Syed Alavi vs E.V.Ramadevan

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Court : Kerala

Decided On : Feb-11-2022

Judge : Honourable Dr. Justice Kauser Edappagath

Appeal No. : Crl.Rev.Pet/188/2007

Appellant : Syed Alavi

Respondent : E.V.Ramadevan

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH FRIDAY, THE 11TH DAY OF FEBRUARY 2022 / 22ND MAGHA, 1943 CRL.REV.PET NO. 188 OF 2007 AGAINST THE JUDGMENT IN CRA 362/2003 OF ADDITIONAL SESSIONS COURT (FAST TRACK COURT-I, PALAKKAD CC 321/2002 OF JUDICIAL MAGISTRATE OF FIRST CLASS -I, PALAKKAD REVISION PETITIONER/APPELLANT/ACCUSED: SYED ALAVI SASIN ELECTRONICS, PARAPPANANAGADI. BY ADV SRI.T.KRISHNAN UNNI (SR.) RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE: 1 E.V.RAMADEVAN MANAGING PARTNER, M/S.SIRTRON, NURANI,, PALAKKAD. 2 STATE OF KERALA REPRESENTED BY

PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULM. BY ADVS. SMT.KEERTHIVAS.G SRI.P.R.VENKATESH SMT M K PUSHPALATHA -SR PP THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 1.02.2022, THE COURT ON 11.02.2022 DELIVERED THE FOLLOWING: -:2:-

O R D E R

Dated this the 11th day of February, 2022

This revision petition has been filed against the judgment

dated 10th November, 2006 passed by the Additional Sessions Court, Fast Track - 1, Palakkad (for short, the appellate Court) in Crl.Appeal No.362/2003 confirming the judgment dated 4 th August, 2003 passed by the Judicial First Class Magistrate-1, Palakkad (for short, the trial court) in CC No. 321/2002.

2. The revision petitioner is the accused. The 1 st respondent is the de facto complainant.

3. A complaint was filed by the 1 st respondent for

prosecuting the revision petitioner for an offence punishable u/s 138 of the Negotiable Instruments Act (for short, the NI Act). The 1st respondent was the Managing Partner of M/s.Sirton Company. The revision petitioner is the proprietor of Sasin Electronics. Admittedly there were business deals between them. It was alleged that the revision petitioner issued Ext.P1 cheque for a sum of `35,716/- to the 1st respondent towards the credit purchase made by him as per Ext.D1 invoice. The cheque on

-:3:- presentation was dishonored for the reason exceeds arrangement. Even though Ext.P4 statutory notice u/s 138B of the NI Act was issued, there was no compliance. Hence, private complaint was instituted.

4. The revision petitioner appeared at the trial Court. When the particulars of offence were read over, he pleaded not

guilty. On the side of the 1 st respondent/complainant, the 1st respondent himself gave evidence as PW1 and Exts.P1 to P9 were marked. On the side of the defence, Exts.D1 to D3 were marked. Ext.X1 was marked as Court exhibit.

5. The trial Court on appreciation of evidence found the

revision petitioner guilty u/s 138 of the NI Act and he was convicted for the said offence. He was sentenced to undergo simple imprisonment for one month and directed to pay compensation of `23,551/- to the 1st respondent u/s 357(3) of Cr.P.C. The appellate Court dismissed the appeal. Challenging these judgments, the revision petitioner preferred this revision petition.

6. I have heard Sri.K.Thareeq Anwar, the learned counsel for the revision petitioner, Sri.P.C.Chacko, the learned counsel for -:4:- the 1st respondent and Smt.M.K.Pushpalatha, the learned Senior Public Prosecutor.

7. The evidence on record would show that there were business dealings between the revision petitioner and the 1 st respondent. Ext.D1 is the invoice No.564 dated 14/10/1997 issued by the firm of the 1 st respondent to the revision petitioner

for the supply of goods. It is for a sum of `35,716/-. The 1st respondent has produced the account books of the firm for the period from 1997 to 1999 marked as Exts.P6, P7 and P8 respectively. 256th page in Ext.P6, 283rd page in Ext.P7 and 235th page in Ext.P8 bears the entry of credit on the supply of goods on credit to the revision petitioner. Those entries were marked as Exts.P6(a), P7(a) and P8(a) respectively. Ext.D1 corresponds to

Ext.P6(a). The 1st respondent has admitted that Ext.D1 was issued on 14/10/1997 from his firm to the revision petitioner and towards the discharge of the amount covered by Ext.D1, the revision petitioner issued Ext.P1. The defence set up by the revision petitioner is that the partnership firm of the 1 st respondent had collected four blank cheques from him as security, and misusing one of those cheques, a false complaint -:5:- was filed. According to him, he did not owe to the M/s.Sirton Company the amount covered by Ext.P1 cheque.

8. Both the courts below, on appreciation of evidence, concurrently found that the actual amount due to the 1 st respondent by the revision petitioner as on the date of Ext.P1

cheque was only `23,551/- and not `35,716/-. Both the courts below further found that the defence set up by the revision petitioner that he had given four blank cheques to the 1 st respondent as security towards business dealing with the firm of the complainant is more probable. The appellate Court found that Ext.P1 cheque was issued by the revision petitioner to the 1 st respondent on 14/10/1997 for the amount due from him as per Ext.D1 invoice without putting any date and since the revision petitioner did not clear the entire amount due as per Ext.D1 invoice, the 1st respondent presented the cheque though the full amount covered by the cheque was not due from the revision petitioner at that time. This finding of fact has become final.

