

(2011) 11 KL CK 0046
In the High Court Of Kerala
Case No : Criminal R.P. No. 3077 of 2010

Seenath

APPELLANT

Vs

Joyson

RESPONDENT

Date of Decision : 17-11-2011

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 5, 6
Penal Code, 1860 (IPC) — Section 418, 427

Citation : (2012) 1 CivCC 492 : (2012) 1 KLJ 200 : (2012) 1 KLT 32 : (2012) 3 RCR(Civil) 577

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : P.V. Kochuthresia and M.P. Mary, for the Appellant; P. Gopalakrishnan Nair and Sabu Sreedharan, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Satheesachandran

1. Revision is by the accused, who has been convicted of the offence u/s 138 of the Negotiable Instruments Act, 1881 (for short "the Act"), concurrently by the two courts below. The trial magistrate, on conviction of the accused, has sentenced her to undergo simple imprisonment for six months and to pay fine of ` 70,000/- with default term of simple imprisonment for two months more. Fine amount, if realised, was directed to be paid to the complainant as compensation. In appeal, the Sessions Judge confirmed the conviction and sentence without any modification. Feeling aggrieved, the accused has preferred this revision.

2. The first respondent is the complainant. He filed a complaint against the revision petitioner/accused alleging that a cheque issued by her towards discharge of a liability to him was dishonoured on presentation. When intimation of dishonour was given over phone he was directed to meet the accused to collect the sum. He went over to her house and, on demand, showed the dishonoured cheque. She snatched and got hold of a portion of the cheque and

destroyed it. Later a notice intimating dishonour with demand of the sum covered by the cheque was issued, in which the incident referred to partial destruction of that instrument was also narrated. A reply denying the transaction and issuing of cheque to him, and also the aforesaid incident alleged, was given by the accused. Producing the portion of the cheque, which remained with the complainant, with such portion containing the signature of the drawer, he filed a complaint to prosecute the accused for the offence u/S. 138 of the Act. Both the courts below, on the materials tendered, negating the challenges raised by the accused denying the transaction with the complainant and issuing of any cheque to him, found her guilty, and convicted and sentenced her as aforesaid. Impeaching the propriety, legality and, in fact, the very sustainability of the prosecution of the accused for the offence u/s 138 of the Act, the revision has been filed assailing her conviction.

3. I heard the counsel on both sides.

4. The learned counsel for the accused contended that prosecution of a drawer of a cheque, on the dishonour of such instrument, for the offence u/S. 138 of the Act would be permissible, and in fact, entertainable only where it is established that an "instrument" satisfying the definition of a "cheque" under the Act, is produced before the court. What has been produced in the present case as Ext.P1 is not a "cheque", but only a portion of what is claimed to be a "cheque", according to the counsel. That portion of the "cheque" contains the signature of the accused is not sufficient to prosecute her for the offence u/S. 138 of the Act, when that mutilated cheque does not even contain the number of that instrument or the particulars of the drawee bank, is the submission of the counsel. The defence of the accused that a torn portion of a cheque left behind with other waste papers when she vacated a rented building under her occupation, the management of which was then with the complainant, had been fraudulently made use of by the complainant was not appreciated properly by both the courts below, is the submission of her counsel. Even if that explanation offered by her as to how the complainant got hold of a portion of the cheque containing her signature is not acceptable, according to the counsel, that would not enable the complainant in any way to sustain the prosecution against her for an offence u/S. 138 of the Act. Where execution of the instrument is denied, it is submitted, there should be concrete and convincing evidence producing the cheque that it has been duly executed by the accused, who is alleged to be the drawer of the instrument, and, further, that instrument has been issued towards discharge of a legally enforceable debt or liability. Reliance is placed by the counsel in Jose Vs. P.C. Joy, to contend that an instrument can be considered as a cheque only if such document satisfies the requirements covered u/S. 6 of the Act. A mutilated cheque as similar to Ext.P1 produced in the case, according to the counsel, does not satisfy such requirements as mandated by the aforesaid Section of the Act. Where the very execution of the cheque has been denied over and above disputing the transaction with the complainant, due proof of execution and also the transaction leading to the issue of the cheque was essential to

