

(2006) 07 KL CK 0086
In the High Court Of Kerala
Case No : Criminal R.P. No. 2221 of 2005

Anirudhan

APPELLANT

Vs

Philip Jacob

RESPONDENT

Date of Decision : 12-07-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 357(3)
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2007) 1 ALD(Cri) 11 : (2007) 3 BC 98 : (2006) 4 CivCC 182 : (2006) 134 CompCas 569 : (2006) CriLJ 3866 : (2006) 3 ILR (Ker) 475 : (2006) 3 KLT 554 : (2006) 4 RCR(Criminal) 382

Hon'ble Judges : R. Basant, J

Bench : Single Bench

Advocate : G. Rajeevkumar and B. Renjith Kumar, for the Appellant; P.A. Raziya, Public Prosecutor, for the Respondent

Judgement

R. Basant, J.—This revision petition is directed against a concurrent verdict of guilty, conviction and sentence in a prosecution u/s 138 of the N.I. Act.

2. The cheque is for an amount of Rs. 50,000/- Signature in the cheque is admitted. Handing over of the cheque is not disputed. The notice of demand, though duly received and acknowledged, did not evoke any response. The complainant examined his Power of Attorney holder as PW1. He was allegedly a witness to the transaction also. The Manager of the drawee bank was examined as PW2. No defence evidence whatsoever was adduced. The courts below concurrently came to the conclusion that all ingredients of the offence punishable u/s 138 of the N.I. Act have been established. Accordingly they proceeded to pass the impugned concurrent judgments.

3. Before the trial court, though no reply was given to the notice of demand, a defence was attempted to be raised that the cheque was issued not for the discharge of any legally enforceable debt/liability, but only as security when a transaction for a much lesser amount was entered into between the complainant

and the accused. That cheque leaf was being misutilised by the complainant and PW1 to stake totally unsustainable and false claim against the petitioner. It was contended that the complainant and PW1 were members of a beneficiary committee and as their benamidar the petitioner had undertaken some work. It is in connection with that work that the earlier transaction was entered into and the blank cheque was allegedly given, it was contended.

4. The courts below came to the conclusion that this version advanced by the accused cannot, be accepted. It is not proved at all, it was held. It was accordingly that the impugned judgments were passed.

5. Called upon to explain the nature of challenge which the petitioner wants to mount against the impugned concurrent judgments, the learned Counsel for the petitioner reiterates the contentions raised before the courts below. He raises a further contention with the help of the decisions reported in *Shaji v. Reghunandanan* 1999 (3) KLT 82, case No. 85), *Vidhyadhar Vs. Manikrao and Another*, , *Janki Vashdeo v. Indusind Bank* 2005 (2) KLT 265 and *T. Muthukaruppan Vs. G. Raghavan*, rep. by his Power of Attorney, *K. Gopalakrishnan and Others*, that the ingredients of the offence punishable u/s 138 of the Act have not been established and the evidence of PW1 should not be accepted when the complainant did not choose to mount the witness box and tender evidence. Necessary adverse inference can be drawn, it is contended.

6. The decisions referred above, according to me, do not at all lay down a proposition of law that the complainant must mount the witness stand and tender evidence in support of his case invariably in all prosecutions u/s 138 of the Act, That is not the law at all. The complainant can prefer the complaint through his Power of Attorney holder. But the Power of Attorney holder does not step into the shoes of the complainant when he comes to tender evidence on the disputed aspects. Merely because the principal has the personal knowledge, a Power of Attorney holder cannot tender evidence of facts exclusively within the knowledge of the principal. This and this alone is laid down in the decisions referred above. The rule of hearsay evidence wilt not permit a person to speak of facts exclusively in the knowledge of another merely because he happens to be the holder of a Power of Attorney of such person. But these decisions referred above do not at all lead to the conclusion that a witness examined on the side of the complainant even if he be the Power of Attorney, is not competent to speak of facts within his exclusive personal knowledge.

