
(2005) 02 KL CK 0064

In the High Court Of Kerala

Case No : Criminal R.P. No. 618 of 2004

M/s. Target Overseas Exports Pvt. Ltd. and Others

APPELLANT

Vs

A.M. Iqbal and Others

RESPONDENT

Date of Decision : 14-02-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 357(3), 446
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 7
Penal Code, 1860 (IPC) — Section 11

Citation : (2005) 3 BC 152 : (2005) 2 CivCC 86 : (2005) 127 CompCas 264 :
(2005) CriLJ 1931 : (2005) 1 ILR (Ker) 807 : (2005) 1 KLJ 679 : (2005) 2 KLT
45 : (2005) 3 RCR(Criminal) 773

Hon'ble Judges : R. Basant, J

Bench : Single Bench

Advocate : Varghese C. Kuriakose, Jacob Sebastian and Praveen K. Joy, for the
Appellant; Noorji Naushad and K.I. Abdul Rasheed (G.P.), for the Respondent

Judgement

R. Basant, J.—Is a person facing indictment under Sec. 141 of the N.I. Act entitled to notice under proviso (b) to Sec. 138 of the N.I. Act? This is the question of law of importance raised in this case. The revision is directed against the concurrent verdict of guilty, conviction and sentence in a prosecution under Sec. 138 of the N.I. Act. The complainant alleged that the 1st accused company, to discharge a legally enforceable debt/liability to him, had issued Ext. P1 cheque for an amount of Rs. 1,78,000/- the cheque was signed jointly by the 2nd accused, its Managing Director and the 3rd accused, another Director. The cheque, when presented for encashment, was dishonoured on the ground of "insufficiency of funds". Thereupon, Ext. P5 notice of demand was issued to all the three accused. Notices issued to the 1st and 2nd accused were returned unserved. Notice issued to the 3rd accused was allegedly served on him and acknowledged under Ext. P8. There was no reply. No payment was forthcoming. It was, in these circumstances, that the complainant came to court with the complaint under Sec. 138 of the N.I. Act.

2. PW. 1 was examined and Exts.P1 to P10 were marked by the complainant. The accused denied the offence alleged against them. They raised various contentions. It was contended that the cheque was not issued for the due discharge of any legally enforceable debt/liability. Signature of the 2nd accused in the cheque was disputed. It was further contended that the 2nd accused is "K.J. Joseph" as shown in the complaint and not "Savio Joseph" in whose name notice of demand - Ext.P5 was allegedly issued. It was further contended that there was no proper service of notice on accused Nos. 1 and 2. With the help of Ext.P8, it was contended that notice was not served on the 3rd accused as alleged. The 1st accused took up a plea of alibi. D.Ws. 1 to 4 were examined on the side of the accused. The accused relied on Exts.D1 to D3. D.W.1 is one Beckkar referred to in Ext.D1 letter. It is the case of the accused that the cheque was received by the complainant under Ext.D1 and not in the circumstances spoken to by P.W.1. D.W.3 is the 2nd accused. D.Ws. 2 and 4 were examined and Exts.D2 and D3 were marked by the defence in an attempt to contend that D.W.2 was not available in Kerala on the date when the cheque was allegedly handed over to P.W.1, he having allegedly gone to Assam in connection with his business.

3. The courts below concurrently came to the conclusion that all the ingredients of the offence punishable under Secs.138 and 141 of the N.I. Act have been established. Accordingly, they proceeded to pass the impugned concurrent judgments.

4. Arguments have been advanced before me by the learned counsel for the rival contestants. The learned counsel for the petitioners assailed the impugned judgments on various grounds.

5. Before proceedings to consider the grounds of challenge, I must alertly remind myself that the jurisdiction sought to be invoked is the one in revision. It is by now trite that a court of revision should not interfere with the concurrent findings of fact unless such findings are grossly erroneous and result in miscarriage of justice. Thus, after reminding myself of the nature and contours of my jurisdiction in revision, the contentions raised shall be considered.

6. It is first of all contended that the cheque is not issued for the due discharge of any legally enforceable debt/liability. Even going by the case of the accused, this contention cannot succeed. They have relied on Ext.D1 which clearly shows that D.W.1 had handed over the cheque in question to the complainant - P.W.1. D.W.1 is admittedly a person who acts as an agent of the 1st accused company. Ext.D1 shows that the cheque was issued by the company and acknowledged by P.W. 1 as one issued for the due discharge of a liability which D.W.1 owed to the complainant. Even assuming that there is an incongruity between the version pleaded by the complainant in the complaint/notice and in the defence advanced by the accused with the help of Ext.D1, the conclusion appears to be irresistible that Ext.P1 cheque was issued to P.W.1 for the due discharge of a legally enforceable debt/liability. The revisional jurisdiction cannot be invoked to interfere with such a finding of fact.

