(2004) 02 KL CK 0050

In the High Court Of Kerala

Case No : Criminal A. No. 610 of 1995

Bhagavathy Prasad Agarwal APPELLANT

Vs

Thriveni Glass House and Others RESPONDENT

Date of Decision : 13-02-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 357(1), 446
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2005) 1 ALD(Cri) 16 : (2005) 2 BC 315

Hon'ble Judges : R. Basant, J

Bench : Single Bench

Advocate : V.R.K. Kaimal and N.M. Madhu, for the Appellant; P. Vijaya Bhanu and Viju Thomas, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

R. Basant, J.—Aggrieved by the judgment of acquittal in a prosecution u/s 138 of the N.I. Act, the complainant has preferred this appeal.

2. In the complaint filed by him, the complainant alleged that Ext. P1 cheque for Rs. 3680.50 was issued by the accused to him, for the due discharge of a legally enforceable debt/liability. Such liability arose from articles supplied by the complainant to the accused, it was alleged. The said cheque, when presented for encashment was dishonoured by the Bank on the ground that the payment had been stopped by the accused by issue of Ext. P7 stop payment memo. The complainant alleged that though the dishonour was on the ground of issue of stop payment memo, the accused did not have sufficient amount in his account and therefore the accused has committed the offence punishable u/s 138 of the N.I. Act. Notice of demand was issued as insisted by Section 138 of the N.I. Act. It was duly received and acknowledged. A reply Ext. P5 was issued. Payment was not made. In the reply, it was contended that it was a blank signed cheque, which was handed over by the accused to the complainant as security.

3. The complainant approached the Court, observing the statutory time-table

scrupulously. Cognizance was taken by the Court. The accused denied the offence alleged against him and thereupon the complainant examined himself as PW1 and the Manager of the drawee Bank as PW2. Exts. P1 to P3 were marked.

4. The accused, in the course of cross-examination of the prosecution witnesses, and when examined u/s 313, Cr.P.C. contended that it was not a case of dishonour on the ground of insufficiency of funds. He had issued Ext. P7 stop payment memo. He had a valid case for issuing such stop payment memo. The memo was issued not because he did not have sufficient funds, but because there was a bonafide dispute between him and the complainant regarding the goods supplied and the omission to give credit to the advance amounts paid under Ext. D2. In the cross-examination of PW2, it was extracted that notwithstanding the fact that the amount in the account was less than the amount covered by the cheque Ext. P1, cheque would have been honoured as there was an arrangement between the Bank and the accused.

5. The learned Magistrate, relying on the evidence of PW2, that the cheque would have been honoured but for the stop payment memo, came to the conclusion that the ingredients of the offence punishable u/s 138 of the N.I. Act have not been established. Accordingly, the learned Magistrate proceeded to pass the impugned judgment of acquittal.

6. The question whether issue of a stop payment memo would help an accused to avoid culpable liability, has been settled by the Supreme Court finally in the decision reported in M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, All the previous decisions on the point, including the decision reported in M/S Modi Cements Limited Vs. Shri Kuchil Kumar Nandi, , were considered in the said decisions. The following passage in paragraphs 19 of the said judgment clearly lays down the law on the point. I extract paragraph 19 below:

"The authority shows that even when the cheque is dishonoured by reason of stop-payment instructions by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge, in whole or in a part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the ''stop payment'' instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer''s Bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence u/s 138 would not be made out. The important thing is that the burden of so proving would be on the accused."

7. On the basis of the evidence of PW2, it can safely be concluded that though the balance amount in the account was less than the amount shown in the cheque, there was an arrangement between the Bank and the accused whereby

the cheque for Rs. 3830.50 would have been honoured by the Bank. Therefore, it can be assumed that there was sufficient amount/arrangement with the Bank to honour Ext. P1, cheque when it was presented for encashment. But this by itself cannot help the accused to claim absolution from liability. By issuing stop payment memo, he is virtually keeping the entire amount available in the account or the amount, which may come into the account on the basis of his arrangement with the Bank out of reach of the payee for honoring/collecting the cheque in question. Whatever be the amount available in account, either actually or on the basis of an arrangement with the Bank, the amount available in the account to honour the cheque is cipher. Because of the stop payment memo, no amount on the account will be available to honour the cheque. In such a situation, as stated in MMTC''s case, it is the burden of the accused to further prove that he has valid cause for issuing the stop payment memo. Whether there any such valid cause is the question to be considered in this case.

8. Ext. D1 produced by the accused would clearly show that as per the invoice, there was a liability of Rs. 3830.50 for the goods invoiced. The accused takes up two contentions to avoid his liability. According to him, an amount of Rs. 500/- had been paid under Ext. D2 and this was liable to be credited in his favour so that he was liable to pay only on amount of Rs. 3330.50 towards the liability under Ext. D1. He alternatively takes up another contention that the goods supplied under Ext. D1 were of inferior quality and different from what was agreed to be supplied under Ext. D1 invoice. For this reason also he contends that he was not liable to pay the amount shown in Ext. P1 cheque and that he hence had valid reasons to stop payment under Ext. PI cheque. The contention virtually is that there was no legally enforceable debt or liability on the date of presentation of the cheque.

