

P.Surendran vs M.Radhakrishnan

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Court : Kerala

Decided On : Jan-12-2022

Judge : Honourable Mr.Justice Ziyad Rahman a.a.

Appeal No. : CRL.A/972/2015

Appellant : P.Surendran

Respondent : M.Radhakrishnan

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.
WEDNESDAY, THE 12TH DAY OF JANUARY 2022 / 22ND POUSHA,
1943 AGAINST THE JUDGMENT DATED 28.06.2014 IN CC 167/2004
OF JUDICIAL FIRST CLASS MAGISTRATE COURT -III, PALAKKAD
LEAVE GRANTED AS PER ORDER IN L.P.199/2015 DATED
30.09.2015 BY THIS HONBLE COURT APPELLANT/ACCUSED:
P.SURENDRAN AGED 64 YEARS S/O.V.S.PANICKER, THRIVENI,
ARCHANA COLONY, AKATHETHARA, PALAKKAD - 8 BY ADVS.
SRI.K.S.MADHUSOODANAN SRI.K.S.MIZVER SMT.K.M.RAMYA
SRI.P.K.RAKESH KUMAR SRI.THOMAS CHAZHUKKARAN
SRI.M.M.VINOD KUMAR RESPONDENTS/ ACCUSED NOS.1,2 AND 4

& FORMAL PARTY: 1 M.RADHAKRISHNAN AGED 54 YEARS S/O.RAMAN NAIR, AISWARYA, KANHIKULAM, KONGAD, PALAKKAD 2 P.GOPALAKRISHNAN AGED 79 YEARS S/O.GOPALAN NAIR,'AISWARYA', KANHIKULAM, KONGAD PALAKKAD 3 PADMINI GOPALAKRISHNAN W/O.GOPALAKRISHNAN -DO- STATE OF KERALA TO BE REP. BY PUBLIC PROSECUTOR HIGH COURT OF KERALA, ERNAKULAM - 682031. BY ADVS. SRI.K.K.DHEERENDRA KRISHNAN SRI.S.RAJEEV SRI.V.VINAY SRI.SUDHEER GOPALAKRISHNAN THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 29.11.2021, THE COURT ON 12.01.2022 DELIVERED THE FOLLOWING:

JUDGMENT

The appellant is the complainant in C.C. No.167/2004 on the file

of Judicial First Class Magistrate Court III, Palakkad. The aforesaid calendar case was registered on the basis of a private complaint submitted by the appellant against 4 accused persons including the respondents 1 to 3 herein. As per the judgment passed in the said case, respondents 1 to 3 herein, who are accused 1,2 and 4 respectively, stands acquitted. The case against the 3rd accused is split up and re- filed as C.C. No.901/2014.

2. The prosecution case is as follows: The 1st and 3rd accused

along with the appellant herein entered into a deed of partnership and thereby started a firm named HaiKai Rubbers on 26.04.1997. The 2nd accused was the power of attorney holder of the 1st accused. The firm availed a loan of Rs.6 lakhs from Catholic Syrian Bank, Palakkad on furnishing collateral securities in the form of properties owned by the 1st accused. In addition to that, a charge was also created upon the property of the appellant having an extent of 16.5 cents. For the purchase of machineries, a hire purchase loan was availed from the

National Small Industries Corporation Limited (for short NSIC) to the tune of Rs.18 lakhs. For securing the aforesaid credit facility, a property of the 1st accused and 2

items of properties having 6.35 cents and 7.1 cents belonging to the wife of the appellant were offered and thus the charges were created upon the same. In addition to the same, 50 post dated cheques signed by the appellant and the 3rd accused in their capacity as partners of the firm, were also given to the National Small Industries Corporation Limited (NSIC). By the end of the year 2000, the appellant expressed his desire to retire from the partnership and made a request to that effect to the other partners. Accordingly, on 07.12.2000, the 2nd accused informed the appellant that NSIC has given consent of his retirement and also as to the reconstitution of the firm. The 2nd accused also promised to replace the post dated cheques already submitted to NSIC. Acting upon the said statements, the partners have executed a deed for Reconstitution of the Partnership on 14.12.2000 and thereby the appellant retired from the partnership. As per the terms and conditions in the retirement deed, the assets and liabilities of the firm were taken completely by the continuing partners

and they have indemnified the appellant, against all losses, claims, damages or expenses that may arise on account of liabilities of the firm.

