
(2014) 12 KL CK 0116
In the High Court Of Kerala
Case No : Crl. Rev. Pet. No. 2339 of 2010 (B)

Mary Thomas

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 04-12-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 357(3)
Evidence Act, 1872 — Section 5
Negotiable Instruments Act, 1881 (NI) — Section 118(a), 138, 139

Citation : (2014) 12 KL CK 0116

Hon'ble Judges : K. Harilal, J

Bench : Single Bench

Advocate : P. Vijaya Bhanu, Sr. Advocate and P.M. Rafiq, Advocate for the Appellant; Abhijett Lessli, Public Prosecutor, Advocate for the Respondent

Judgement

K. Harilal, J.—The above Criminal Revision Petition is filed against the conviction entered and the sentence imposed on the revision petitioner in S.T. No. 4611/2006 on the files of the Judicial Magistrate of the First Class-III, Palakkad, which was confirmed by the judgment in Crl. Appeal No. 788/08 on the files of the Court of Session, Palakkad Division. The revision petitioner was prosecuted for the offence punishable under Sec. 138 of the Negotiable Instruments Act, 1881 (for short "the N.I. Act") on a complaint filed by the 2nd respondent herein. After trial, he was convicted for the said offence and sentenced to pay a fine of Rs. 2,50,000/- and in default, to undergo simple imprisonment for a period of three months. If the fine amount is realised, it will be given to the complainant/2nd respondent. The legality and propriety of the concurrent findings of conviction entered and the sentence imposed on the revision petitioner is under challenge in this revision petition.

2. The complainant's/2nd respondent's case is that the revision petitioner had borrowed a sum of Rs. 2,50,000/- from him on 21/8/2006 and in discharge of that debt, the revision petitioner had issued a cheque on 4/9/2006 for Rs. 2,50,000/- to the 2nd respondent/complainant. When the cheque was presented

for encashment in the Bank, the same was dishonoured and returned by the Bank with an endorsement "funds insufficient". Though he had caused to issue a lawyer's notice, the revision petitioner did not pay the cheque amount; but sent a reply stating false contentions.

3. The revision petitioner has not adduced any evidence either documentary or oral. But, when he was questioned under Sec. 313 of the Cr.P.C., she stated that a cheque was given to one P.A. Noushad in 2002 and the present case was filed misusing the cheque which was given to the said Noushad and he has no acquaintance with the 2nd respondent. The suggestion put by the defence to P.W.1 was that the cheque which was obtained by Noushad for business purpose was misused. P.W.1 had denied the said suggestion.

4. After considering the oral evidence of the 2nd respondent and Exts. P1 to P6, the trial court found that the 2nd respondent has successfully discharged the initial burden of proving the execution and issuance of the cheque and thereby the presumption under Secs. 118(a) and 139 of the N.I. Act would stand in favour of the 2nd respondent. I do not find any kind of perversity in the appreciation of evidence from which the court found as above. What remains to be considered is whether the revision petitioner had rebutted the said presumption under Secs. 118(a) and 139 of the N.I. Act which stood in favour of the 2nd respondent.

5. Going by the judgment passed by the appellate court, it could be seen that the learned Sessions Judge has re-appreciated the entire evidence on record and observed that though the revision petitioner contended that Ext. P1 cheque was the cheque which was issued to said Noushad, in defence, he has not stated how the cheque issued to the person named Noushad reached at the hands of P.W.1. The evidence of P.W.1 shows that he does not have acquaintance with the person named Noushad. There is no reliable evidence showing that the 2nd respondent under the influence of a person named Noushad filed a false complaint for and on behalf of the said Noushad. So also, there is nothing on record to show that P.W.1 had any ill-will, grudge and oblique motive against the revision petitioner and out of which he filed a false complaint against the revision petitioner. Even in this revision petition the learned counsel for the revision petitioner is unable to show any material, which would indicate anything contrary to the above observation. So, I am inclined to hold that there is no perversity in the appreciation of evidence and there is no illegality in the finding that the revision petitioner has miserably failed to rebut the presumption under Secs. 118(a) and 139 of the N.I. Act which stood in favour of the 2nd respondent.

