

Bobby a.Thomas vs Xavier Alex

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Court : Kerala

Decided On : Dec-18-2023

Judge : Honourable Mr.Justice P.G. Ajithkumar

Appeal No. : Crl.Rev.Pet/343/2021

Appellant : Bobby a.Thomas

Respondent : Xavier Alex

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR
MONDAY, THE 18TH DAY OF DECEMBER 2023/ 27TH
AGRAHAYANA, 1945 CRL.REV.PET NO. 343 OF 2021 AGAINST THE
JUDGMENT DATED 15.03.2021 IN CRA 7/2020 OF II ADDITIONAL
SESSIONS COURT-II, THIRUVANANTHAPURAM AGAINST THE
JUDGMENT DATED 03.01.2020 IN ST 340/2016 OF JUDICIAL
MAGISTRATE OF FIRST CLASS-X, THIRUVANANTHAPURAM
REVISION PETITIONER/APPELLANT/ACCUSED: BOBBY A.THOMAS,
AGED 44 YEARS, S/O.THOMAS, ARIKUPURATHU HOUSE,
PAVUKKARA MURI, KURATTISSERY VILLAGE, CHENGANNUR
TALUK. BY ADVS. JACOB P.ALEX JOSEPH P.ALEX MANU SANKAR

P. RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE:

1 XAVIER ALEX, AGED 49 YEARS, S/O.T.T.ALEXANDER, T.C.34/949, VALIYATHOPPU, VALLAKADAVU P.O., THIRUVANANTHAPURAM, PIN - 695 008. 2 STATE OF KERALA, REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA. R1 BY D.SAJEEV R1 BY K.SREEKUMARAN NAIR R1 BY LIGEY ANTONY R2 BY SMT SEENA C., PUBLIC PROSECUTOR THIS CRIMINAL REVISION PETITION HAVING COME UP FOR FINAL HEARING ON 05.12.2023, THE COURT ON 18.12.2023 DELIVERED THE FOLLOWING:

P.G. AJITHKUMAR, J.

----- Dated this the 18th day of
December, 2023

ORDER

The accused in S.T.No.340 of 2016 on the files of the Court of the Judicial Magistrate of First Class-X, Thiruvananthapuram is the revision petitioner. He was convicted and sentenced for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (N.I. Act). He has filed an appeal. The Additional Sessions Judge-

II, Thiruvananthapuram allowed the appeal in part. Conviction was confirmed, but the sentence was modified to one of simple imprisonment till rising of the court and to pay a fine of Rs.12 lakhs. Aggrieved by the same, the petitioner has filed this Revision Petition under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (Code).

2. Heard the learned counsel for the petitioner, the learned counsel for the 1st respondent and the learned Public Prosecutor.

3. The 1st respondent filed the complaint. The allegation was that Ext.P1 cheque issued by the petitioner in

order to repay Rs.10 lakhs, which he had borrowed from the

1st respondent, when presented for encashment was returned unpaid for want of sufficient funds with his account and that inspite of a demand, the said amount was not repaid. Having

the accusation been denied by the petitioner, the 1 st respondent adduced evidence both oral and documentary. He tendered evidence as PW1 and proved Exts.P1 to P5. When the petitioner was questioned under Section 313(1)(b) of the Code, he denied the transaction. In the statement filed, he took the stand that he did not even know the 1 st respondent and that a cheque given by him to the father of the 1 st respondent while they were working together abroad was misused by the 1st respondent. The trial court did not accept the said explanation of the petitioner. On finding that the 1 st respondent could prove execution of Ext.P1 and existence of a legally enforceable liability, found the petitioner guilty. A contention that the demand notice was not duly issued or

served was taken up. But the same was also rejected by the trial court.

4. In the appeal, the petitioner had set forth similar

contentions. It was contended that PW1 did not precisely testify before the court the dates on which he advanced money, the date on which the cheque was issued, the address of the petitioner and so on and so forth. The Appellate Court considered the said contentions in the light of the evidence that came on record. After re-appreciation of the evidence, the Appellate Court rejected the said contentions of the petitioner. The concurrent finding thereby entered by the courts below are under challenge in this Revision Petition.

5. The learned counsel for the petitioner, after

adverting to the oral testimony of PW1, submitted that the said evidence is totally insufficient to establish due execution of Ext.P1 and also passing of consideration.

It is submitted that while PW1 could not say when did he give money to the 1st respondent and on which day the cheque was issued, the plea of the petitioner should have been accepted by the courts

below. What PW1 deposed is that he advanced money to the petitioner in consideration of their close family relationship for years together. He deposed that Rs.10 lakhs was advanced to the 1st respondent not in one instance, but during the period 2013 and 2014. He admitted that he could not say the date on which the cheque was issued. But he categorically stated that the cheque was brought filled by the petitioner and signed before him. It was suggested that PW1 purposefully avoided stating the dates of payment in order to guard against the truth being coming out, for the petitioner was working abroad and he has travel documents with him. PW1 avoided stating any date of payment fearing that the 1st respondent might not be in India on such dates and in that event what PW1 states would turn out to be false. Similar reason is pointed out for his avoiding mentioning the date of issuance of the cheque.

