
(2013) 07 KL CK 0124

In the High Court Of Kerala

Case No : Criminal A. No"s. 2645 and 2647 of 2009

Dr. Jyothi Prasad Bhat

APPELLANT

Vs

K. Sundara Rajan and Another

RESPONDENT

Date of Decision : 02-07-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 357(1)(b), 357(3)

Evidence Act, 1872 — Section 118

Negotiable Instruments Act, 1881 (NI) — Section 118, 118(a), 138, 139

Citation : (2013) 3 ILR (Ker) 557 : (2013) 3 KHC 141 : (2013) 3 KLJ 554

Hon'ble Judges : Harun-UI-Rashid, J

Bench : Single Bench

Advocate : A. Dinesh Rao, for the Appellant; S. Sreekumar Senior Advocate, Sri. V.A. Johnson (Varikkappallil) and Smt. Seena Ramakrishnan (Public Prosecutor), for the Respondent

Judgement

Harun-UI-Rashid, J.—Appellant in the above appeals is the complainant in C.C. No. 639/2003 and 640/2003 on the file of the Judicial First Class Magistrate I, Hosdurg. Complaints were filed against the same accused K. Sundara Rajan for the offence punishable u/s 138 of the Negotiable Instruments Act. Complainant is aggrieved by the common judgment passed by the Additional Sessions Court (Ad hoc) I, Kasaragod in Criminal Appeal Nos. 391/2007 and 392/2007. The learned Magistrate found that the accused committed offence punishable u/s 138 of the Negotiable Instruments Act. By the common order dated 11-10-2007 in C.C. Nos. 639 & 640/2003 the accused was convicted and sentenced to undergo simple imprisonment for one year each and to pay compensation of Rs. 5 lakhs each to the complainant u/s 357(3) Cr.P.C. and in default of payment of compensation to undergo simple imprisonment for a further period of 4 months. The Appellate Court reversed the findings of the trial court, allowed the appeal, set aside the conviction and sentence imposed against the accused and the accused in both cases were acquitted. The parties are hereinafter referred to as the complainant and accused as arrayed in the complaint. The prosecution case

is as follows:

The accused is familiar to the complainant from 1996 onwards. He is a close friend of her husband and is a habitual visitor to her house. The complainant's husband died on 29-9-2002. Accused used to borrow money from her husband and from the complainant. During the period 1998-2001 the accused borrowed several lakhs of rupees from them. The complainant and her husband advanced the amounts by means of crossed cheque from her account as well as the account of her husband. At the time of the death of her husband the amount due to her from the accused was Rs. 10 lakhs. After the death of the complainant's husband, she requested the accused to pay the amount due. Hence, on 6-6-2003 the accused handed over two crossed cheques (Exts. P-1 and P-6) for Rs. 5 lakhs each drawn from the City Union Bank Ltd., Chennai from out of the account maintained by the accused in the aforesaid bank. The cheques issued by the accused were presented by the complainant for collection through her bank at Kanhangad on 10-6-2003. The cheques were returned with an endorsement "funds insufficient" in the account of the accused. Complainant sent a lawyer notice to the accused demanding money and informing the bouncing of the cheques. Accused received the notice. He did not pay the amount nor send any reply.

2. The trial court ordered joint trial of both the complaints. Complainant adduced evidence as RW. 1 and Exts. P-1 to P-12 were marked on her behalf. Accused was questioned u/s 313 Cr.P.C. No oral evidence was adduced on behalf of the defence. Ext. D-1 was marked on behalf of the accused. Accused denied the transaction. The contention raised by the accused in the written statement is that he was forced to sign the cheques by the City Commissioner of Police, Chennai at the instance of the complainant. It is contended by the accused that there is no presumption envisaged u/s 139 of the Negotiable Instruments Act. As P.W. 1 the complainant testified that the accused was close friend of her husband, that he used to come her home frequently, that her husband died on 29-9-2002, that loan was advanced by her and her husband, that at the time of the death of her husband, an amount of Rs. 10 lakhs was due from the accused and that for repayment of the amount due the accused handed over Exts. P-1 and P-6 cheques to her. Dishonour memos were marked as Exts. P-2, P-3, P-7 and P-8. Copies of lawyer notices were marked as Exts. P-4, and P-9. Postal acknowledgment cards were marked as Ext. P-5 and P-10 respectively in C.C. No. 639/2003 and 640/2003.

