**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN**

**TUESDAY, THE 17TH DAY OF NOVEMBER 2015/26TH KARTHIKA, 1937**

**CRL.A.No. 1937 of 2004 ( )**
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**Crl.L.P. 670/2004 OF HIGH COURT OF KERALA**

**CC 258/2003 OF CHIEF JIUDICIAL MAGISTRATE COURT, KOTTAYAM**

**APPELLANT(S)/COMPLAINANT::**
**-------------------------------------------------**

**RAJESH BABU,KALLUMKAL,**
**VADAVATHUR, KOTTAYAM.**

**BY ADV. SMT.VANAJA MADHAVAN**

**RESPONDENT(S)/ACCUSED::**
**---------------------------------------------**

**N.SAYED MUHAMMED, SAJNA MANZIL,**
**AMBALLUPARAMBU, THATHAMANGALAM, PALAKKAD.**

**R1 BY ADV. SRI.A.SREERAMAKRISHNAN**

**BY PUBLIC PROSECUTOR SHRI. JIBU P. THOMAS**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**SKV**

K.RAMAKRISHNAN, J.

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Crl. Appeal No.1937 OF 2004

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Dated this the 17th day of November, 2015

JUDGMENT

The complainant in CC No.258/2003 on the file of the Chief Judicial Magistrate's Court, Kottayam is the appellant herein. The above 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 referred to as the Act).

2. The case of the complainant in the complaint was that the accused borrowed a sum of Rs.1,00,000/- and in discharge of that liability he had issued Exts.P1 and P2 cheques both dated 14.1.2003 for an amount of Rs.50,000/- each, drawn on Catholic Cyrian Bank Ltd. Thathamangalam branch in favour of the complainant. The complainant presented the cheques for collection and the same was dishonoured for the reason funds insufficient vide Exts.P3 and P4 dishonour memos by the drawee bank. This was intimated by the complainant by his banker vide Exts. P5 and P6 intimation letters. The complainant issued Exts.P7 notice dated 11.2.2003 vide Ext.P8 postal receipt and the same was returned with endorsement

unclaimed by the accused. He had not paid the amount. So he had committed the offence punishable under Section 138 of the Act and 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 P9 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 and he denied all the incriminating circumstances brought against him in the complainants evidence. He had further stated that he has no transaction with the complainant and he had not borrowed any amount and issued any cheque to the complainant. Infact he had borrowed amounts from his father and issued two blank signed cheques and after the death of the father, he had repaid the balance amount to the complainant but the cheques were not returned and misusing the cheques the present complaint has been filed.

4. In order to prove his case, the accused himself was examined as DW2 and his wife's uncle was examined as DW1

and Exts.D1 to D3 were marked on his side. After considering the evidence on record, the court below found that the case of the complainant is not believable and the case of the accused is more probable and acquitted the accused under Section 255 (I) 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. 6070/2004, leave was granted and appeal was admitted to file.

5. Heard Smt. Vanaja Madhavan, counsel for the appellant and there is no representation for the respondent.

6. The counsel for the appellant submitted that the evidence of DWs1 and 2 is not sufficient to rebut the presumption and there was nothing mentioned about the issuance of cheque to the father of the complainant in Ext. D1 receipt. He had not sent any reply to the notice issued as well. The reasons given by the court below is not sufficient to acquit the accused especially when the presumption under Section 139 of the Act is in favour of the complainant. So according to the learned counsel, the court below was not justified in acquitting the accused and the complainant had proved the

case and court below ought to have convicted and sentenced him for the offence alleged.

7. The case of the complainant in the complaint was that the accused borrowed a sum of Rs.1,00,000/- and issued Exts.P1 and P2 cheques for Rs.50,000/- each, with date 14.1.2003 drawn on Catholic Cyrian Bank, Thathamangalam Branch.

8. The case of the accused was on of total denial and his case was that he had money transaction with the father of the complainant and the blank signed cheques were misused even after discharge of the amount after the death of the father. It is true that the accused had not received the notice and it was returned with endorsement unclaimed and he had not sent any reply also. That may be one of the grounds to come to the conclusion that he had nothing to say about the allegations in the notice sent by the complainant. But if there are other materials available on record on the basis of evidence to disprove the case of the complainant, non sending of reply notice cannot be taken as a ground to disbelieve the defence taken by the accused.

