

V.a.Viju vs Manappuram General Finance & Leasing Ltd

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Court : Kerala

Decided On : Dec-03-2020

Judge : Honourable Mr.Justice N.Anil Kumar

Appeal No. : Crl.Rev.Pet/410/2007

Appellant : V.a.Viju

Respondent : Manappuram General Finance & Leasing Ltd

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE N.ANIL KUMAR
THURSDAY, THE 03RD DAY OF DECEMBER 2020/12TH
AGRAHAYANA, 1942 Crl.Rev.Pet.No.410 OF 2007 AGAINST THE
JUDGMENT IN CRL.APPEAL No.599/2004 DATED 29-12-2006 OF III
ADDITIONAL SESSIONS COURT (ADHOC), FAST TRACK-I,
THRISSUR ST 612/1999 DATED 25-09-2004 OF CHIEF JUDICIAL
MAGISTRATE COURT, THRISSUR REVISION
PETITIONER/APPELLANT/ACCUSED: V.A.VIJU, S/O.ANTONY,
VEMBILATH HOUSE, NEAR PRIVATE BUS STAND, ANKAMALY P.O.,
ERNAKULAM DISTRICT. BY ADVS. SMT.LATHA PRABHAKARAN
SRI.K.M.JAMALUDHEEN

RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE:

1 MANAPPURAM GENERAL FINANCE & LEASING LIMITED, BROTHERS COMPLEX, REPRESENTED BY K.DINESH, THE LEGAL OFFICER AND POWER OF ATTORNEY HOLDER OF V.P.NANDAKUMAR, MANAGING DIRECTOR OF THE COMPANY. 2 STATE OF KERALA, REPRESENTED BY ITS PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. R1 BY ADV.SRI.SABU S.KALLARAMOOLA R2 BY SENIOR PUBLIC PROSECUTOR SRI.M.S.BREEZ THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY

HEARD ON 25-11-2020, THE COURT ON 03-12-2020 PASSED THE FOLLOWING: ..2.. [CR]

ORDER

This criminal revision petition is directed against the

judgment dated 29.12.2006 rendered by the third Additional

Sessions Court, (Ad hoc) Fast Track-I, Thrissur, in Crl.Appeal No.599 of 2004, whereby the learned third Additional Sessions Judge dismissed the appeal, confirming the conviction and sentence for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881, (hereinafter referred to as 'the N.I.Act') rendered by the trial court against the revision petitioner/accused to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment for a period of three months. If the fine amount is realised, the trial court ordered Rs.90,000/- as compensation payable to the complainant under Section 357(1) of the Cr.P.C.

2. The revision petitioner was the accused in

S.T.No.612/99 on the file of the Chief Judicial Magistrate Court, Thrissur and the appellant in Crl.Appeal No.599/2004 on the file of the third Additional Sessions Court, (Ad hoc), Fast Track- ..3.. I, Thrissur. The 1st respondent filed a complaint

before the trial court alleging commission of the offence punishable under

Section 138 of the N.I.Act against the accused. Upon consideration of the complaint, the learned Magistrate is prima facie satisfied that the case is made out against the accused. Hence, the learned Magistrate took cognizance of the offence under Section 138 of the N.I.Act and the case was taken on file as S.T.No.612/99. Parties are hereinafter referred to as the 'complainant' and 'accused' according to their status in the court below unless otherwise stated.

3. It is the case of the complainant that the accused

had entered into a lease agreement with the complainant company on 09.05.97. Consequent to the agreement, the vehicle bearing registration No.KL 7 Q 7646 was leased out to the accused on agreeing to pay a monthly rent of Rs.11,505/- to the company for 48 months without any default. When the accused committed default in paying the installment, the company repossessed the vehicle and sold it for Rs.2,50,000/-. The balance amount due from the accused was Rs.76,247.99.

..4.. When the company requested the accused to pay the amount, he issued a cheque in favour of the complainant for a legally enforceable debt. When the said cheque was presented for encashment it was dishonoured for the reason 'insufficient fund'. The complainant sent a notice to the accused demanding the amount covered under the cheque. The accused received the notice. He had neither sent any reply nor paid the amount covered under the cheque.