3. Complainant testified before the court below that huge amounts were advanced to the accused during the period from 1998 to 2001. According to her, at the time of the death of her husband, an amount of Rs. 10 lakhs was due from the accused. She deposed that she was present personally along with her husband during each and every transaction. She also deposed that she had not filed any complaint before the Commissioner of Police, Chennai. She denied the contention of the accused that the accused was dragged to the Commissioner's

office and forced to sign two cheques. It is also stated by her that during the period 1998-2001 about 17 lakhs were borrowed by the accused from her and her husband and out of the said amount approximately 7 lakhs were returned by the accused to her. During cross-examination Ext. D-1 was marked on behalf of the accused. Ext. D-1 money receipt shows that Rs. 20,000 was paid by the accused to the husband of the complainant on 8-8-2001. Witness was recalled and re-examined on behalf of the complainant. During examination Exts. P-1 1 and P-12 were marked subject to proof. Exts. P-11 and P-12 are the transaction pertaining to the account of P.W. 1 and her husband during the period 1998-2001. Ext. P-11 is the transaction relating to the account of her husband during the period from 3-11-1998 to 12-3-2001. Ext. P-12 is the transaction relating to the account of P.W. 1 for the period from 1-8-2000 to 5-8-2000. Ext. P-11 and P-12 statements were issued by the Bank under their seal and signature.

4. The Trial Court examined oral and documentary evidence adduced by the parties. The trial court concluded that the complainant has established her case through the evidence of P.W. 1 and documentary evidence marked as Exts. P-1 to P-12. The trial court drawn a presumption u/s 139 of the Negotiable Instruments Act in favour of the complainant. The trial court observed that it is the duty of the accused to rebut that presumption by adducing legal evidence. Ext. D-1 produced on the side of the defence is the acknowledgement of Rs. 20,000 by the husband of P.W. 1. Ext. D-1 is dated 8-8-2001. Exts. P-1 and P-6 cheques are dated 6-6-2003. Therefore, the court below found that Ext. D-1 cannot be treated as valid acknowledgement towards the liability of Exts. P-1 and P-6 cheques. The accused contended before the trial court that the learned Magistrate has no jurisdiction to entertain the complaint as the entire transaction took place in Chennai and both are the residents of Chennai. The trial court after considering the contention found that the court has jurisdiction to try the case. The same question was confirmed by the Lower Appellate Court. The Appellate Court also reversed the other findings of the trial court. No argument was addressed before this Court regarding the question of jurisdiction.

5. Accused contended that there is no legally recoverable debt and therefore the complaint is liable to be dismissed. The complainant, who was examined as P.W. 1, tendered oral evidence stating the relationship between the accused and her family and the financial transaction between her and her husband during the period 1998-2001. She testified before the court below that the accused is a close family friend and is a frequent visitor to her house. Ext. D-1 receipt produced by the accused itself shows that there was financial transaction between the accused and complainant's husband. Complainant's version in the box was that Rs. 17 lakhs was advanced to the accused and out of that approximately Rs. 7 lakhs was returned. The oral evidence tendered by the complainant was believed by the trial court. The oral and documentary evidence adduced in this case would show that the amount covered by Exts. P-1 and P-6 cheques is legally recoverable debt. Learned Magistrate recorded the said finding

as well.

