
(2010) 03 KL CK 0144

In the High Court Of Kerala

Case No : Criminal Revision Petition No. 1687 of 2005

V.S. Reddy

APPELLANT

Vs

Excel Glasses Ltd. and Another

RESPONDENT

Date of Decision : 04-03-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 205, 205(1), 273, 317, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2010) CriLJ 4171 : (2010) 3 ILR (Ker) 215 : (2011) 6 RCR(Criminal) 366

Hon'ble Judges : P.S. Gopinathan, J

Bench : Single Bench

Advocate : P. Vijaya Kumar, for the Appellant; B. Raman Pillai, R. Anil, Raju Radhakrishnan and Anil K. Mohammed and Rithwik, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Gopinathan, J.—The revision Petitioner in CrI.R.P. No. 1687/2005 as well as the Petitioner in CrI.M.C. No. 1970/2005 is the accused in CC. No. 315/2004 on the file of the Chief Judicial Magistrate, Alappuzha. (Hereinafter, he is referred as the Petitioner). The first Respondent in both proceedings is the complainant before the trial court. The first Respondent in his complaint alleged that the Petitioner issued three cheques, totally for a sum of Rs. 11,08,474/-, in discharge of a liability arising out of a business transaction, whereby the Petitioner purchased glass bottles from the first Respondent and that when presented for collection, the cheques were returned dishonoured with endorsement "payment stopped by the drawer" and that there was no balance in the account of the Petitioner and that though a notice demanding discharge of liability was caused, neither any reply was sent nor the liability was discharged. The learned Magistrate took cognizance and issued process.

2. The Petitioner, after accepting the process, filed a petition before this Court as

Crl.M.C. No. 2685/2004 seeking an order to quash the complaint in exercise of the powers conferred on this Court u/s 482 of the Code of Criminal Procedure with a plea that the bottles supplied by the first Respondent when sent with medicinal products developed cracks and were of very poor quality and so the amount due to the first Respondent was much lesser and in that circumstance, the Petitioner directed his bank to stop payment and that there was sufficient amount in his account to honour the cheques, when presented for collection, and that the transaction between the Petitioner and the first Respondent is purely a civil one and the dispute is of a civil nature and to be disposed accordingly and that no offence u/s 138 of the Negotiable Instruments Act was constituted.

3. While disposing Crl.M.C. No. 2685/2004, this Court issued the following directions:

(i) If an application is filed by the Petitioner to exempt him from personal appearance in court, the learned Magistrate shall consider the application on its merits and appropriate orders on the same shall be passed in accordance with law, after affording an opportunity of being heard to the complainant also.

(ii) The Petitioner may file an application pleading for a discharge with specific reference to the contention of the Petitioner that the ingredients of the offence have not been made out in the complaint. His plea that stop memo was issued for valid reasons can also be considered by the learned Magistrate. If such an application is filed, the learned Magistrate shall consider the same in accordance with law.

Accordingly, seeking an order to exempt the Petitioner from personal appearance, a petition as Crl.M.P. No. 5555 of 2004 was filed. By order dated 23.4.2005 that petition was dismissed. Assailing the said order Crl.M.C. No. 1970 of 2005 was preferred.

Crl. R. P. No. 1687/2005.

4. Another petition as Crl.M.P. No. 355 of 2005 was filed seeking an order of discharge. By order dated 23.4.2005 the learned Magistrate dismissed the petition. Assailing the legality, correctness and propriety of that order, the revision petition was filed.

5. The fact that the Petitioner issued three cheques in discharge of the liability out of business transaction is, in fact, not disputed. But the contention advanced is that, when the glass bottles supplied by the 2nd Respondent were despatched with medicinal products the bottles were found leaking and developed cracks and that the glass bottles supplied were of inferior quality and hence that much amount covered by the cheques were not due to the first Respondent and in that circumstances the Petitioner issued stop memo to the Bank and that the cheques were dishonoured by the Bank only on the basis of the issuance of the stop memo with good reasons and not for want of sufficient funds to honour the cheques.

6. It is crucial to note that before launching the prosecution, the first Respondent had complied with all mandatory procedures.

