(2022) 11 KL CK 0001

In the High Court Of Kerala

Case No : Criminal Revision Petitions No. 582 Of 2022

T P Shine APPELLANT

Vs

State Of Kerala RESPONDENT

Date of Decision : 01-11-2022

Acts Referred:

Code of Criminal Procedure, 1973 — Section 313(1)(b), 357(1)(b), 397, 401
Negotiable Instruments Act, 1881 — Section 20, 87, 118, 138, 139
Legal Services Authorities Act, 1987 — Section 21

Citation : (2022) 11 KL CK 0001

Hon'ble Judges : A.Badharudeen, J

Bench : Single Bench

Advocate : Sadchith.P.Kurup, V.Madhusudhanan, C.P.Anil Raj, Ancy Rubens, Renjit George

Final Decision : Dismissed

Judgement

A.Badharudeen, J.

1. This is a revision petition filed under Sections 397 and 401 of the Code of Criminal Procedure (hereinafter will be referred as Cr.P.C. for convenience) and the revision petitioner herein is the sole accused in C.C.No.1704 of 2016 on the file of the Judicial First Class Magistrate Court, Njarakkal. He impugns conviction and sentence imposed by the learned Magistrate in the above case, as per judgment dated 18.02.2021 confirmed by the appellate court as per judgment in Crl.Appeal No.104 of 2021 dated 27.05.2022 of the First Additional Sessions Judge, Ernakulam, arising therefrom. The respondents herein are the original complainant as well as the State of Kerala.

2. Heard the learned counsel for the revision petitioner/the accused and the learned Public Prosecutor on admission.

3. I shall refer the parties in this Revision Petition as ‘complainant’ and ‘accused’ for convenience.

4. Shorn off unnecessary details, the case put up by the complainant before the trial court is as under:

The complainant launched prosecution alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter will be referred as 'NI Act' for convenience) by the accused on the allegation that cheque for Rs.2,00,000/- each dated 24.07.2016 and 27.08.2016 issued by the accused to the complainant in discharge of the loan amount received by the accused from the complainant, when dishonoured.

5. The court below secured the presence of the accused for trial and went on trial. During trial, PW1 examined and Exts.P1 to P6 were marked on the side of the complainant.

6. After questioning the accused under Section 313(1)(b) of Cr.P.C, though opportunity was provided to the accused to adduce defence evidence, no defence evidence was adduced.

7. While assailing the concurrent verdicts of the trial court as well as the appellate court, the learned counsel for the accused would submit that Exts.P1 and P2 were issued as blank signed cheques towards security, when the accused borrowed Rs.1,00,000/- from the complainant and the said amount was repaid with interest. Therefore, Exts.P1 and P2 lack consideration and as such, courts below went wrong in convicting and sentencing the accused.

8. It is argued further that the cheques were issued in terms of an award passed before the Lok Adalat and therefore, as per Section 21 of the Legal Services Authorities Act, the same is a deemed decree. Therefore, the remedy of the second respondent herein is to execute the decree and the prosecution initiated on dishonour of the said cheques is bad in law.

9. In fact, the legal position insofar as an award passed in the Lok Adalat is not in dispute. In the decision reported in [(2012) 2 SCC 51], K.N.Govindan Kutty Menon v. C.D.Shaji., the judgment rendered by this Court in W.P(C).No.33013/2009 dated 24.11.2009 reported in [2010 1 KHC 8] was challenged before the Apex Court. This Court while dealing with Section 21 of the Legal Services Authority Act, 1987 held that an award passed by the Adalat in a criminal case involving offence punishable under Section 138 of the Negotiable Instruments Act can be treated as an order of the criminal court and it cannot be executed as a decree of a civil court. But the Apex Court after considering the impact of Section 21 of the Legal Services Authorities Act, settled the following propositions :

“26. (1) In view of the unambiguous language of Section 21 of the Act, every award of the Lok Adalat shall be deemed to be a decree of a civil court and as such it is executable by that court.

(2) The Act does not make out any such distinction between the reference made by a civil court and a criminal court.

(3) There is no restriction on the power of the Lok Adalat to pass an award based on the compromise arrived at between the parties in respect of cases referred to by various courts (both civil and criminal), tribunals, Family Court, Rent Control Court, Consumer Redressal Forum, Motor Accidents Claims Tribunal and other forums of similar nature.

