

Hamza Musliar Vs. Hamza Khan

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Court : Kerala

Decided On : Nov-20-2014

Judge : Honourable Mr. Justice K.Ramakrishnan

Appellant : Hamza Musliar

Respondent : Hamza Khan

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN THURSDAY, THE 20^H DAY OF NOVEMBER 2014 29TH KARTHIKA, 1936 CrI.Rev.Pet.No. 1998 of 2014 ()
----- AGAINST THE

JUDGMENT

IN CC212009 of J.M.F.C-I, MANJERI DATED 17-02-2011 AGAINST THE

JUDGMENT

IN CRA802011 of ADDL.D.C.& SESSIONS COURT - III, MANJERI DATED 23-04-2013
REVISION PETITIONER/APPELLANT/ACCUSED:

----- P.K. HAMZA MUSLIAR, S/O.MUHAMMED MUSLIAR, PULIKKODAN HOUSE, VEETHANASSERI, CHATHANGOTTUPURAM, PERINTHALMANNA TALUK, MALAPPURAM DIST BY ADV. SRI.M.P.MOHAMMED ASLAM

RESPONDENTS/RESPONDENTS/COMPLAINANT: ----- 1.

HAMZA KHAN, S/O.AHAMMED, PERUMPALLY HOUSE, UTHIRAMPOYIL, PULLANKODE P O, KALIKAVU, MALAPPURAM DIST.

2. STATE OF KERALA REP BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA ERNAKULAM R1 BY ADV. SRI.BABU S. NAIR R1 BY ADV. SRI.K.RAKESH R2 BY PUBLIC PROSECUTOR SRI. N.SURESH THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 2011-2014, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: "CR" K. RAMAKRISHNAN, J.

..... CrI.R.P.No.1998 of 2014
..... Dated this the 20th day of November, 2014.

ORDER

The accused in C.C.No.21/2009 on the file of the Judicial First Class Magistrate Court-I, Manjeri is the revision petitioner herein.

2. The case of the complainant in the complaint was that at the request of the revision petitioner an amount of Rs. 3 lakhs has been invested for his business purpose agreeing to repay the same along with profit after 1 = years and later the revision petitioner did not pay the amount as agreed and when demanded the amount, he had issued Ext.P2 cheque dated 10.11.2008 drawn on Punjab National Bank, Kalikavu branch. The cheque when presented was dishonoured for the reason funds insufficient evidenced by Ext.P3 dishonour memo and that was intimated to the complainant by his banker vide Ext.P4 intimation letter. The complainant issued Ext.P5 notice dated 28.11.2008 vide Ext.P6 postal receipt. Since he did not get the postal acknowledgment, he made Ext.P7 complaint to the postal authorities and received Ext.P8 letter from the Superintendent CrI.R.P.No.1998 of 2014 2 of post offices, Manjeri division stating that notice has been delivered to the addressee. The revision petitioner did not pay the amount. So he had committed the offence punishable under Section 138 of the Negotiable Instruments Act.

3. When the revision petitioner appeared before the court below, particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, the complainant himself was examined as PW1 and Exts.P1 to P8 were marked on his side. After closure of the complainants' evidence, the revision petitioner was questioned under section 313 of the Code and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that there was no money transaction as claimed by the complainant and the cheque was not issued in discharge of any liability. The revision petitioner along with several others have supported the partnership business evidenced by Ext.D4 partnership agreement and the partnership business could not be flourished as expected and the business failed and other persons have withdrawn the amount and the complainant and the revision petitioner wanted to proceed with the business and for that purpose they wanted to shift the business to another building Crl.R.P.No.1998 of 2014 3 and for the purpose of giving security to the building owner, a cheque was prepared and kept in the business premises, which was somehow obtained by the complainant and the present complaint was filed. In order to prove the case of the revision petitioner, the son of the complainant was examined as DW1 and the revision petitioner himself was examined as DW2 and Exts.D1 to D4 were marked on his side. After considering the evidence on record, the court below disbelieved the case of the revision petitioner and believed the case of the complainant and convicted him for the offence under Section 138 of the Act and sentenced him to undergo simple imprisonment for six months and also to pay the cheque amount of Rs.3 lakhs as compensation, in default to undergo simple imprisonment for three months under Section 357(3) of the Code. Aggrieved by the same, the revision petitioner filed Crl.A.No.80/2011 before the Sessions Court, Manjeri, which was made over to the Third Additional Sessions Court, Manjeri for disposal. The learned Additional Sessions Judge allowed the appeal in part confirming the order of conviction and direction to pay compensation with default sentence but modified the substantive sentence to imprisonment till the rising of court. Aggrieved by the same, the present revision has been filed by Crl.R.P.No.1998 of 2014 4 the revision petitioner before this Court.

4. Since the first respondent had appeared in the delay condonation application through counsel and the counsel expressed his willingness to appear in the revision also, this Court felt that the revision can be admitted, heard and disposed of today itself on merit considering the nature of contentions raised in the revision petition. So, the revision is admitted, heard and disposed of today itself.

