Abdul Rasheed E.K. vs Koya

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Court : Kerala

Decided On : Jan-09-2024

Judge : Honourable Mr.Justice P.G. Ajithkumar

Appeal No. : CRL.A/269/2006

Appellant : Abdul Rasheed E.K.

Respondent : KOYA

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR TUESDAY, THE 9TH DAY OF JANUARY 2024 / 19TH POUSHA, 1945 CRL.A NO. 269 OF 2006 AGAINST THE JUDGMENT DATED 31.10.2005 IN C.C.NO.106 OF 2004 OF THE JUDICIAL MAGISTRATE OF FIRST CLASS -II,THAMARASSERY APPELLANT/COMPLAINANT: ABDUL RASHEED E.K. AGED 31 YEARS S/O.HUSSAIN,IRATTAKANDY HOUSE, PAZHOOR P.O., POOLAKKODE AMSOM, PAZHOOR AMSOM. BY ADVS. T.K.SANDEEP ARJUN SREEDHAR ARUN KRISHNA DHAN ALEX ABRAHAM RESPONDENTS/ACCUSED/STATE: 1 KOYA S/O.MELEPULPARAMBIL ABOOBACKER, VALLUVAKUNNIL HOUSE,

KUNNAMANGALAM POST, KUNNAMANGALAM AMSOM, DESOM. 2 STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. SMT.PUSHPALATHA M.K - SR.PUBLIC PROSECUTOR THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 04.01.2024, THE COURT ON 09.01.2024 DELIVERED THE FOLLOWING:

P.G. AJITHKUMAR, J.

---------- Dated this the 9th day of January, 2024

JUDGMENT

This is an appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973. The appellant is the complainant in C.C.No.106 of 2004 on the files of the Judicial Magistrate of the First Class-II, Thamarassery. As per the judgment dated 31.10.2005, the 1 st respondent- accused was acquitted. The said judgment of acquittal is under challenge in this appeal.

2. The appellant filed the complaint with the following allegations: In November 2003, the 1st respondent availed a loan of

Rs.70,000/- from the appellant. The amount of debt was agreed to be repaid on 20.12.2003. At the time of borrowing, the 1st respondent issued Ext.P1 cheque which was dated 20.12.2003. When the cheque was presented for encasement, it was returned unpaid for the reason funds insufficient. A demand notice was issued. The 1 st respondent

evaded the notice. The amount due under the cheque remained unpaid.

3. The 1st respondent appeared before the learned

Magistrate and denied the accusation. The appellant examined himself as PW1 and proved Exts. P1 to P6. After closing the prosecution evidence, the 1st

accused was questioned under Section 313(1)(b) of the Code. He denied the incriminating circumstances appeared in evidence. He filed a written statement setting forth the contentions that the cheque was obtained under threat and it was in relation to his son's marital dispute. His son's father in law obtained four blank cheques and misusing one among such cheques this case was filed through his relative. It was also stated that he did not receive any demand notice. On his side DWs 1 to 4 were examined and Exts.D1 to D7 were marked. The court below after considering the evidence on record found the 1st respondent not guilty and acquitted him.

4. In the appeal preferred after obtaining leave, notice was duly served on the 1 st respondent. He did not chose to appear before the court.

5. Heard the learned counsel for the appellant and the learned Public Prosecutor.

6. The trial court after considering the evidence on

record found that execution of Ext.P1 cheque was admitted by the 1st respondent and therefore a presumption under Section 139 of the NI act was available. The further finding is that the 1st respondent failed to rebut the said presumption. It was however found that the appellant failed to give a notice demanding the amount of cheque to the 1 st respondent as contemplated in the proviso (b) to Section 138 of the NI Act and therefore the prosecution could only fail.

7. Dw4 is the 1st respondent-accused. He deposed

before the court admitting his signature in Ext.P1. He asserted in the box that he wrote his name and signature alone in Ext.P1. Other entries in it were stated to be entered subsequently by the appellant. The court below acting upon that evidence drew a presumption under Section 139 of the N.I.Act.

8. In Bir Singh v. Mukesh Kumar [(2019) 4 SCC

197] the Apex Court held that 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. It was further held that even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 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.

9. The Apex Court in Basalingappa v. Mudibasappa [(2019) 5 SCC 418] explained the law relating to presumption under Sections 118(a) and 139 of the N.I.Act and the rebuttal. It was - 23. We having noticed the ratio laid down by this Court in above cases on Section 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:-

(i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

(ii) The presumption under Section 139 is a rebuttable

presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii) To rebut the presumption, it is open for the

> accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

(v) It is not necessary for the accused to come in the witness box to support his defence.

