

(2010) 06 KL CK 0113
In the High Court Of Kerala
Case No : Criminal R.P. No. 3017 of 2005

Padmanabhan

APPELLANT

Vs

Vasudevan Namboodiri

RESPONDENT

Date of Decision : 18-06-2010

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2010) 4 BC 335 : (2011) 3 CivCC 910 : (2010) 3 ILR (Ker) 349 :
(2010) 3 KLT 216 : (2011) 1 RCR(Civil) 76 : (2011) 1 RCR(Civil) 76

Hon'ble Judges : M. Sasidharan Nambiar, J

Bench : Single Bench

Advocate : S. Sreekumar and Martin Jose P, for the Appellant; K.S. Sivakumar, Public Prosecutor, Philip T. Varghese and Thomas T. Varghese, for the Respondent

Final Decision : Allowed

Judgement

M. Sasidharan Nambiar, J.—Petitioner, the accused in C.C. No. 1270 of 2002 on the file of Chief Judicial Magistrate, Ernakulam was convicted and sentenced for the offence u/s 138 of the Negotiable Instruments Act (hereinafter referred to as "the Act" for short). Petitioner challenged the conviction and sentence before Sessions Court, Ernakulam in CrI.Appeal No. 211 of 2005. The learned Additional Sessions Judge on reappreciation of evidence, confirmed the conviction and sentence and dismissed the appeal. It is challenged in the revision.

2. Learned Counsel appearing for the revision petitioner and the first respondent were heard.

3. The argument of the learned Counsel appearing for the revision petitioner is that both the courts below did not properly appreciate the evidence and wrongly convicted the petitioner. It was argued that presumption u/s 139 of the Act could be drawn only if it is admitted that petitioner has drawn the cheque or it is proved that the petitioner had executed the cheque in favour of the first respondent and when there is no admission and evidence to prove the execution,

the conviction is unsustainable. The learned Counsel argued that first respondent was not examined and on his behalf the Manager was examined as PW1 and the evidence of PW1 does not show that the cheque was either written or signed in his presence and therefore the evidence of PW1 does not establish execution of the cheque. The learned Counsel also argued that even though PW1 deposed that the cheque was issued by the petitioner at the house of the first respondent, he has not deposed that he was even present at that time and in such circumstances, courts below should not have drawn the presumption u/s 139 of the Act that Ext.P2 cheque was issued in discharge of an existing debt or liability. It was also argued that there is no evidence to prove that Ext.P2 cheque was issued towards discharge of any existing debt or liability. The learned Counsel also argued that Ext.P5, the original notice sent u/s 138(b) of the Act, was not served or refused by the petitioner and instead it is seen returned with the endorsement "petitioner left the address" and in such circumstances, it cannot be treated as a valid service of notice and therefore the learned Magistrate could not have taken cognizance of the offence or convicted the petitioner.

4. The learned Counsel appearing for the first respondent argued that evidence of PW1 has to be appreciated in the light of the evidence tendered by the petitioner as DW1, as well as the defence raised by him. It was argued that the evidence of PW1 establishes that the cheque was issued by the petitioner towards the amount due to the first respondent and there is no serious challenge with regard to the consideration for the cheque or the liability spoken to by PW1. It was argued that the case of the petitioner that Ext.P2 cheque was handed over to Sukumaran, his Manager, who in turn handed it over to the first respondent was not proved as Sukumaran was not examined and it is proved to be an unbelievable story. It was argued that evidence of DW1 shows that he was aware that the cheque was with the first respondent and still he did not take any steps to get the cheque returned back and therefore, case of the petitioner was rightly disbelieved by the courts below and the evidence of PW1 establishes that the cheque was issued towards discharge of an existing liability. Relying on the decision of the Apex Court in Rangappa v. Sri Mohan 2010(2) KLT 682(SC) : 2010(2) BC 693 (SC), the learned Counsel argued that when cheque was drawn in the account maintained by the petitioner, which is not disputed, the presumption u/s 139 of the Act shall be drawn and if drawn, it establishes the existence of a legally enforceable debt or liability and therefore, conviction of the petitioner for the offence u/s 138 of the Act is perfectly legal. Learned Counsel also argued that though petitioner would contend that he left his residence at Ernakulam, when Ext.P5 notice was taken to that house by the Postman, there is no evidence to prove that he had sold that house earlier to that date. It was argued that if that house plot was sold, there would be sale deed to establish the sale and if it is produced, it would establish when the petitioner left Ernakulam and merely because the address of the petitioner is shown at Coimbatore in Exts. D1 and D2, it cannot be found that petitioner was not residing in the address shown in Ext.P5 notice, which even according to the petitioner was the correct

address known to the first respondent and therefore, there is no reason to interfere with the conviction and sentence.

