

(2007) 03 KL CK 0081

In the High Court Of Kerala

Case No : Criminal R.P. No's. 4487 and 3275 of 2006

Jose

APPELLANT

Vs

P.C. Joy

RESPONDENT

Date of Decision : 21-03-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 138, 357(3)
Evidence Act, 1872 — Section 101
Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 5, 6, 7

Citation : (2008) 3 ILR (Ker) 311 : (2008) 3 KLT 512

Hon'ble Judges : K. Hema, J

Bench : Single Bench

Advocate : R. Santhosh Babu, for the Appellant; Pirappancode V.S. Sudheer, for the Respondent

Judgement

K. Hema, J.—The revision petitioner was convicted and sentenced by the Magistrate court to undergo simple imprisonment for a period of 5 months for offence u/s 138 of the Negotiable Instruments Act, 1881 (for short "the Act"). The revision petitioner-accused was also directed to pay a sum of Rs. 1,50,000/- as compensation u/s 357(3) of Cr.P.C. and in default to undergo simple imprisonment for a period of 2 months.

2. In appeal, the conviction was confirmed by the Sessions Court but the sentence of 5 months was modified to simple imprisonment till rising of the court. The compensation was confirmed. The said conviction and sentence are challenged by the accused in Cr.R.P. No. 4487 of 2006. The complainant filed a revision (CrI.R.P. 3275/06) challenging the illegality of the sentence passed. Both these revisions are heard together and disposed of by this common judgment.

3. Facts briefly: (The parties will be referred to as complainant and accused, for convenience sake). The accused allegedly gave Ext. P1 cheque in discharge of a debt/liability which he owed towards the complainant. The cheque, on presentation, was dishonoured on the ground of insufficiency of fund. A notice

was sent demanding payment but no payment was made. He, however, sent a reply notice. After complying with the legal requirements complaint was filed alleging that the accused committed offence u/s 138 of the Act.

4. Evidence was adduced on both sides. The accused set up a case that he is a contractor and that he used to supply materials in a lorry owned by the complainant between the period 14-3-2000 to 24-6-2000. As a security, he had entrusted a blank cheque with the complainant. Though the liability was settled, as evidenced by Ext. D1 and D1(a), the cheque was not returned, inspite of requests. Therefore, a stop memo was issued to the bank by the petitioner. He also gave a criminal complaint against the complainant which was taken on file as C.M.P. 281/01 (Exts. D2 and D3). The accused does not owe any money to the complainant, but the blank cheque was misused by the complainant to foist a false case against him.

5. The Courts below, after consideration of the defence case found that it cannot be accepted. It was also held that, since the accused's case is not acceptable, the complainant's case is more probable. It was also held by learned Magistrate: "when the execution and issuance of Ext. P1 cheque stands proved, complainant is entitled to get the benefit of presumption as envisaged u/s 139 of the N.I. Act. By applying that presumption it can be seen that, Ext. P1 cheque was issued by the accused for discharging his legally enforceable liability towards the complainant". The lower appellate court concurred with the above findings and held the Magistrate "has appreciated the evidence in the correct perspective there is no reason to interfere with the conviction passed by the lower court".

6. After hearing both sides and on perusal of the records in this case, particularly judgments of the court below, I find that the courts below committed a serious illegality in finding that the prosecution case is more probable because the accused's version is not acceptable. In any criminal case, what the court has to primarily consider is whether prosecution has proved its case or not. The court is bound to look into all the materials available and both oral and documentary evidence adduced in the case and enter a finding whether all the ingredients of the offence are proved by the prosecution or not.

7. But, both the courts below analysed only the defence version and came to the conclusion that the accused failed to establish his case and hence, it was concluded that complainant's case is more probable. It is needless to say that the probability of the prosecution case does not depend upon the improbability or falsity of the defence case. It may not be proper to enter a finding that the prosecution case is true only because the defence case is untrue. Irrespective of the falsity or improbability of the defence case, the prosecution has to prove its case beyond reasonable doubt. What the court has to consider is whether the prosecution has proved all the ingredients of the offence or not and not whether the accused has failed to establish his case to come to a conclusion whether prosecution has established its case.