7. Secondly, it is contended that the cheque is not signed by the 2nd accused. That he is competent to sign the cheque on behalf of the 1st accused - company is not disputed. That the 3rd accused is another Director competent to sign the cheque and operate the account is also not disputed. That the 3rd accused has signed the cheque is clearly admitted. That the cheque was handed over by D.W.1 to P.W.1 on behalf of the company under intimation to the company as indicated in Ext.D1 is also conclusively established. The memo of dishonour clearly shows that the signature of the 2nd accused appearing in the cheque does not tally with the specimen signature. There is no serious or worthwhile attempt to deny and dispute the signature appearing Ext.P1 cheque as that of the 2nd accused. In these circumstances, the apology of a contention raised that the 2nd accused has not signed the cheque cannot obviously succeed. Less said about the plea of alibi, the better. The mere interested oral testimony of D.W.2 and his employees are not sufficient to discharge the burden on the accused to prove alibi.

8. It is next contended that the 2nd accused is "K.J. Joseph" and not "Savio Joseph" to whom notice is seen to have been issued as per notice Ext.P5. The complainant has taken a stand that the 2nd accused is "K.J. Joseph alias Savio Joseph", Managing Director of the 1st accused company. The 2nd accused has no contention that he is not the Managing Director of the company. The only dispute is whether he has an alias name i.e., "Savio Joseph". I find absolutely no difficulty to accept the evidence of P.W.1 that the 2nd accused is known by the name "Savio Joseph" also. In the complaint, it is made clear that the 2nd accused is K.J. Joseph @ Savio Joseph. There is no contention for any of the accused that 2nd accused is not the Managing Director of the company. In these circumstances, the innocuous difference in the description of the name of the Managing Director in Ext.P5 notice cannot deliver any advantage to the accused. That notice is admittedly issued to the named Managing Director of the company. The challenge raised, on the basis of the difference in the name of the 2nd accused, cannot also succeed.

9. It is then contended that no proper notice of demand has been issued to 1st, 2nd and 3rd accused. Ext.P5 notice would suggest that notices were all issued in the name of the respective accused at the address of the company at "Keralapuram Buildings, Kottayam". Ext.P9 is the extract of the account maintained by the 1st accused with the bank. The address of the 1st accused shown in Ext.P9 is also "Keralapuram Buildings, Kottayam". In these circumstances, the contention that the notice issue to all the three accused is bad for the reason that it shows the address at "Keralapuram Buildings, Kottayam" cannot succeed at all. Of these, notices addressed to 1st and 2nd accused were returned unreserved and they are marked as Ext.P7 series. From Ext.P7 series, it is seen that the said notices were re-directed to another address where also it was not received. There is no contention that the address shown on Ext.P7 series is in any way incorrect. The 2nd accused when examined as D.W.3 did not raise such a specific contention. I am, in these circumstances, satisfied

that there is no merit in the contention that notice issued to 1st and 2nd accused is defective on the ground of the address being incorrect.

10. So far as the 3rd accused is concerned, we have Ext.P8 acknowledgment to show that notice was actually served on the 3rd accused. But a perusal of the address shown in Ext.P8 indicates that the address of the 3rd accused shown therein is not the address of the 3rd accused shown in Ext.P5 notice. Much is attempted to be made out of this incongruity. I take note of the same. The theoretical possibility of Ext.P8 having been issued to acknowledge some other notice cannot be ruled out. But that does not impress me as a practical probability. Only a practical probability and not a fanciful possibility can succeed in generating a reasonable doubt in the mind of the court. No such doubt is generated on the facts of this case. Regarding service of notice to the 3rd accused, the 3rd accused has no specific case that he received any notice other than Ext.P5 notice under Ext.P8. Ext.P8 shows that the said acknowledgment was for a postal article received from the counsel who issued Ext.P5. Third accused could easily have produced the said letter which he allegedly received under Ext.P8 to support his attempt to generate a reasonable doubt in the mind of the court. That having not been done, the present attempt appears to be only a vague one without conviction to pick holes in the case of the complainant.