substantiate the charge under S. 138 of the Act; but, in the present case, other than the evidence of the complainant as PW. 1, nothing has been tendered in the case to prove such aspects, is the submission of the counsel. Reliance is also placed on Bhaskaran Nair v. Mohanan (2009 (2) KLT 897) to contend that even to draw the presumption u/S. 139 of the Act due execution of the cheque must be established. The learned counsel has also relied on Padmanabhan Vs. Vasudevan Namboodiri, to reiterate the proposition canvassed that presumption under S. 139 of the Act could be drawn only if there is admission or proof of execution of the cheque.

5. Complainant had filed another case against the accused for offences under Ss.418 and 427 of the Indian Penal Code in respect of the incident alleged over the snatching of a portion of the cheque from his hand and destroying it by the accused. That case has ended in acquittal is the submission of the counsel, seeking to place reliance on a copy of the judgment rendered in the aforementioned case, produced with the revision. So far as the incident imputed that the complainant went over to the house of the accused, on her promise to pay the money after the cheque was dishonoured, and then, the accused snatched away a portion of the cheque and destroyed it, though he claimed that such incident was seen by another person, no evidence thereof was produced in both cases. The accused who had been proceeded against in the connected case, referred to earlier, on the footing of the incident alleged over the destruction of the cheque, was found not guilty and acquitted. That being so, the case against her producing a portion of the cheque for the offence under S. 138 of the Act, has no basis or merit at all, according to the counsel. Both the courts below, without advertent to and appreciating that the complaint filed with a portion of a cheque, which does not satisfy the requirement of a "cheque", cannot form the basis to launch a prosecution for the offence under S. 138 of the Act, have wrongly founded a conviction against the accused, and, it is liable to be interfered with by this court, is the submission of the counsel.

6. Per contra, the learned counsel for the complainant urged that there is no infirmity in the finding of guilt concurrently entered against the accused by the two courts below, after appreciating the facts and circumstances involved in the case with reference to the materials tendered. He further contended that the offence u/S. 138 of the Act is based on the dishonour of the cheque issued by the drawer of the instrument and when there is material to substantiate the same and where other ingredients to constitute the offence are also satisfied, a torn portion of the dishonoured cheque was produced in the case does not have any significance. Both the courts below have found that a cheque issued to the complainant by the accused had been dishonoured on its presentation and the statutory notice issued was not responded with payment of the sum. The case of the complainant as to how the dishonoured cheque was torn, as stated by him, was found credible and trustworthy. When that be so, there is no infirmity in the finding of guilt entered against the accused concurrently by the two courts below, according to the counsel. Relying on Manoharan v. Selvin Shabu (2006 (4) KLT

SN 9 (Case No. 13), the learned counsel contended that dishonour memo is sufficient evidence to constitute that a cheque issued by the drawer had been dishonoured due to insufficiency of funds in his account, to constitute the very basis or foundation to prosecute the drawer for the offence u/S. 138 of the Act. A portion of the cheque alone, but not the full cheque, which was dishonoured, was produced in the case is not at all material, is the submission of the counsel to contend that the conviction of the accused concurrently rendered by the two courts below does not suffer from any infirmity.

