

D.Ganesan Vs. The State of Kerala

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Court : Kerala

Decided On : Dec-02-2014

Judge : Honourable Mr. Justice K.Ramakrishnan

Appellant : D.Ganesan

Respondent : The State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN TUESDAY, THE 2D DAY OF DECEMBER 2014 11TH AGRAHAYANA, 1936 CrI.Rev.Pet.No. 2064 of 2014 ()
----- AGAINST THE

JUDGMENT

IN CRA.NO.303/2010 of ADDITIONAL SESSIONS JUDGE - II, THIRUVANANTHAPURAM DATED 01/09-2014 AGAINST THE

JUDGMENT

IN ST.NO.84/2008 of JUDICIAL FIRST CLASS MAGISTRATE COURT, NO-I, THIRUVANANTHAPURAM DATED 17/04-2010 REVISION PETITIONER(S)/APPELLANT/ACCUSED:

----- D.GANESAN,
AGED 45 YEARS S/O.DHARMARAJAN, RESIDING AT TC.37/1092, THAMMAN STREET, FORT, THIRUVANANTHAPURAM. BY ADVS.SRI.M.RAMASWAMY

PILLAI SMT.PREETHI R.NAIR RESPONDENT(S)/RESPONDENTS/STATE & COMPLAINANT: -----

1. THE STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR HIGH COURT OF KERALA, ERNAKULAM.

2. UNION BANK OF INDIA, KARAMANA BRANCH, TRIVANDRUM-695002 REPRESENTED BY THE BRANCH MANAGER. R1 BY PUBLIC PROSECUTOR SRI.N.SURESH. THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 0212-2014, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: Crl.Rev.Pet.No.2064 of 2014 APPENDIX PETITIONER'S ANNEXURES ANNEXURE-I THE PHOTOCOPY OF THE NOTICE DATED 3005.2009 ANNEXURE-II THE ATTESTED COPY OF THE AFFIDAVIT DATED 0309.2009 FILED BY THE COMPLAINANT. RESPONDENT'S ANNEXURES NIL //True Copy// P.A. To Judge Bb K. Ramakrishnan, J.

===== Crl.R.P.No.2064 of 2014
===== Dated this, the 02nd day of December, 2014.

ORDER

Accused in S.T.No.84/2008 on the file of the Judicial First Class Magistrate Court, No-I, Thiruvananthapuram is the revision petitioner herein.

2. The case was taken on file on the basis of a private complaint filed by the complainant Bank against the revision petitioner alleging offence under Section 138 of the Negotiable Instruments Act (hereinafter called 'the Act').

3. The case of the complainant in the complaint was that the revision petitioner availed a loan from the complainant Bank and there was an amount of Rs.3,02,791/- due and in discharge of that liability, he had issued Ext.P1 cheque which when presented was dishonoured for the reason 'funds insufficient' evidenced by Ext.P2 dishonour memo. The complainant issued Ext.P3 notice which was received by the revision petitioner evidenced by Ext.P4 postal acknowledgment. He had not paid the amount. So, he had committed the offence

punishable under Section 138 of the Act. Hence the complaint. Crl.R.P.No.2064 of 2014 :

2. :

4. When the revision petitioner appeared before the court below, the particulars of offences were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, the Branch Manager of the complainant Bank was examined as PW1 and Exts.P1 to P8 were marked on his side. After closure of the complainant's evidence, the revision petitioner was questioned under Section 313 of Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that the cheque was not issued as stated by the complainant. But, at the time of availing the loan, a blank signed cheque of City Union Bank was issued and misusing that cheque, the present complaint was filed. But no evidence was adduced on his side in defence.

5. After considering the evidence on record, the court below found the revision petitioner guilty under Section 138 of the Act and convicted him thereunder and sentenced him to undergo simple imprisonment for six months and also to pay a fine of Rs.3,10,000/- in default to undergo simple imprisonment for three months. It is further ordered that if the fine amount is realised, the same be paid to the Crl.R.P.No.2064 of 2014 :

3. : complainant as compensation under Section 357(1)(b) of Code of Criminal Procedure. Aggrieved by the same, he filed Crl.Appeal.No.303/2010 before the Sessions Court, Thiruvananthapuram which was made over to Second Additional Sessions Court for disposal and the learned Additional Sessions Judge allowed the appeal in part, confirming the order of conviction and sentence to pay the cheque amount of Rs.3,10,000/- as fine and further direction to pay the fine amount if realised as compensation to the complainant, but, reduced the substantive sentence to imprisonment till rising of court and enhanced the default sentence to 4 months from 3 months imposed by the court below. Dissatisfied with the same, the present revision has been filed by the revision petitioner - accused before the court below.

6. Considering the scope of enquiry and nature of contentions raised, this court felt that the revision can be disposed of at the admission stage itself after hearing the Counsel for the revision petitioner and the learned Public Prosecutor appearing for the first respondent and dispensing with notice to second respondent. Crl.R.P.No.2064 of 2014 :

4. :

7. The Counsel for the revision petitioner submitted that a property has been given as charge and there is no necessity to initiate proceedings under Section 138 of the Act on the basis of a blank signed cheque given as a security at the time of availing the loan. Further, no power of attorney was produced but only an authorisation letter was given which is not sufficient to initiate proceedings under Section 138 of the Act. These aspects has not been properly considered by the court below and so, the conviction entered by the court below is erroneous and he is entitled to get acquittal. Further, he had also submitted that the sentence imposed is harsh and if it is ultimately found that he is guilty, he prayed for time for payment of the amount.