9. In this case the date of borrowal or date issuance of

cheque was not mentioned in the complaint. Further even in the chief affidavit he has not mentioned the date of borrowal or date of issuance of cheque. But only in the cross examination, he had vaguely stated about the date of borrowal of the amount which reads as follows:-

"പ്രതിക്ക് ഒരു ലക്ഷം രൂപ കൊടുത്തത് 2002 ഒക്ടോബര മാസം 10നു ആണ്"

10. According to him when the accused borrowed the amount and issued the cheque, his staff members were there in the office and it is in their presence that the cheques were issued. But none of the staff members of the complainant were examined to prove this fact especially when the accused had a case that he had no transaction with the complainant and he had not issued the cheques to the complainant as claimed by him. Further there is no explanation forthcoming from the side of the complainant as to why the accused had issued two cheques with same date. If it is a post dated cheque given on different dates for different amounts, one can understand that the accused had given two cheques with an intention to pay the amounts in two instalments on the dates mentioned in the cheques. So that also probabilise the case of

the accused that there was no possibility for the accused to issue Exts.P1 and P2 cheques to the complainant as claimed by him.

11. PW1 had earlier stated that he did not know whether the accused had any money transaction with his father and he had paid the amount later to him. But when Ext.D1 receipt was confronted to him, he had admitted that he had money transaction with his father and it was after his death, the accused had paid the amount for which he had issued Ext.D1 receipt. It is true that in Ext.D1 the issuance of two cheques to the father of the complainant was not mentioned. But that alone is not sufficient to disbelieve the case of the accused. Further the accused as well as DW1 were examined to prove their case. DW1 had stated that it was through him the father of the complainant was introduced to the accused and Rs.1,00,000/- loan was obtained and after deducting the interest, Rs.93,000/- was paid to him. It was he who had taken initiative to pay off the amount after the death of the father of the complainant by paying the amount to the complainant and obtaining Ext.D1 receipt. It is true that DW1 is a relative of DW2 the accused and he was examined in

another case as well. But that alone is not sufficient to disbelieve his case. Further he is a retired Assistant Sub Inspector of Police and it was brought out in the evidence of PW1 that he is known to his father as well. So under the circumstances there is nothing to disbelieve the evidence of DWs1 and 2 regarding the factum of accused having money transaction with the father of the complainant and issuing two blank signed cheques to him. Further when DW1 was cross examined nothing was mentioned about Exts.P1 and P2 cheques which according to DW1 were given to the father of the complainant as blank signed cheques. So that also probabilise the case of the accused

12. Further it will be seen from Ext.D3 ledger extract that cheques issued prior to and after Exts.P1 and P2 cheques were encashed during the period from 1995 and 1997. One cannot believe for a moment that the accused will be keeping the cheque and later given it to PW1 for a money transaction alleged to have been taken place in the year 2002. Further it cannot be believed for a moment that the complainant will be paying Rs.1,00,000/- to the accused without getting any document when the amount was paid as well. If the evidence

of PW1 is believed, then it can be seen that the amount was borrowed on October 10, 2002. But the cheques were issued on a subsequent date. Further it will be seen from the evidence of PW1 that the entire writings in the cheque were written by the accused and it was signed by him in his presence. It will be seen from Exts.P1 and P2 in the handwriting of the accused for writing his name with initial 'n' will go to show that the writings in the cheque could not have been written in his handwriting because the 'n' seen in the signature portion and the 'n' seen in the letters 'thousand and only' are entirely different and it could not be said to have been written by the same person. No attempt was made on the side of the complainant to send Exts.P1 and P2 cheques for expert opinion to prove that the handwriting in the cheques was also that of the accused especially when he denied the execution of the cheque. Further court below had come to the conclusion that the complainant had not proved his source of income for paying so much amount as well. So these are all the circumstances taken by the court below cumulatively for the purpose of coming to the conclusion that the complainant had failed to prove his case and the case of the accused is more probable than the case of the complainant and the complainant had not established his case and the accused had rebutted the presumption and rightly acquitted the accused giving him that benefit. The finding of the court below on the basis of evidence cannot be said to be perverse or no such view could be possible in the circumstances of the case as well. If two views are possible on the basis of the evidence adduced and one such view taken by the court below is also probable and possible, then even if another view is possible on the basis of evidence, the Appellate court should not substitute its alternate view so as to reverse the order of acquittal passed by the court below by invoking the appellate power, unless the court is satisfied that the view taken by the court below is perverse and no such view is possible on the basis of evidence available. Once the accused has rebutted the presumption under Section 138 of the Act the burden shifts to the complainant to prove the transaction and in this case such an effort was not taken on the side of the complainant to prove the transaction as claimed by him and court below was perfectly justified in acquitting the accused giving him the benefit of doubt doubt and that finding does not call for any interference. So the appeal lacks merit and the same is liable to be dismissed.

In the result the appeal fails and the same is hereby dismissed. The order of acquittal passed by the court below against the accused is hereby confirmed. Office is directed to communicate this order to the concerned court immediately.

Sd/-
K.RAMAKRISHNAN, JUDGE

SKV