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Sivan Kutty Vs. Balakrishnan and State

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Court : Kerala

Decided On : Jul-22-2015

Judge : Honourable Mr.Justice K.Harilal

Appellant : Sivan Kutty

Respondent : Balakrishnan and State

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE K.HARILAL WEDNESDAY, THE22D DAY OF JULY201531ST ASHADHA, 1937 Crl.Rev.Pet.No. 2842 of 2011 ( ) ---------- AGAINST THE

JUDGMENT
IN CRA1922010 of SESSIONS COURT, KOLLAM DATED3006-2011. AGAINST THE

JUDGMENT
IN CC13042006 of J.M.F.C. - I, KARUNAGAPPALLY DATED2404-2010. REVISION PETITIONER/APPELLANT/ACCUSED: ---------- SIVAN KUTTY, AGED49YEARS, S/O. PRABHAKARA KURUP, ANANDA BHAVANAM, PADANAYARKULANGARA NORTH, KARUNAGAPPALLY. BY ADV. SRI.V.PHILIP MATHEW RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE:

---------- 1. BALAKRISHNAN, S/O. VELUTHAKUNJU, VALAYATHU HOUSE, PADANAYARKULANGARA NORTH, KARUNAGAPPALLY-6714122.

2. STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-682 031. R1 BY ADV. SRI.PRATHEESH.P R2 BY PUBLIC PROSECUTOR SRI. JUSTINE JACOB THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON2207-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: K. HARILAL, J.

---------- Crl.R.P. No. 2842 of 2011 ---------- Dated this the 22nd day of July, 2015

ORDER

This Revision Petition is filed challenging the concurrent findings of conviction entered and the sentence imposed on the Revision Petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the N.I. Act') in Criminal Appeal No.192 of 2010 on the files of the Sessions Judge, Kollam. The above appeal was filed challenging the judgment finding that the Revision Petitioner is guilty of the said offence, passed in C.C.No.1304 of 2006 on the files of the Judicial First Class Magistrate's Court, Karunagappally. According to the impugned judgment, the Revision Petitioner is Crl.R.P. No. 2842 of 2011 -:

2. :- sentenced to undergo simple imprisonment for 15 days and to pay a sum of `95,000/- as compensation to the complainant. In default, to undergo simple imprisonment for three months and two weeks.

2. The case of the complainant is that the accused borrowed an amount of `85,000/- from the complainant on 13/8/2006 and in discharge of the said debt, the accused issued Ext.P1 cheque for the said amount to the complainant. When he presented the cheque for encashment, the same was dishonoured and returned for want of sufficient fund. Though he had caused to issue a statutory legal notice demanding the cheque amount, the accused did not pay the cheque amount; nor did he send a reply denying the said liability. To discharge the initial burden of

proving execution and issuance of the cheque, the complainant was examined as P.W.1 and Exts.P1 to P6 were marked. After evaluating the evidence of the complainant, the court below found that the accused has miserably failed to probabilise Crl.R.P. No. 2842 of 2011 -:

3. :- his version or improbabilise the complainant's case. Thus, the complainant has successfully discharged the initial burden of proving execution and issuance of the cheque and thereby the presumptions under Secs.138 and 118(a) of the N.I. Act would stand in favour of the complainant.

3. The sole contention raised by the accused, in defence, is that the complainant has no source of income; but he has explanation as to how Ext.P1 cheque happened to be in the possession of the complainant. As regards the source of income, when the complainant was examined as P.W.1, he deposed that he is conducting a hotel business near the railway station at Karunagappally. To controvert the said contention, the accused has produced Ext.D1 issued by the Secretary of the Karunagappally Panchayat. As rightly held by the court below, when the complainant was examined, no question was put to the complainant with respect of Ext.D1 or as to the fact whether he was conducting a business under a Crl.R.P. No. 2842 of 2011 -:

4. :- licence issued in his own name. Thus, he has not ruled out the possibility of conducting hotel business under the licence issued in the name of his wife or children. Therefore, no reliance can be placed on Ext.D1 to arrive at a finding that he has no source of income. More over, since the prosecution under Sec.138 of the N.I. Act is based on the dishonour of the cheque and the cause of action has arisen only on the dishonour of the cheque, the complainant need not prove the source of income, as contended by the accused. That apart, the accused has not mounted the box to give evidence on oath. In the above context, the court below is justified in finding that the accused has miserably failed to rebut the above presumptions under Secs.139 and 118(a) the N.I. Act. There is no illegality or impropriety in the above finding and I do not find any perversity in the appreciation of evidence from which those findings have arrived at.