6. Accused did not deny the signature in Ext. P-1 and P-6 crossed cheques. He has no case that the blank cheques issued by him were misused by the complainant. The case of the accused is that he happened to execute and issue Ext. P-1 and P-6 cheques due to force and pressure. According to him, the complainant filed a false complaint before the Commissioner of Police, Chennai and he was dragged to police and under threat and coercion he was made to sign many documents including these cheques. His further case is that though he preferred a complaint before the higher authorities against the Commissioner of Police, all turned down in vain. After recording the statement u/s 313, accused filed a written statement. In the written statement he has stated the aforesaid version. Though he filed witness list for examination of the Commissioner City Crime Branch, Egmore, Chennai, Tamil Nadu no further steps were taken to examine the Commissioner. He has not produced any complaint alleged to have been lodged before the higher authorities against the Commissioner of Police as stated in the written statement. Apart from the bald statement that he was dragged to police and under threat and coercion he was made to sign the cheques, nothing has been adduced in support of the defence version. He has no case that he has not signed Exts. P-1 and P-6 cheques nor he has not handed over these cheques to the complainant. His only version is as narrated above. Apart from the bald statement there is nothing to show that the complainant had committed the act of threat and coercion. In the absence of any evidence the case of the accused that he was dragged to police and under threat and coercion he was made to sign the cheques is not at all believable. The facts and circumstances in this case would evidently show that the accused had executed and signed Exts. P-1 and P-6 cheques, that these cheques were sent for collection and that the same were bounced due to insufficient funds. The versions of P.W. 1 would show that there was money transaction between herself, her husband and the accused. Ext. D-1 receipt produced by the accused would also show that there was money transaction between the parties. In the facts and circumstances of the case, the contention of the accused that the complaints are false is not supported by evidence and hence unbelievable. There is no contra evidence in this case to prove that Exts. P-1 and P-6 cheques are not executed for discharge of any debt or liability. The proof that is required to prove the execution even where there is denial by the maker depends upon the facts and circumstance involved in the case. The evidence of the complainant where it is found to be credible and trustworthy is sufficient to conclude that the cheque was duly executed by the maker towards discharge of a debt or liability towards her. Whether corroboration to her evidence on that disputed question is required or not has to be looked into with reference to the facts proved and not solely on the basis that a defence raised challenging the execution. On the basis of the evidence on record, it is proved that the defence canvassed by the accused denying the execution of the cheque setting up a rival version was totally devoid of any merit. It is settled law that the onus to prove her case is on the

complainant, and to challenge his case, the accused need only show the probability of his defence. On the other hand, there is positive evidence to prove the transaction between the complainant and the accused. After the death of the husband of the complainant, the accused wanted to pay off the debt due to the complainant and her husband and therefore, he issued Exts. P-1 and P-6 cheques.

7. The Apex Court in the decision reported in Rangappa Vs. Sri Mohan, examined the question as to whether presumption mandated by Section 139 includes the existence of legally enforceable debt or liability. It was held that the said presumption is in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein existence of a legally enforceable debt or liability can be contested. It was also held that there cannot be no doubt that there is an initial presumption which favours the complainant. The Apex Court further held that it is a settled position that when an accused has to rebut the presumption u/s 139 the standard of proof for doing so is that of preponderance of probabilities and therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. Accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own. In the decision reported in Drum Manufacturing Company v. Amin Chand Pyarelal (1993) 3 S.C.C. 35 (para 12) the Apex Court held that once execution of the promissory note is admitted, the presumption u/s 118(a) would arise that it is supported by consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. It was also held that the bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that it did not exist. In Joseph Vs. Gladis Sasi, & Mohammed, M.M. and Another Vs. C.K. Mohanan and Others the courts held that it is settled law that the presumption u/s 139 could be drawn only if there is either admission or proof of execution of a cheque. Neither the weakness of the defence case nor the failure of the accused to prove his case will enable the complainant to succeed in a criminal prosecution. Burden is always on the complainant to establish that the cheques were issued by the accused. Only if the drawing of the cheque by the accused is established, the presumption u/s

139 of the N.I. Act could be drawn. Padmanabhan Vs. Vasudevan Namboodiri, . In the decision in Santhi v. Mary, 2011 (3) KLT 273 it was held that admission of signature in a cheque will not constitute admission of execution of cheque.