4. On service of summons, the accused appeared

before the trial court. Particulars of the offence were read over and explained to the accused, to which the accused pleaded not guilty. Thereafter, PW1 was examined and marked Exts.P1 to P9 on the side of the prosecution. On closing the evidence of the prosecution, the accused was questioned under Section 313(1)(b) of the Cr.P.C. for the purpose of enabling him to explain any circumstance appearing in the evidence against him. He denied all the incriminating circumstances appearing in the evidence against him. DW1 was examined and marked Exts.D1 to D8 on the side of the accused.

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5. On appreciation of the evidence, the learned

Magistrate held that the execution of the cheque was proved by the complainant and that the cheque was dishonoured for the reason 'insufficient fund'. The complainant issued statutory notice calling upon the accused to pay the amount within fifteen days from the date of receipt of the statutory notice. The amount was not paid within the statutory period. Hence, the learned Magistrate concluded that the cheque was issued by the accused for the discharge of debt or liability.

6. Heard Smt.Latha Prabhakaran, the learned counsel

for the revision petitioner, Sri.Sabu.S, the learned counsel for the 1st respondent and Sri.M.S.Breez, the learned Senior Public Prosecutor for the 2nd respondent-State.

7. In order to determine the question whether the

offence punishable under Section 138 of the N.I.Act is made out against the accused, it is necessary to examine the Penal provision of Section 138 of the N.I.Act and the presumptions to be raised as envisaged by the provisions of Sections 118 and 139 of the N.I.Act. Section 118 of the N.I.Act provides ..6..

certain presumptions to be raised laying down some special rules of evidence relating to presumptions. The presumption, therefore, is a matter of principle to infuse credibility to negotiable instruments including cheques and to encourage and promote the use of negotiable instruments in financial transactions. Section 118 of the N.I.Act provides presumptions

to be raised until the contrary is proved, (i) as to consideration, (ii) as to date of instrument, (iii) as to time of acceptance, (iv) as to time of transfer, (v) as to order of indorsements, (vi) as to appropriate stamp, and (vii) as to holder being a holder in due course. That apart, Section 139 of the N.I.Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 of the N.I.Act for the discharge, in

whole or in part, of any debt or other liability. Applying the definition of the word 'proved' in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the N.I.Act, it becomes evident that in a trial under Section 138 of the N.I.Act, a presumption will have to be made

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that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. Needless to say that as and when the complainant discharges the burden to prove that the cheque was executed by the accused, the rules of presumptions under Sections 118 and 139 of the N.I.Act are very much available to the complainant and the burden shifts to the accused.

However, this presumption is rebuttable. Under the circumstances, it is the duty of the accused to adduce evidence before the court to show that the cheque was not supported by consideration and that there was no debt or liability to be discharged as alleged. It is necessary on the part of the accused to set up a probable defence for getting the burden of proof shifted to the complainant. Once such rebuttable evidence is adduced and accepted by the court, the burden shifts back to the complainant.

8. The accused was examined as DW1 before the trial court. He admitted execution of Ext.P3 lease agreement and ..8..

the entrustment of the vehicle as per the agreement. According to DW1, he had given signed blank cheques to the complainant and the complainant might have utilized one of the cheques to file the present case.

9. In this case, A.V.Unnikrishnan, Junior Assistant of

the complainant company was examined as PW1. Ext.P4 cheque dated 21.7.98 is for an amount of Rs.76,247.99. Ext.P5 memorandum issued from the bank would show that the cheque was dishonoured on the ground that there was no sufficient amount in the account of the accused. Ext.P6 dated 3.11.98 is the intimation given from the bank to the

complainant regarding the dishonour of the cheque. Thereafter, Ext.P7 Lawyer notice dated 3.11.98 was issued to the accused. The accused received the notice on 11.11.98. The complaint was filed within the time on 23.12.98.