11. It is in this context that the question of law becomes relevant. Even assuming that notice was not issued to accused Nos. 2 and 3, can the conviction be sustained? Can it be said that not only the drawer but also persons who face indictment with the help of Sec. 141 of the N.I. Act are entitled to notice under the second proviso to Sec. 138 of the N.I. Act? Counsel were requested to research whether binding or persuasive precedents are there. They submit that no binding precedents on this specific aspect is there. The other precedents cited at the Bar shall be dealt with later. No other precedents are brought to my notice. I shall now proceed to consider this question of law.

12. I extract below Sec. 138 of the N.I. Act:

138. Dishonour of cheque for insufficiency, etc., of funds in the account.--Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months

from the date on which it is drawn or within the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

(emphasis supplied)

13. The expression "drawer" of the cheque is defined in Sec. 7 of the N.I. Act in the following words:

7. "Drawer".-- The maker of a bill of exchange or cheque is called the "drawer".

Under Sec. 138 of the N.I. Act, the person who has drawn the cheque must be deemed to be the drawer of the cheque. The expression "person" is not defined in the N.I. Act; but is defined in Sec. 11 of the IPC in the following words:

11. "Person",- The word "person" includes any Company or Association or body of person, whether incorporated or not.

14. It is, thus, evident that a natural person, an incorporated person or even an unincorporated association or body, of person like a partnership can be a person under Sec. 11 IPC. Consequently, such entity can be a person under the body of Sec. 138 of the N.I. Act. The "drawer", under Sec. 7 of the N.I. Act can, therefore, be undoubtedly a natural person or an incorporated person or a body of persons whether incorporated or not. In the instant case, the drawer of the cheque is the company - a juristic deemed person. The 1st accused - company is, thus, the drawer - the person who has drawn the cheque.

15. Who is entitled to notice under proviso (b) to Sec. 138 of the N.I. Act? The language of proviso (b) makes it very clear that notice in writing is to be given within thirty days "to the drawer of the cheque". I have already noted that the drawer of the cheque in the instant case is the company - the 1st accused. The second or third accused who have signed the cheque on behalf of the company are not the drawers. They are only persons who have signed the cheque on behalf of the company. The company - the 1st accused is the drawer. Accused 2 and 3 are not the drawers. They are only persons who have signed the cheque on behalf of the drawer by virtue of authority vested in them.

16. Going by the language of proviso (b) to Sec. 138 of the N.I. Act, the person entitled to notice is the drawer and not the persons who have signed the cheque on behalf of the drawer. The purpose of notice must also be borne in mind. Notice is not an empty ritualistic formality. The drawer of the cheque must be

given an opportunity to reverse the effect of dishonour within the specified period. Such notice by its very purpose need be given only to the drawer and not those who do acts on behalf of such drawer. In these circumstances, it appears to me to be evident that only the 1st accused - company and not accused 2 and 3, the signatories/Directors are entitled to notice under proviso (b) to Sec. 138 of the N.I. Act.

17. Accused 2 and 3 face indictment not primarily under Sec. 138 of the N.I. Act. They face indictment because 1st accused has committed the offence under Sec. 138 of the N.I. Act and they happen to be persons in charge and responsible to the company for the conduct of its affairs. Thus, primarily accused 2 and 3 are the persons in charge and they face indictment only under sec. 141 of the N.I. Act. The language of Sec. 141 of the N.I. Act does not at all indicate, suggest or help the court to conclude that such persons who face indictment under Sec. 141 of the N.I. Act are entitled to notice under proviso (b) to sec. 138 of the N.I. Act. Such a stipulation is not there at all under Sec. 141 of the N.I. Act. That would be reading into Sec. 141 of the N.I. Act something which is not there at all. The legislature appears to have cautiously avoided such insistence.

18. Thus, going by the language of Secs. 138 and 141 of the N.I. Act and considering the purpose of notice under proviso (b) to Sec. 138 it follows that accused 2 and 3 who face prosecution under Sec. 141 of the N.I. Act are not entitled to any notice under proviso (b) to Sec. 138 of the N.I. Act.

19. Having come to such conclusion on the basis of first principles and analysis of the statutory provision, we now have to look for precedents, if any. I take note of the fact that a Division Bench of the Calcutta High Court in Dilip Kumar Jaiswal Vs. Debapriya Banerjee, and a single Bench of the Andhra Pradesh High Court in the decision reported in Suraj Theatre, a partnership firm by Suraj Theatre and Others Vs. Kakarla Bhorathe and Another, have taken the same view. However, a single Bench of the Punjab and Haryana High Court appears to have taken a different view in M. Raja Mohammed and another Vs. Food Inspector, Palghat Municipality, . I have gone through the reasons that weighed with the courts as revealed from the decisions cited above. I take note of the fact that the Punjab and Haryana High Court had not considered the language of Secs. 138 and 141 of the N.I. Act specifically. Nor is the purpose of notice under Sec. 138 of the N.I. Act seen considered in that decision. At any rate, I respectfully disagree with the said view accepted by the Punjab and Haryana High Court, I am of opinion that the decisions of the Calcutta and the Andhra Pradesh High Courts referred above lay down the position of law correctly.