3. Later, the appellant received a notice from NSIC, alleging

offence under Section 138 of Negotiable Instruments Act. On enquiry he came to know that the cheques which contained his signature were not replaced by the accused and the some of the said cheques got dishonoured when those cheques were presented by NSIC for want of sufficient fund. Even after receipt of the said notice, the accused persons did not made the said payment and proceedings under Section 138 of Negotiable Instruments Act were initiated against the firm, the appellant and also against the 3rd accused. In the meanwhile, the entire machineries purchased by the firm by availing the credit facility through the hire purchase loan from the NSIC were also surrendered,

for settling the loan. The NSIC conducted auction of the said machineries in which the 4th accused, who is the mother in law of the 1st accused purchased the said items for a total amount of Rs.9.51 lakhs, whereas the invoice rate of the said machineries would come to Rs.18,00,635/-. The Catholic Syrian Bank filed a civil case against the firm and the partners thereof including the appellant herein for

recovery of an amount of Rs.68,910/-. The NSIC filed O.S. No.5396/2014 before the City Civil Court, Chennai against the appellant and his wife for realizing an amount of Rs.4,67,524/- which is the balance amount due to them after auctioning the machineries surrendered by the firm. The Sale Tax Authorities have also issued

notice for recovery of dues to them. In such circumstances, the complaint was submitted by the appellant before the trial court contending that the appellant retired from the partnership by believing words of the accused that, they have obtained necessary consent from its creditors for relieving the appellant from all the liabilities. Since no such consent was taken from any of the creditors he was subjected to various litigations in the nature of both civil and criminal. Thus it was contended that the offence under Sections 418 and 420 are attracted.

4. In support of his contentions, PWs 1 and 2 were examined and Exts.P1 to P13 were marked under Section 244 of Cr.P.C. On the

basis of the same charge was framed, read over and explained to accused 1, 2 and 3 to which they pleaded not guilty. Thereafter PWs 1 and 2 were recalled and cross-examined. Exts.P14 to 24 were also marked. After closure of prosecution evidence accused 1, 2 and 4 were examined under Section 313 of Cr.P.C., wherein they denied all the incriminating circumstances against them. In defence, they have produced and marked Exts.D1 to D6.

5. After considering the materials on record, the learned

Magistrate found the respondents 1 to 3 not guilty of the offences and accordingly they were acquitted. This appeal is filed challenging the aforesaid order of acquittal.

6. Heard Sri.K.S. Madhusoodhanan, learned counsel for the appellant and Sri.K.K.Dheerendra Krishnan, learned counsel for the respondents 1 to 3 and Sri.Sudheer Gopalakrishnan, learned Public Prosecutor for the State.

7. The basic allegation against the accused persons is that, the appellant was induced to retire from the partnership on the basis of a statement dishonestly

made by the accused to the effect that, they

have obtained consent of all the creditors for relieving the appellant from all the said liabilities. The 2nd accused was implicated in the offences as he was the power of attorney holder of the 1st accused. The 4th accused/3rd respondent was implicated on the reason that it was she who purchased the machineries which were sold by NSIC in public auction.

8. The crucial allegation for an offence of Section 420, according to the appellant is the statement said to have been made to

the appellant by the 2nd accused on 07.12.2000. Ext.P1 is the partnership deed and Ext.P2 is the deed of retirement. The deed of retirement is executed on 14.12.2000 and the specific case of the appellant is that the said deed was executed only because of the assurance as to the consent obtained by the creditors for relieving the

appellant from the liabilities. However, the crucial aspect to be noticed in this regard is that Ext.P2 deed of retirement does not contain any details of consent or any assurance as to the consent obtained or to be obtained from the creditors of the firm. On going through the said document it can be seen that the reason stated for

retirement of the appellant is due to personal reasons. Nowhere in the aforesaid agreement any liability was cast upon the remaining partners to obtain consent of the creditors for relieving the appellant. The only evidence available is the oral evidence of the appellant alone, which is not seen corroborated by any other materials. The aforesaid aspect gains importance particularly because, all the terms and conditions governing the relationships between the parties are specifically spelt out in Ext.P1 partnership deed and Ext.P2 deed of retirement. The only obligation contemplated in Ext.P2, upon the

remaining partners is as per Clause 5 thereof. The said clause provides that the continuing partners indemnify and agree to keep retiring partner indemnified against all losses, claims, damages or expenses that may arise on account of the

liabilities of the firm. The absence of requirement of obtaining any consent from the creditors,

for retirement of the appellant, is conspicuous in this regard, particularly because of the reason that, the question that arises here is regarding the culpability upon the accused persons for which strict proof is required.

9. In order to attract the offence under Section 420 one of the

basic ingredients is that there must have been a dishonest intention on the part of the accused persons, right from the inception and on account of an inducement made by the accused, the complainant must have delivered some property to any person. In this case, there are absolutely no materials to arrive at the conclusion that, while retiring from the partnership, the appellant was solely acting upon the assurance alleged to have been made by the accused persons as to the

consent of the creditors. The reasons stated in Ext.P2 for the retirement is only personal reasons and it does not contain any mention as to the consent already obtained or to be obtained in due course. In such circumstances, it cannot be concluded that the offences under Section 420 is attracted.

