
(1998) 07 KL CK 0006
In the High Court Of Kerala
Case No : Criminal M.C. No. 2442/98

Rajan George

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 21-07-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190, 192, 200
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (1999) 1 ALT(Cri) 64 : (1998) 3 CivCC 374 : (1998) 2 KLJ 398 :
(1998) 4 RCR(Criminal) 444

Hon'ble Judges : P.V. Narayanan Nambiar, J

Bench : Single Bench

Advocate : Jaji Itten, for the Appellant; C.M. Suresh Babu, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

P.V. Narayanan Nambiar, J.—A complaint alleging offence punishable u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act") was filed by the Petitioner through his pleader. The complainant could not be present before the Court on the day of presentation of the complaint as he was hospitalised due to a motor accident. The complaint was filed on the last day of limitation, but the same was returned by the Judicial First Class Magistrate's Court II, Ernakulam holding that there is no provision in the Code of Criminal Procedure enabling the Court to receive a complaint u/s 200 of the Code in the absence of the complainant. This order is under challenge. So, the question to be considered in this petition is whether a complaint could be presented before the Court by a pleader in the absence of the complainant.

2. Section 190 Code of Criminal Procedure empowers a Magistrate to take cognisance of any offence (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts and (c) upon information received from any person other than a police officer, or upon his own

knowledge, that such offence has been committed. Section 200 Code of Criminal Procedure deals with the procedure in case a complaint is filed before the Magistrate. The Magistrate taking cognizance of the complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. But the proviso to Section 200 Code of Criminal Procedure makes it clear that when the complaint is made in writing, the Magistrate is not bound to examine the complainant and the witnesses, if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint and/or if the Magistrate makes over the case for enquiry or trial to Anr. Magistrate u/s 192.

3. Section 142 of the Act provides thus:

Cognizance of offences.-Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974).-

(a) no Court shall take cognizance of any offence punishable u/s 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138;

(c) no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable u/s 138.

4. It is clear from Section 142 of the Act that the Court can take cognizance of an offence punishable u/s 138 of the Act only upon a complaint in writing made by the payee or as the case may be, the holder in due course of the cheque. The present complaint is filed by the payee of the cheque. So, the Court is empowered to take cognizance of the same. But the complainant was not present before the Court for his examination on oath. Examination of the complainant is also compulsory in a case like this, before taking cognizance. It is not compulsory that cognizance should be taken on the date of presentation of the complaint. It could be taken on any subsequent day also on examination of the complainant. So, when a complaint is filed by a pleader in the absence of the complainant, the Court is not disabled from taking cognizance of the offence. At the most, it could be said that the Court was not in a position to take cognizance on the day on which the complaint was presented.

5. As already stated, the complaint was presented by the pleader of the complainant. A pleader in whose favour a vakalath has been executed by the complainant, is duly competent to represent the complainant. Form No. 57 of the Criminal Rules of Practice, 1982 prescribes the form for vakalath which is extracted hereunder:

In the Court of...

I/Wedo hereby appoint and retain Shri....Advocate, to appear for me/as in the above and to conduct and prosecute or defend the same and all proceedings that may be taken in respect of any application therein. I/We empower the said Advocate to appear in all miscellaneous proceedings in the above matter and to produce in Court any money, document or valuable security on my/our behalf, to apply for their return and to receive back the same, to apply for and obtain copies of all documents in the record of the proceedings, to draw any moneys that may be payable to me/us in the above and I/We do hereby agree that everything lawfully done or made by the said Advocate in the conduct of the matter shall be as valid and binding on me/us if done by me/us in person.

Signed this the...Day of...19...

Witnesses:-

- 1.
- 2.

Accepted

(Sd.) Advocate Date???.

The vakkalath is executed in the form prescribed in Form No. 57. On a careful reading of the Form, it is clear that a pleader in whose favour the vakkalath has been executed is appointed to appear for the complainant in the case and to conduct, prosecute or defend the same. So, it Cannot be said that in case of a valid reason for the absence of the complainant, the complaint cannot be presented by his pleader.

6. Insistence on the part of the Court for the presence of the complainant at the time of filing of the complaint which was filed on the last day of limitation may sometime cause unpleasant consequences as in the present case wherein the complainant could not be present before the Court as he was hospitalised. In such circumstances, the remedy available to the complainant u/s 138 read with Section 142 of the Act will be illusory. If the complainant was laid up on the last day on which the complaint should have been filed or incapable of appearing before the Court for other reasons, could it be said that he should lose his right to file a complaint for ever? Such a consequence is not intended by the legislature.

7. There is nothing in Section 142 of the Act which makes it mandatory on the complainant to file the complaint personally. It can even be filed by a duly authorised person like his advocate or power of attorney. This Court in the decision reported in Hamsa v. Ibrahim ILR 1994 Ker 622, held that a complaint could be filed through the power of attorney. It is stated therein that if the payee or holder in due course falls ill on the last day of the expiry of the period prescribed or if has to leave the station due to unavoidable reasons, the cause of action would die out as the complaint cannot be filed by an agent or a power of

attorney holder. This Court further held that it would not be in the interest of justice to construe the provision as containing a restriction that the complaint should be made by the payee or the holder in due course, as the case may be, "personally". So, the insistence on the part of the Court that the complaint will be accepted only if the same was presented by the complainant personally is not conducive to the interest of justice and hence uncalled for.

8. Along with the complaint, a petition was also filed to bring to the notice of the Court that the complainant could not be present personally before the Court as he was hospitalised. In such circumstances, the Court below should not have returned the complaint. On the other hand, the Court should have accepted the same and posted to some other day for appearance of the complainant for the purpose of recording his sworn statement.

9. In view of what is stated above, the impugned order is set aside. Counsel for the complainant will present the complaint before the Court below. The Court will receive the complaint, treat the same as filed on 17th April 1998 (the day on which it was presented earlier) and proceed in accordance with law and in the light of the observations contained in this order.

Crl. M.C. is allowed as above.