

(1995) 12 KL CK 0005
In the High Court Of Kerala
Case No : Criminal Appeal No. 643 of 1993

K.P. Sahadevan

APPELLANT

Vs

T.K. Sreedharan

RESPONDENT

Date of Decision : 08-12-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 29(2), 325, 357, 357(1)
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (1996) 1 CivCC 196 : (1996) CriLJ 1223 : (1996) 1 ILR (Ker) 816 :
(1996) 2 RCR(Criminal) 396

Hon'ble Judges : K.P. Balanarayana Marar, J

Bench : Single Bench

Advocate : M.K. Damodaran, for the Appellant; M.P. Ashok Kumar, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Pankajbhai Nagjibhai Patel Vs. The State of Gujarat and Another, AIR 2001 SC 567 : (2005) 3 BC 435 : (2001) 104 CompCas 418 : (2001) CriLJ 950 : (2001) 1 JT 523 : (2001) 1 SCALE 102 : (2001) 1 SCR 337 : (2001) 1 UJ 485 : (2001) AIRSCW 184 : (2001) 1 Supreme 124

K.P. Balanarayana Marar, J.—Appeal against acquittal. The complainant in C. C. 241/89 before Judicial First Class Magistrate, Kannur is the appellant.

2. The complaint was one u/s 142 of the Negotiable Instruments Act alleging commission of offence u/s 138 of the Act. The complainant is the President of the Kannur District Motor Engineering Metal Workers Union. The accused was the proprietor of T. K. Automobiles and General Engineering Service and two other concerns. His factory was closed with effect from 3-9-1987. In pursuance to conciliation proceedings initiated by District Labour Officer, Kannur the disputes between the management and the union were settled and a sum of Rs. 1,50,583/- was agreed to be paid to the workers. The amount was not paid as

agreed. Since then a sum of Rs. 29,700/- was paid. Towards the balance a cheque for Rs. 1,17,000/- was issued which when presented in the bank was returned with the endorsement "refer to the drawer". Notice under proviso (b) to Section 138 was sent by the complainant. The accused received that notice, but did not send any reply. Hence the complaint.

3. The accused pleaded not guilty to the charge. The Magistrate found him guilty, convicted him and sentenced him to pay a fine of Rs. 1,57,000/- and in default to undergo R. I. for a period of one year. Out of the fine if realised a sum of Rs. 1,17,000/- was directed to be paid to the complainant as the amount due under the cheque and the balance of Rs. 40,000/- as compensation u/s 357 Criminal Procedure Code. On appeal, Sessions Court, Thalassery set aside the conviction and sentence and acquitted the accused. Hence this appeal after obtaining special leave.

4. Heard counsel on both sides.

5. The two reasons given by the learned Sessions Judge for entering a verdict of acquittal are; (1) The cheque has not been proved to have been returned for insufficiency of funds. (2) The First Class Magistrate has no authority to impose fine exceeding Rs. 5,000/-.

6. The Manager of the Bank was not examined to speak about the insufficiency of amount in the account of the accused. The cheque was dishonoured with the endorsement "refer to the drawer". A Division Bench of this Court in *Thomas Varghese v. Jerome* 1992 (1) KLT 812 held that endorsements like "refer to drawer", "account closed", "payment has been stopped" etc. made by the banker at the time of the return of the cheque are having the effect of proving that the cheque has been bounced. It is observed that if the bouncing of the cheque was on account of insufficiency of funds belonging to the drawer then the drawer will be subjecting himself to proceedings u/s 138 of the Act. The complainant is the President of an Employee Union and the amount covered by the cheque represents retrenchment compensation payable to them as per a conciliation agreement. The accused has no case that he was having sufficient funds in the bank on the date on which the cheque was presented. The complainant has not summoned the Bank Manager to prove that the drawer was not having sufficient funds in the bank. That the cheque was returned with endorsement "refer to the drawer" is not disputed. The burden is on the complainant to show that the cheque was returned either for insufficiency of fund or that the amount exceeds the amount arranged to be paid. Since the amount covered by the cheque is due to the workers by way of retrenchment compensation I am of the view that an opportunity has to be given to the complainant to summon the Bank Manager to prove the insufficiency of funds in the account on the date on which the cheque was presented.

7. The other reason given by the Court below is the incompetency of the Magistrate to impose fine exceeding Rs. 5000/- by virtue of the powers conferred

on a Magistrate of First Class u/s 29(2) of the Code of Criminal Procedure. In meeting this contention learned counsel for the appellant draws attention to the non obstante clause contained in Section 142 of the Negotiable Instruments Act. That section enables a payee to file a complaint before a Court of Metropolitan Magistrate or Judicial Magistrate of the First Class as the case may be. This power is conferred on the Magistrate notwithstanding anything contained in the Code of Criminal Procedure. Section 138 of the Act makes the offence under that section punishable with imprisonment for a term which may extend to one year or with fine which may extend to twice the amount of the cheque or with both. The Legislature was therefore aware of the necessity of awarding fine in excess of Rs. 5000/- while conferring powers on a Judicial Magistrate of First Class to take cognizance of the offence u/s 138 of the Act. Specific powers had therefore been conferred on a Magistrate of the First Class u/s 142 to impose fine exceeding Rs. 5000/-. Though this aspect has not been decided in so many words a learned Judge of this Court had incidentally referred to this aspect in *Mrs. Jaya Baby Vs. K.K. Vijayan and Another*, . It is observed therein that there is no merit in the contention that the complainant would be put to handicap due to want of powers for the Magistrate to impose a fine amount more than rupees five thousand. It is also observed that if such Magistrate is of the opinion that a more severe sentence is warranted he can resort to the steps envisaged in Section 325 of the Criminal Procedure Code. It is stated that even without resorting to such steps, a Magistrate can alleviate a complainant's grievance by resort to Section 357(1) of the Procedure Code.

8. The Madras High Court had occasion to consider this aspect in *Prabhakar v. Naresh Kumar N. Shah* 1994 MLJ Cri 91. Interpreting Section 142 of the Negotiable Instruments Act in the light of Section 29(2) Cr. P. C. it was held that Section 29(2) Cr. P. C. is not applicable in view of the primary clause in Section 142, viz. notwithstanding anything contained in the Code of Criminal Procedure. Agreeing with the view of the Madras High Court I hold that the Magistrate of the First Class is empowered to impose a fine exceeding Rs. 5000/- for offence u/s 138 of the Negotiable Instruments Act.

9. For the aforesaid reasons the appeal is allowed and the order of acquittal is set aside. C. C. 241/89 before Judicial First Class Magistrate, Kannur is sent back to the Magistrate for fresh consideration in the light of the observations contained in this judgment. The Magistrate shall give sufficient opportunity to complainant to summon the Bank Manager for proving that the cheque was returned dishonoured for insufficiency of funds. After examining the Manager the Magistrate shall decide the case afresh on the basis of such evidence and the other evidence already available on record. It is made clear that the additional evidence to be adduced is only the evidence of the Bank Manager and documents in connection with the return of the cheque by the bank. Neither party will be entitled to adduce any other evidence. The parties shall appear before Judicial First Class Magistrate Kannur on 8-1-1996.