7. I have perused the records with reference to the submissions made by the counsel on both sides.

8. Ext.P1 is a portion of the "cheque" containing the signature of the drawer of that cheque. There is no challenge from the accused that the signature appearing in Ext.P1 cheque was not subscribed by her. Ext.P1 is a portion of a cheque containing her signature remains unchallenged. In Ext.P5 reply notice sent by the accused in response to Ext.P4 notice intimating dishonour of the cheque, she had contended of abandoning a blank cheque, after tearing it, when she left a rented building. There is no advertence in the reply notice that the blank cheque leaf left behind after tearing was one subscribed with her signature. The reply notice also does not make mention of the place where she left such a blank cheque after tearing it. But when the complainant was examined as PW. 1 through suggestive questions, she made attempts to develop a case that it was so done at a rented building, which was under the management of the complainant, as and when she vacated that building. In the given facts of the case where the complainant had specifically alleged that on dishonour of the instrument before issuing the statutory notice on the request of the accused he went over to her house with the dishonoured cheque to collect the amount as promised, and, then, she snatched away a portion of the dishonoured cheque and destroyed it, what has been stated in Ext.P5 reply notice issued by the accused, as referred to above, shows the falsity of the defence canvassed. Both the courts below, on the evidence tendered in the case have found that the complainant had presented through his bank a cheque, which was not tampered in any manner, for encashment. PW.3 is the Manager of the bank through which the complainant presented the cheque. That instrument was sent over to the South Indian Bank, Malappuram Branch, wherein the drawer of that instrument maintained his/her account. PW.2 the Manager of that bank has given evidence that on receiving such cheque Ext.P2 dishonour memo stating "funds insufficient" was issued, since the account of the drawer was short of funds. He has also given evidence that the instrument transmitted related to the account of the accused, giving particulars of that account. The extract of the "cheque return register" of that bank was also marked as Ext.P6. He further gave evidence that Ext.P1 cheque, as and when it was transmitted over and received was in full size, that it was in order, and not mutilated. In cross-examination though it has been brought out that he was not the Manager of the bank at that point of time, and also had no occasion to deal with the transaction relating to the cheque giving

rise to the issue of Ext.P2 dishonour memo, that does not in any way affect the core of his testimony which is supported by the documentary materials also. A cheque issued for a sum of ` 70,000/- from the account of the accused, as and when transmitted from the bank of the complainant to the drawee bank was in order and not mutilated, and it was dishonoured due to insufficiency of funds in the account of the accused, is proved by the evidence of PW.2. PW.3 has given evidence that the cheque returned with Ext.P2 dishonour memo from the bank of PW.2, was given back to the complainant with Ext.P3 return memo. So much so, the evidence let in through the bank officials, Pws.2 and 3, with the documentary evidence over the transaction covered by the cheque demonstrated in unmistakable terms that a cheque drawn by the accused for a sum of ` 70,000/- was presented in proper form and not in a mutilated condition by the complainant to his bank and it was returned in proper form and untampered with a dishonour memo stating "funds insufficient", to honour such instrument in the account maintained by the accused in her bank. Where it is so established, the question comes up for consideration whether the production of Ext.P1 a portion of the cheque alone by the complainant to prosecute the accused in any way affect the substratum of his case.

9. The offence u/S. 138 of the Act is fundamentally based on "dishonour of a cheque" for the reason that the amount in the credit of the drawer is insufficient or it exceeds the amount arranged to be paid from that account by an agreement made with the bank. True, prosecution on such dishonour, depends on completion of further steps as to issue of a notice within the period fixed and also filing of the complaint within the time limit prescribed, in case the amount covered by the instrument with the intimation of notice of dishonour and demand is not complied with by the drawer of such instrument. Where dishonour of the instrument drawn by the accused towards the discharge of a debt or liability in favour of the complainant is proved, with the essential ingredients constituting the offence u/S. 138 of the Act as to issue of notice and non-payment of the sum after such notice and filing of the complaint in time are established, it is futile to contend that the prosecution launched thereof is liable to fail for the reason that the cheque produced before the court with the complaint was only a portion of the instrument. In such a case, even the non-production of a cheque, if proper and sufficient explanation thereof is made out, may not have any significance. In the present case, the trial magistrate who recorded the testimony of the complainant as PW.1 found his version as to the circumstances under which the dishonoured cheque was mutilated reliable, trustworthy and convincing. The learned Sessions Judge, after reappraisal of the evidence, concurred with the conclusion so formed by the magistrate. I do not find any infirmity in the conclusion so concurrently formed by the two courts in accepting the case of the complainant where the documentary materials tendered by him, and more so, the testimonies of Pws.2 and 3, the bank officials, lend assurance in accepting his version as true. Denial of the transaction with the complainant and also the execution and handing over of any cheque to him, canvassed by the accused, no

doubt, require to be examined. However, that defence canvassed for has to be examined with reference to the totality of the proved facts and circumstances established in the case. Her statement in the reply notice to explain away the possession of a portion of the cheque with the complainant, which has been adverted to earlier, clearly spell out that she has no regard for truth. Mere denial of execution of the instrument, and dispute raised challenging the transaction with the complainant, will be hardly sufficient to sustain the defence canvassed thereof more particularly in a case where the incriminating circumstances presented by the materials produced in the case clearly demonstrate the culpability of the accused for the offence under S.138 of the Act.

