(2013) 03 KL CK 0042

In the High Court Of Kerala

Case No : Crl. A. No. 841 of 2005

P.G.P. Rajan APPELLANT

Vs

K. Sasidharan Nair and State of Kerala RESPONDENT

Date of Decision : 04-03-2013

Acts Referred:

Citation : (2013) 03 KL CK 0042

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

Bench : Single Bench

Judgement

V.K. Mohanan, J.—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 judgment dated 5.10.1996 in Crl.A. No. 85 of 1994 in the court of the Principal Sessions Judge, Thiruvananthapuram. The case of the complainant is that the accused borrowed an amount of Rs. 45,000/- from the complainant on 7.8.1991 and on the same day, issued Ext. P1 cheque for Rs. 45,000/- towards the repayment of the above amount and when the complainant presented the cheque for encashment, the same returned on 3.10.1991 with an endorsement that the payment was stopped by the drawer. It is the further case of the complainant that though he had caused to send statutory notice, the accused has not repaid the amount or made any reply in time. Thus, according to the complainant, the accused has committed the offence punishable u/s 138 of the N.I. Act.

2. With the above allegation, the complainant approached the Chief Judicial Magistrate''s Court, Thiruvananthapuram by filing a complaint upon which the learned CJM took cognizance and subsequently made over the case to the trial court viz., Judicial First Class Magistrate Court-IV (Mobile Court), Thiruvananthapuram wherein C.C. No. 488 of 1991 was instituted. During the trial of the case, the complainant himself got examined as PW1 and another witness PW2 was examined from the side of the complainant and produced Exts.P1 to P4 documents. From the side of the defence, Dws. 1 to 3 were

examined and produced Exts.D1 to D8. The trial court finally found that it is proved that the accused has committed the offence punishable u/s 138 of the N.I. Act and accordingly, he is found guilty u/s 138 of the N.I. Act and consequently, he is convicted for the said offence. On such conviction, the accused is sentenced to undergo simple imprisonment for a period of six months and in addition to that, the accused is ordered to pay Rs. 45,000/- as compensation to the complainant u/s 357 of the Cr.P.C. and he is also directed to pay a sum of Rs. 1000/- as cost to the complainant.

3. Challenging the above finding, the order of conviction, the sentence of compensation and cost, the accused preferred Crl. A. No. 85 of 1994 before the Principal Sessions Court, Thiruvananthapuram and the learned Judge of the appellate court, by his judgment dated 5.10.1996 in Crl.A. No. 85 of 1994 found that the lower court had not considered the entire evidence in its correct perspective and as such, the finding of the lower court and conviction and imposition of sentence on the accused are liable to be set aside. Accordingly, the appeal was allowed and the conviction and sentence were set aside and the accused is found not guilty and he is acquitted u/s 386 of the Cr.P.C. It is the above finding and order of acquittal vide judgment dated 5.10.996 in Crl.A. No. 85 of 1994 of the lower appellate court challenged by the appellant, who is the complainant, before this Court.

4. I have heard Sri. B. Raman Pillai, learned counsel for the appellant and Advocate Sri. M. Sreekumar, counsel for the first respondent/accused.

5. Learned counsel for the appellant vehemently contended that the finding of the lower appellate court that Ext. P1 cheque was dishonoured not for insufficiency of fund and therefore, the offence u/s 138 of the N.I. Act is not attracted, is incorrect, illegal and arbitrary. It is further contended that the evidence of PW2 specifically shows that at the time of presentation of Ext. P1 cheque, there was no amount in the account of the accused to honour the same. Therefore, according to counsel for the appellant, the essential ingredient of Section 138 of the N.I. Act is attracted, but the lower appellate court miserably failed to consider those aspects. It is also contended by the counsel that the appellate court committed wrong in accepting the case of the defence, which is not substantiated by any evidence. It is further contended by the counsel for the appellant that one of the grounds for acquittal of the accused by the lower appellate court is that the accused has not even made suggestion to PW1 that Ext. P1 cheque was issued by the accused to one Mariappan. Learned counsel strenuously submitted that the trial court has considered the entire evidence and materials and all aspects including the defence put forward by the accused and in such a situation, the appellate court went wrong in setting aside the order of conviction and the reasons given by the lower appellate court are totally strange both in factual and legal aspects, considering the facts and circumstances involved in the present case. Therefore, the counsel submitted that the judgment of the lower appellate court is liable to be interfered with as the same is not

