

Alavi Vs. State of Kerala

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Court : Kerala

Decided On : Jan-24-2014

Judge : Honourable Mr. Justice K.Ramakrishnan

Appellant : Alavi

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE
HONOURABLE MR.JUSTICE K.HARILAL FRIDAY, THE 24TH DAY OF
JANUARY 2014 4TH MAGHA, 1935 Crl.Rev.Pet.No. 27 of 2014 ()
----- AGAINST THE

JUDGMENT

IN CRL.A. 472/2011 of ADDL. SESSIONS COURT - V, KOTTAYAM AGAINST
THE

JUDGMENT

IN ST2702010 of J.M.F.C - II, CHENGANACHERRY REVISION
PETITIONER(S)/APPELLANT/ACCUSED: ----- BABU
POTHEN, AGED 62 YEARS, S/O.POTHEN, KARINGADA HOUSE, CHERUKARA
KUNNU, CHANGANASSERY. BY ADVS.SRI.GEO PAUL SRI.SANU MATHEW
SRI.C.R.PRAMOD SRI.S.ASHOK KUMAR. SRI.R.VINU RAJ SMT.P.M.HRIDYA
SRI.S.ABHILASH VISHNU RESPONDENTS/RESPONDENTS &

STATE/COMPLAINANT: ----- 1. MATHEW C. PALATHUMADAM, PALATHUMADAM HOUSE, IE NAGAR P.O., VEROOR, CHANGANASSERY, PIN-686 101.

2. STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-682 031. R2 BY PUBLIC PROSECUTOR SRI. ROY THOMAS THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 24/01-2014, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: K. HARILAL, J.

----- Crl.R.P. No.27 of 2014
----- Dated this the 24th day of January, 2014

ORDER

This Revision Petition is filed challenging the concurrent findings of conviction entered and the sentence imposed on the Revision Petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the N.I. Act') in Criminal Appeal No.472/2011 on the files of the V Additional Sessions Judge, Kottayam. The above appeal was filed challenging the judgment finding that the Revision Petitioner is guilty of the said offence, passed in S.T.No.270/10 on the files of the Judicial First Class Magistrate's Court-II, Changanacherry. According to the impugned judgment, the Revision Crl.R.P. No.27 of 2014 -:

2. :- Petitioner is sentenced to undergo imprisonment till rising of the court and pay a fine of Rs.64,000/-. In default of payment of fine, the accused shall undergo imprisonment for one month. If the fine amount is paid, it shall be paid to the complainant under Sec.357 (i)(b) of the Cr.P.C.

2. It is the case of the 1st respondent/complainant that the accused, in discharge of his liability towards the complainant, drawn and issued a cheque for `22,000/- and another cheque for `41,262/- drawn from his bank and on presentation of the aforesaid cheques, those cheques were dishonoured for the reason that "payment stopped by the drawer". In spite of the demand notice, calling upon the accused to pay the amounts under the cheques, he has not complied to the demand and

thereby committed the offence under Sec.138 of the N.I. Act.

3. In evidence, the complainant was examined as P.W.1 and he testified that the accused was the Manager of Appolo Sindoori Share Trading Company Crl.R.P. No.27 of 2014 -:

3. :- at Changanassery, who was conducting share marketing business. The accused was doing share marketing business for the complainant and also as instructed by him, he was operating the account also. It is alleged that the accused misused the opportunity and misappropriated some amount to the tune of `63,262/-. When the matter was came to the knowledge of the complainant, he enquired about the misappropriation and the accused issued Exts.P1 and P1(a) cheques to the complainant for the amount due to him in connection with the share dealings. But, when the accused was examined as D.W.1, he deposed that he had no financial dealings with the complainant and he has not operated his account as alleged. He would state that no amount is due to the complainant from him and Exts.P1 and P1(a) cheques are obtained from him under coercion. But, at the same time, at another instance he deposed that the complainant had agreed to return the cheques, but he has not returned the same as promised. Thus, the Crl.R.P. No.27 of 2014 -:

4. :- second version of the accused given in evidence would cut the root of the first version that the cheques were obtained by employing coercion.

4. It was also contended that after parting with the cheques, he issued stop payment memo to the bank. But, when P.W.2 Manager was examined, he deposed that there was no sufficient fund in the account of complainant either on the date of issuance of the cheque or on the date of dishonour of the cheque. Thus, the said contention also is seen raised without bona fides.