5. The counsel for the revision petitioner attacked the findings of the court below on three grounds. (1) The evidence adduced on the side of the revision petitioner proved his case by preponderance of probabilities that there is no transaction as claimed by the complainant and the case of the revision petitioner is more probable than the complainant's case and that aspect has not been properly appreciated by the court below though the revision petitioner adduced evidence to prove his case. (2) There is no proper service of notice as postal acknowledgment has not been produced. The complainant relied on Exts.P6 and P7 which were not properly proved. So in the absence of service of notice as contemplated under Section 138 of the Act, the complaint under Section 138 of the Act is not maintainable. (3) Further execution of CrI.R.P.No.1998 of 2014 5 the cheque has been denied by him and in such circumstances, the burden is on the complainant to prove the transaction which the complainant had not discharged. So on that ground also the offence under Section 138 of the Act is not attracted are the contentions raised by the counsel for the revision petitioner.

6. On the other hand, the counsel for the first respondent submitted that the revision petitioner had admitted the execution of the cheque and he had no case that blank signed cheque was given and he had no dispute regarding the amount and the entries in the cheque. He had not examined anyone to show that he had such arrangements with the building owner for which the cheque has been prepared and kept. Further the evidence adduced on the side of the revision petitioner that DW1 had in fact supported the case of the complainant though he happened to be the son of the complainant. The evidence of DW2 is not believable and the document produced has not been properly proved and Ext.D4 is only the photostat copy which cannot be admitted in evidence and no steps have been taken to summon the original said to have been in the possession of the complainant for the purpose of relying on secondary evidence. The

accused/revision petitioner had no case that notice will not be served in his address. The postal authorities Crl.R.P.No.1998 of 2014 6 have replied that the addressee was delivered with notice. So the statutory presumption will be available in such cases. So according to him, the court below had considered all the aspects and rightly convicted the revision petitioner and the concurrent findings of the court below on facts do not call for interference.

7. The case of the complainant in the complaint was that the revision petitioner borrowed a sum of Rs. 3 lakhs for his business purpose agreeing to repay the same within 1 = years and when he demanded the amount, he had issued Ext.P2 cheque. The case of the revision petitioner was that there was no money transaction as alleged. In fact he along with the complainant and 14 others formed a partnership firm for doing some business, but later the business failed and most of the persons joined in the business took away money and even the complainant had withdrawn some amount through his son, who was examined as DW1. All those things were entered in Ext.D3 diary. Further cheque was not given to the complainant. On the other hand, the cheque was intended to be given to the building owner in whose building they wanted to shift their existing business and that was kept in the office premises and that was somehow taken by the complainant and the present complaint was filed and there was no proper service of notice Crl.R.P.No.1998 of 2014 7 also. When the execution of the cheque and the transaction has been denied, then burden is on the complainant to prove the same.

8. It is true that in the decision reported in Damodar S. Prabhu v. Sayed Babalal H. (JT2010(4) SC457 the Hon'ble Supreme Court has held that once execution of the cheque is proved by the complainant under Section 138 of the Act, then the court shall presume existence of liability and also issuance of the cheque for discharge of that liability invoking the statutory presumption available under Section 138 of the Act. In the same decision, it has been observed that burden is on the accused to rebut the presumption and that can be discharged by the accused by preponderance of probabilities and his burden is not as heavy as that of the complainant to prove his case beyond reasonable doubt. The same view has been reiterated in the decision reported in Rangappa v. Mohan (2010 (2) KLT682(SC)

and Somnath Sarkar v. Utpal Basu Mallick (2013 (4) KLT350SC). In this case, the complainant was examined as PW1 and he deposed that he had produced Ext.P1, the account extract maintained and that will go to show that he was having funds. The revision petitioner had no case that the complainant had no capacity to raise the Crl.R.P.No.1998 of 2014 8 fund and pay the same as well. Further even the revision petitioner had a case that the complainant had contributed some amount for the purpose of business which was intended to be started evidenced by Ext.D4 photostat copy of agreement, execution of which was disputed by PW1. In order to prove the transaction, he had examined DW1, the son of the complainant. He had not supported the case of the revision petitioner. On the other hand, he had supported the case of the complainant and stated that the revision petitioner had borrowed the amount and he had executed Ext.P2 cheque in favour of his father and he had stated that the signature in Ext.D3 is not his signature and the writings were also not his. Further when the accused/revision petitioner was examined as DW2, he had admitted that the entries in Ext.P2 were his own hand writing. He also admitted that it was an account payee cheque. So it cannot be said that he was not aware of the consequences of the writings of the cheque and giving of the same. Further case of the revision petitioner was that the cheque was kept in the office to be given to the owner of the building to which they wanted to shift the business and that was somehow obtained by the complainant and misusing the same the present complaint has been filed. Further he did not Crl.R.P.No.1998 of 2014 9 give any intimation to the bank about the missing of the cheque. So under the circumstances, the courts below were perfectly justified in coming to the conclusion that the case put up by the revision petitioner is not probable or believable.