sustainable and is liable to be set aside and the accused is liable to be convicted and sentenced by restoring the finding and the judgment of the trial court. Learned counsel for the appellant placed reliance upon the decisions reported in M/S Modi Cements Limited Vs. Shri Kuchil Kumar Nandi, , Chackochan. T.K. v. P.P. Paul and Another [2008(4) KHC 922], Narayanan Vs. State of Kerala and Another, , Raj Kumar Khurana Vs. State of (NCT of Delhi) and Another, , Kaushalya Devi Massand Vs. Roopkishore Khore, , Vijayakumar Vs. Vijayan, and Laxmi Dyechem Vs. State of Gujarat and Others, .

6. On the other hand, the learned counsel for the respondent vehemently submitted that the trial court has miserably failed to consider as to whether the complainant has succeeded in taking appropriate plea and adducing evidence to establish the offence u/s 138 of the N.I. Act against the accused in terms of Section 138 of the N.I. Act. After taking me through the judgment of the trial court and the complaint and the evidence on record, the learned counsel submitted that the lower appellate court has specifically found that neither in the complaint nor in the evidence of the complainant, there is averment and evidence to convince the court that Ext. P1 cheque was dishonored for want of sufficient fund, which is a condition precedent to attract the offence u/s 138 of the N.I. Act. Therefore, according to the counsel, as the appellant has failed to show that the findings of the court below and the judgment are perverse, this Court will not be justified in interfering with such order of acquittal and therefore, the appeal is liable to be dismissed.

7. I have carefully considered the arguments advanced by counsel for the appellant and the respondents and I have perused the judgments of both the trial court as well as the appellate court and carefully scrutinised the evidence and materials on record.

8. At the outset, it is to be noted that Chapter XVII comprising Sections 138 and 142 of the N.I. Act was introduced in the statute during the year 1988. In the present case, Ext. P1 cheque is dated 7.8.1991 and the trial court''s judgment is dated 2.3.1994, i.e., after six years from the date of introduction of Sections 138 to 142 in the statute. On a reading of Section 138 of the N.I. Act, it is crystal clear that the dishonour would constitute an offence only if the cheque is returned by the bank ''unpaid'' either because the amount of money standing to the credit of the drawer''s account is insufficient to honour the cheque or that the amount exceeds the amount arranged to be paid from that account by an agreement with that bank. Being a penal statute, Section 138 requires strict interpretation and thus, the dishonour must necessarily be for one of the two reasons stipulated u/s 138. In that sense, according to me, the grounds for interference made by the appellate court and the order of acquittal seem to be correct. After the introduction of Section 138 of the N.I. Act, through authoritative pronouncement, though there is no change in the basic requirements, the penal liability would be attracted if the cheque is dishonoured for the reasons other than mentioned in Section 138 of the N.I. Act. So,

according to me, this Court being the appellate court is bound to reconsider the entire facts and circumstances of the case and to re-appreciate the evidence and to find out any penal liability established against the accused on the basis of the settled position of law as on today.

9. In the present case, the substance of the allegation against the accused is that the accused borrowed a sum of Rs. 45,000/- from the complainant on 7.8.1991 and on that day itself, Ext. P1 cheque was given towards the discharge of the said liability. While denying the above allegation, the defence taken, while the accused were examined u/s 313 of the Cr.P.C. is to the effect that the accused had two money transactions with one Mariappan whereby the accused borrowed Rs. 10,000/- each from the said Mariappan and as a security for the above transaction, the accused issued two cheques to him of which one cheque is for Rs. 10,000/-, while the other cheque is blank and signed one. According to the accused, he had repaid the entire amount to said Mariappan and when demanded back the cheques, the said Mariappan told the accused that the blank cheque was found missing. Thus, according to the accused, on hearing the said fact, he issued an instruction to his banker to stop payment and initiated civil proceedings for the recovery of those documents. According to the accused, when the suit notice is received by the said Mariappan, with the help of the present complainant, inserted the amount in the blank cheque and presented for collection and got it dishonoured and thus filed the present complaint. In this juncture, it is relevant to note that when PW2, the Bank Manager was examined, he had deposed before the court that the accused, by issuing instruction, stopped the payment and it is also clear that as per Ext. P2 dishonour memo, payment was stopped by the drawer. Now it is well settled that even if the cheque is dishonoured for the reason that drawer stopped the payment, an offence u/s 138 would be attracted. But, when the appellate court considered the case on merit, it is specifically found that there is no averment in the complaint and also absence of evidence would show that cheque was dishonoured for the reason insufficiency of fund. Pleadings and evidence to that effect are most essential to fix liability u/s 138 of the N.I. Act. In this case, it is also relevant to note that the appellate court has also found particularly in paragraph 6 of its judgment that the signature of the accused appears to be made with one pen and all the other writings including the amount, the name and the date were written by different pen of different ink. Suffice to say after having noticed the above discrepancies, the lower appellate court proceeded to acquit the accused by setting aside the judgment of the trial court on the ground that absence of proper pleading and evidence with respect to dishonour of cheque for insufficiency of funds, which, according to counsel for the appellant, is highly illegal and arbitrary.