8. A Division Bench of this Court in the decision in S. Devan, Cine Artist Vs. C. Krishna Menon and State of Kerala, held that "it is not the law at all that in a prosecution u/s 138 of the N.I. Act, the complainant must establish the original cause of action in meticulous details. That is precisely why the presumption u/s 139 of the N.I. Act has been incorporated in addition to the presumption u/s 118 of the Evidence Act which was already there. We need only reiterate that once the signature, execution and handing over of the cheque is satisfactorily proved by the evidence by the complainant, presumption u/s 139 of the N.I. Act comes into play and the same holds the field until the accused discharges the burden on him at least by the inferior standard of preponderance of possibilities and probabilities as applicable in a civil case".

9. u/s 118 of the Negotiable Instruments Act unless the contrary was proved, it is to be presumed that the negotiable instruments (including a cheque) had been made or drawn for consideration. u/s 139 of the Act the court has to presume unless the contrary was proved that the holder of the cheque received, the cheque for discharge in whole or in part, of a debt or liability. This presumption is rebuttable. However, the burden of proving that a cheque had not been issued for a debt or liability is on the accused. The learned Judge had lost sight of Sections 118 and 139 of the Negotiable Instruments Act. The judgment erroneously proceeds on the basis that the burden of proving consideration for a dishonoured cheque is on the complainant. The aforesaid principles are stated in the decision in K.N. Beena Vs. Muniyappan and Another, .

10. It is seen that after acknowledging the statutory notice issued informing him of the dishonour of Exts. P-1 and P-6 cheques demanding the sum covered thereunder, the accused did not even respond by a reply, if not with payment. The statutory requirement of issuing notice on dishonour of cheques to the drawer has to be complied with within the time-limit from the date of intimation of dishonour. No tenable explanation was offered by the accused why no reply was sent to the notice if at all he has a case that he had no personal liability to be discharged to the complainant.

11. In the decision in P. Gopakumar Vs. B.Anilkumar and Another, it was held that failure to explain why reply notice was not sent would weaken the defence case. Taking note of the minor discrepancies in the testimony of P.W. 1 and irrelevant facts, the Lower Appellate Court took the view that on an evaluation of the evidence of P.W. 1 in cross-examination as well as in chief examination, it is very clear that P.W. 1 complainant has not proved or substantiated that what is the exact amount she has given to the appellant/accused on particular dates even during the period 1998/2001. The Appellate Court also observed that in the legal notice issued to the accused calling for the amount wherein also the amount she has paid to the appellant/accused is shown as Rs. 10 lakhs and the

amount which her husband paid etc. is not also mentioned in Exts. P-4 and P-8 legal notices. On that basis, the Appellate Court came to the conclusion that it is very clear that actually P.W. 1 has not proved beyond doubt that she has given the said amount of Rs. 10,00,000 to the accused and hence Exts. P-1 and P-6 cheques were executed by the accused and issued in favour of the respondent. The finding recorded by the Lower Appellate Court is without appreciating the evidence and the facts and circumstances of the case in the right perspective. The complainant clearly stated that there was money transaction between herself, her husband and the accused for the period 1998-2001. She testified before the Court that the total amount of Rs. 17 lakhs payable was due from the accused and he had paid Rs. 7 lakhs. She deposed that the balance amount due is Rs. 10 lakhs and for discharging the debt the accused issued Exts. P-1 and P-6 cheques. This fact and the oral evidence tendered by P.W. 1 are not properly appreciated and in such a situation the conclusions arrived at by the Appellate Court is incorrect. The Lower Appellate Court also observed that the mere presence of signature or mere receipt or handing over the cheques cannot be presumed that negotiable instruments (cheque) in fact is executed by the drawer. He has no case that he has not written the words contained in the cheque, put his signature or handed over the same. Going by the evidence on record, it is admitted that he has executed the cheque. His only case is that he was caused to execute the cheques by force exerted by the police officer. He has no case that he had handed over a blank signed cheque to the complainant. Section 139 of the Act lays down that it shall be presumed that the holder of the cheque received the cheque of the nature stated in Section 138 of the Act for the discharge of a debt or liability. His only case is that Exts. P-1 and P-6 cheques were issued not for the purpose of discharging the legally enforceable debt. The relevance of Ext. D-1 document was also brushed aside stating that Ext. D-1 create some doubt regarding the real financial transaction in Exts. P-1 and P-6.