8. As regards Exts.D3 and D4 are concerned, Ext.D3 is a diary said to have been maintained by the revision petitioner. There is nothing to show that any of the entries in Ext.D3 were acknowledged by the complainant. The entries in Ext.D3 are not binding on the complainant or to disprove the case of the complainant especially when DW1 the son of the complainant was examined on the side of the revision petitioner to prove the entries but he denied the same. No further steps have been taken by the revision petitioner to prove that the entries relate to the son of the complainant. Further he did not send any reply to the notice issued as

well. He had not produced the original of Ext.D4 partnership agreement. He had only produced the photostate copy which is not admissible in evidence. Though he had stated that the original was with the complainant, that was denied by the complainant. He had not taken any steps to get the same produced by filing an application before the court below and for getting a negative answer from the complainant so as to rely on the secondary CrI.R.P.No.1998 of 2014 10 evidence by producing the photostate copy as contemplated under 66 of the Evidence Act. So under the circumstances, the courts below were perfectly justified in not relying on Ext.D4 to prove the case of the revision petitioner. Under the circumstances, the submissions made by the counsel for the revision petitioner that he had discharged his burden by preponderance of probabilities and those things were considered by the court below cannot be accepted. Further in the decision reported in Rangappa v. Mohan (2010 (2) KLT682(SC), the Hon'ble Supreme Court has observed that the presumption mandated under Section 139 includes existence of legally enforceable debt or liability. This is in the nature of rebuttal presumption and it is open to the accused to raise wherein it can be contested. In the same decision it has been observed that Section 138 is attracted when the cheque is dishonoured on account of stop payment by the accused in respect of post dated cheque irrespective of insufficiency of fund in the account. Further once execution of the cheque is proved by the complainant, then burden is heavy on the accused/revision petitioner to prove the circumstances under which the cheque reached the hands of the complainant which has not been discharged by the revision petitioner to the CrI.R.P.No.1998 of 2014 11 satisfaction of the court. So under the circumstances, the courts below were perfectly justified in rejecting the contentions of the revision petitioner and believing the case of the complainant and relying on the presumptions available under Sections 139 and 118 of the Act came to the conclusion that the complainant had proved execution of the cheque in discharge of a legally enforceable debt by the revision petitioner.

10. As regards the service of notice is concerned, the complainant had issued notice in the address of the revision petitioner when it will be normally delivered. When he did not receive postal acknowledgment, he had filed Ext.P7 complaint to the postal authorities and they have sent Ext.P8 reply stating that it was delivered to the addressee. The accused/revision petitioner had no case that he will not get

the notice in this address. Once it is proved by the complainant that he had issued notice in the address in which normally it will be served on the accused/revision petitioner and if it is not returned, then it can be presumed that it was served on the accused, who is the addressee in the notice. This was so held in the decision reported in *Alavi Haji C.C v. Palapetty Mohammed & others* (ILR2007(3) Kerala 203)=2007 (3) KLT CrI.R.P.No.1998 of 2014 12 77). So, the statutory presumption available under Section 114 of the Evidence Act that the official acts have been done in the correct way unless the contrary is proved. When the postal authorities sent reply stating that it was delivered, presumption is available under Section 27 of the General Clauses Act that when a notice has been issued in the correct address by registered post and that is not returned can be invoked and then it can be presumed that it was served on the addressee and in such cases, the burden is on the addressee to prove that it was not actually delivered on him. Such evidence is lacking in this case. The court below was perfectly justified in coming to the conclusion that there was proper service of notice under Section 138 of the Act and rightly came to the conclusion that the revision petitioner had committed the offence punishable under Section 138 of the Act and convicted him for the said offence and the concurrent findings of the courts below do not call for any interference.

11. As far as the sentence is concerned, though the trial court sentenced the revision petitioner to undergo simple imprisonment for six months and also to pay compensation of Rs. 3 lakhs, in default to undergo simple imprisonment for three months under section 357(3) of the Code, the appellate CrI.R.P.No.1998 of 2014 13 court had, though confirmed the compensation part with default sentence under Section 357 (3) of the Code, but reduced the substantive sentence to imprisonment till the rising of court. Maximum leniency has been shown by the appellate court in awarding sentence as well which cannot be said to be excessive. So this Court does not find any reason to interfere with the sentence imposed also.

12. While this court was about to be disposed of the case, the counsel for the revision petitioner prayed for three months time to pay the compensation, which appears to be reasonable. So the revision petitioner is granted time till 20.2.2015

to pay the compensation amount. Till then, execution of the sentence is directed to be kept in abeyance. With the above directions and observations, the revision petition is dismissed. Sd/- K. RAMAKRISHNAN, JUDGE. cl /true copy/ P.S to Judge

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