

Majeed Vs. K.K. Ebrahim

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Court : Kerala

Decided On : Jan-31-2013

Judge : Honourable Mr.Justice V.K.Mohanan

Appellant : Majeed

Respondent : K.K. Ebrahim

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN THURSDAY, THE 31ST DAY OF JANUARY 2013 11TH MAGHA 193 CrI.Rev.Pet.No. 1442 of 2002 (A) ----- AGAINST THE ORDER/JUDGMENT IN CRA.46/2000 of 5th ADDL. SESSIONS JUDGE, EKM DATED 29 07/2002 AGAINST THE ORDER/JUDGMENT IN CC.859/1997 of J.M.F.C.-II, KOCHI DATED 10 12/1999 REVISION PETITIONER/APPELLANT/ACCUSED: ----- MAJEED, S/O MAMU, H.NO.14/2077, PADINJARAMURIYIL,CHULLICKAL,KOCHI-5. BY ADVS.SRI.V.R.KESAVA KAIMAL SRI.N.M.MADHU COMPLAINANTS/RESPONDENTS/COMPLAINANT: ----- 1.H.NO.6/1192,PALIKKAL K.K.EBRAHIM S/O. KADER KUNJU, HOUSE,STAR JUNCTION, MATTANCHERY,KOCHI TALUK. (DIED). (ADDL.RESPONDENTS 2 TO 1.IMPLEADED) 2.H.NO.4/3147,STAT IBRAHIM, AGED 55 SHRIFA, W/O. LATEJUNCTION,MATTANCHERRY, COCHIN-2. 3.DO. BASHEER, S/O. LATE IBRAHIM, AGED 38 DO. 4.DO. SUBAIR, S/O. LATE IBRAHIM, AGED 30 DO. 5.DO. NAVAN, S/O. LATE

IBRAHIM, AGED 28 DO. 6.AGED KABEER, S/O. LATE IBRAHIM, 26,DO. DO. Crl.Rev.Pet.No. 1442 of 2002 (A) 7.DO. JAMILA, D/O. LATE IBRAHIM, AGED 34 DO. 8.DO. SAJITHA, D/O. LATE IBRAHIM, AGED 32 DO. 9.DO. SULFATH, D/O. LATE IBRAHIM, AGED 25 DO.

10. SUBAIDA,D/O.LATE IBRAHIM,AGED 40 DO. DO IMPEADED AS ADDL.RESPONDENTS AS PER ORDER IN CRL.MP.258/2000 DATED.2-11-2000 BY THE SESSIONS COURT.

2. STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR,ERNAKULAM. R2 BY-PUBLIC PROSECUTOR SMT.REMA.R. THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 31-01-2013, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: V.K.MOHANAN, J.

----- Crl.R.P.No.1442 of 2002 -----
----- Dated this the 31st day of January, 2013 ORDER
The revision petitioner, who is the sole accused in C.C.No.859 of 1997 of the court of the Judicial First Class Magistrate-II, Kochi and the appellant in Crl.A.No.46 of 2000 of the court of the fifth Additional Sessions Judge, Ernakulam preferred this revision petition, as he is aggrieved by the above judgments by which he is found guilty for the offence under Section 138 of the N.I. Act and sentenced him to undergo rigorous imprisonment for four months and to pay fine of `4,000/-.

2. Though the above revision petition was presented as early as on 12/11/2002 and though notice was ordered on 14/11/2002, the service of notice on the respondent is not completed. Therefore the above case is posted in the defect list.

3. Mr.V.R.K.Kaimal, learned counsel appearing for the petitioner submits that though he had sent a Crl.R.P.No.1442/2002 :

2. : registered letter to the revision petitioner, the same was returned and no instruction is received from the revision petitioner and therefore he is not in a position to proceed with the revision petition after curing the same. Since the above revision petition is pending before this Court for the last ten years, I am of

the view that this revision petition can be disposed of on merit with the assistance of the counsel for the revision petitioner.

4. The case of the original complainant, who is no more is that, the accused borrowed a sum of `55,000/- from him after executing a promissory note on 02/02/1997 and subsequently the accused borrowed a sum of `55,000/- from the complainant and when these amounts demanded back, the accused paid a sum of `10,000/- in cash to the complainant and for the balance amount of `45,000/- the accused issued Ext.P1 cheque dated 08/08/1997, after its due execution by the accused and when the said cheque presented for encashment, the same was dishonoured due to insufficiency of fund in the account maintained by the Crl.R.P.No.1442/2002 :

3. : accused as per Ext.P2 memo dated 08/08/1997. According to the complainant, consequent to the dishonor of the cheque, he caused to issue a lawyer notice as evident from Exts.P3 and P4. It is the further case of the complainant that though the accused received the lawyer notice, no amount was paid though he had caused to send a reply notice taking some false contention. Thus, according to the complainant, the accused has committed the offence punishable under Section 138 of the N.I. Act. During the trial of the case, PWs.1 and 2 were examined from the side of the complainant and produced Exts.P1 to P7 documents. No evidence either oral or documentary produced from the side of the defence. Finally, the trial court has found that, the accused has not repaid the amount even after receiving Ext.P3 notice and no contra evidence is adduced from the side of the defence against the evidence of PWs.1 and 2. Thus, the trial court has concluded that, considering the facts and circumstances involved in the case along with the oral evidence of PWs.1 and 2 and documentary evidence of Crl.R.P.No.1442/2002 :

