
(1991) 07 KL CK 0053

In the High Court Of Kerala

Case No : Original Petition No. 5605 of 1991-P

K.S. Anto

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-07-1991

Acts Referred:

Constitution of India, 1950 — Article 20(2)
Negotiable Instruments Act, 1881 (NI) — Section 138, 140, 142
Penal Code, 1860 (IPC) — Section 420

Citation : (1993) 76 CompCas 105 : (1991) 3 ILR (Ker) 529 : (1991) 2 KLJ 193

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : Chakkappan Kalliath, for the Appellant;

Final Decision : Dismissed

Judgement

S. Padmanabhan, J.—The petitioner is the accused in two criminal cases instituted on private complaints filed by the third respondent before the fourth respondent for offences punishable u/s 138 of the Negotiable Instruments Act, 1881.

2. In this original petition, he wants Sections 138 and 142 of the Negotiable Instruments Act declared unconstitutional and the fourth respondent prohibited from going ahead with trial of the cases.

3. In support of his case that Sections 138 and 142 of the Act are unconstitutional, the following facts were placed before me. u/s 140, even the absence of reasonable belief that the cheque will be dishonoured on presentation will not be a defence in a prosecution u/s 138. Making an act done without mens rea, an offence, is illegal and arbitrary. A combined reading of Sections 138 and 142 shows that the date of commission of the offence cannot be ascertained. According to him, at any rate, a post-dated cheque cannot come u/s 138. A cheque drawn for the discharge of a legally enforceable liability alone could form the subject-matter of an offence punishable u/s 138. The Magistrate

who is empowered to try the offence will not be competent to decide whether the cheque was drawn for the discharge of a legally enforceable debt or other liability and it will have to be decided by a competent civil court. Therefore, the penal provision is unworkable. The section is violative of Article 20(2) of the Constitution, because the same offence is punishable u/s 420 of the Indian Penal Code also.

4. In my opinion, these are all wrong and imaginary assumptions. Section 138 was introduced with a laudable public policy behind it. It is intended to prevent or curtail a mischief which is likely to affect financial transactions and thereby trade and business and ultimately, the economy of the country. Even though the normal rule is that an act or illegal omission, in order to constitute an offence, must have the requisite mental condition in the form of intention, knowledge or reasonable belief, that prerequisite could be statutorily dispensed with in appropriate cases by creating strict liability offences in the interest of the nation, just like offences under the Prevention of Food Adulteration Act. Further, there is no point in contending that mens rea is not required for constituting an offence punishable u/s 138. What is made an offence is not the drawing of a cheque alone. It must have been drawn in discharge, in whole or in part, of a legally enforceable debt or other liability. It must have been duly presented in time and dishonoured for the reasons specified. Then there must be a written demand for the amount within a specified time, followed by failure to make payment within another specified time. It becomes an offence only on such failure which is an illegal omission, made with requisite mens rea. This aspect is also an answer to the contention of the petitioner that the date of commission of the offence cannot be ascertained. Whether the cheque is post-dated or not is immaterial. It becomes an offence only after the expiry of fifteen days from the date of written demand, if the amount is not paid on that date. The date of commission of the offence could be ascertained with accuracy. The cause of action for filing a complaint u/s 138 arises only on that date and a complaint will have to be filed within one month from the date on which the cause of action arose, as provided in Section 142(b). It is the duty of the person, who draws the cheque in discharge of a legally enforceable debt or other liability, to provide funds in the account to honour the cheque. There is nothing arbitrary or unconstitutional in Section 140, because a person who drew the cheque without reason to believe that it may be dishonoured on presentation can avoid liability by making payment on demand in writing. One who is not having such a capacity should not issue a cheque. The possibility of a stolen cheque being made the subject of a complaint need not be considered because that is only an imaginary possibility and it is a matter of proof, depending upon facts.

5. Section 142(c) invests certain Magistrates with the power of trying offences punishable u/s 138. When power is given to try an offence, it includes the power to convict or acquit and, in case of conviction, to exercise the sentencing discretion also to award an appropriate sentence, allowed by law. In order to convict an accused, the court must find him guilty. For the purpose of entering

conviction or acquittal, the Magistrate must get himself satisfied of the ingredients of the offence.

6. Power to try and convict includes the power to decide existence of the ingredients necessary to constitute the offence. One of the ingredients to be found is as to whether the cheque was drawn in discharge, in whole or in part of any legally enforceable debt or other liability. If that question arises in a civil suit, it could be said that it could be decided only by that civil court. In a criminal prosecution, that question will arise only collaterally for the purpose of deciding criminal liability. The Magistrate himself can decide it for the purpose of the criminal trial and conviction. He is not deciding that matter to decree a suit for money due under the cheque. His finding may not be binding on a civil court. Still, for the purpose of conviction, he himself can decide that matter. Without deciding that matter, he cannot enter conviction. Power to convict includes the power to decide anything necessary for that purpose. As apprehended by the petitioner, after taking cognizance, he need not refer the question of drawing of the cheque in discharge of a legally enforceable debt or other liability to a competent civil court and await its decision to proceed with the trial. Such an absurd contingency could never have been contemplated by the Legislature.

7. There is also no point in the contention of the petitioner that the punishment is disproportionate or that the provisions of Article 20 of the Constitution are violated. The bar under Article 20(2) that no person shall be prosecuted and punished for same offence more than once cannot be said to be violated by Section 138. The same act or omission may be capable of constituting more than one offence under different provisions. That is no reason to say that Article 20(2) is offended. What is barred under Article 20(2) is only a second prosecution and conviction for the same offence. In other words, what is prohibited is double jeopardy which is provided in Section 300 of the Code of Criminal Procedure also. Offences u/s 138 of the Negotiable Instruments Act and Section 420 of the Indian Penal Code are different and the ingredients are also different. Conviction for different offences separately is not barred under Article 20(2). In spite of prosecution and conviction u/s 138, there will be no constitutional bar on prosecution for an offence punishable u/s 420 of the Indian Penal Code and a prosecution will lie, if such an offence is made out.

8. The object behind this petition is only to escape the ordeal of criminal trial under some pretext or other. There is no merit in the petition and it is hereby dismissed. No costs.