5. The specific case in the complaint is that petitioner is a businessman having business by name Balaji Jewellers and Balaji Plantations and he borrowed considerable amount from the first respondent for the purpose of his business and first respondent had entrusted considerable quantity of old gold ornaments with the petitioner on the promise that he would deliver new gold ornaments for its value and as large amounts were outstanding, in partial discharge of the debt, Ext.P2 cheque was drawn by the petitioner and issued to the first respondent. The case of the petitioner is that he did not issue Ext.P2 cheque to the first respondent and instead it was a blank signed cheque entrusted with his Manager, Sukumaran, who was not examined, who entrusted it to the first respondent. Therefore, there is no admission about execution of the cheque. There is also no admission that the cheque was drawn by the first respondent. Therefore to draw the presumption provided u/s 139 of the Act, there should be evidence to prove that Ext.P2 cheque was drawn by the petitioner. The question is whether there is evidence to establish that factual foundation.

6. The first respondent was not examined. On his behalf, his Manager and power of attorney holder was examined as PW1. The proof affidavit of PW1 shows that due to health reasons the first respondent could not travel and therefore on his behalf PW1 was examined. The relevant portion with regard to the issuance of Ext.P2 cheque in the proof affidavit is as follows:

In partial discharge of the existing liabilities, the accused issued to the complainant cheque bearing No. 0470305 dated 30.12.97 drawn on Lord Krishna Bank Ltd., M.G. Road, Ernakulam for a sum of Rs. 9,85,000/-.

7. There is no statement in the proof affidavit that when the petitioner allegedly issued Ext.P2 cheque, PW1 was present. There is also no statement in the proof affidavit that either Ext.P2 cheque was brought by the petitioner after writing the same and thereafter it was signed in the presence of PW1 or it was written and signed in his presence. PW1 was cross-examined by the counsel appearing for the petitioner. The evidence of PW1 in cross-examination with regard to the issuance of the cheque is that Ext.P2 cheque was given by the petitioner in December 1997 showing the date 30.12.97 and it was given at the house of the first respondent. Even at that point of time, PW1 has no case that he was present when the cheque was given by the petitioner. Learned Counsel appearing for the first respondent argued that, that aspect was not disputed by the petitioner as PW1 was not questioned about it. It is not for the petitioner to question on this aspect, as it is for the first respondent to prove that cheque was issued by the petitioner in the presence of PW1 especially when petitioner has taken a specific stand that he did not issue the cheque to the first respondent. In such circumstances, the burden is definitely on the first respondent to establish that fact. As first respondent was not examined, it is up to the first respondent to make PW1 speak on this aspect. The failure to cross-examine PW1 on this aspect

is not fatal to the defence and it is not a valid ground when PW1 has not spoken that when petitioner handed over the cheque at the house of the first respondent, he was present. It is a fact which is to be proved by the first respondent and not a fact to be disproved by the petitioner in the absence of evidence to that effect. Therefore, for the failure of the counsel appearing for the petitioner to specifically ask PW1 whether he was present at the time when the cheque was alleged to have handed over by the petitioner, it cannot be presumed that PW1 was present at that time. Moreover, the statement of PW1 in cross-examination is that petitioner had handed over the cheque in December 1997 showing the date as 30.12.1997. It means that the cheque was issued as a post-dated cheque. Otherwise the answer would have been that the cheque was handed over on 30.12.1997. Unless the cheque was not issued on 30.12.1997, there is no necessity for PW1 to depose that the cheque was handed over in December, 1997 showing the date as 30.12.1997. Moreover, PW1 has no case that either the date 30.12.1997 shown in the cheque was written in his presence or the petitioner signed in Ext.P2 cheque in his presence. Therefore, the evidence of PW1 is insufficient to prove execution of the cheque or drawing of the cheque in favour of the first respondent.