9. While considering whether there is valid cause, one must look at Ext. P7 memo, as also Ext. P6 reply sent by the accused to the notice of demand issued by the complainant''s Counsel. In Ext. P6, surprisingly defence raised is that it was a blank cheque issued by the accused to the complainant. Bottom is knocked out of this theory when we read Ext. P7 dated 6.11.1992. Ext. P7 shows that on 6.11.1992, the accused had written to the Bank that he had issued to the complainant not a blank signed cheque, but a cheque No. 243381 dated 16.11.1992 for Rs. 3830.50. Even though in Ext. P6 notice, he has raised the contention that the advance of Rs. 500/- had not been given credit to and the goods supplied were not ones ordered it is significant, crucial and vital that till he issues Ext. P6 reply notice dated 17.12.1992, he does not inform the complainant of any inadequacy in the goods supplied or of the omission to give credit to any advance payment made under Ext. D2. That the conduct of the accused is not bonafide and the cause urged by him to justify the issue of the stop payment memo is not valid or bonafide is eloquently revealed from these circumstances. I have serious doubts as to whether Ext. P7 stop payment memo was issued on 6.11.1992 itself as contended by the accused. It does not show that Bank had received it on 16.11.1992 or any day prior to 16.11.1992. The

statement of an obliging manager of the Bank to protect the interests of his client, the account holder, must be alertly borne in mind. But even assuming that Ext. P7 was issued no 6.11.1992, it is transparently evident that the accused did not have any valid cause to justify issue of Ext. P7 stop payment memo. There is nothing to show that the amount of Rs. 500/- paid under Ext. P2 should have been adjusted to the amount shown in Ext. P1. The fact that in response to the notice of demand, the amount of the cheque less the amount shown in Ext. D2 was not tendered is also relevant while considering the validity of the cause. The disputes raised now and in Ext. P7 are transparently shown to be not bonafide disputes or valid causes for issuing the stop payment instructions for the simple reason that the accused who had instructed the Bank to stop payment on 6.11.1992, did not inform the complainant of such disputes till he submitted Ext. P6 reply dated 17.12.1992.

10. In these circumstances, following the decision in MMTC, supra, it has to be held that the stop payment memo was not issued for any valid or bonafide cause. The accused is hence not entitled to avoid the liability under appellants 138 of the N.I. Act.

11. The learned Counsel for the accused alternatively attempts to support the impugned judgment of acquittal with the help of the decision in Dassan Vs. Ranimol, . The evidence of PW1 makes it crystal clear that he is the proprietor of M/s. Super Aluminum Company. There is no worthwhile dispute on that aspect. The payee in Ext. PI cheque is Super Aluminum Company, Cochin, which is nothing but the name in which the proprietor transacts business. Though Super Aluminum Company is shown as the payee, it is not a person and it is only the name in which the payee transacts business. In these circumstances the dictum in Dassan''s case cannot be of any help to the accused.

12. No other contentions have been raised. I am satisfied that all ingredients of the offence punishable u/s 138 of the N.I., Act have been established by the evidence tendered by the complainant. The accused has not succeeded in rebutting the presumption u/s 138 of the N.I. Act. The statutory time table has been scrupulously followed. In these circumstances, I am satisfied that the impugned judgment of acquittal warrants interference and the accused deserves to be found guilty and convicted u/s 138 of the N.I. Act.

13. Coming to the question of sentence, 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 reported in Anil Kumar v. Shammy I (2003) BC 547:2002(3) KLT 852. I am satisfied that a sentence of fine coupled with an appropriate direction for payment of compensation shall eminently meet the ends for justice in the facts and circumstances of this case.

14. In the result--

(a) This appeal is allowed.

(b) The impugned judgment of acquittal is set aside.

(c) The accused are found guilty and convicted u/s 138 of the N.I. Act.

(d) The second accused is sentenced to pay a fine of Rs. 5.000/- (five thousand only) and in default to undergo simple imprisonment for a period of two months. The first accused firm is sentenced to pay fine of Rs. 2000/- (two thousand only).

15. The fine amount if realized shall be released entirely to the complainant u/s 357(1), Cr.P.C.

16. The learned Magistrate shall take necessary steps for execution of the modified sentence hereby imposed. The petitioner shall appear and his sureties shall produce him before the Court below on 3.5.2004 for execution of the sentence if the fine amount is not paid by then. Needless to say that the learned Magistrate shall be at liberty to take necessary action against the petitioner and his sureties u/s 446, Cr.P.C. if the petitioner does not appear before the learned Magistrate as directed above.