging his initial burden to get the benefit of presumption available under sections 118 and 139, N.I Act and if the answer is in the affirmative the next question is whether the said presumptions were successfully dislodged by the second respondent/accused.

4. Evidently, in this case, the second respondent/accused had denied the execution of Ext.P1 series of cheques and her defence was that she had no occasion to issue such cheques in favour of the appellant and further that the cheques in question were entrusted with the complainant who is a private financier by her son as a security while availing a loan of ₹50,000/- and to substantiate the same Exts.D1 to D4 were produced through PW1 during his examination. In such circumstances, even if it is taken that the appellant has succeeded in discharging his initial burden to get the benefit of the presumptions available under sections 118 and 139 N.I Act the

question whether the second respondent has succeeded in dislodging the said presumptions by adducing the documentary evidence in Exts.D1 to D4 has to be considered. Before such consideration certain other aspects have to be looked into especially the oral testimony of the appellant during his examination. A scanning of his defence as PW1 would reveal that his precise case was that he had purchased the property having an extent of 26 cents comprised in Re.sy.Nos.304/5A, 304/5C and 304/6 in Pappinissery village belonging to the second respondent/accused for an amount of ₹4,00,000/- pursuant to an agreement executed between them. It is his further case that despite the receipt of the said amount towards sale consideration, the second respondent failed to get registered the property in his name and thereafter the second respondent issued Ext.P1 series of cheques for the purpose of repaying the amount of ₹4,00,000/- received by her. Evidently, he has categorically deposed before the court that apart from the transaction in respect of the said property, he had no other transaction with the second respondent/accused. I will refer to the other discrepancies in the evidence of PW1 a little later. In view of the aforesaid evidence tendered by PW1 the evidence revealed through Exts.D1 to D4 has to be looked into. As noticed hereinbefore, they were got marked through PW1 appellant and he had not disputed the existence of the said documents. Ext.D1 is the lawyer notice dated 14.7.1997 issued on behalf of the appellant/ complainant to the second respondent/accused. Ext.D2 is another notice dated 28.9.1998 issued by the complainant to the accused pursuant to the dishonour of cheque No.691127 dated 18.9.1998. Ext.D3 is the post card dated 25.9.1998 issued by the complainant to the accused requiring her to clear the interest dues. At this juncture it is to be noted that what exactly is the transaction based on which the second respondent/accused was called upon to pay interest is not discernible from Ext.D3. Ext.D4 is the covering letter addressed by the complainant to the accused while sending Ext.D2 notice which was returned unserved due to the mistake in the address. It is to be noted that in Ext.P3 as also in the complaint a reference was made by the complainant regarding the agreement executed for the sale of the aforementioned property. There was conspicuous absence of any reference to the total sale consideration in Ext.P3. At the same time, going by the pleadings in the complaint, the total sale consideration in respect of the property mentioned above was ₹4,00,000/- and he had paid the sale consideration in full going by the averments in the complaint. Ext.D1 proved through him refers to an agreement executed between them in respect of the said property on 22.7.1996. It would also reveal that going by the said agreement, the total sale consideration in respect of the said property was ₹5,00,000/- and out of it, an amount of ₹4,00,000/- alone was paid as advance. After narrating, as such, in Ext.D1 lawyer notice issued on behalf of the appellant, the second respondent was asked to receive the balance sale consideration and to execute the agreement. It is also to be noted that going by Ext.D1 dated 14.7.1997, the period of agreement was not expired by the time it was issued. It is to be noted that the appellant had disowned Ext.D1 in the box. A perusal of Ext.D1 would reveal that the discrepancy arising in the evidence of PW1 in the light of Ext.D1 could not be said to be a minor one. It is to be noted that going by the pleadings in the complaint and also the evidence of the appellant as PW1, the total sale consideration for the property was only ₹4,00,000/- and that apart, he had paid the entire sale consideration. At the same time, Ext.D1 dated 14.7.1997 would reveal that the agreement in respect of the sale of the aforesaid property was executed on 22.7.1996 and that the total sale was ₹5,00,000/- and in respect of the same, he had paid only an amount of ₹4,00,000/- as advance. It was in that context in and vide Ext.D1 the second respondent was required to receive the balance amount and to register the property in terms of the agreement. In this context it is also relevant to note that in the box the appellant deposed that no agreement fixing the sale consideration of the aforementioned property as ₹5,00,000/- was executed. That apart, he had also deposed that he had purchased 26 cents comprised in the aforesaid survey numbers for ₹4,00,000/- but the second respondent had failed to register the same in his favour. If that be so, how