Though the Petitioner acknowledged the notice demanding discharge of the liability, wherein it is specifically mentioned that the cheques issued in discharge of liability were dishonoured because of the stop payment and for want of sufficient funds in the account of the Petitioner, no reply was caused. The contention that the materials supplied for which the value was paid by cheques were of inferior quality and that so much amount covered by the cheques were not due to the first Respondent were raised subsequent to the launching of the prosecution. The defence plea may be a good defence in trial. It is matter within the knowledge of the Petitioner and not borne out by any document. Much less any document was produced. It is not disputed that if the glass bottles purchased by the Petitioner were of expected quality, the amounts covered by the cheque were due to the first Respondent. So, only on proof of inferior quality, the Petitioner can demand for reduction. It is very crucial to note that the Petitioner has no case that even a single bottle was returned. The contention that the glass bottles were of inferior quality cannot be taken as "Gospel truth" to discharge the Petitioner. The defence advanced is one necessarily to be established by evidence. An accused in a prosecution u/s 138 of the Negotiable Instruments Act is not entitled to a discharge before trial on advancing plea, that too after launching the prosecution, that the amount due is lesser than what is shown in the instrument.

7. The learned Counsel had canvassed my attention to a judgment of the Apex Court in *Raj Kumar Khurana Vs. State of (NCT of Delhi) and Another*, wherein at para. 11 it is held as follows:

[S]uch a penal provision, enacted in terms of the legal fiction drawn would be attracted when a cheque is returned by the bank unpaid. Such non-payment may either be: (i) because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank. Before a proceeding thereunder is initiated, all the legal requirements therefore must be complied with. The court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with.

According to the learned Counsel, the case on hand is identical to the case in *Raj Kumar Khurana's* case and that the Petitioner is entitled to an order of discharge. The facts of the case on hand has no application with *Raj Kumar Khurana's* case, because in this case, there is sufficient pleadings in the complainant regarding compliance of all legal requirements. The Petitioner has no case that there is non compliance of any legal requirement. The defence plea was raised only after the acceptance of process. The Petitioner didn't even care to reply to the statutory notice.

8. Relying upon the decisions in *M/S Modi Cements Limited Vs. Shri Kuchil Kumar*

Nandi, , M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, and in Gooplast Pvt. Ltd. Vs. Shri Chico Ursula D'Souza and Another, , it was argued by the learned Counsel for the first Respondent that when a cheque issued by an accused was got dishonoured on his stop payment instruction, it is the burden of the accused to establish that he had sufficient funds to clear the debt and that the stop payment was given for valid reasons, including absence of debt or liability for stop payment; and that, once a cheque is issued by drawer, the presumptions u/s 139 of the Negotiable Instruments Act must follow and merely because of the drawer issued notice to the drawee or to the bank for stoppage of payment, will not preclude an action under the Negotiable Instruments Act by the drawee or the holder of the cheque in due course. Having, due regard to the rulings of the Apex Court in the decisions cited supra and the judgment in Raj Kumar Khurana's case, I find that the facts of the case in Raj Kumar Khurana's case has no similarity with the facts of the case on hand. Whereas the facts of the case in Modi Cements Ltd., M.M.T.C, Ltd. and Geoplast Pvt. Ltd. are almost identical.

9. A similar case has been to the consideration of this Court in Narayanan v. State of Kerala ILR 2009 (Ker) 676 : 2010 Cri LJ 459 . Learned Judge, following the ratio of the decisions in Modi Cements Ltd., M.M.T.C. Ltd. and Geoplast Pvt. Ltd., held that it is for the accused to prove that "stop payment" was issued for good and valid reason and that the cheque was not dishonoured due to insufficiency of funds. I find that the case on hand is identical to the one and the burden is on the Petitioner to establish that he had issued "stop memo" for valid reasons. The reason that the Petitioner stated is a matter yet to be proved. Before establishing the reason, the Petitioner is not entitled to an order of discharge. The learned Magistrate was correct in dismissing the petition filed by the Petitioner. The revision petition is devoid of merit and is liable to be dismissed.

Crl.M.C. No. 1970 of 2005.

10. The learned Magistrate dismissed the petition with a reason that the Petitioner didn't appear before the Court and the personal attendance of the Petitioner, to obtain the bail, is required. It appears that the learned Magistrate had intended that the Petitioner can apply for exemption from personal appearance only after appearing and executing a bail bond. To have a correct appraisal, I find that a reading of Section 205 and Section 317 Code of Criminal Procedure would be relevant.