9. As stated already, there is a clear finding by both the courts below that the amount covered by the cheque was not actually due from the revision petitioner to the 1st respondent as -:6:- on the date when the cheque was presented for collection. In short, Ext.P1 cheque was in excess of the amount actually due.

The learned Counsel for the revision petitioner Sri. Thareeq Anwar relying on the decision of the Division Bench of this Court in Joseph Sartho v. Gopinathan Nair (2008 (4) KLT 509) and another decision of the Single Bench of this Court in Shiju K. v. Nalini and Others (2016 (2) KLT 517) submitted that when the whole amount of liability or debt is lesser than the amount represented by the cheque, an offence u/s 138 of NI Act would not be attracted.

10. A Single Bench of this Court in R.Gopikuttan Pillai v. Sankara Narayanan Nair (Crl.Appeal No.270/1997 dated

cheque was not actually due when the cheque was presented for collection the offence u/s 138 of NI Act would be attracted. On the other hand, another Single Bench of this Court in Supply House v. Ullas (2006 (3) KLT 921) took a contrary view that where the amount represented by the cheque was larger than the amount due from the drawer, the offence u/s 138 of NI Act would not be attracted.

In view of the conflict between both the two

-:7:- decisions, the matter was referred for decision by a Division Bench. Answering the reference, the Division Bench in Joseph Sartho (supra) held thus;

> In this case, once part payment was received, the cheque no longer was one for payment of money for discharging in whole or in part of any debt or other liability. In fact, the amount covered by the cheque was admittedly larger than the amount of debt or liability. The whole amount of debt or liability was lesser than the amount represented by the cheque. So, if the cheque for such an amount was dishonoured, the same will not be an offence under S.138 of the Act. Normally, a penal law has to be interpreted strictly. If there is any vagueness in the law, the benefit of the same should go to the accused. Going by the plain words of the Section, the cheque presented for encashment should be one for payment in full or part of the debt due. In this case, admittedly, the cheque was for an amount higher than the amount due on the date it was presented for encashment. The law contemplates making of an indorsement by the drawee on the back of the cheque regarding the part payment received. So, we are of the view that the 1st respondent cannot be found guilty of the offence under S.138 of the Act, for not making arrangement to honour the cheque for an amount more than what is due from him. If he had made arrangement for honouring the cheque, he would have to go after the appellant to get back the substantial amount paid by him earlier. Therefore, we find it difficult to subscribe to the view that the accused has committed -:8:- the offence, as he failed to pay the balance amount, on issuance of notice by the appellant. In view of S.56, the appellant could have claimed only the balance amount. Towards the amount due under a cheque, if some amount is received, the same has to be indorsed on the reverse of the cheque. The law of banking contemplates several such indorsements and if there is no space for making any indorsement on the reverse of the cheque, it may be made on a slip of paper annexed thereto, which is called allonge in banking

circles. In India, attachment of a slip of paper to the cheque is statutorily recognized in S.15 of the Act. So, the action of the appellant in this case, of presenting the cheque claiming the entire amount, is plainly illegal and the same cannot be the spring board for an action against the 1st respondent/accused under S.138 of the Act. For the bouncing of a cheque, which did not represent the amount or part of the amount due to the appellant, the accused cannot be made liable."

11. The dictum laid down in Joseph Sartho (supra) was

followed in Shiju (supra). It was held that when a part payment of the amount due under a cheque is paid and if the payee or drawee fails to make an endorsement and the holder claims the full cheque amount, no offence u/s 138 of NI Act will be attracted.

12. The dictum laid down in the above two decisions squarely applies to the facts of the present case. Admittedly, the cheque in question was issued towards the amount covered by -:9:-

Ext.D1 invoice dated 14/10/1997. The cheque as well as Ext.D1 was for a sum of `35,716/- Both courts concurrently found that, thereafter, the revision petitioner made payment towards the amount due under Ext.D1 and as on the date of the cheque, the actual amount due was only `23,551/-. Admittedly the 1st respondent failed to make any endorsement in the cheque and he claimed the full cheque amount.

13. The learned counsel for the 1st respondent relying on the latest decisions of the Apex Court in Rohitbhai Jivanlal Patel v. State of Gujarat and Another [(2019) 18 SCC 106]

and in Kalamani Tex (M/s.) and Another v. P. Balasubramanian (2021 (2) KHC 517) argued that once the signature of the revision petitioner in the cheque is established, then reverse onus clause becomes operative and in such a situation the obligation shifts upon the revision petitioner to discharge the presumption upon him and in this case, the revision petitioner failed to discharge the said presumption. True, presumption mandated by Ss.139 and 118 includes existence of legally enforceable debt or liability. But the said presumption is not absolute. It is open to the accused to rebut the presumption

by projecting a probable defence. It is settled that if the accused is able to raise a probable defence which creates doubt about existence of legally enforceable debt or liability, the prosecution must fail. As stated already, both courts below concurrently found that the amount covered by the cheque was not actually due to the 1st respondent. Hence, it cannot be said that there existed a legally enforceable debt or liability for the entire amount covered by the cheque.

For the reasons stated above, I am of the view that the conviction and sentence passed by the courts below cannot be sustained. The revision petitioner/accused is not found guilty for the offence charged against him and accordingly he is acquitted. The revision petition stands allowed as above. Sd/- DR. KAUSER EDAPPAGATH JUDGE Rp