10. Reiterating the aforesaid principles, a three Judge Bench of the Apex Court in M/s Kalamani Tex and

another v. P.Balasubramanian [(2021) 5 SCC 283] held

that the N.I.Act mandates that the signature of an accused on the cheque is established, then the 'reverse onus' clauses become operative. In such a situation, the obligation shifts upon the accused to discharge the presumption imposed upon him. A similar view was taken by the Apex Court in Rajesh Jain v. Ajay Singh [2023 SCC OnLine SC 1275] also. It was held that Section 139 of the N.I. Act requires that the Court 'shall presume' the fact stated therein, it is obligatory on the court to raise this presumption in every

case where the factual basis for the raising of the presumption had been established. But this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary as is clear from the use of the phrase 'unless the contrary is proved'.

11. As rightly pointed out by the trial court, having

the signature in Ext.P1 been admitted by the 1 st respondent, a presumption under Section 139 of the NI Act can be drawn. In view of the law laid down by the Apex Court in the aforesaid decisions such a view is quite plausible and right. The court below held that the 1st respondent failed to rebut the presumption. Having gone through the evidence on record I find that the 1st respondent did not bring forth evidence or circumstance to rebut the said presumption. In the said circumstances, the findings that Ext.P1 was duly issued by the 1st respondent and it is supported by consideration are correct.

12. The specific contention of the 1st respondent was

that the demand notice was issued not in his correct address. Ext.P5 is the notice which was returned unserved. The address given in Ext.P5 is Mr.Koya,

S/o.Meleparambil

Aboobacker, Valluvakunnil house, P.O Kunnamangalam, Calicut. It was seen redirected to Thachankunnil house. The endorsement on it would show that the envelope was returned to the sender stating, addressee out. The 1 st respondent deposed as DW4 before the court that the address shown in Ext.P5 was not his address. He further stated that his correct address is Thachankunnil, MIE. In support of the said plea the 1st respondent produced copies of his ration card(Ext.D4), his electoral ID card(Ext.D5), a lawyer notice he received earlier(Ext.D6) and a summons he

received in another case(Ext.D7). Addresses carried by the said documents are not the one given in Ext.P5. Of course, the address given in Ext.D4 is not the address given in Exts.D5, D6 and D7. The said documents were of different periods and therefore the difference in those addresses cannot be said to be unusual.

13. Ext.P5 notice was issued on 05.02.2004. Ext.D3 is

a sale deed dated 23.06.2003 executed by the 1 st respondent. The address given in Ext.D3 is the same as given in Ext.P5. Pointing out that fact, the learned counsel for the appellant would submit that the notice was issued in the last known correct address of the 1st respondent and therefore the appellant cannot be found at fault. As pointed out above, Exts.D4 to D7 carried different addresses of the 1st respondent. The 1st respondent deposed in court that the address given in Ext.P5 is not his correct address. In that context the address given in Ext.D1, which is a copy of the ledger concerning the bank account of the 1 st respondent in which Ext.P1 cheque was drawn, is relevant. The said account was opened on 24.06.2003. The address of the 1 st

respondent given in Ext.D1 is different from that given in Ext.P5. Thus from the materials on record, it is not able to find that Ext.P5 was issued in the correct address of the appellant.

14. The learned counsel for the appellant places

reliance on the decisions in Cherian Kurian K. v. P.K. Radhakrishnan and another [2018(2) KHC 689] and Monichan P.V. v. State of Kerala and another [2020(3) KHC 200] in order to fortify his contention that in a case where the notice is returned by the postal authorities with endorsement that 'addressee not in the station', an inference of due service of notice can be drawn. In both the said decisions, the view taken is that so long as a complaint could prove that he had sent demand notice in the correct address of the accused, due service of notice can be inferred, even if, the notice was returned with endorsement 'refused', 'not available in house', 'house locked', 'addressee not in station' etc. Such a presumption is permitted under Section 27 of the General Clauses Act, 1897. The law is clear that a presumption regarding due service of notice can be drawn

only if it is proved that the notice was sent to the correct address of the accused.

15. I found above that from the evidence available on

record, it cannot be said that Ext.P5 was sent in the correct address of the 1st respondent. It is true that there is an endorsement in Ext.P5 that it was redirected to the address Thachankunnil House, P.O MIE. It is however not evident from which post office it was returned and the endorsement 'addressee out', was made on Ext.P5. That fact should have been proved by the appellant. In the absence of evidence in that regard, it is not possible to say that Ext.P5 was sent to the correct address of the 1 st respondent. Therefore, an inference that there was due service of notice to the 1 st respondent is not possible in this case. The finding of the trial court in that matter cannot be said to be perverse or totally incorrect. The judgment of acquittal cannot therefore be interfered with.

Hence, the appeal fails and it is dismissed. Sd/- P.G. AJITHKUMAR, JUDGE PV