(2023) 10 KL CK 0043

In the High Court Of Kerala

Case No : Criminal Revision Petition No. 1124 Of 2011

Sakkir Hussain APPELLANT

Vs

Sreelakshmi Kuries & Loans(P)Ltd & Anr RESPONDENT

Date of Decision : 06-10-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 313, 357(1), 397, 401
Negotiable Instruments Act, 1881 — Section 118, 138, 139

Citation : (2023) 10 KL CK 0043

Hon'ble Judges : C. S. Dias, J

Bench : Single Bench

Advocate : Nagaraj Narayanan, Saijo Hassan, Pushpalatha M.K.

Final Decision : Dismissed

Judgement

C. S. Dias, J

1. The revision petitioner calls in question the correctness and legality of the judgments of the Court of the Sessions, Palakkad Division (Appellate Court) in Crl.Appeal No.524/2009, confirming the judgment of the Judicial First Class Magistrate-II, Palakkad (Trial Court) in C.C No.520/2008, convicting and sentencing the revision petitioner for the offence under Section 138 of the Negotiable Instruments Act (in short, “N.I.Act”). The revision petitioner was the accused and the 1st respondent was the complainant before the Trial Court.

The facts in brief:

2. The 1st respondent-company had filed the complaint before the Trial Court alleging that the revision petitioner had subscribed to one kuri and bid the same for Rs.50,000/- in an auction held on 15.01.2005. The said amount was paid to the revision petitioner on executing a surety bond. After remitting a few monthly subscriptions, the revision petitioner defaulted in payment of the balance amount. In discharge of his liability, he issued Ext.P3 cheque in favour of the first respondent. The cheque, on presentation to the bank for collection, was

dishonored by Ext.P4 memorandum, due to ‘insufficiency of funds’ in the revision petitioner’s bank account. Despite receipt of Ext.P6 statutory lawyer notice, the revision petitioner failed to pay the demanded amount. Hence, the revision petitioner committed the offence under Section 138 of the N.I.Act.

3. The revision petitioner pleaded not guilty to the substance of accusation read over to him. In the Trial, the 1st respondent was examined as PW1 and Exts.P1 to P9 were marked in evidence. The revision petitioner denied the incriminating circumstance put against him in the questioning under Section 313 of the Code of Criminal Procedure (in short, ‘Cr.P.C.’) The revision petitioner did not let in any defence evidence.

Trial Court Judgment

4. The Trial Court, after analysing the materials placed on record, convicted the revision petitioner for the offence under Section 138 of the N.I.Act and sentenced him to undergo simple imprisonment for a period of six months and to pay a compensation of Rs.46,005/- to the 1st respondent, and in default to undergo simple imprisonment for a further period of six months.

5. Aggrieved by the said judgment, the revision petitioner filed Criminal Appeal No.524/2009 before the Appellate Court.

Appellate Court judgment

6. The Appellate Court, after re-appreciating the materials on record, by the impugned judgment, confirmed the conviction, but modified the sentence by directing the revision petitioner to pay a fine of Rs.47,005/-, and in default to undergo simple imprisonment for a period of one month. If the fine amount was realised, an amount of Rs.46,005/- to be paid to the first respondent as compensation under Section 357(1) of the Cr.P.C.

7. It is assailing the concurrent findings of the courts below, the revision petition is filed.

8. Heard; Sri.Nagaraj Narayanan, the learned Counsel appearing for the revision petitioner and the learned Public Prosecutor appearing for the 2nd respondent - State.

9. Is there any illegality, impropriety or irregularity in the judgments passed by the courts below.

10. It is trite, the revisional power of this Court under Sections 397 to 401 of the Cr.P.C. is to be sparingly exercised and in cases of exceptional rarity. The power of this Court is more in the nature of a supervisory jurisdiction, to correct manifest illegality, patent errors and a misreading of the records.

11. In Sanjaysinh Ramrao Chavan vs Dattatray Gulabrao Phalke & Anr [(2015) 3 SCC 123], the Hon’ble Supreme Court has succinctly laid down the scope and purport of the powers under Secs.397 to 401 of the Cr.P.C. It is apposite to

extract the revisional declaration of law, which reads as follows:

"14. In the case before us, the learned Magistrate went through the entire records of the case, not limiting to the report filed by the police and has passed a reasoned order holding that it is not a fit case to take cognizance for the purpose of issuing process to the appellant. Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under Sections 397 to 401 CrPC is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."

12. Now, coming back to the facts of the case.

13. The first respondent's case was that, the revision petitioner was a subscriber to its kuri, and had bid in the auction and was paid an amount of Rs.50,000/-. In default of the payment of the monthly subscription, the revision petitioner issued Ext.P3 cheque in favour of the first respondent. The cheque, on presentation before the bank for collection, was dishonoured due to insufficiency of funds in the bank account of the revision petitioner. The revision petitioner failed to pay the demanded amount, despite receipt of Ext.P6 lawyer notice.

14. The revision petitioner's defence was that, he only stood as a surety and had not issued Ext.P3 cheque towards a legally enforceable debt. Therefore, the complaint may be dismissed.