6. The learned counsel for the 1st respondent would submit that having the petitioner admitted signature in Ext.P1, a presumption under Section 139 of the N.I.Act is

available and the circumstances pointed out by the petitioner are insufficient to rebut such a presumption. It is submitted that considering the close relationship between the parties, the inconsistencies and deficiencies pointed out by the learned counsel for the petitioner in the evidence of PW1 are quite inconsequential. It is also submitted that when the petitioner himself admitted his close association with the father of the 1st

respondent, the defence set up by him cannot be countenanced at all. In support of the contention that a presumption is available in respect of Ext.P1, the learned counsel for the 1st respondent placed reliance on the decisions of the Apex Court in *Bir Singh v. Mukesh Kumar* [(2019) 4 SCC 197], *Basalingappa v. Mudibasappa* [(2019) 5 SCC

418] and M/s Kalamani Tex and another v. P.Balasubramanian [(2021) 5 SCC 283].

7. In Bir Singh [(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.

8. The Apex Court in Basalingappa [(2019) 5 SCC 418] held that,-

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.

9. Reiterating the aforesaid principles, a three Judge

Bench of the Apex Court in *M/s Kalamani Tex* [(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* [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'.

10. As stated, the petitioner in his statement submitted

under Section 313 of the Code admitted that he had issued the cheque in question. His explanation is that it was given not to the 1st respondent, but to his father. The petitioner did not let in any evidence in order to prove anything further of his contention. Thus, the evidence on record would go to show that the petitioner admitted execution of Ext.P1. In the light of the law laid down in the

aforesaid decisions a presumption that Ext.P1 is supported by consideration is, therefore, liable to be drawn. That takes to the question whether the petitioner has succeeded in rebutting the said presumption.

11. The learned counsel for the petitioner would submit

that the version of PW1 that he lent Rs.10 lakhs without obtaining any document is quite unbelievable. Further, the indefinite answers given by him while examined in court regarding the date of lending money, issuing of Ext.P1 cheque and the address of the petitioner would further probabilise that he has created a false story in order to suit his design to misuse the cheque, the petitioner has given to his father. True, the answers given by PW1 during cross-examination in regard to the aforesaid aspects have such infirmities. But, when it has come out from evidence that the petitioner had acquaintance with the family of the 1st respondent, and he did not adduce any evidence, the said inconsistencies are not enough to discharge his burden of rebutting the presumption in respect of Ext.P1. Hence, I hold that the view taken by the courts below that what PW1 deposed regarding the lending of money and issuance of cheque can be believed is not a perverse finding.

12. Ext.P5 is the notice sent to the petitioner along

with the acknowledgement card, which was returned unserved. The courts below held that since the notice was issued in the correct address of the petitioner and it was returned with the endorsement of the postal authorities 'unclaimed', due service of the notice could be inferred. The learned counsel for the petitioner assails the said finding on the ground that PW1 was unable to say before the court as to what is the address of the petitioner and also he failed to assert in the complaint or in the chief-examination about the

correctness of the petitioner's address. During cross- examination PW1 stated that he did not remember the correct address of the petitioner, but he asserted that he stated in the complaint the correct address of the petitioner. The learned counsel places reliance on the decision of this Court in Suresh Kumar v. Sasi [2003 (2) KLT 367] wherein it was held that Section 27 of the General Clauses Act, 1897 is attracted only if the notice is sent to the correct address. It is urged by the learned

counsel that in the absence of a positive assertion

from the part of the 1st respondent, no presumption under Section 27 of the General Clauses Act regarding service of notice could be drawn.

13. The Apex Court in C.C.Alavi Haji v. Palapetty

Muhammed and others [(2007) 6 SCC 555] held that Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the correct address of the drawer, it is unnecessary to further aver in the complaint that inspite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. Not only the notice was sent but the complaint was filed and all the processes were taken out in the same address of the petitioner. Therefore, the assertion by PW1 that the address of

the petitioner is the one stated in the complaint is enough to draw a presumption. Ext.P5 was returned with endorsements of the postal authority that notice about the envelope was given to the addressee and after a week it was returned as unclaimed. So much so, the findings concurrently held by the courts below that giving notice to the petitioner demanding the amount due under Ext.P1 could be inferred, is also not liable to be interfered with by this Court in the exercise of the powers of revision.

14. The power of revision under Section 401 of the Code

is not wide and exhaustive. The High Court in the exercise of the powers of revision cannot re-appreciate evidence to come to a different conclusion, but its consideration of the evidence is confined to find out the legality, regularity and propriety of the

order impugned before it. When the findings rendered by the

courts below are well supported by evidence on record and cannot be said to be perverse in any way, the High Court is not expected to interfere with the concurrent findings by the courts below while exercising revisional jurisdiction. [See: State of Kerala v. Puttumana Illath Jathavedan Namboodiri (1999) 2 SCC 452; Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke (2015) 3 SCC 123; Kishan Rao v. Shankargouda (2018) 8 SCC 165].

15. In the light of the law laid down in the aforesaid

decisions, this Court is not expected to substitute the concurrent finding of the court below with a different view unless such findings are perverse and against the evidence. In my view, the courts below rendered the findings that lead to the conviction of the petitioner based on a proper appreciation of evidence. In the said circumstances, I am of the view that, the Revision Petition lacks merits and liable to be dismissed. Accordingly, the Revision Petition is dismissed.

Sd/- P.G. AJITHKUMAR, JUDGE dkr

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