8. The failure on the part of the accused to establish his case will not automatically be a ground to hold that the prosecution has proved its case. Even the silence on the part of the accused cannot be made a ground to conclude that the prosecution succeeded in establishing its case, particularly, without examining the evidence adduced by the prosecution. In this direction, both the courts committed a clear illegality in violating all the well-settled principles of criminal law, and appreciation of evidence. Even the provisions contained in the Evidence Act are ignored. u/s 101 of the Evidence Act, the burden is on the prosecution to prove its case and such burden is not discharged by showing that the accused's case is improbable or false.

9. In a case involving offence u/s 138 of the Act, the court shall first consider, on the basis of the evidence all materials placed before court, whether the prosecution has proved that the cheque is drawn by the accused. In considering this question, it may be necessary to refer to the evidence adduced by the accused also, depending upon facts and circumstances of each case. But that does not mean that the burden shifts to the accused to prove that the cheque was not drawn by him. If the prosecution proves that the cheque was drawn by the accused, the court has to further consider whether such drawing was for the purpose of the discharge of any debt or liability. These two ingredients of the offence of Section 138 of the Act are inevitable factors to be established in a criminal prosecution for offence u/s 138 of the Act. But both the courts below did not even look into the evidence of PW1 to come to the conclusion whether his evidence at least refers to the fact that the cheque was drawn by the accused. On going through the evidence of PW1, the complaint and the chief affidavit, I find that there is no evidence to show that the cheque was "drawn" by the accused.

11. The expression "drawing" is not defined under the Act but the "drawer" is defined u/s 7 of the Act. The "drawer" is defined as the person who "makes" the cheque. "Make" means "prepare, create" etc. Therefore, the court has to consider whether there is evidence to show that the accused has "made" the cheque. That is, whether he has created or prepared the cheque. To prepare the cheque, he can certainly take the aid of another person to fill up the relevant details in the cheque especially if he is illiterate or if he is unable to prepare the same for some reason or due to any other justifiable reason. Thus, he may either prepare or create the cheque by himself or cause the relevant details in the cheque to be filled up by another person under his instructions. But, the cheque shall be signed by the drawer himself.

12. An instrument can be construed as a "cheque" only if such document satisfies the requirements u/s 5 read with Section 6 of the Act. A cheque has to be a bill of exchange which has to contain an order in writing and it shall be signed by the accused. The cheque thus, mainly consists of two parts: (1) the order in writing and (2) the signature of the drawer. A cheque which contains only the signature cannot be construed as a "cheque", though it is loosely

referred to as a "cheque". In law, it is only a blank cheque-leaf which contains the signature. So, on the facts and circumstances of each case, the court will have to examine whether the instrument involved is "cheque" as defined u/s 5 read with Section 6 of the Act or whether it was only a "blank cheque leaf containing the signature alone. Depending upon the facts and circumstances of each case, the court will have to decide whether it was only a blank cheque leaf, with or without the order in writing that was handed over to the complainant or some other person.

13. But, a reading of the first paragraph of the complaint and the Chief affidavit will go to show that the only allegation made in the complaint regarding drawing of the cheque is that "the cheque was written for an amount of Rs. 1,45,000/- with date 31-7-2001". There is no other averment that the payee's name was entered while the so-called cheque was handed over to complainant. Under what circumstances, the payee's name happened to be entered in Exhibit PI is not in evidence. Neither in the complaint nor in the evidence of PW1, the complainant stated whether there was any direction in the cheque handed over to him that Rs. 1,45,000/- was to paid to him. This omission in the evidence itself is enough to hold that the complainant failed to prove that the cheque was "drawn" by the accused as contemplated by the provisions in Sections 5 and 6 of the Act especially in the light of the specific contention raised by the accused that he had entrusted only a blank cheque.

13A. The mere production of the cheque, Exhibit PI does not prove by itself that the contents were either prepared by the accused or caused to be prepared by him. This is specially so, since the complainant only stated that the amount and date were written in the cheque and he omitted to state other details. It is only if the court is satisfied that a cheque was created or made as referred to in Section 5 read with Section 6 containing an order in writing that the court can hold that the cheque is drawn by the accused. A mere signature in the cheque or a writing of the amount or date in the cheque will not be sufficient for the court to conclude that the cheque is drawn by the accused in favour of the complainant.

