(2012) 02 KL CK 0157

In the High Court Of Kerala

Case No : Criminal A. No. 2883 of 2008

N.P.R. Finance Ltd. APPELLANT

Vs

Pious George and The State of Kerala RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:

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

Citation : (2012) 02 KL CK 0157

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

Bench : Single Bench

Advocate : S. Sreekumar By, for the Appellant; T.Y. Laliza Public Prosecutor By R2, for the Respondent

Final Decision : Dismissed

Judgement

Justice V.K. Mohanan

1. The complainant in a prosecution for the offence punishable u/s 138 of the Negotiable Instruments Act, 1881 (for short ''the N.I. Act'') is the appellant as he is aggrieved by the order of acquittal recorded by the trial court u/s 255(1) of the Code of Criminal Procedure.

2. The case of the appellant/complainant is that being a financier, the complainant has executed the hire purchase agreement with one Babu Kuriakose as hirer and the accused in this case stood as the first guarantor for the said hire purchase connected with finance given to 2000 Model Tata bus bearing Regn.No.KL-8 R 2180. According to the complainant, towards the monthly hire amount and expenses, the accused issued Ext.P4 cheque for an amount of Rs.7,83,150/-. and when the said cheque was presented for encashment, the same was dishonoured as there was no sufficient fund and the accused has not repaid the amount in spite of the statutory notice and thus, the accused has committed the offence punishable u/s 138 of the N.I.Act. During the trial, PW1 was examined and Exts.P1 to P8 were marked and no evidence either oral or

documentary was produced from the side of the defence. Finally, the trial court has found that the accused is not guilty u/s 138 of the N.I.Act and accordingly, he is acquitted. It is the above finding and order of acquittal sought to be challenged in this appeal.

3. The trial court, after considering the evidence and materials on record, has specifically found that when PW1 was questioned, he had deposed that no document was produced to prove that Babu Kuriakose was the RC owner of the vehicle. The trial court has also found that only if the complainant produces the evidence to show that the hypothecation still continues against the said Babu Kuriakose, then only he can realise the amount covered by Ext.P4 cheque. Therefore, the complainant has to prove that Babu Kuriakose was the RC owner with hypothecation in the RC Book. The specific defence taken by the accused is that either in the present case or in the other two cases i..e, S.T.Nos.1355/2005 and 1359/2005, at no point of time, hypothecation was created in the R.C. Particulars against the hirer. Thus, according to the learned Magistrate, in the absence of the R.C.particulars, it cannot be said that hire purchase is still in force. It cannot be held that the learned Magistrate is wrong in his observation that if the complainant after receipt of amount has transferred the R.C. by issuing NOC, the amounts covered by Ext.P4 would become unenforceable. So, according to the learned Magistrate, there is no cogent and convincing evidence that hypothecation was created in the RC particulars against the hirer viz., Babu Kuriakose. The learned Magistrate also found that though Ext.P3 demand draft is dated 12.5.2003 for Rs.3,75,000/-, Ext.P4 cheque is dated 12.4.2005 for an amount of Rs.7,83,150/-. According to the learned Magistrate, the complainant has miserably failed to explain how the principal amount is doubled within the short span of less than two years. It is also found by the learned Magistrate that the pleading in the complaint is to the effect that the cheque was issued towards monthly hire amount and expenses. But, it is not clear how an amount of Rs.7,83,150/-happened to be the monthly hire amount. On the basis of the above facts, the trial court has further concluded that as the complainant failed to prove that the hire purchase is still in existence, the complainant is not entitled to enforce payment as per Ext.P4 cheque. It was also found by the learned Magistrate that the complainant has miserably failed to produce the resolution passed by the company authorising PW1 to prosecute the case whereas what produced is Ext.P1, which is only a Power of Attorney issued by one of the Directors of the complainant/company. It was on the basis of the above finding, the learned Magistrate has concluded that the accused is not guilty.

4. Learned counsel for the appellant submitted that the amount covered by Ext.P4 cheque includes the total due amount including the expenses. It is also the submission of the Learned Counsel that though the resolution was not produced before the court, it is a fact that the complainant has already adopted a resolution authorising, one of the Directors of the company to prosecute the case and it is the said Director executed Ext.P1 Power of Attorney and therefore, according to the Learned Counsel, the finding of the court below is not correct

that the complaint is not properly constituted.

5. The admitted fact shows that the case of the complainant is that the accused is stood as the first guarantor for the hire purchase agreement of which one Babu Kuriakose is the hirer. But the complainant has miserably failed to produce the R.C. particulars to show that hypothecation agreement still exists in the name of Babu Kuriakose, the R.C.owner. Therefore, according to me, the learned Magistrate is fully justified in his observation and finding connected with the non-production of the R.C.particulars so as to fix the liability against the guarantor, the accused. When the pleading in the complaint is to the effect that Ext.P4 cheque was issued being the monthly hire amount and expenses, there is no convincing and acceptable explanation as to how the monthly hire amount comes to the tune of Rs.7,83,150/-. As rightly pointed out by the learned Magistrate, though Ext.P3 demand draft is for Rs.3,75,000/-, in the absence of any plausible and convincing explanation as to how the figure Rs.7,83,150/-arrived in Ext.P4 cheque, appears to be correct. So the amount shown in Ext.P4 cannot be treated as a debt or liability which can be legally enforced especially, when the complainant failed to prove that the hire purchase is still in existence in the name of the hirer. In the light of the above discussion, I am of the view that the trial court has rightly refused to accept the case of the complainant by assigning proper and acceptable reasons and the said finding cannot be treated as perverse or illegal so as to interfere with the same in appeal. As the appellant miserably failed to make out any substantial reason so as to disturb the double presumption of innocence in favour of the accused, there is not even a remote scope of interfering with the order of acquittal recorded by the trial court. Therefore, according to me, the appellant miserably failed to make out a prima facie case to interfere with the finding and order of acquittal of the trial court and therefore, the appeal need not be entertained any further. Accordingly, this Criminal Appeal is devoid of any merit and accordingly, the same is dismissed.