15. A negotiable instrument, which includes a cheque, carries the presumption of consideration under Secs.118(a) and 139 of the N.I Act. It is profitable to extract the said relevant provisions:

"118. Presumptions as to negotiable instruments – Until the contrary is proved, the following presumptions shall be made;-

(a) of consideration-that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

139. Presumption in favour of holder. —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”.

16. A three-Judge Bench of the Hon’ble Supreme Court in Rangappa vs. Sri.Mohan [2010 KHC 4325], while dealing with Sec.139 of the N.I Act has conceptualised the doctrine of ‘reverse onus’, by holding thus:

“ 18. In light of these extracts, we are in agreement with the respondent - claimant that the presumption mandated by S.139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. S.139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While S.138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under S.139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by S.138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused / defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under S.139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his / her own.

15. Coming back to the facts in the present case, we are in agreement with the High Court's view that the accused did not raise a probable defence. As noted earlier, the defence of the loss of a blank cheque was taken up belatedly and the accused had mentioned a different date in the 'stop payment' instructions to his bank. Furthermore, the instructions to 'stop payment' had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to

the statutory notice under S.138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant - accused was not able to contest the existence of a legally enforceable debt or liability. The fact that the accused had made regular payments to the complainant in relation to the construction of his house does not preclude the possibility of the complainant having spent his own money for the same purpose. As per the record of the case, there was a slight discrepancy in the complainant's version, in so far as it was not clear whether the accused had asked for a hand loan to meet the construction – related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way, the complaint discloses the prima facie existence of a legally enforceable debt or liability since the complainant has maintained that his money was used for the construction - expenses. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes into play and the same has not been rebutted even with regard to the materials submitted by the complainant”.

17. Recently, a three-Judge Bench of the Hon’ble Supreme Court in Kalamani Tex and Anr vs. P. Balasubramanian [2021 (2) KHC 517] has reiterated the legal position and doctrine of the reverse onus. It is apposite to extract the relevant paragraphs, which declares the law on the point in the following terms:

“14. Adverting to the case in hand, we find on a plain reading of its judgment that the trial Court completely overlooked the provisions and failed to appreciate the statutory presumption drawn under Section 118 and Section 139 of NIA. The Statute mandates that once the signature (s) of an accused on the cheque/ negotiable instrument are established, then these ‘reverse onus’ clauses become operative. In such a situation, the obligation shifts upon the accused to discharge the presumption imposed upon him. This point of law has been crystalized by this Court in Rohitbhai Jivanlal Patel v. State of Gujarat (2019 (2) KHC 243).”

18. In Rangappa (supra), the Honourable Supreme Court has held that, once a cheque is dishonoured, a reverse onus of proof is cast on the accused under Section 139 of the N.I.Act. If the accused fails to reply to the statutory lawyer notice issued by the complainant under Section 138 of the N.I.Act, then an inference is to be drawn in favour of the complainant.

19. In Kalamani Tex (supra), the Honourable Supreme Court has held that even if a blank cheque is voluntarily signed and issued by the accused towards some payment, the statutory presumption under Section 139 of the N.I.Act cannot be obliterated, unless the accused raises a probable defense.

20. In the case at hand, indisputably, despite receipt of Ext.P6 lawyer notice, the revision petitioner has not sent a reply notice and has not let in defence evidence. He has bluntly denied the incriminating questions put to him under Section 313 of the Cr.P.C. The defence let in by the revision petitioner through the cross examination of the PW1 and also the answers given under Section 313

questioning will not rebut the reverse onus of proof cast on him under Section 139 of the N.I.Act.

21. On an appreciation of the materials on record and the judgments rendered by the courts below, I do not find any error, illegality or impropriety in the judgments of the courts below holding that the revision petitioner had issued Ext.P3 cheque towards a legally enforceable debt and, thereby, he had committed the offence under Section 138 of the N.I.Act. Thus, I confirm the concurrent convictions of the courts below and the sentence imposed by the Appellate Court.

22. At the said point of time, the learned Counsel appearing for the revision petitioner prayed that the revision petitioner may be granted at least two months' time to pay the fine amount. As the revision petition is of the year 2011 and this Court had suspended the execution of sentence, subject to the condition that the revision petitioner deposits an amount of Rs.25,000/- before the Trial Court, I am inclined to grant the revision petitioner two months’ time to deposit the fine amount.

In the result;

(i) The revision petition is dismissed;

(ii) The conviction passed by the courts below and the sentence imposed by the Appellate Court are confirmed;

(iii) The revision petitioner is directed to appear before the Trial Court on or before 6.12.2023, to pay the fine amount and on his failure to undergo the sentence;

(iv) Needless to mention, if the revision petitioner deposits any amount towards the fine amount, only the balance amount need be paid;

(v) In case of failure of the revision petitioner to appear before the Trial Court to pay the fine amount, the Trial Court shall execute the sentence and recover the fine amount, including the default sentence.

(vi) The execution of the sentence shall stand deferred till 6.12.2023.

(vii) The Registry is directed to forthwith forward a copy of this order to the Trial Court for compliance.

