IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 12TH DAY OF NOVEMBER 2015/21ST KARTHIKA, 1937

CRL.A.No.2025 of 2004 ( )

AGAINST THE JUDGMENT IN CC.793/2002 of J.M.F.C.-II, CHERTHALA, DATED 16-11-2004
&
AGAINST THE ORDER/JUDGMENT IN Crl.L.P. 779/2004 of HIGH COURT OF KERALA, DATED 01-12-2004

APPELLANT(S)/ACCUSED:

K.S.RENADEV, S/O.K.K.SOMANADHAN,
KANDATHIL, MUHAMMA P.O., ALAPPUZHA.

BY ADV. SRI.T.RAJESH

RESPONDENT(S)/COMPLAINANT:

1. **STATE OF KERALA, REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA.**

2. **N.K.YUSUF KUNJU, S/O.KUNJU MOHAMMED METHAR, KADUVATHAZHATH VELIYIL, MANNANCHERRY WARD NO.3, PONNAD P.O., ALAPPUZHA.**

R1 BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

R2 BY ADVS.SRI.S.SANTHOSH KUMAR
SMT.P.LISSY JOSE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ss

K. RAMAKRISHNAN, J.

Crl. Appeal No.2025 of 2004

Dated this the 12th day of November, 2015

JUDGMENT

Complainant in C.C.No.793/2002 on the file of the Judicial First Class Magistrate Court-II, Cherthala, is the appellant herein. The case was taken on file on the basis of a private complaint filed by the appellant against the 2nd respondent under Section 138 of the Negotiable Instruments Act (hereinafter called 'the Act').

2. The case of the complainant in the complaint was that, accused borrowed a sum of ₹2,00,000/- and in discharge of that liability he had issued Ext.P1 cheque dated 05.12.2001 in favour of the complainant drawn on State Bank of Travancore, Muhamma Branch in favour of the complainant. The complainant presented the cheque for collection and the same was dishonoured for the reasons 'funds insufficient' in the account of the accused evidenced by Ext.P2 dishonour memo. This was intimated to the

complainant by his banker vide Ext.P3 intimation memo. Complainant issued Ext.P4 notice vide Ext.P5 postal receipt to the accused intimating the dishonour and demanding payment of the amount. The accused issued Ext.P7 reply notice denying the transaction. He had not paid the amount thereby 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 complainant himself was examined as PW1 and Exts.P1 to P7 were marked on his side.

4. After closure of the complainants 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 he had no transaction with the complainant and he had not borrowed any amount from the complainant and he had some money transaction with one Xavichan and he borrowed ₹2,500/- from him and gave a blank signed cheque and though the amount was paid, the cheque was not returned and misusing the cheque the present complaint was filed through the complainant. No evidence was adduced on his side in defence. After considering the evidence on record, the court below came to the conclusion that complainant failed to prove his case and no offence under Section 138 is committed by the accused and acquitted the accused under Section 255(1) of the Code of Criminal Procedure. Aggrieved by the same, the above appeal has been preferred by the appellant/ complainant before the court below along with Leave Petition as Crl.L.P.No.779/2004 and leave was granted and the appeal was admitted to file.

5. Heard Sri.T. Rajesh, counsel for the

appellant and Sri.A.Santhoshkumar, counsel appearing for the respondent and Sri.Jibu P.Thomas Public Prosecutor appearing for the State/ first respondent.

6. The counsel for the appellant submitted that, the signature in Ext.P1 was admitted by the accused and he had not discharged his burden of handing over the cheque to Xavichan and as such the presumption has not been rebutted by him. Court below was not justified in relying on a stray sentence and come to the conclusion that the complainant had not proved the case. He had also submitted that for any reason, this court feels that the evidence is not sufficient, he may be given an opportunity to prove his case.

7. On the other hand, the counsel for the respondent submitted that court below had appreciated the evidence and rightly acquitted the accused and the order of acquittal does not call for any interference.

8. Heard the Public Prosecution also.

9. The case of the complainant in the complaint was that accused borrowed a sum of ₹2,00,000/- and in discharge of that liability, he had issued Ext.P1 cheque. The case of the accused was one of total denial. In this case when the complainant issued Ext.P4 notice intimating the dishonour and demanding payment, accused had sent Ext.P7 reply notice, in which he had categorically stated that there was no transaction between the complainant and the accused and he never borrowed any amount from the complainant and issued any cheque to him and in fact there was some money transaction between himself and the one Xavichan and the blank signed cheque given was misused and the present complaint was filed through the complainant. So in Ext.P7 reply notice itself, the accused had denied the transaction and issuance of the cheque and he had put up a specific defence that the cheque given to one Xavichan was misused and the present complaint was filed. In spite of that, except stating that what ever stated in

the reply notice is not true, he had not narrated the date of borrowel and date of issuance of the cheque in the complaint. In the complaint he had only stated that the cheque was issued in discharge of a liability of ₹2,00,000/- due from the accused to the complainant. But only in the proof affidavit, he had stated that he had paid ₹2,00,000/- to the accused on 08.11.2001 and when he demanded, the accused had issued the cheque on 05.12.2001. He had also stated that he did not know who had filled the cheque. According to him, accused brought the cheque and signed the cheque in his presence and delivered the same. In the cross examination, it was admitted that, he knew Xavichan and when a specific question was put to him that the accused was having some money transaction with Xavichan and issued them a blank signed cheque as security and that cheque was misused and the present complaint was filed, the complainant did not deny the same instead he had stated that he did not know. Really this was a suggestion put by the accused reiterating his defence taken by him in Ext.P7 reply notice. In spite of that the complainant had not denied the same instead he pretended ignorance about the same. So it cannot be said that he was not aware of the consequences of that question and the answer given by him as submitted by the counsel for the appellant.

10. Further in the evidence it is seen that he did not know the educational qualification of the accused and he did not know for what purpose the amount was borrowed by the accused etc., He also did not know about the occupation of the accused as well. So under the circumstances, it is very difficult to believe for a moment that he will be parting with such a huge amount without getting any document from the accused. Once the execution and issuance of the cheque is denied and when a suggestion has been given reiterating the defence taken up by the accused regarding the circumstances under which the cheque happened to come to the hands of the complainant

and if he did not deny the same, then it can be safely concluded that the accused had rebutted the presumption and the burden shifts to the complainant to prove the transaction as such. But the complainant had failed to establish the case of the accused borrowing the amount and the circumstances under which the amount was borrowed by the accused and the date of borrowel of the amount and issuance of the cheque in the complaint and he did not adduce any evidence to prove those aspects to the satisfaction of the court also. So under the circumstances, court below was perfectly justified in coming to the conclusion that the complainant had failed to prove his case and the borrowel of the amount by the accused and issuance of the cheque in discharge of the liability and as such no offence under Section 138 of the Negotiable Instruments Act is established against the accused and rightly acquitted him giving him the benefit of doubt. The view taken by the court below, on the basis of evidence, cannot be said to be perverse so as to interfere with the order of acquittal passed by the court below by invoking the appellate power. So the appeal lacks merits 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 is hereby confirmed.

Office is directed to communicate this judgment to the court below at the earliest.

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge

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