10. The aforesaid view is fortified due to other reasons as

well. PW1 is the appellant himself. In his evidence he has clearly stated that even though proceedings in the nature of criminal as well as civil were initiated against the appellant and also the other partners, all the said liabilities were subsequently settled. Exts.P17 to P24 are

the certified copies of the judgments by which the appellant was acquitted in the cases filed by NSIC and also the dismissal of the civil suits filed by the Catholic Syrian Bank as well as NSIC. Exts.D4 to D6 are the receipts of final settlement with the NSIC and also with the Catholic Syrian Bank Limited. The settlements as evidenced by the aforesaid documents were admitted by the appellant in his evidence. However, the case of the appellant is that he was dragged into the aforesaid proceedings unnecessarily and he had to spent amounts for defending those proceedings. It is also his case that the continuing partners have not chosen

to defend those proceedings and the same

were being conducted by the appellant alone. However, the said contention cannot be accepted as such. On going through the evidence of the appellant as PW1, it can be seen that while admitting the settlement of all the amounts, it is also conceded by him that he did not make any payments towards the said liability. In such circumstances, it is evident that, the entire liabilities were settled by the other partners of the firm, including the accused persons and no additional expenses or liabilities were incurred by the appellant in this regard. Of course, it might be true that he must have incurred expense for defending the legal proceedings initiated against him. However, in my view, that by itself is not sufficient to attract the offence under Section 420 of Indian Penal Code. As mentioned above, in order to attract the offence under Section 420 the dishonest intention must be in existence right from the inception. In this case, such a dishonest intention cannot be found from any of the materials

available. It is discernible from the records that it was not the appellant alone who was compelled to face the criminal prosecution as well as civil proceedings pursuant to liabilities of the firm. As far as the criminal cases registered under Section 138 are concerned, apart from the appellant, the 3rd accused was also an accused in those proceedings. Ultimately, it was at his instance the aforesaid matters were settled without collecting any amount from the appellant herein. Similarly, the civil suits also were settled by the other partners of the

firm who were also parties to the aforesaid litigations. In such circumstances, a dishonest intention on the part of the accused cannot be inferred.

11. It is true that as mentioned above, the appellant incurred

certain expenses. But merely because of that reason, culpability as contemplated under Section 420 of IPC cannot be attributed against the accused. At the most, the same would come within the purview of a claim which the appellant can legally make, by invoking his civil remedies. Clause 5 of Ext.P2 deed of retirement, which contemplates the indemnity of the costs incurred by the appellant, fortifies the claim of the appellant before a competent civil court. Learned counsel for the

appellant submits that, merely because of the reason that, the allegations give rise to a civil claim, it cannot be concluded that criminal prosecution is not at all possible. He places reliance upon the

judgment rendered by this Court in Pradeep Kumar S. v. State of

Kerala [2021 Cri LJ 1422]. It is true that merely because of the reason that a civil remedy is available, the criminal prosecution will not be barred. However, in order to constitute the criminal offence there must be materials to substantiate the offence alleged. In this case, from the appreciation of the materials as discussed above, there are no materials to arrive at a conclusion that offence under Section

420 is attracted. In such circumstances, the only remedy available to the appellant is to invoke his civil remedies by placing reliance upon the terms of indemnity as contained in Ext.P2.

12. The learned counsel for the respondents 1 to 3 placed

reliance upon various judgments to convince this Court that an order

of acquittal by the trial court cannot be normally be interfered with, during the appellate stage unless there exists very strong and convincing reasons justifying such interference. My attention was brought to the decision rendered by the honble Supreme Court in Chandrappa and Others v. State of Karnataka [2007 (4) SCC 415]. In paragraph 41 thereof the general principles regarding the powers of appellate court while dealing with an appeal against an acquittal were explained. Out of the said guidelines, the guidelines 4 and 5 are relevant for the purpose of this case which are as follows:

(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 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.

(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. In this case, the position of the accused is much safer as I do not find any two reasonable conclusions possible. According to me the materials available on record do not attract any of the offence alleged. In the above circumstances, I do not find any material justifying

interference of the finding of the acquittal arrived at by the trial court. Accordingly, I dismiss this appeal by confirming judgment dated 28.06.2014 in CC No.167/2004 passed by Judicial First Class Magistrate Court III, Palakkad. Sd/- ZIYAD RAHMAN A.A. JUDGE SCS

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