6. In this revision petition also the revision petitioner filed CrI.M.A. No. 8323/10 with a prayer to accept Annexures-A to E in evidence. In the affidavit accompanying the petition, it is stated that though the revision petitioner contended that the 2nd respondent has no source of income so as to lend Rs. 2,50,000/- to the revision petitioner and when the 2nd respondent was examined as P.W.1, he deposed that he had sold away the landed property in 2006 and

raised the amount for lending money. But, at that time, despite his earnest efforts to obtain the relevant documents which would show that no such sale was effected in the year November 2006 by the 2nd respondent, she could not obtain the same before closing the evidence. But now she has obtained a certificate showing the list of documents executed by him in favour of person in the Sub Registrar Office, Palakkad, during the period from 1/11/2006 to 30/11/2006 and the said documents do not show that the 2nd respondent has sold away his landed property so as to raise Rs. 2,50,000/-. The learned counsel for the revision petitioner advanced arguments in support of the averments in the revision.

7. Per contra, the learned counsel for the respondent drew my attention to the oral evidence of P.W.1 while cross-examining him and pointed out that P.W.1 has deposed that he is a real estate broker and he obtained the required fund in one transaction during the course of his business and did not claim that he sold away his own property and raised the amount given to the revision petitioner. In the absence of such an admission that the sale in which he got the money was not that the sale of his own property, even if these documents are admitted, they do not improve the case of the revision petitioner. The legal position well settled by the Apex Court, as regards the source of fund, in a prosecution under Section 138 of the N.I. Act is that it is not obligatory on the part of the complainant that he must prove his source of income. The admission of signature and issuance of the cheque leaf goes long way to prove the execution and issuance of the cheque unless the contrary is proved by preponderance of probability. Therefore the source of funds is neither a fact in issue nor a relevant fact. Under Section 5 of the Indian Evidence Act, evidence can be let in to prove the fact in issue or a relevant fact only. On an analysis of the contentions raised by both parties, firstly I am of the opinion that source of funds is not a relevant fact in the instant case. Secondly, as rightly submitted by the learned counsel for the respondent, he has not admitted that the property which he sold away in November 2000 belongs to him. Therefore, even if these documents are taken in evidence, the contents of the documents do not improve the case of the revision petitioner. Thirdly, these are the documents which required to be tested and proved during the course of trial in accordance with the provisions of the Indian Evidence Act. In short, the documents which are produced by the petitioner cannot be admitted in evidence in the exercise of revisional jurisdiction. Therefore, I dismiss I.A. No. 8323/10 filed by the revision petitioner. Hence the conviction and sentence imposed on the revision petitioner will stand confirmed.

8. The learned counsel for the revision petitioner urged for six months time to pay fine amount. He further submits that the revision petitioner is suffering from financial crisis and she is ready and willing to pay the fine within six months.

9. The Supreme Court, in the decision in Kaushalya Devi Massand Vs. Roopkishore Khore, , held that the offence under Section 138 of the N.I. Act is almost in the nature of civil wrong which has been given criminal overtone, and

imposition of fine payable as compensation is sufficient to meet the ends of justice. Further, in R. Vijayan Vs. Baby and Another, , Supreme Court held that the direction to pay the compensation by way of restitution in regard to the loss on account of the dishonour of the cheque should be practical and realistic. So, in a prosecution under Section 138 of the N.I. Act, the compensatory aspect of remedy should be given much priority over punitive aspect.

10. In the light of the legal position settled by the Apex Court, as regards the sentencing policy in a proceedings under Section 138 of the N.I. Act, I am of the opinion that a reasonable time can be given to the revision petitioner to pay the fine amount which would be payable to the 2nd respondent as compensation. Hence this revision petition will stand disposed of with the following terms:

"(1) The revision petitioner shall pay the fine amount within a period of five months from today and the same shall be given to the complainant/2nd respondent as compensation under Section 357(3) of the Cr.P.C.

(2) If she has deposited any amount towards the fine in compliance with the interim order of this Court dtd. 17/9/2010, the said amount shall be given credit to and the balance alone needs to be paid as fine. In that event, the 2nd respondent/complainant is allowed to realise the said amount, if deposited, forthwith and the balance can be realised as and when the revision petitioner deposits within the said period of five months or realised."

This Revision Petition is disposed accordingly.