
(2013) 04 KL CK 0047

In the High Court Of Kerala

Case No : Criminal Appeal No. 1754 of 2010

N.E. Muhammed Rafeeqe

APPELLANT

Vs

Hridya. C.K. and State of Kerala

RESPONDENT

Date of Decision : 05-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 255(1)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 04 KL CK 0047

Hon'ble Judges : V.K. Mohanan, J

Bench : Single Bench

Advocate : K. Anand, for the Appellant; N. Raghuraj and Smt. K. Amminikutty for R1 by Advocate and Smt. Seena Ramakrishnan for R2 by Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Mohanan, J.—The complainant in a prosecution for the offence u/s 138 of the Negotiable Instruments Act, 1881 (for short "the N.I. Act") is the appellant since he is aggrieved by the judgment dated 31.5.2010 in S.T. No. 2879 of 2009 of the court of Judicial First Class Magistrate-II, Palakkad by which the learned Magistrate acquitted the accused u/s 255(1) of the Cr.P.C. The case of the complainant is that the accused borrowed a sum of Rs. 10,00,000/- from the complainant and towards the discharge of the same, the accused issued Ext. P1 cheque dated 1.6.2008 for the said amount and when the above cheque presented for encashment, dishonoured due to insufficient fund in the account maintained by the accused and it is the further case of the complainant that the accused failed to clear the amount in spite of statutory notice served on her. Thus, according to the complainant, the accused has committed the offence punishable u/s 138 of the N.I. Act. The complaint was instituted through the Power of Attorney Holder of the complainant and during the trial of the case, the Power of Attorney Holder of the complainant is examined as PW1 and Exts. P1 to P5 were marked. From the side of the defence, though no witness is examined,

Exts. D1 to D1(b) were recorded. The trial court, after due consideration of the evidence, has found that the disclosure made by PW1 would show that though he claimed to be knowing every transaction, he had no direct knowledge in respect of many relevant factors and most of his knowledge is hearsay and accordingly, concluded that the evidence of PW1 is not sufficient to prove the due execution and delivery of Ext. P1 cheque in favour of the complainant. Consequently, the accused is found not guilty and she is accordingly acquitted u/s 255(1) of the Cr.P.C. and it is the above finding and order of acquittal challenged in this appeal.

2. I have heard Sri. K. Anand, learned counsel for the appellant and Sri. N. Raghuraj, learned counsel for the first respondent.

3. Counsel for the appellant vehemently submitted that the trial court was constrained to conclude that the evidence of PW1 is not sufficient to prove the due execution and delivery of Ext. P1 cheque in favour of the complainant only because PW1 is the Power of Attorney Holder and therefore, according to the counsel, only the complainant can depose before the court about the transaction and hence, the counsel submitted that the matter may be remanded back to the trial court after giving an opportunity to the complainant to adduce evidence.

4. On the other hand, learned counsel for the respondents vehemently submitted that right from issuing the reply notice Ext. D1, the defence taken by the accused is that the complainant had abducted the husband of the accused and obtained the possession of the cheque leaf and thereafter, forged the signature of the accused and filed the present case. Thus, according to the accused, the transaction, liability and also the execution of Ext. P1 cheque and its issuance are not correct and the accused has emphatically denied the same. It is in the above premises of the defence version, the case had gone for trial during which PW1 examined to prove the case of the complainant. Of course, there is no legal bar in conducting the prosecution through the Power of Attorney Holder of the complainant, but the Power of Attorney Holder can depose before the court with respect to the fact which he has direct knowledge. The learned Magistrate has, after considering the evidence of PW1, observed that PW1 admitted that he had advanced Rs. 10 lakhs to the complainant Rafeeqe, who in his presence handed over the said amount to the accused. During the cross-examination of PW1, he had revealed that he is engaged in manure business and regarding the transaction, PW1 has admitted that he is not in a position to say whether the cheque signed by the accused on the relevant date was produced before the court. It is also found that PW1 has no idea as to whether the cheque is handwritten or typewritten or computer typed and also he has no idea about the Bank on which the cheque was drawn. During the cross-examination, according to the learned Magistrate, PW1 has confessed that if more details are to be known about the cheque, the complainant must be interrogated. It is in the light of the above evidence of PW1, the learned Magistrate has found that PW1 has no direct knowledge in respect of many relevant factors and what all he had deposed before the court is only on the basis of hearsay. So, I find no fault with

the observations and conclusions arrived by the learned Magistrate with respect to the evidence of PW1. The learned counsel for the appellant submitted that the case may be remanded back to the trial court by giving an opportunity to the complainant to adduce evidence. I am unable to sustain the above submission. No reason is forthcoming for not adducing better evidence including by examining the complainant who allegedly gave the amount to the accused and allegedly witnessed the execution of Ext. P1 cheque by the accused. If such a prayer of the learned counsel is allowed, that will amount to give opportunity to make up the serious lacuna occurred in the prosecution case which will be prejudicial to the accused. Further, in case such a prayer is allowed, there will not be any finality for the prosecution. If the appellant succeeded in appraising this Court that the complainant was prevented from adducing better evidence or the evidence could not be adduced due to the reasons beyond his control, such a prayer can be considered, but in the present case, no reasoning is forthcoming for adducing better evidence at the time of trial of the case. Therefore, the request of the counsel for the remand of the matter is declined.

5. In the light of the above discussion and the evidence and materials referred to above, it can be seen that the findings of the court below are based upon the evidence and materials available on record and therefore, it cannot be said that those findings or judgment of the trial court is either perverse or illegal. In a decision reported in *Pudhu Raja and Another Vs. State*, rep. by Inspector of Police, the Honourable Apex Court has held that, "The Appellate court can interfere only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse. The Appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's order of acquittal bolsters the presumption of innocence". Thus, on examination of the facts and circumstances involved in the present case, in the light of the above dictum, according to me, the appellant has miserably failed in substantiating the challenge against the findings of the court below and the order of acquittal. Therefore, even if this appeal is entertained any further, there is little scope for interference with the findings of the court below and order of acquittal.

Therefore, the appeal fails and accordingly the same is dismissed.