(4) Even if a matter is referred by a criminal court under Section 138 of the Negotiable Instruments Act, 1881 and by virtue of the deeming provisions, the award passed by the Lok Adalat based on a compromise has to be treated as a decree capable of execution by a civil court."

10. In the case on hand, while asserting the said point, the learned counsel for the revision petitioner placed reliance on the award passed in this case before the Taluk Legal Services Committee, Kochi dated 08.04.2018. As per the said settlement, following are the terms incorporated:

Both sides agree to settle the case on payment of Rs.4,20,000/- (Rupees Four lakh Twenty Thousand only) to the complainant by the accused as scheduled below.

1) Accused shall pay Rs.1,00,000/- (One lakh only) on or before 27.09.2018.

2) Balance Rs.50,000/- (Fifty Thousand only) shall be paid on or before 30.10.2018.

3) Balance Rs.2,70,000/- (Two lakh Seventy Thousand only) shall be paid on or before 30.12.2018.

4) On receipt of the said amount complainant will withdraw the cases.

5) In case of non-payment of the amount complainant will be at liberty to proceed with the complaint.

11. As per Clause 5 in the settlement, the parties agreed that, in case of non-payment of the amount, the complainant would be at liberty to proceed with the complaint. That means no finality reached in the award and the terms of the award is to the effect that in case of failure to pay the amount, the complaint in the prosecution shall continue.

12. In such a case, it cannot be held that the award relied on by the learned counsel for the revision petitioner is the final award to be executed and the agreement was to continue the prosecution, when payment, as agreed, was not effected.

13. It is the settled law that in order to execute a decree, the decree must be one capable of execution and the terms thereof shall be sufficient to get the same executed. It is unexceptionable that a court executing a decree cannot go behind the decree; it must take the decree according to its tenor; has no jurisdiction to widen its scope and is required to execute the decree as made. The decision reported in [(2009) 5 SCC 634 : 2009 KHC 4617], M/s.Century

Textiles Industries Ltd. V. Deepak Jain & anr., is on this point.

14. In the case on hand, no final award passed and the prosecution also was not terminated at any point of time. Therefore, it cannot be held that the dispute was settled by passing a final award, having the trappings of a civil court decree under Section 21 of the Legal Services Authorities Act. Therefore, this contention cannot be appreciated.

15. Coming to the other contentions, it has to be noted that the accused admitted that he had issued Exts.P1 and P2 at the time when he borrowed Rs.1,00,000/- from the complainant. The further contention was that he had discharged the said liability. But no evidence forthcoming to establish the plea of discharge, insofar as the admitted liability also.

16. In this case, the courts below relied on the evidence of PW1 along with Exts.P1 to P6 to hold that the complainant discharged his initial burden in the matter of transaction led to execution of the cheque. Thereby, the courts below given benefit of presumptions in favour of the complainant and finally, convicted and sentenced the accused. As regards the presumption, the law is well settled.

17. In this connection, I would like to refer a 3 Bench decision of the Apex Court in [2010 (2) KLT 682 (SC)], Rangappa v. Sri.Mohan. In the above decision, the Apex Court considered the presumption available to a complainant in a prosecution under Section 138 of the N.I Act and held as under:

“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 [2008 (1) KLT 425 (SC)] may not be correct. 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 specified 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. 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.”

18. In the decision reported in [2019 (1) KLT 598 (SC) : 2019 (1) KHC 774 : (2019) 4 SCC 197 : 2019 (1) KLD 420 : 2019 (2) KLJ 205 : AIR 2019 SC 2446 : 2019 CriLJ 3227], Bir Singh v. Mukesh Kumar, the Apex Court while dealing with a case where the accused has a contention that the cheque issued was a blank cheque, it was held as under:

“A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of S.138 would be attracted. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.”

19. In a latest 3 Bench decision of the Apex Court reported in [2021 (2) KHC 517 : 2021 KHC OnLine 6063 : 2021 (1) KLD 527 : 2021 (2) SCALE 434 : ILR 2021 (1) Ker. 855 : 2021 (5) SCC 283 : 2021 (1) KLT OnLine 1132], M/s.Kalamani Tex. & anr. v. P.Balasubramanian, the Apex Court considered the amplitude of presumptions under Sections 118 and 139 of the N.I Act it was held as under:

“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 S.118 and S.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. Once the 2nd Appellant had admitted his signatures on the cheque and the Deed, the Trial Court ought to have presumed that the cheque was issued as consideration for a legally enforceable debt. The Trial Court fell in error when it called upon the Complainant-Respondent to explain the circumstances under which the appellants were liable to pay.

