

S.Abitha Beevi Vs. Titus George

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Court : Kerala

Decided On : Oct-08-2013

Judge : Honourable Mr.Justice K.Vinod Chandran

Appellant : S.Abitha Beevi

Respondent : Titus George

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN TUESDAY, THE 8TH DAY OF OCTOBER 2013 16TH ASWINA, 1935 CRL.A.No. 86 of 2007 (A) ----- CrI.L.P. 2/2007 of HIGH COURT--OF KERALA DATED 04-01-2007 AGAINST THE

ORDER

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JUDGMENT

IN C.C.No.479/2004 of JMFC-V, (SPL.COURT FOR MARKLIST CASES), THIRUVANANTHAPURAM DATED 17-10-2006 ---- APPELLANT/COMPLAINANT: ----- S. ABITHA BEEVI, SHERIFA MANZIL, PEROORKADA, THIRUVANANTHAPURAM. BY ADV. SRI.S.SANTHOSH KUMAR RESPONDENTS/ACCUSED & STATE:: ----- 1.T.C.78/5080, TITUS GEORGE, S/O.GEORGE, TITANIUM P.O., VETTUKKADU,

THIRUVANANTHAPURAM, FROM T.C.32/829, VETTUKKADU, TITANIUM P.O., THIRUVANANTHAPURAM. 2.BY THE STATE OF KERALA, REPRESENTED THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA. R1 BY ADV.SRI.PRAVEEN VYASAN R2 BY PUBLIC PROSECUTOR SMT.M.T.SHEEBA THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08/10/2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: V.K.MOHANAN, J.

----- Crl.A.No.86 of 2007 ----- Dated this the 08th day of October, 2013

JUDGMENT

The complainant in a prosecution for the offence punishable under Section 138 of the N.I. Act is the appellant herein as he is aggrieved by the judgment dated 17/10/2006 in C.C.No.479 of 2004 of the court of the Judicial First Class Magistrate Court-V (Special Court for Marklist Cases), Thiruvananthapuram by which the learned Magistrate acquitted the accused, who faced the prosecution for the said offence.

2. The case of the complainant is that, the accused borrowed an amount of `1,00,000/- from the complainant and towards its repayment the accused had issued two cheques bearing number 435967 dated 01/8/2002 and 435968 dated 01/09/2002 each for `50,000/- and when the said cheques were presented for encashment, the same were returned for the reason of insufficiency of the fund in the account maintained by the accused and though an attempt was made Crl.A.No.86 of 2007 :-2-: to serve statutory notice on him, he refused the same and thereafter no money was paid and thus according to the complainant the accused has committed the offence punishable under Section 138 of the N.I. Act.

3. During the trial of the case, the complainant is examined as PW.1 and Exts.P1 to P7 were produced from her side. From the side of the defence DW.1 was examined and produced Ext.D1 photocopy of the promissory note. The defence contented that no statutory notice was served on him and accepting the above contention the learned Magistrate has found that there is strong suspicion regarding the sending of the statutory notice in the correct name of the accused and hence the "refused" postal endorsement cannot be considered as serving the

statutory notice to the accused under Section 27 of the General Clauses Act and thus the complainant failed to prove that she had sent statutory notice under Section 138 of the N.I. Act to the accused. Consequently, the learned Magistrate held that the complainant failed to establish the offence under Section 138 of the N.I. Act. Accordingly, the CrI.A.No.86 of 2007 :-3-: accused found not guilty and he is acquitted under Section 255(1) of Cr.P.C. It is the above finding and order of acquittal that are challenged in this appeal.

4. I have heard Sri.S.Santhosh Kumar, the learned counsel for the appellant and Adv.Sri.Praveen Vyasan, the learned counsel appearing for the first respondent.

5. The learned counsel for the appellant vehemently submitted that in Ext.P6 the name given on the top of Ext.P6, which is a pro-note dated 18/5/2000, the name of the accused is shown as C.George, even though in the bottom it is shown as Titus George S/o.George and therefore the statutory notice, though initially typed as George S/o.Titus George it was corrected in writing as Titus S/o.C.George. So, according to the learned counsel the finding of the court below is incorrect and the statutory notice, sent in the address furnished by the accused was refused by him. On the other hand, the learned counsel for the respondent, on the strength of the evidence of DW.1, it is submitted that the correction made in Ext.P4 is only after the receipt of the unserved or returned notice on refusing CrI.A.No.86 of 2007 :-4-: the same by the addressee shown in the cover. So, according to the learned counsel for the respondent, there is no proper and acceptable evidence to prove the service of formal notice on the accused and therefore the trial court is correct in its finding and as such no interference is warranted.

6. I have carefully considered the arguments advanced by the learned counsel for the appellant as well as the respondent and I have gone through the evidence and materials on record and perused the impugned judgment.