8. The argument of the learned Counsel is that the defence case is unbelievable and in such circumstances, it is to be taken that Ext.P2 cheque was issued to the first respondent as deposed by PW1. True, the evidence of with regard to the handing over the cheque to Sukumaran does not inspire confidence. It is also true that Sukumaran was not examined. If Sukumaran, his Manager, had made use of the cheque entrusted by the petitioner, without his consent and later when the petitioner got information that the cheque is with the first respondent, he would have taken some steps to get back the cheque or intimate the first respondent not to present the cheque. But neither the weakness of the defence case nor the failure of the accused to prove his case will enable the first respondent to succeed in a criminal prosecution. Burden is on the first respondent to establish that Ext.P2 cheque was issued by the petitioner. Only if the drawing of the cheque by the petitioner is established, the presumption u/s 139 of the Act could be drawn.

9. Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138, for the discharge in whole or in part, of any debt or other liability. The presumption so provided u/s 139 of the Act shall be drawn in a case where the accused either admits the drawing of the cheque or the complainant establishes that it was drawn by the accused. If there is no admission and there is no proof of execution of the cheque, the presumption provided u/s 139 of the Act cannot be drawn and in such a case, it is to be independently proved.

10. The Honourable Supreme Court in Rangappa's case (supra) after analysing the earlier decisions has held that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability.

But it cannot be said that the Honourable Supreme Court has laid down a principle that once a criminal prosecution is launched based on a dishonoured cheque, irrespective of the question whether the execution of the cheque is admitted or proved, the presumption is to be drawn. Presumption could be drawn only if there is either admission or proof of execution of the cheque. As stated earlier, there is no evidence in this case to prove the execution. Therefore, based on the presumption u/s 139 of the Act it cannot be held that petitioner issued Ext.P2 cheque rewards the discharge of an exiting debt or liability.

11. The case in the complaint is that petitioner, a business man, had borrowed amount from the first respondent for his business. It is also alleged that first respondent entrusted old gold ornaments to the petitioner, on his promise, that for the value of the old gold ornaments, new gold ornaments will be supplied, it is contended that though there was outstanding liability and in partial discharge of that liability Ext.P2 cheque was issued and PW1 in his proof affidavit, as stated by the first respondent in the complaint stated that it was issued towards partial discharge, in cross-examination it was deposed by PW1 that petitioner did not receive money from the first respondent and Ext.P2 cheque was issued for the value of the gold to be paid to the first respondent. As per the complaint, petitioner had borrowed money and also obtained gold ornaments, entrusted by the first respondent, and with regard to the gold ornaments so entrusted, there is a promise that for the value of the old gold ornaments new gold ornaments will be supplied and in partial discharge of those liabilities the cheque was issued. Therefore, if the evidence of PW1 is to be accepted, Ext.P2 cheque was issued towards only the liability, namely in fulfillment of the promise to supply new gold ornaments for the value of the old gold ornaments entrusted by the first respondent. The evidence of PW1 does not show what was the quantity of gold supplied and at what rate petitioner has to pay for the old gold ornaments supplied. Therefore evidence of PW1 is insufficient to prove the existence of a debt or liability of above Rupees Nine lakhs or that Ext.P2 cheque was issued towards the discharge of an existing debt or liability to the tune of Rs. 9,85,000/-. Unfortunately these material aspects were omitted to be appreciated in the proper perspective by the courts below. Evaluating the evidence, it can only be found that first respondent failed to establish that Ext.P2 cheque was drawn by the petitioner towards the discharge of an existing debt or liability to the first respondent. If that be so, conviction of the petitioner for the offence u/s 138 of the Act is not sustainable.