10. To assail the above order and the findings of the lower appellate court, the learned counsel for the appellant vehemently submitted that there was no suggestion from the side of the defence, or, effective cross-examination, with respect to the transaction and the liability and also with respect to the execution

of the cheque. According to the learned counsel, in the absence of any effective challenge from the side of the defence and particularly when Ext. P2 dishonour memo coupled with the evidence of PW2, which shows that there was no sufficient money in the account of the accused to honour the cheque, the absence of any pleading in the complaint make no difference and when the cheque is dishonoured for the reason ''payment stopped'', there need not be any allegation in the complaint that insufficiency of fund in the account maintained by the accused. It is also the contention of counsel for the appellant that execution of the cheque has not been properly challenged, especially when the accused has admitted his signature in Ext. P1 cheque. I am unable to sustain all the above contentions of the counsel for the appellant, to set aside the judgment of the lower appellate court, especially when the lower appellate court acquitted the accused for the offence u/s 138 of the N.I. Act. I have gone through the averments in the complaint and the evidence of PW1/the complainant, to find out whether the essential ingredients of Section 138 are attracted or not, particularly with respect to the transaction and the liability and also the execution of Ext. P1 cheque.

In this juncture, it is relevant to note that, on a perusal of the trial court judgment, it can be seen that the only question framed for its consideration is whether the accused has committed the offence punishable u/s 138 of the N.I. Act. Going through the judgment of the trial court, it can be further seen that having regard to the facts and circumstances involved in the case and particularly in the light of the evidence and materials on record, and in the light of the proved fact that payment was stopped by the drawer, the trial court did not address the question regarding the transaction and liability connected with Ext. P1 cheque and the execution of Ext. P1 cheque. I am of the view that, during the trial of the case, both the complainant as well as the accused have miserably failed to bring up the relevant facts on records for proper scrutiny and to came into a correct finding after proper appreciation of such facts and therefore this Court at this stage need not enter into any finding on merit which can be left to the trial court. According to me, for the above reason, the above question requires fresh consideration in the light of the settled legal position as on today. Therefore, the matter requires remand and reconsideration by the trial court and the parties to the dispute can be permitted to adduce evidence to substantiate their respective contentions whatsoever.

In the result, this appeal is disposed of setting aside the judgment dated 5.10.1996 in Crl.A. No. 85 of 1994 of the court of Principal Sessions Judge, Thiruvananthapuram and the judgment dated 2.3.1994 in C.C. No. 488 of 1991 of the court of the Judicial First Class Magistrate-IV, Mobile Court, Thiruvananthapuram and the matter is remanded back to the trial court for re-consideration of the entire matter particularly, the question whether the complainant has succeeded in establishing the transaction and liability connected with Ext. P1 cheque and whether the complainant has succeeded in proving the execution and issuance of Ext. P1 cheque in favour of the complainant and whether the accused has succeeded in making out a probable case in support of the defence, with liberty to parties to the dispute to adduce evidence, if they are so advised, to substantiate their respective contentions. Accordingly, the parties are directed to appear before the trial court on 18.04.2013, on which date the learned Magistrate is directed to post the above case and thereafter to proceed to dispose the same on merit as directed above. As the case pertained to the year 1991, the learned Magistrate is directed to dispose the same as expeditiously as possible at any rate within 6 months from 18.04.2013 and the parties are directed to co-operate with the trial of the case for an earlier disposal.