10. A definite case was put up by the accused in this

case that the cheque in question was issued as a security at the time of entering into the agreement. It is also contended that the complainant had instituted Ext.D1 suit against the ..9.. accused for realisation of an amount of Rs.76,247.99. The trial court dismissed the suit by way of Ext.D2. The learned counsel for the revision petitioner mainly relied on Ext.P4 cheque in Ext.D2 and contended that there was no legally enforceable debt.

11. The accused admitted execution of Ext.P4 cheque in

favour of the complainant. Regarding the amount claimed under Ext.P4 cheque, the complainant filed Ext.D1 suit for recovery of money before the Munsiff Court, Thrissur. The amount covered under Ext.D1 is Rs.76,247.99. The cheque No.178931 is dated 21.7.98 drawn on South Indian Bank Ltd.,

Meladoor Branch. The certified copy of Ext.P4 cheque No.178931 in this case is marked as Ext.A5 in Ext.D2 judgment. Ext.D1 plaint was presented before the court on 15.10.99. Item No.2 in the list of documents as per Ext.D1 is the cheque No.178931 dated 21.7.98. CrI.M.P.No.6082/98 was filed by the complainant against the accused before the Chief Judicial Magistrate Court, Thrissur alleging commission of the offence punishable under Section 138 of the N.I.Act on

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23.12.98. In paragraph 3 of the complaint, it is stated that the accused came down to the complainant's office at Thrissur and issued a cheque for Rs.76,247.99 bearing No.178931 dated 21.7.98 drawn on South Indian Bank Ltd., Meladoor Branch in favour of the complainant in discharge of the existing liability to the complainant. It is clear that prosecution initiated under Section 138 of the N.I.Act on 23.12.98 and a civil suit was later filed on 15.10.99. There cannot be any doubt or dispute that a creditor can maintain a civil and criminal proceeding at the same

time. Both the proceedings, thus, can run parallel. The legal position in this regard is settled in *Sh.Vishnu Dutt Sharma v. Smt.Daya Sapra* [2009 (4) KHC 581].

12. By virtue of Ext.D2 judgment, the court held in page 9 of the judgment as follows:-

Since defendant was not in possession of the property subsequent to 2-11-97 he is not bound to pay the amount covered by Ext.A2 though the agreement is a lease which clearly shows that so long as lessee is in possession then only he will be entitled to pay the rent and other expenses. ..11..

Now it has come out in evidence that defendant is the registered owner. Even though plaintiff would say that it is owner of the vehicle nothing has been brought out in evidence to establish the fact that plaintiff was owner of the vehicle. Ext.A4 valuation certificate of the insurance Surveyor says that defendant is the registered owner whereas plaintiff is stated as the finance company. It does not state that plaintiff is the owner of the vehicle. If that be so defendant is the registered owner so that the owner cannot lease the vehicle to himself as the definition of lease is handing over possession by the lessor who is the owner to another person who is called lessee. A lessor cannot lease the property to himself. Further what is the outstanding due is not proved in this case. Though Ext.A3 account extract had been produced, it is not at all proved in this case. Since production of statement of account does not mean that the contents are true PW1 is not competent enough to speak about the contents of such account as he is not the person who has prepared it. In the said circumstance the case of the plaintiff is difficult to believe.

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13. In view of the above finding the suit was dismissed

with cost on 22.1.2003. The said judgment had not been challenged in appeal. No stay order from the appellate court was produced before the trial court. No other evidence was adduced to show that Ext.D2 was set aside in appeal. Resultantly,

Ext.D2 has become final between the parties.

14. The civil court held that the complainant herein was

not the owner of the vehicle and the accused was the registered owner of the vehicle. According to the civil court, an owner of the vehicle cannot lease the vehicle to himself. It was further held that the outstanding amount covered under Ext.P4 cheque which was produced as Ext.A5 in the civil case was not proved. Rightly or wrongly, the civil court entered a finding that the amount covered under Ext.P4 was not recoverable from the accused. The said finding has not been set aside in a process known to law. The finding has become conclusive between the parties. Sitting in revision, this Court has no jurisdiction to examine the correctness of the decision taken by the civil court. Going by the tenor of judgment, it is clear

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that, what was covered under Ext.P4 is not a legally enforceable debt. The very foundation of the case set up herein is found against the complainant in the civil suit between the very same parties. Merely because criminal case and civil case are maintainable in respect of the very same cheque, the same itself is not sufficient to hold that the amount which has been found not recoverable by a civil court between the same parties can be enforced through criminal proceedings under Section 138 of the N.I.Act.