12. Added to this, petitioner would contend that there was no service of notice as provided u/s 138(b) of the Act. Ext.P5 is the original notice sent by the first respondent to the petitioner. Ext.P5 was not served on the petitioner. It was sent to the petitioner at his address Parvathy Nivas, Palliam, Ernakulam. Though petitioner contended that he left the house in 1997 and was not residing at Parvathy Nivas in January 1998, when Ext.P5 notice was returned, apart from producing DI and D2 the two indemnity bonds executed in respect of his business, petitioner did not adduce satisfactory evidence to prove that he had

actually shifted his residence from Parvathy Nivas, Palliam, Ernakulam. As DW1, petitioner admitted that he was residing in Parvathy Nivas, Palliam, Ernakulam and his account in the bank was opened in that address and even first respondent had gone to that house. In such circumstances, it cannot be said that Ext.P5 notice was not sent in the correct address of the petitioner. Ext.P5 notice establishes that a registered notice was sent in the correct address of the petitioner at Ernakulam.

13. But the question is whether there is either a service of notice or a refusal to receive the notice. Ext.P5 was returned with the endorsement "addressee left". There are two other endorsements in Ext.P5 by the Postman. One is dated 10.1.98 as "gone" and then on 12.1.98 as "-do-". Ext.P5 does not show that intimation of Ext.P5 notice was served either on the petitioner or any member of his family. There is no endorsement in Ext.P5 that any member of the family refused to receive the intimation and therefore intimation could not be served. From the endorsement found in Ext.P5 it cannot be said that intimation of Ext.P5 notice was served either on the petitioner or any member of his family. The question in such circumstances is whether the notice which was returned to the sender as addressee left tantamount to service of notice or its refusal. There is no evidence to prove that petitioner evaded to receive the notice or refused to receive the notice. Learned Counsel appearing for the petitioner relied on the decision of the Apex Court in *State of M.P. Vs. Hiralal and Others*, . That was a case where in a civil appeal notice sent to the respondents was returned with postal remarks "not available in the house, house locked and shop closed". The decision only shows that, in view of the office report that it would appear that respondents obviously managed to evade notices, which were returned with postal remarks "not available in the house, house locked and shop closed" respectively. It must be deemed that notices have been served on the respondents. The notice treated as served was not a mandatory notice like the one provided u/s 138(b) of the Act in the absence of which there cannot be a cause of action to lodge a complaint u/s 138 of the Act. The decision also does not disclose the details of the report or the facts based on which the Registry reported that the respondents managed to get the notices returned. Therefore, based on the said decision, it cannot be said that whenever a notice is returned with a postal endorsement "the addressee is gone out" or "left the house" it is deemed to be a service of notice. The position would have been different if intimation of the notice was served either on the addressee or any member of his family. In such a case, it could have presumed that there was a proper service of notice, as in spite of the intimation, the addressee did not receive the notice, if the addressee has to be away from the house for some days and during that period a postal article was taken to that house and finding that the addressee is not there, notice is returned as addressee left. It cannot be said that there was valid service of notice or deemed notice. In such a case, the addressee is in fact unaware of the notice at all. On the other hand, if the addressee was there in the house and he managed to get an endorsement from the Postman to the effect

that he is "out of station" or "left the house", it cannot be said that there was no proper service of notice. If the postal endorsements were procured by the addressee, to evade service of notice, he cannot contend that there was no proper service of notice. Therefore whether the Postman gone to the house of the addressee and whether the endorsements seen in the registered notice are true or the addressee managed to get the endorsements by winning over the Postman, are all facts to be considered while considering the question whether there was proper service of notice. Except alleging in the complaint that petitioner was aware of the notice and he willfully and deliberately evaded service of notice, no evidence was adduced to prove that the endorsements seen in Ext.P5 to the effect that petitioner left the house was successfully managed by the petitioner. When Ext.P5 notice was returned with such endorsements, which clearly establishes that petitioner has either gone out of the house or left the house, first respondent should have sent another notice in the correct present address. Without sending such a notice and without establishing that petitioner has managed to get the postal endorsement mala fide, first respondent cannot contend that there was service of notice. Therefore on that ground also it is to be found that prosecution of the petitioner for the offence u/s 138 of the Act is not sustainable, in the absence of a notice in writing served on the petitioner demanding the amount covered by Ext.P2.

Revision is therefore allowed. The conviction of the petitioner for the offence u/s 138 of Negotiable Instruments Act in C.C. No. 1270 of 2002 by Chief Judicial Magistrate, Ernakulam as confirmed by Sessions Court, Ernakulam in Crl.Appeal 211 of 2005 is set aside. Petitioner is found not guilty of the offence. He is acquitted.