5. It is the case of complainant that Exts.P1 and P1(a) cheques were written under the hand of the accused himself and it was admitted by the accused himself during the course of his examination in cross. Though he contended that the cheques were obtained by employing coercion, no evidence has been adduced to substantiate the said contention. It was also contended that the cheques were

issued to settle the dispute in between complainant and his brother. On Crl.R.P. No.27 of 2014 -:

5. :- an analysis of the evidence of the accused, it could be seen that, as regards the question how the cheques happened to be in the possession of the complainant, the accused had three versions and those versions are mutually destructive and inconsistent. Therefore, I also agree with the findings of the court below that the accused miserably failed to rebut the presumption under Secs.118(a) and 139 of the N.I. Act.

6. The learned counsel for the Revision Petitioner reiterated the contentions which were raised before the courts below and got rejected concurrently. The learned counsel urged for a re- appreciation of evidence once again, which is not permissible under the revisional jurisdiction unless any kind of perversity is found in the appreciation of evidence. The Revision Petitioner failed to point out any kind of perversity in the appreciation of evidence. The courts below had concurrently found that the complainant/1st respondent had successfully discharged initial burden of proving execution and Crl.R.P. No.27 of 2014 -:

6. :- issuance of the cheque; whereas the Revision Petitioner had failed to rebut the presumption under Section 118(a) and 139 of the N.I. Act which stood in favour of the 1st respondent. So also, it is found that the debt due to the 1st respondent was a legally enforceable debt and Ext.P1 cheque was duly executed and issued in discharge of the said debt. I do not find any kind of illegality or impropriety in the said findings or perversity in appreciation of evidence, from which the above findings had been arrived. Therefore, I am not inclined to re-appreciate entire evidence once again and I confirm the concurrent findings of conviction.

7. The counsel for the Revision Petitioner submits that challenge under this Revision is confined to sentence only. The sentence imposed on the Revision Petitioner is disproportionate with the gravity and nature of the offence. He further submits that the Revision Petitioner is willing to pay the compensation as ordered by the court below; but he is unable to Crl.R.P. No.27 of 2014 -:

7. :- raise the said amount forthwith due to paucity of funds. But he is ready to pay the fine within three months.

8. The Supreme Court, in the decision in Kaushalya Devi Massand v. Roopkishore (AIR 2011 SC2566, held that the offence under Section 138 of the N.I. Act is almost in the nature of civil wrong which has been given criminal overtone, and imposition of fine payable as compensation is sufficient to meet the ends of justice. Further, in Vijayan vs. Baby (2011(4) KLT355, Supreme Court held that the direction to pay the compensation by way of restitution in regard to the loss on account of the dishonour of the cheque should be practical and realistic. So, in a prosecution under Section 138 of the N.I. Act, the compensatory aspect of remedy should be given much priority over punitive aspect.

9. Having regard to the nature and gravity of the offence, in the light of the decisions quoted above and submission made at the Bar, expressing willingness to CrI.R.P. No.27 of 2014 -:

8. :- pay the compensation within three months, I am inclined to grant three months time to pay the compensation. Consequently, this Revision Petition is liable to be disposed of subject to the following terms. i. The Revision Petitioner shall undergo simple imprisonment for one day till rising of the court. ii. The Revision Petitioner shall pay a fine of Rs.64,000/- (Rupees sixty four thousand only) within a period of three months from today and the same shall be given to the complainant as compensation under Sec.357(1)(b) of the Cr.P.C. If he had deposited any amount towards fine, the same shall be given credit to and the balance alone need to be paid as fine. In that event, the 1st respondent/complainant is allowed to withdraw the amount which the revision petitioner had deposited earlier. iii. The Revision Petitioner shall appear before the Trial Court to suffer substantive sentence of simple imprisonment as ordered above on or before 23/4/14 with sufficient proof to show payment of CrI.R.P. No.27 of 2014 -:

9. :- compensation . iv. In default, the Revision Petitioner shall undergo simple imprisonment for a period of one month. The Criminal Revision Petition is disposed of accordingly. Sd/- (K. HARILAL, JUDGE) Nan/ //true copy// P.S. to

Judge

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