7. In the light of the rival contentions and in view of the evidence and materials on record, the question to be considered is whether the trial court is justified in its finding and whether there is any perversity in its judgment so as to interfere while exercising the appellate jurisdiction of this Court. To prove the service of statutory notice on the accused, the appellant/complainant very much relied upon the

evidence of PW.1 the complainant and other documentary evidence such as Exts.P4 to P7. I have again perused the above documents. According to the complainant, on receiving the dishonoured CrI.A.No.86 of 2007 :-5-: cheque he had caused to send statutory notice through his counsel. Office copy of that statutory notice dated 30/1/2003 is marked as Ext.P4. According to the complainant the statutory notice was sent by registered post and it was returned with postal endorsement "refused". According to the defence the endorsement "refused" contained in Exts.P5 and P7 is for the reason that the name and address are not correct and not tallying with correct name and address of the accused. In Ext.P5 the name is seen written as Titus George S/o.George through correction using ink pen. Their house number is shown as T.C.78/5080, whereas in Ext.P7 the name of the addressee is shown as C.George S/o.Titus George House No.78/3086. But the house number shown in both Exts.P5 and P7 is not tallying with the House Number shown in Ext.P6, which is a document relied on by the complainant. It is further relevant to note that, according to the defence the correction with regard to the name of the addressee in Ext.P5 is effected on return of the same, on refusal by the original addressee of that cover. According to me, a casual perusal of address CrI.A.No.86 of 2007 :-6-: portion of Ext.P5, it can be seen that the alteration through the handwritten entries, with regard to the name made, on the red line put by the postal authorities. The above fact itself is sufficient to show that, at the time of sending Ext.P5 cover, there was no handwritten entry in the address portion of the addressee, particularly the name of the addressee and it was subsequently altered.

8. The learned Magistrate, in paragraph 10 of the impugned judgment particularly in page 6, has stated that "during the time of hearing on 27/7/2006, on request of the defence counsel, this court had carefully broken open Ext.P5, in the presence of the complainant's counsel to find out whether such correction was also inside the letter. When this court had attempted to break open that letter, it was clearly revealed to this Court that, after getting back that letter being refused, that letter had been opened by the complainant (or by somebody on behalf of her) for some purpose, and that might be for some correction as alleged by the accused/defence counsel. The doubtful circumstances, which are brought to the CrI.A.No.86 of 2007 :-7-: court on opening Ext.P5 on 27/7/2006, are narrated in the proceedings of the

court on that day." So on seeing Ext.P5 and on a perusal of the same I am of the view that the learned Magistrate is correct in his finding regarding the opening of Ext.P5 letter.

9. In this juncture, it is relevant to note that as usual the complaint for the offence under Section 138 of the N.I. Act being filed on getting the communication on sending the statutory notice, namely, either the reply or the acknowledgment card or the cover refused to accept. So, at the time of the filing the complaint if the complainant was fully aware of the correct address of the accused, the same would be incorporated in the cause title of the complainant and there need not be any correction in such address of the accused in the cause title of the complainant. But in the present case the name and address in the complaint is also seen corrected. Thus, the above facts and circumstances and the materials on record are probalilise the case of the defence and appear to be correct about the manipulation in the address of the Crl.A.No.86 of 2007 :-8-: accused in Ext.P5 as well as in the complaint.

10. Moreover, it is relevant to note that, according to the complainant the statutory notice was sent to the accused through registered post. So, the best evidence, that can be produced by the complainant to show that the statutory notice was sent to the correct address of the accused, is the receipt issued by the postal authority. In the present case, no such receipt is produced and the complainant gave an evasive explanation that the receipt was misplaced. So the complainant failed to produce the best evidence available to prove the service of the statutory notice on the accused.

11. In the light of the above discussion and the evidence and materials referred to above, I am of the view that the learned Magistrate is fully justified and correct in his findings, which are supported by evidence and materials and therefore there is no perversity in the finding of the learned Magistrate or any compelling circumstances to interfere with the findings of the court below. The Hon'ble Apex Court in a recent decision reported in Mokkiah & Anr. Vs. State, Rep. by the Crl.A.No.86 of 2007 :-9-: Inspector of Police, Tamil Nadu [2013 (1) Supreme 88], held the general principles regarding powers of the appellate court while dealing

with an appeal against an order of acquittal and it is held as follows:- "8. In a recent decision in *Murugesan & Ors. vs. State Through Inspector of Police*, 2012 (10) SCC383 one of us Ranjan Gogoi, J.

elaborately considered the broad principles of law governing the power of the High Court under Section 378 of the Code of Criminal Procedure while hearing the appeal against an order of acquittal passed by the trial Judge. After adverting to the principles of law laid down in *Sheo Swarup vs. King Emperor*, AIR 1934 PC227(2) and series of subsequent pronouncements in para 21 summarized various principles as found in para 42 of *Chandrappa & Ors. vs. State of Karnataka*, (2007) 4 SCC415as under: "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge: (1) An appellate court has full power to review, re-appreciate and re-consider the evidence upon which the order of acquittal is founded. (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or Crl.A.No.86 of 2007 :-10-: condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law. (3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion. (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. Crl.A.No.86 of 2007 :-11-: (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court. (emphasis supplied)." Thus, on examination of the present facts and

circumstances involved in the case at hand, in the light of the text laid down by the Hon'ble Apex Court in the above decision, according to me, the appellant has miserably failed to make out a case so as to warrant an interference of this Court against the order of acquittal recorded in favour of the accused/1st respondent. Therefore, there is no merit in this appeal and accordingly the same is dismissed.

V.K.MOHANAN, JUDGE skj

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