…...............

18. Even if we take the arguments raised by the appellants at face value that only a blank cheque and signed blank stamp papers were given to the

respondent, yet the statutory presumption cannot be obliterated. It is useful to cite Bir Singh v. Mukesh Kumar (2019 (1) KHC 774 : (2019) 4 SCC 197 : 2019 (1) KLD 420 : 2019 (1) KLT 598 : 2019 (2) KLJ 205 : AIR 2019 SC 2446 : 2019 CriLJ 3227], P.36., where this Court held that:

"Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under S.139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."

20. Thus the law is clear on the point that when the complainant discharged the initial burden to prove the transaction led to execution of the cheque, the presumption under Sections 118 and 139 of the N.I Act would come into play. No doubt, these presumptions are rebuttable and it is the duty of the accused to rebut the presumptions and the standard of proof of rebuttal is nothing but preponderance of probabilities.

21. In this case, except the point argued by the learned counsel for the revision petitioner on the submission that there was an award passed under Section 21 of the Legal Services Authorities Act which is found against as discussed herein above, all other contentions are, in fact, can be addressed based on appreciation/ re-appreciation of evidence. But the same is not permissible within the power of revision.

22. It is the settled law that power of revision available to this Court under Section 401 of Cr.P.C r/w Section 397 is not wide and exhaustive to re-appreciate the evidence to have a contra finding. In the decision reported in [(1999) 2 SCC 452 : 1999 SCC (Cri) 275], State of Kerala v. Puttumana Illath Jathavedan Namboodiri, the Apex Court, while considering the scope of the revisional jurisdiction of the High Court, laid down the following principles (SCC pp. 454-55, para 5):

"5. …... In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinising the impugned judgment of the High Court from the aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by reappreciating the oral evidence. ..."

23. In another decision reported in [(2015) 3 SCC 123 : (2015) 2 SCC (Cri) 19], Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke, the Apex Court held that the High Court in exercise of revisional jurisdiction shall not interfere with the order of the Magistrate unless it is perverse or wholly unreasonable or there is non-consideration of any relevant material, the order cannot be set aside merely on the ground that another view is possible. Following has been laid down in para.14 (SCC p.135) :

"14. …... 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 Cr.P.C 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 glaring 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."

24. The said ratio has been followed in a latest decision of the Supreme Court reported in [(2018) 8 SCC 165], Kishan Rao v. Shankargouda. Thus the law is clear on the point that the whole purpose of the revisional jurisdiction is to preserve power in the court to do justice in accordance with the principles of criminal jurisprudence and, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence had already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the court which would otherwise tantamount to gross miscarriage of justice. To put it otherwise, if there is non-consideration of any relevant materials, which would go to the root of the matter or any fundamental violation of the principle of law, then only the power of revision would be made available.

25. In this case, the trial court sentenced the accused to pay a fine of Rs.4,00,000/- and in default of payment of fine, six months imprisonment was ordered. Fine was ordered to paid as compensation to the complainant under Section 357(1)(b) of Cr.P.C.

26. In the appeal, the appellate court modified the sentence by enhancing the fine amount to Rs.5,80,000/-.

27. In this connection, another decision of the Apex Court in R.Vijayan v. Baby and Another, [AIR 2012 SC 528] also is of relevant.

28. In paragraph 16 of the judgment of the Apex Court directed that unless there

are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine upto twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate. Uniformity and consistency in deciding similar cases by different Courts, not only increase the credibility of cheque as a negotiable instrument, but also the credibility of Courts of justice.

29. Therefore, it could not be held that the appellate court went wrong in increasing the fine, while maintaining the default sentence.

30. Having considered the above aspects, I am of the view that the concurrent verdicts of conviction as well as sentence imposed by the trial court do not require any interference at the hands of this Court and therefore, the revision must fail.

31. In the result, this revision petition fails and it is, accordingly, dismissed.

32. However, the revision petitioner/the accused is given two months time from today to pay the compensation and to undergo the sentence. Therefore, the revision petitioner/the accused is directed to appear before the trial court on 31.12.2022 to pay the compensation and to undergo the sentence. The execution of the sentence shall stand deferred till 30.12.2022.

On failure to do so, the trial court is directed to execute the sentence without fail.

Registry is directed to forward a copy of this order to the courts below concerned for information and compliance.