he came to cause issuance of Ext.D1 especially when he himself deposed that he had no other transactions with the second respondent/accused. In the contextual situation it is also relevant to note that despite taking up such a contention that the entire sale consideration was paid to the second respondent, and still she had failed to execute the agreement and got registered the property in the name of the complainant, he would depose before the court that he had not instituted any civil proceedings. His explanation is that since the second respondent is a lady and has expressed her inability to effect registration of the property he thought it fit to bring no civil litigation against her. The said explanation of the appellant cannot be swallowed because if the appellant was that much magnanimous towards the second respondent why he launched a criminal prosecution against the same lady that too, before the expiry of the period of limitation for filing the suit in respect of the said transaction. As noticed hereinbefore, the appellant herein had categorically deposed before the court that apart from the transaction pertaining to the property in question which ultimately culminated in the said proceedings he got no other transactions with the second respondent. At the same time no explanation was forthcoming with respect to the situation that constrained him to issue Ext.D3 notice. Obviously he had not disputed the issuance of Ext.P3. In the aforesaid situation the decision of the Hon'ble Apex Court in **Krishna Janardhan Bhat v. Dattatraya G. Hegde [2008(2) SCC Crl.166]** assumes relevance. Going by the same, in a prosecution the complainant must prove the guilt of the accused beyond any reasonable doubt and at the same time the standard of proof required on the part of the accused is only 'preponderance of probabilities'. It was further held therein that inference of probabilities could be drawn not only from the materials brought on record by the parties but also by referring to the circumstances upon which the accused rely. In this case, the following circumstances have to be taken into consideration. It is the definite case of the appellant that the liability that constrained the second respondent to issue Ext.P1 series of cheques emerged from the execution of the sale agreement in respect of the property belonging to the second respondent and the consequential payment of an amount of ₹4,00,000/- towards the sale consideration. His oral testimony was also on the same lines. However, in Ext.D1 lawyer notice dated 14.7.1997 caused to the second respondent/accused in relation to the very same property a specific reference was made about an agreement executed in respect of the said property on 22.7.1996. Ext.D1 would also reveal that the total sale consideration was ₹5,00,000/- and an amount of ₹4,00,000/- was paid to the second respondent towards sale consideration as advance and he did not disown the issuance of Ext.D1 dated 14.7.1997. As per Ext.D1, the second respondent was asked to receive the balance consideration and to execute the agreement. At the same time, he denied the existence and execution of any agreement in respect of the aforementioned property fixing the sale consideration as ₹5,00,000/-. According to him, the total sale consideration was only ₹4,00,000/- and he had paid the entire sale consideration. He would also depose that in respect of the sale of the aforementioned property only one agreement was executed by him. But at the same time, he would depose that he entrusted that agreement with his lawyer and it got destroyed in fire. Another circumstance also assumes relevance to consider the trustworthiness of PW1. He had categorically deposed that apart from the transaction relating the property he got no other transaction with the second respondent. However Ext.D3 would belie the same. It is to be noted that the appellant did not dispute the existence of Ext.D3 and that apart he had not given any explanation as to under what circumstances Ext.P3 was issued. Though the appellant is having a definite case that he had paid the entire sale consideration of ₹4,00,000/- his explanation was that since the second respondent was a lady and she expressed her inability to execute the same he thought it fit not to file any suit. When that be the case how such a person would launch a criminal prosecution against the same lady that too before the period of limitation for instituting a civil case. As noticed hereinbefore, preponderance of probabilities in the case of the defence could be established in the light of the materials adduced by the parties and it could also be interfered from the circumstances relied on by the accused. The circumstances which were explained hereinbefore would undoubtedly reveal that the second respondent has succeeded in dislodging the presumptions available to the appellant by virtue of the provisions under sections 118 and 139 of the N.I Act by adducing Exts.D1 to D4 and by effectively cross examining PW1, the appellant. In the light of such circumstances obtained from the evidence on record I do not find any reason to upturn and reverse the conclusions arrived at and the findings of the learned Magistrate. In other words, the conclusions and findings of the learned Magistrate did not call for any appellate interference. In such circumstances, this criminal appeal is liable to fail and accordingly, it is dismissed.

Sd/-
C.T. RAVIKUMAR
(JUDGE)

spc/

C.T. RAVIKUMAR, J.

JUDGMENT

September, 2010