14. No amount of discussion on the defence evidence, the flaws and latches on the part of the accused will make good, the failure on the part of PW1 to prove that the cheque was drawn by the accused. The mere production of a document will not prove that it was created, made or drawn by the accused. The production of the document will only prove the contents of the document, but not the truth of its contents or the fact it was created or made by the accused. The mere production of the cheque only proves the existence of the document and the fact that it contains certain things, but it will not further prove that the said document was executed by a particular person, in the absence of evidence to that effect. Whether the contents are filled up by the accused or caused to be filled by the accused or whether it is filled up by the complainant or caused to be filled by the complainant under instructions of accused himself or whether it was filled up by the complainant on his own accord without instructions from the accused etc. are

matters which may require consideration depending upon the facts and circumstances of each case, on the facts of this case, there is no evidence to infer, presume or conclude that the cheque was "drawn" by the accused. This is a clear case where the prosecution failed to prove that the accused had drawn a cheque as defined u/s 5 read with Section 6 of the Act.

15. On a perusal of the records and evidence, I do not find that this as a fit case where an opportunity is to be given to the complainant to establish his case. The lacuna is not something which can be allowed to be filled up, because such permission will result in miscarriage of justice. The case set up by the accused that he only handed over a blank cheque, to certain extent, has been probalised by the vital omissions in the complaint and in the evidence of PW1. Both the courts below have not considered whether the cheque was "drawn" by the accused as referred to in Section 5 read with Section 6 of the Act and whether there is evidence adduced by the prosecution to prove this fact. The accused is convicted for offence u/s 138 Cr.P.C. even in the absence of such a finding. This is clearly illegal.

16. Regarding the incurring of debt also, there is absolutely no satisfactory evidence. A bare statement is made in the complaint as well as in the chief examination that the cheque was entrusted for the discharge of an amount of Rs. 1,45,000/- which the accused owed to the complainant. None of the details are available before the court to come to the conclusion that such bare allegations are true. The defence has brought out in evidence that there was a transaction between the accused and the complainant and a suggestion made to the complainant that all the amounts which the accused owed to the complainant were paid was not denied by the complainant, while he was cross-examined. It is only in the re-examination that the complainant came forward with a new case that the amount was borrowed by the accused but even at that time it was not stated from where on what date it was borrowed etc.

16. Learned Counsel appearing for complaint vehemently contended that as per the dictum laid down in Goa Plast (P) Ltd. Vs. Chico Ursula D'Souza, it has to be presumed that the cheque is issued in discharge of any debt or liability. But, the above decision is to be read along with the decision of the three Judges bench of the Supreme Court in Hiten P. Dalal Vs. Bratindranath Banerjee, , wherein it is held that to draw a presumption the court must be satisfied that the basis for drawing the presumption are established. One of the requirements for drawing the presumption is that the "cheque" has to be of the nature stated in Section 138. That means, the cheque must be one "drawn" by the accused. Since drawing is not established, presumption u/s 139 cannot be drawn as one of the requirements u/s 139 is not proved in this case. All these aspects were considered in detailed in the decision reported in Kamalammal v. Mohanan 2006 (3) KLT 972 and hence, the complainant cannot take the aid of presumption u/s 139 of the Act, in the absence of proving that the cheque was drawn by the accused.

17. The court below has committed a grave illegality in holding that there is a presumption in favour of the complainant u/s 139 of the Act, since the execution is proved. Here, execution/drawing of the cheque itself is not proved. The presumption u/s 139 of the N.I. Act can be drawn only in favour of the "holder" of the cheque. The courts below went wrong in drawing the presumption u/s 139 in favour of the complainant even without considering whether the complainant is the "holder" as defined under the Act. As the title to Section 139 itself indicates presumption under the said provision can be drawn only in favour of "holder". These facts are discussed in detail in the judgment referred to in *Kamalammal v. Mohanan* 2006 (3) KLT 972 and *Gemini v. Chandran* 2007 (1) KHC 698.

18. In such circumstances, I find that the conviction and sentence passed against the revision petitioner in CrI.R.P. 4487 of 2006 are unsustainable and those are set aside. The accused is found not guilty of offence u/s 138 of the Act and he is acquitted of the said offence. He is set at liberty forthwith.

19. CrI.R.P. 4487 of 2006 is allowed. CrI.R.P. No. 3275 of 2006 is dismissed.