7. The question then is only whether PW1, who is examined as a witness in this case on the side of the complainant did really have the requisite competence to testify before the court. Merely because he is the Power of Attorney, his competence to speak of facts exclusively within his knowledge is not taken away or come to an end at all. I am unable to understand the decisions referred above as laying down such a proposition of law - that a Power of Attorney cannot speak facts within his knowledge which the complainant could also have spoken of. In this view of the matter the challenge raised against the admissibility of the oral

evidence of PW1 cannot succeed.

8. I shall now proceed to consider the acceptability of such evidence. The complainant has no doubt to prove the original transaction or the original consideration in a prosecution u/s 138 of the Act. Once the issue of cheque is proved, a presumption u/s 139 of the Act ensures to the benefit of the complainant. Thereafter the burden is on the accused to rebut the presumption and the onus is on him to discharge such burden. In the instant case, we have the evidence of PW1, a neighbour residing within 100 ft, of the house of the complainant that the amount was advanced by the complainant and the cheque was issued by the accused. It is true that the presence of PW1 at the time of the transaction is not narrated in the complaint. But that is not of any crucial significance when we consider the fact that the notice of demand though duly received and acknowledged did not evoke any response. It is in that background that the averments in the complaint have to be considered. In the total absence of any response to the notice of demand, the complainant was not obliged to and cannot be found fault with if he does not furnish all details of the original transaction and consideration in the complaint. Much cannot be made out of such omission to narrate the presence and involvement of PW1 when the transaction took place. It cannot also be lost sight of that even according to the petitioner the complainant and PW1 were members of a beneficiary committee, on whose behalf the petitioner had undertaken the work as a benamidar and the transaction was allegedly entered into. PW1 is even going by the version of the petitioner, not a stranger to the transaction at all.

9. The evidence of PVV1 read along with the inaction/want of response to Ext.P7 notice of demand threatening criminal prosecution must be construed along with the presumption u/s 139 of the Act and the total absence of a semblance of attempt by the accused to adduce any evidence in support of his case. The inevitable conclusion in these circumstances is that the complainant has succeeded in establishing all ingredients of the offence punishable u/s 138 of the Act and the accused has totally and miserably failed to substantiate the contentions urged by him. The courts below cannot be said to have committed any error justifying the invocation of revisional powers by this Court. The challenge on merits must, in these circumstances, fail.

10. The learned Counsel for the petitioner then prays that leniency may be shown on the question of sentence. The cheque is for an amount of Rs. 50,000/-. It is dated 23.7.2001. The petitioner now faces a sentence of S.I. for three months. There is a direction to pay on amount of Rs. 50,000/- as compensation and in default to undergo S.I. for a further period of three months. I have already adverted to the principles governing imposition of sentence in a prosecution u/s 138 of the N.I. Act in the decision in Anilkumar v. Shammy 2002 (3) KLT 852. I am not satisfied that there are any compelling reasons which would justify or warrant imposition of any deterrent substantive sentence of imprisonment on the petitioner. Leniency can be shown on the question of

sentence. But it will have to be zealously ensured that the complainant, who has been compelled to wait from 2001 and to fight three rounds of legal battle (though he has not chosen to enter appearance in this case) for the redressal of his grievances is adequately compensated. The challenge on the question of sentence can succeed only to the above extent.

11. In the nature of the relief which I propose to grant it is not necessary to wait for issue and return of notice on the respondent.

12. In the result:

(a) This revision petition is allowed in part.

(b) The impugned verdict of guilty and conviction of the petitioner u/s 138 of the N.I. Act are upheld.

(c) But the sentence imposed is modified and reduced. In supersession of the sentence imposed on the petitioner by the courts below, he is sentenced to undergo imprisonment till rising of court. He is further directed u/s 357(3) CrPC. to pay an amount of Rs. 60,000/- as compensation and in default to undergo S.I. for a period of two months. If realised the entire amount shall be released to the complainant.

13. The petitioner shall appear before the learned Magistrate on or before 1.9.2006 to serve the modified sentence hereby imposed. The sentence shall not be executed till that date. If the petitioner does not so appear, the learned Magistrate shall thereafter proceed to take necessary steps to execute the modified sentence hereby imposed.