4. : Exts.P1 to P7, it is clear that the accused owed a sum of `45,000/- to the complainant and for the payment of the said amount, the accused issued Ext.P1 cheque, which dishonoured for want of fund when presented for encashment. Thus, the accused has committed the offence punishable under Section 138 of the N.I. Act and the complainant has succeeded in proving the case against the accused beyond reasonable doubt. Accordingly the accused is found guilty under

Section 138 of the N.I. Act and he is accordingly convicted for the said offence. On such conviction, the trial court sentenced the revision petitioner/accused to undergo rigorous imprisonment for a period of four months and also sentenced him to pay fine of `4,000/- and in default he is directed to undergo simple imprisonment for a period of two months. It is ordered that on realisation of the said amount of fine, a sum of `2,500/- being given to PW.1 by way of compensation under Section 357(1)(b) of Cr.P.C. Crl.R.P.No.1442/2002 :

5. :

5. Challenging the above conviction and sentence though the revision petitioner had preferred an appeal, the learned Judge of the appellate court dismissed the appeal by judgment dated 29/07/2002 in Crl.A.No.46 of 2000. It is relevant to note that while the above appeal was pending consideration, the respondent/original complainant expired and therefore his legal heirs are impleaded as additional respondents 2 to 10 in the above appeal. Thus challenging the above conviction and sentence, the accused preferred the present revision petition. Though the challenge is against the concurrent finding of the court below the same is not substantiated. I am not proposed to repeat factual matrix which already considered by the trial court as well as the lower appellate court. From the facts and circumstances involved in the case and from the evidence and materials which referred to by the learned Magistrate and the learned Judge of the appellate court it appears that there is no dispute with respect to the transaction claimed by the complainant. According to the complainant, the Crl.R.P.No.1442/2002 :

6. : accused borrowed a sum of `55,000/- and towards the discharge of the said liability the accused repaid a sum of `10,000/- in cash and towards the balance amount and discharging the balance amount, the accused issued Ext.P1 cheque. Whereas the case of the revision petitioner/accused is that the entire amount is repaid to the complainant. To prove the above case of discharge of the amount, no evidence or material is adduced by the defence at any stage of the trial of the case. According to me, since the accused/revision petitioner has admitted the transaction and taken a plea of discharge, it was incumbent upon the defence to prove the same. In the present case there is no material to that effect. But it is

pertinent to note that when he sent the reply notice, as correctly observed by the learned Sessions Judge, in Ext.P5 reply notice his case is that he had returned a sum of `15,000/- to the complainant. But when PW.1 was cross-examined the suggestion is to the effect that a sum of `40,000/- was repaid and the balance amount was only `15,000/-. It is also relevant to note that Crl.R.P.No.1442/2002 :

7. : during the examination under Section 313 of Cr.P.C. his case was that out of `55,000/- which borrowed from the complainant, he repaid `50,000/-. In the absence of any concrete evidence or materials to prove the discharge, the above inconsistent version of the defence regarding the discharge, especially in the light of the evidence of PWs.1 and 2 and the documentary evidence of Exts.P1 to P7 which positively proves the case of the complainant, I am of the view that, there is no scope for any interference with the concurrent finding of the court below. Therefore, the revision petition fails.

6. It is relevant to note that, the trial court imposed a sentence of four months on convicting the revision petitioner for the offence under Section 138 of the N.I. Act. According to me, the above sentence is exorbitant, which is not proportionate to the offence alleged and therefore the same requires interference and modification, especially in the light of the decision of the Apex Court in Damodar.S.Prabhu v. Sayed Babalal.H. [JT 2010(4) SC Crl.R.P.No.1442/2002 :

8. :

457. , wherein it is held that in the case of dishonour of cheques, the compensatory aspect of the remedy should be given priority over the punitive aspects. In the result, this revision petition is disposed of confirming the conviction of the revision petitioner for the offence under Section 138 of the N.I. Act as recorded by the trial court. But the sentence of imprisonment ordered by the trial court and confirmed by the appellate court is modified and the same is reduced into one day imprisonment that till the rising of the court. Since the substantial sentence is reduced considerably, the petitioner is sentenced to pay a fine of `56,250/- within two months from today and in default he is directed to undergo simple imprisonment for a period of four months. Accordingly, the petitioner is directed to appear before the trial court on 01/04/2013 to receive the modified

sentence and to deposit the fine amount. In case of any failure on the part of the revision petitioner in appearing before the trial court on the above date to receive the modified sentence fixed by this CrI.R.P.No.1442/2002 :

9. : Court and to pay the fine amount within the time stipulated, the trial court is free to take coercive steps to secure the presence of the revision petitioner and to execute the sentence and to realise the fine amount. On realisation of the amount a sum of `55,000/- shall be paid to the respondents as compensation under Section 357(1)(b) of Cr.P.C. and the remaining amount of `1,250/- shall be remitted in the State Exchequer. Coercive steps, if any, pending against the revision petitioner shall be deferred till, 01/04/2013. V.K.MOHANAN, JUDGE skj

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