12. This case relates to dishonour of cheques in the year 2003. As limitation for filing civil suit expired long back, the appellant has also lost opportunity of recovering the amount by way of civil suit. The apparent intention is to ensure that not only the offender is punished but also ensure that the complainant invariably receives the amount of cheque by way of compensation u/s 357(1)(b) of the Code. In practice once the criminal complaint is lodged u/s 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque. This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such case is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonour of cheque u/s 357(1)(b) of the Code. The Apex Court in the decision reported in *R. Vijayan Vs. Baby and Another*, held:

As the provisions of Chapter XVII of the Act strongly lean towards grant of reimbursement of the loss by way of compensation, the court should, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine upto twice the cheque amount (keeping in view the cheque

amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate." Exts. P-1 and P-6 cheques are dated 6-6-2003. The amount is due from that date. Taking a practical and realistic view the accused shall compensate the complainant by making payment of Rs. 7,50,000 each.

13. I come to the conclusion that the finding of the trial court that the cheques were signed, executed and handed over by the accused to the complainant, that they were issued for the due discharge of a legally enforceable debt/liability and that the presumption u/s 139 of the N.I. Act has not been rebutted by the accused is eminently correct and the same do not warrant interference. On a reappraisal of the evidence on record and after hearing the parties, I am of the view that the impugned judgment passed by the Lower Appellate Court is legally and factually incorrect and therefore, liable to be set aside. I agree with the finding recorded by the trial court. The trial court convicted and sentenced the accused in C.C. No. 639/2003 and 640/2003 to undergo simple imprisonment for one year each and to pay a compensation of Rs. 5 lakhs each to the complainant u/s 357(3) Cr.P.C. and in default of payment of compensation to undergo simple imprisonment for a period of four months each as default sentence. Considering the facts and circumstances of the case and taking a lenient view, this Court is inclined to modify the sentence imposed by the trial court.

In the result, the appeal is allowed. The common judgment dated 23-9-2009 passed by the Additional Sessions Judge (Ad hoc) I, Kasaragod in Cri. Appeal Nos. 391/2007 and 392/2007 is set aside. The conviction passed by the trial court is confirmed. Accused in C.C. No. 639/2003 is convicted and sentenced to undergo simple imprisonment for a period of three months and to deposit before the trial court compensation amount of Rs. 7,50,000 (Rupees seven lakhs and fifty thousand) payable to the complainant u/s 357(3) Cr.P.C. and in default of payment of compensation he shall undergo simple imprisonment for a period of six months as default sentence. Accused in C.C. No. 640/2003 is convicted and sentenced to undergo simple imprisonment for a period of three months and to deposit before the trial court compensation amount of Rs. 7,50,000 (Rupees seven lakhs and fifty thousand) payable to the complainant u/s 357(3) Cr.P.C. and in default of payment of compensation he shall undergo simple imprisonment for a period of six months as default sentence. The accused is granted two months" time to deposit the compensation amount. The accused shall appear before the trial court on 2-9-2013 for undergoing the substantive sentence. The court below shall issue a revised committal warrant.

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