8. The learned Public Prosecutor supported the concurrent findings of the court below on this aspect.

9. The complaint was that the complainant is a nationalized bank filed the complaint through its Branch Manager. It is settled law that complaint under Section 138 of the Act can be filed either by the payee of the cheque or the holder in due course. If the payee is a legal entity, then, they can only be represented through a living person. As far as the Crl.R.P.No.2064 of 2014 :

5. : banks are concerned, the Bank Managers are the authorised person to do all things on behalf of the Bank in respect of the branch of which he is the Branch Manager. Further Ext.P6 authorization letter has been produced by PW1 to prove that he has been authorized to file the complaint and give evidence on behalf of the bank. Here, the complainant is the Bank and is only represented through a living person which is permissible under law as legal person cannot themselves, though entitled to sue in their name, come to court and file a complaint for which

they require the assistance of a living person. So, the submission made by the Counsel for the revision petitioner that the complaint is not maintainable has no substance.

10. The case of the complainant in the complaint was that the revision petitioner availed a loan and an amount of Rs.3,02,791/- was due from the revision petitioner as on the date of issuance of the cheque and the revision petitioner had issued Ext.P1 cheque in discharge of that liability due as on the date of issuance of the cheque. But, the case of the revision petitioner was that no such cheque was given but he had given a blank signed cheque to the complainant Bank when he Crl.R.P.No.2064 of 2014 :

6. : availed the loan. This aspect was denied by PW1 when he was examined before the court and he had categorically stated the revision petitioner had executed the cheque and delivered the cheque in his presence in discharge of the amount due.

11. Merely because a property has been given as a security will not prevent the complainant bank to proceed against the revision petitioner if he had given a cheque in discharge of his liability for the amount due from him in order to save his property. So, if a cheque has been given in discharge of a legally enforceable debt and if that was dishonoured for the reason 'funds insufficient' and in spite of notice issued, if he did not pay the amount, then, offence under Section 138 of the Act is complete and the complainant is entitled to proceed against the revision petitioner for the offence under Section 138 of the Act. The availability of a civil remedy for realisation of the amount by enforcing the property security given is not a bar for initiating criminal action on the basis of a dishonoured cheque issued by the drawer of the cheque under Section 138 of the Act.

12. Though PW1 was cross examined at length, nothing was brought out to discredit his evidence regarding the aspect Crl.R.P.No.2064 of 2014 :

7. : of revision petitioner issuing the cheque in discharge of his liability for the amount due from him. Further, the documents produced, namely the account extract as authenticated as per the Bankers' Books Evidence Act shows that the

amount shown in the cheque was due as on that date. The revision petitioner had no case that he had not availed the loan and filed Ext.P7 loan application and executed Ext.P8 demand promissory note as well. He had no case that he had discharged the liability due to the bank covered by the cheque amount as well. He did not send any reply to the notice issued when the bank informed him about the dishonour and demanding payment of the amount covered by the cheque. So, all these things will go to show that the revision petitioner had no case that he had not issued the cheque and he had no liability to pay the amount and that was the reason why he did not send any reply to the notice issued by the bank. He did not adduce any evidence to prove his case as well. So, under the circumstances, in view of the dictum laid down by the Hon'ble Supreme Court in several decisions on this aspect and also the availability of statutory presumption under Section 139 of the Negotiable Instruments Act, the courts below were CrI.R.P.No.2064 of 2014 :

8. : perfectly justified in coming to the conclusion that the case of the revision petitioner is not believable or probable and rightly believed the evidence of PW1 and convicted him for the offence under Section 138 of the Act and the concurrent finding does not call for any interference.

13. As regards the sentence is concerned, though the trial court had sentenced him to undergo simple imprisonment for six months and also to pay a fine of Rs.3,10,000/- in default to undergo simple imprisonment for three months and directed the fine amount if realised be paid to the complainant as compensation under Section 357(1)(b) of Code of Criminal Procedure, the appellate court had reduced the substantive sentence to imprisonment till rising of court and enhanced the default sentence to four months while confirming the sentence of fine and direction to pay the fine amount to the complainant as compensation. So, maximum leniency has been shown by the court below in awarding the sentence. The fine imposed also cannot be said to be excessive as court has got power to impose double the cheque amount as fine and after quantifying the fine amount, compensation to be awarded out of the fine amount invoking the power under Section 357(1)(b) of Code of CrI.R.P.No.2064 of 2014 :

9. : Criminal Procedure. So, the sentence also does not call for any interference.

14. When this court was about to dispose of the case, the Counsel for the revision petitioner sought ten months time for payment of the amount. Considering the amount involved, this court feels that it appears to be reasonable. So, ten months time is granted to the revision petitioner to pay the amount. If the fine is realised and the same is paid to the complainant as compensation, then, this will have to be adjusted towards the amount due in the loan transaction or any decree to be obtained by them by filing a suit on the basis of the cheque and other documents as provided under Section 357(5) of Code of Criminal Procedure. So, the revision petitioner is granted time till 30.09.2015 to pay the amount. Till then, the execution of sentence is directed to be kept in abeyance. If the petitioner pays the amount directly to the Bank and produces proof of payment of the same before the court below within that time and the bank authorities appear before the court below and acknowledge receipt of the amount, then, court below is directed to treat the same as substantial compliance of payment of compensation out of the fine amount Crl.R.P.No.2064 of 2014 :

10. : and that can be recorded in the respective registers as provided in the decisions reported in Beena Vs. Balakrishnan Nair and Another [2010 (2) KLT1017 and Sivankutty Vs. John Thomas and Another [2012 (4) KLT21 and permit the revision petitioner to serve the substantive sentence of imprisonment till rising of court. With the above direction and observation, the revision petition is dismissed. Office is directed to communicate this order to the concerned court immediately. Sd/- K.Ramakrishnan, Judge. Bb [True copy] P.A to Judge

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