15. In the case on hand, the accused admitted

execution of Ext.P4 cheque. His contention is that the amount covered under Ext.P4 is not a legally enforceable debt. The accused adduced evidence before the trial court to show that Ext.P4 cheque had not been issued towards discharge of a legally enforceable debt, but was issued by way of security or any other reason on account of some business transaction between the complainant and the accused. The burden on the part of the accused has been discharged by producing Exts.D1 to D8 before the trial court. DW1 adduced evidence before the

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trial court to show that he was the owner of the vehicle and the vehicle was repossessed on 22.11.97 illegally by the complainant. He also produced Ext.D7 passbook issued by the complainant. According to him, he paid six installments to the complainant as per Ext.D8. He also produced Ext.D4 to show that he remitted an amount of Rs.71,354/- towards security. His main complaint is that the amount covered under Ext.D4 was not deducted and the complainant presented the cheque issued on account of some other business transaction without deducting the amount paid by the accused. His definite case is that the cheque was issued as a security in connection with some other business transaction and according to him, he was constrained to issue 48 blank cheques in favour of the complainant. After taking into consideration the entire aspects, Ext.D2 judgment was pronounced by the civil court holding that the amount covered under Ext.P4 is not a legally enforceable debt.

16. It is true that the standard of proof required in the criminal and civil proceedings are entirely different. Civil cases ..15..

are decided on the basis of the preponderance of evidence. In a criminal case the entire burden lies on the prosecution and the prosecution is bound to prove the offence beyond reasonable doubt. In Ext.D1 civil case, the cause of action for institution of suit was on the basis of Ext.P4 cheque issued by the accused in favour of the complainant pursuant to a

business transaction between the complainant and the accused. The prosecution under Section 138 of the N.I.Act also initiated on the same set of facts. In the civil suit, the complainant was non-suited, finding that the amount was not recoverable from the accused. Hence, the amount which was found not recoverable on merits by a civil court cannot be recovered in a prosecution under Section 138 of the N.I.Act. The judgment of the civil court is relevant in this context to decide as to whether the amount covered under Ext.P4 is a legally enforceable debt or not.

17. On analysing the entire evidence, this Court is of the view that the amount covered under Ext.P4 cheque is not

a legally enforceable debt and the finding in Ext.D2 judgment

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is relevant under the Scheme of the Evidence Act to decide this case. Further, the accused as DW1 adduced evidence to rebut the presumption contemplated under Sections 118 and 139 of the N.I.Act. DW1 adduced evidence to prove that he issued several cheques in favour of the complainant pursuant to the transactions between the parties as security and one of the cheques was utilized by the complainant to file the complaint under Section 138 of the N.I.Act. Thus, the accused discharged his burden under Sections 118 and 139 of the N.I.Act to prove that the cheque had not been issued towards a legally enforceable debt. Thus, the trial court as well as the appellate court wrongly appreciated the evidence on record. When the conviction and sentence imposed by the courts below against the revision petitioner/accused are based on untenable grounds, it would be just and proper for the High Court to interfere with the findings of the courts below in exercise of powers under Section 401 of the Cr.P.C.

18. In the result, the criminal revision petition is allowed. The conviction and sentence imposed against the ..17..

revision petitioner/accused by the trial court as well as the appellate court are set aside. The revision petitioner/accused is found not guilty of the offence punishable under Section 138 of the N.I.Act and he is acquitted thereunder. Cancelling his bail bond this Court directs that he be set at liberty. If any fine amount is deposited by the revision petitioner/accused during

the pendency of this revision, pursuant to an interim order

passed by this Court, the same shall be refunded to the revision petitioner/accused in accordance with rules. Pending applications, if any, stand disposed of. Sd/- N.ANIL KUMAR, JUDGE skj

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