IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

CRL.A.No. 1919 of 2004 ( )

AGAINST THE ORDER/JUDGMENT IN Crl.L.P. 539/2004 of HIGH COURT OF KERALA DATED 13-09-2004

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AGAINST THE JUDGMENT IN CC 633/2003 of J.M.F.C.-I(FOREST OFFENCES), THODUPUZHA, DATED 31-05-2004

APPELLANT(S)/COMPLAINANT:

THE NOBLE FINANCE COMPANY, THODUPUZHA,
REPRESENTED BY P.R.SUDHEER KUMAR

BY ADV. SRI.K.K.CHANDRAN PILLAI (SR.)

RESPONDENT(S)/ACCUSED AND ANOTHER:

1. K.M.RATHEESH, S/O. MANCHARAN ACHARY,
   KURUVIKKATTIL VEETTIL, KANJIRAMATTAM KARA, THODUPUZHA.

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

R1 BY ADVS. SRI.KISHOR B.
SRI.K.P.ABDUL GAFOOR
SRI.TOMS MATHEW

R2 BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ss

K. RAMAKRISHNAN, J.

Crl. Appeal No.1919 of 2004

Dated this the 2nd day of November, 2015

JUDGMENT

Complainant in C.C.No.633/2003, on the file of the Judicial First Class Magistrate Court-I, Thodupuzha, is the appellant herein. The case was taken on file on the basis of a private complaint filed by the complainant/ company through its partner against the first respondent under Section 138 of the Negotiable Instruments Act, (hereinafter called 'the Act').

2. The case of the complainant in the complaint was that, the complainant concern is a registered partnership firm represented by its partner vide Ext.P5 resolution. The accused borrowed a sum of ₹28,800/- from the complainant and executed a hire purchase agreement on 11.01.2001 for the purpose of his motor cycle with No.KL-6A/4859. He had to repay the amount in 24 equal monthly installments at the rate of ₹1,200/- per month from

11.02.2001. He committed default from 11.07.2001. When a notice was issued, it was returned with endorsement unclaimed. Thereafter according to the complainant on 14.07.2003 accused came to the firm and issued Ext.P1 cheque for ₹26,400/- in full settlement of the amount due as on that day. The complainant presented the cheque for collection through their bank, but the same was dishonoured by the drawee bank for the reasons 'funds insufficient' evidenced by Ext.P2 dishonour memo. Complainant issued Ext.P3 notice dated 31.07.2003 and the same was received by the accused evidenced by Ext.P4 postal acknowledgment. Accused had not paid the amount. So he had committed the offence punishable under Section 138 of the Negotiable Instruments 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 partner of the complainant was examined as PW1 and Exts.P1 to P5 were marked on their side. After closure of the complainant's evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that, so much amount is not due and a blank signed cheque was given as security and that was misused and the present complaint has been filed. Though no oral evidence was adduced on his side. Exts. D1 to D5 were marked on his side through PW1 to prove his case. After considering the evidence on record, the court below found that the complainant had failed to prove the amount covered by the cheque is really due from the accused and they have failed to prove that the cheque was issued for the amount legally due and acquitted the accused on that ground under Section 255(1) of the Code of Criminal Procedure. 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.539/2004 and the application was allowed and the leave was granted and then the appeal was admitted.

4. Heard Sri.K.K. Chandran Pillai, Senior counsel appearing for the appellant and Sri. Jibu P. Thomas, Public Prosecutor appearing for the 2nd respondent/ State. There is no representation for the 1st respondent.

5. The counsel for the appellant submitted that, the court below had not properly appreciated the evidence given by PW1. PW1 had categorically stated that as per the hire purchase agreement, if the accused committed default, they are entitled to realise the amount with 12% penal interest and he had not proved his case that the amount is not really due and the case of PW1 was that the penal interest will not be entered into the ledger and the amount was calculated as on the date of issuance of the cheque. So

the court below was not justified in acquitting the accused and court below ought to have convicted the accused and sentenced him for the offence alleged.

6. The case of the complainant in the complaint was that, accused borrowed a sum of ₹28,800/- on 11.01.2001 as per the hire purchase agreement in respect of his motor cycle and as per the agreement, he will have to pay the amount in 24 equal monthly installments of ₹1,200/- each and he had committed default from 11.07.2001 onwards. Though a notice was issued, it was returned with endorsement 'unclaimed'. Thereafter on 14.07.2003 the accused came to the firm and settled the accounts for ₹26,400/- and he issued Ext.P1 cheque.

7. The case of the accused was that he had repaid the installments and the accounts were not properly maintained and he had not issued any cheque. When he went to the office for settling the accounts, they insisted for huge amount, so he returned and misusing the blank signed

cheque given at the time of availing the loan, the complaint was filed by filling the same for a huge amount without his consent. His case at the time of examination under Section 313 of the Code of Criminal Procedure was that only an amount of ₹8,500/- was due. It is true that accused could not adduce any evidence to prove that only ₹8,500/- was due from him, but that will not absolve the burden cast on the complainant to prove that the cheque was issued in respect of a legally enforceable debt. When the amount and execution of the cheque is disputed, the burden is on the complainant to prove those facts.

8. The evidence of PW1 will go to show that the amount is inclusive of 12% penal interest chargeable on the defaulted amount. It was admitted by him that certain amounts were paid as per Exts.D1 to D3 and that amounts were credited in the account after deducting penal interest. But he had admitted in his evidence that Exts.D4 and D5 are the ledger and day book relating to his firm and it will

not show charging of any penal interest. He had also admitted in his evidence that it will not be seen in Ext.D4 ledger relating to the loan transaction of the accused that an amount of ₹26,400/- was due as on the date of issuance of Ext.P1 cheque. Ext.P1 cheque was dated 14.07.2003. If really a settlement was effected on 14.07.2003, there would have been an entry in Ext.D4 after calculating the amount as on that day showing the actual amount due. But no such entry was seen in Ext.D4, the ledger extract relating to the loan transaction of the accused with PW1 concern. Further the PW1 had no case that the cheque was brought duly filled and handed over to him. According to him the cheque was issued in his presence, but it will seen from Ext.D1 that except the signature and the thump impression other writings were type written and it was not in the handwriting of the accused. The complainant had no case that the accused had got the facility to enter the entries by using a type writer. That probabilises the case of the accused that a blank signed cheque given as security at the time of transaction was misused without his consent and the complaint was filed. Further the hire purchase agreement was not produced by the complainant to prove that they are entitled to recover 12% penal interest on default payment. Unless this fact is proved by the complainant by producing the best evidence with them, they are not entitled to collect the penal interest as claimed by them, which according to the complainant is inclusive of that amount mentioned in Ext.P1 cheque. If that be the case, the court below was perfectly justified in coming to the conclusion that the complainant had failed to prove that the amount mentioned in Ext.P1 cheque was really due as on the date of issuance of the cheque from the accused and they have failed to prove that Ext.P1 cheque was issued by the accused for an amount which is legally due from him and as such no offence under Section 138 of the Act is attracted and rightly acquitted the accused for the offence alleged. I do not find any reason to interfere with the finding of the court below on this aspect as it cannot be said that the finding is perverse on the basis of evidence and no such finding could be arrived by the court below on the basis of evidence. 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 blow against the first respondent is hereby confirmed.

Office is directed to communicate this judgment to the concerned court, immediately.

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge

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