20. The learned counsel for the petitioner relies on the decision of the Supreme Court reported in Rajneesh Aggarwal Vs. Amit J. Bhalla, . The fact situation in that case was totally different and the Supreme Court in the said decision was not called upon to consider the question of law raised in this case. That was a case where a company was the drawer of the cheque. Instead of issuing notice to the company, the complainant issued notice only to the Director who was the

signatory to the cheque and the complainant in that case chose to prosecute only the Director and not the company. The Director in that case raised a defence that notice having not been given to the company, there is infraction of the mandate in proviso (b) of Sec. 138 of the N.I. Act and the prosecution must, therefore, fail. It is in that context that the Supreme Court held that notice to the Director was sufficient and prosecution of the Director was perfectly justified even in the absence of notice to and indictment of the company. The Supreme Court in the said decision has considered the purpose of the notice - under Sec. 138 of the N.I. Act which is to notify the drawer of the cheque of the dishonour of the cheque issued by him and give him time to cure his indiscretion of not having placed funds at the disposal of the bank. The said decision cannot, in any way, be reckoned as authority for the proposition that persons facing prosecution under Sec. 141 of the N.I. Act must also be issued notice of demand under the proviso (b) to Sec. 138 of the N.I. Act in addition to the notice issued to the company.

21. I am, in these circumstances, of the view that the question of law has to be answered in favour of the complainant. I hold that where notice has been issued to the company, the drawer, the persons facing indictment with the help of Sec. 141 are not entitled to insist on separate notices to them.

22. Coming to the question of sentence, I have already adverted to the principles governing the imposition of sentence in a prosecution under Sec. 138 of the N.I. Act in the decision reported in Anilkumar Vs. Shammy, . I am satisfied that, in the facts and circumstances of this case, it is not necessary to insist on imposition of any deterrent substantive sentence of imprisonment on the petitioners. Leniency can be shown on the question of sentence. But it must, at the same time, be zealously ensured that the complainant, who has been compelled to fight three rounds of legal battle and to wait from the year 1999 for the redressal of his grievance, is adequately compensated. I am satisfied that the challenge against the sentence can succeed only to the above extent.

23. The courts below have chosen to impose a sentence of fine of Rs. 5,000/- on the first accused company and simple imprisonment for a period of six months each on accused 2 and 3. All the accused together are directed to pay the cheque amount as compensation under Sec. 357(3) of the Cr.P.C. No default sentence is seen imposed.

24. The learned counsel for the petitioners contends that the sentence imposed is excessive. He requests that the indictees may, at any rate, be spared of any deterrent substantive sentence of imprisonment. I find force in that contention. I find no reason to insist on imposition of any deterrent substantive sentence of imprisonment on the accused. A lenient substantive sentence of imprisonment coupled with appropriate direction for payment of compensation with a default sentence shall meet the ends of justice eminently. I am satisfied that the challenge can succeed only to the above extent. The sentence imposed on the company need not be modified.

25. In the result:

(a) This revision petition is allowed in part.

(b) The impugned verdict of guilty and conviction of the petitioners under Sec. 138 of the N.I. Act are upheld.

(c) But the sentence imposed on accused 2 and 3 is modified and reduced. In supersession of the sentence imposed on accused 2 and 3 by the courts below, they are sentenced to undergo imprisonment till rising of the court. They are further directed under Sec. 357(3) Cr. P.C. to pay an amount of Rs. 1,00,000/- (Rupees one lakh only) each as compensation under Sec. 357(3) and in default, to undergo simple imprisonment for a period of three months. The sentence imposed on the 1st accused is upheld. If realised, the entire compensation amount shall be released to the complainant/1st respondent herein as compensation.

The revision petitioners are not present in court. Accused 2 and 3 shall appear and their sureties shall produce them before the learned Magistrate at 11 a.m. on 18-4-2005 for execution of the modified sentence. The learned Magistrate shall take necessary steps to execute the modified sentence hereby imposed. Needless to say, the learned Magistrate shall be at liberty to invoke his powers under Sec. 446 of the Cr.P.C. against the petitioners and their sureties if the petitioners do not appear before the learned Magistrate, as directed.