10. The decisions cited by the counsel for the accused, *Bhaskaran Nair v. Mohanan* (2009 (2) KLT 897) and *Padmanabhan Vs. Vasudevan Namboodiri*, have no application to the facts of the present case. Where the evidence of the complainant over the execution of the cheque, and also the transaction between him and the accused, in a case where the cheque was presented by him for encashment as the payee and it was dishonoured, is found credible, trustworthy and reliable by the court, there is no need to seek any corroboration from any independent source to establish the execution and transaction. A challenge has been set up by the accused on those aspects, by itself, does not cause any inhibition in the court in accepting the testimony of the complainant, if it found reliable, to hold that there was due execution and also proof of transaction over the instrument. So far as the drawing of the presumption under S. 139 of the Act, which has been considered in both the reported decisions cited above, what is required is only admission or proof of execution. When the evidence of the complainant is found to be sufficient to prove the execution, naturally, without anything more, and unless and until it is rebutted, statutory presumption can be drawn that the instrument has been issued in discharge of a debt or liability by the drawer thereof. Similarly, the decision cited by the counsel in *Jose Vs. P.C. Joy*, , has also no bearing to the present case. Advertence to Sections 5 and 6 of the Act was made in that decision, as seen from the facts involved, in relation to issue of a cheque in blank form with signature alone. In that context it was held that a mere signature in the cheque or a writing of the amount or date in the cheque will not be sufficient for the court to conclude that the cheque is drawn in favour of the complainant. The accused has no case that she had issued any cheque in blank form with signature, but, a totally different defence denying the transaction and issue of cheque. The defence so canvassed has been shown to be totally false and unworthy of any merit. Sustainability or merit of a prosecution for the offence on the basis of a mutilated dishonoured cheque, or even its non-production was not a question involved in Jose's case cited above, and the proposition laid down thereof has no application to the present case.

11. Complainant was unsuccessful and, in fact, lost his case prosecuted against the accused, separately, over the destruction of the cheque, alleging offences under Ss.418 and 427 of the Indian Penal Code, which has been canvassed by the counsel for the accused to impeach her conviction in the present case, does

not lend any assistance to the accused to question the propriety and correctness of the conviction concurrently rendered against her by the two courts below. Prosecution launched by the complainant separately over the destruction of the cheque, though he was unsuccessful, would only indicate that the case stated by him as to the circumstance under which the dishonoured cheque was mutilated more credible and trustworthy. The accused had been acquitted in that case for absence of evidence to prove her culpability for the offences u/Ss. 418 and 427 of the Indian Penal Code, would not absolve her from the offence u/S. 138 of the Act, which has been found proved on the materials tendered by the two courts below concurrently. Conviction of the accused for the offence u/S. 138 of the Act, in the proved facts of the case, is unassailable.

12. So far as the sentence imposed against the accused, particularly, the substantive term of imprisonment for six months is found to be excessive. The circumstances proved in the case that the cheque, after its dishonour, was mutilated on account of her culpable acts require to be taken into account in awarding appropriate punishment. I find imposition of substantive term of imprisonment for a period of one month is warranted against the accused, retaining the fine amount with the default term of imprisonment. Sentence shall stand modified accordingly.

13. Affirming the conviction of the petitioner/accused, sentence imposed against her is modified and reduced to simple imprisonment for one month, retaining the fine of ` 70,000/- with default term of simple imprisonment for two months. Fine amount, if realised, shall be paid as compensation to the complainant.

Subject to the modification of sentence, as indicated above, revision is dismissed in all other respects.