205. Magistrate may dispense with personal attendance of accused: (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused,

and, if necessary, enforce such attendance in the manner herein before provided.

317. Provision for inquiries and trial being held in the absence of accused in certain cases: (1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

Having gone through the above provisions, I fail to find that the accused can apply for exemption from personal attendance only after executing a bail bond. Even before executing a bail bond, in the event there are sufficient reasons, the accused is entitled to apply for exemption from personal appearance.

11. A similar case was considered by the Calcutta High Court in *Ajit Kumar Chakraborty and Ors. v. Serampore Municipality* 1989 Cri.L.J. 523. At para.10 it is held as follows:

[T]hat apart, we find nothing in Sub-section (1) of Section 205, Code of Criminal Procedure, to give own the remotest indication that in order in claim exemption from personal attendance the accused must, at the first instance, appear personally in court. On the contrary, the sub-section clearly goes to show that even of the stall of issuing summons the Magistrate may, if he sees reasons so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader. This discretion may be exercised by the Magistrate own in the absence of any prayer by the accused for exemption from personal attendance.

In *Kaveri alias Benga and Another Vs. The State*, , it is held in para.4 as follows: .

[W]hile dealing with an application for dispensing with the personal attendance the Court should not take too technical or stringent view. The approach should be to see whether personal appearance is absolutely necessary for purpose of the case.

In *Debasis Samantaray Vs. State of Orissa and Another*, , at para.7 it is held as follows:

[T]he question as to under which circumstances personal attendance of an accused can be dispensed with had been considered by this Court in the decisions cited supra as well as in *Ramesh Chandra Lath Vs. State of Orissa*, ,

Bikram v. State (1994) 7 OCR 721, Radhanath v. Babulal (1986) 62 C L.T. 445, and last but not the least, Surojit v. Sanatan (1999) 17 OCR 473. The ratio of the aforesaid decisions is that the power u/s 205(1), Code of Criminal Procedure can be exercised by a Magistrate not only at the stage of issuance of summons to the accused, but also at subsequent stage even after issuance of N.B.W. Law is no more res integra that even if an application u/s 205, Code of Criminal Procedure is rejected at an earlier stage, such petition can be allowed at a subsequent stage by invoking the provisions of Sections 273 and 317, Code of Criminal Procedure. Thus, it can be safely concluded that an application u/s 205, Code of Criminal Procedure is maintainable even though the accused has not appeared personally and the Magistrate should not hesitate to extend the discretion only on that ground.

In M/s. Bhaskar Industries Ltd. Vs. M/s. Bhiwani Denim and Apparels Ltd. and Others, , it is held by the Apex Court, in para. 17 as follows:

[T]hus, in appropriate cases the Magistrate can allow an accused to make even the first appearance through a counsel. The Magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the Court to dispense with the personal attendance of the accused, (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, on precaution which the Court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the Court that he would not dispute his identity as the particular accused in the case, and that a counsel in his behalf would be present in Court and that has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.

12. In the light of the precedents quoted and the provisions contained in Sub-section (1) of Section 205 and Section 317 Code of Criminal Procedure, I find that in appropriate cases, the Magistrate can allow an accused to make even the first appearance through counsel. The learned Magistrate ought to have considered the petition filed by the Petitioner on merits, irrespective of the fact that he didn't execute the bail bond. But having gone through the averments in the petition, I find that it didn't contain necessary particulars as was laid down by the Apex Court in M/s. Bhaskar Industries case. In this view of the matter, I find that the learned Magistrate was correct in dismissing the petition, though the reasons stated is not correct. Crl.M.C. is devoid of merit and is liable to be dismissed.

In the result, the Revision Petition and the Criminal Miscellaneous Case are dismissed. The learned Magistrate shall proceed with the trial at the earliest and to dispose the same within four months. The Petitioner is at liberty to apply afresh for exemption from personal appearance, if so choses, which shall be

disposed on merits in the light of the ruling laid down by the Apex Court in M/s. Bhaskar Industries case (supra) and for the reasons stated earlier.