4. The learned counsel for the Revision Petitioner Crl.R.P. No. 2842 of 2011 -:

5. :- reiterated the contentions which were raised before the courts below and got rejected concurrently. The learned counsel urged for a re-appreciation of evidence once again, which is not permissible under the revisional jurisdiction unless any kind of perversity is found in the appreciation of evidence. The Revision Petitioner failed to point out any kind of perversity in the appreciation of evidence. The courts below had concurrently found that the complainant/1st respondent had successfully discharged initial burden of proving execution and issuance of the cheque; whereas the Revision Petitioner had failed to rebut the presumption under Section 118(a) and 139 of the N.I. Act which stood in favour of the 1st respondent. So also, it is found that the debt due to the 1st respondent was a legally enforceable debt and Ext.P1 cheque was duly executed and issued in discharge of the said debt. I do not find any kind of illegality or impropriety in the said findings or perversity in appreciation of evidence, from which the above Crl.R.P. No. 2842 of 2011 -:

6. :- findings had been arrived. Therefore, I am not inclined to re-appreciate entire evidence once again and I confirm the concurrent findings of conviction.

5. The counsel for the Revision Petitioner submits that the sentence imposed on the Revision Petitioner is disproportionate with the gravity and nature of the offence. The learned counsel further sought for time to pay the compensation as ordered by the court below, if this revision petition is found meritless, as he is unable to raise the said amount forthwith due to paucity of funds.

6. Similarly, the substantive sentence imposed on the revision petitioner is too harsh and excessive. The learned counsel for the revision petitioner prayed for setting aside the sentence of imprisonment also. If the revision petitioner is incarcerated for a period as ordered by the courts below, the entire family will put put in great hardship.

7. The Supreme Court, in the decision in Kaushalya Devi Massand v. Roopkishore (AIR 2011 SC Crl.R.P. No. 2842 of 2011 -:

7. :- 2566), held that the offence under Section 138 of the N.I. Act is almost in the nature of civil wrong which has been given criminal overtone, and imposition of

fine payable as compensation is sufficient to meet the ends of justice. Further, in Vijayan vs. Baby (2011(4) KLT355, Supreme Court held that the direction to pay the compensation by way of restitution in regard to the loss on account of the dishonour of the cheque should be practical and realistic. So, in a prosecution under Section 138 of the N.I. Act, the compensatory aspect of remedy should be given much priority over punitive aspect.

8. Having regard to the nature and gravity of the offence, in the light of the decisions quoted above and submission made at the Bar, I am inclined to grant five months time to pay the compensation. Similarly, the substantive sentence of simple imprisonment for 15 days is reduced and modified to simple imprisonment for one day till rising of the court. Consequently, In supersessions of the sentence imposed by the trial Crl.R.P. No. 2842 of 2011 -:

8. :- court and modified by the appellate court, the revision petitioner will stand sentenced as follows: i. The Revision Petitioner shall undergo simple imprisonment for one day till rising of the court. ii. The Revision Petitioner shall pay Rs.95,000/- (Rupees Ninety five thousand only) within a period of five months from today to the 1st respondent as compensation under Sec.357(3) of the Cr.P.C.. iii. The Revision Petitioner shall appear before the Trial Court to suffer substantive sentence of simple imprisonment as ordered above on or before 23/12/2015 with sufficient proof to show payment of compensation. iv. In default, the Revision Petitioner shall undergo simple imprisonment for a period of three months. v. If the revision petitioner had deposited any amount in the trial court towards compensation or fine, the same Crl.R.P. No. 2842 of 2011 -:

9. :- shall be given credit to and the balance alone needs to be paid as compensation or fine, as the case may be, and in that event, the complainant is allowed to realise such deposit from the court. The Criminal Revision Petition is disposed of accordingly. Sd/- (K. HARILAL, JUDGE) Nan/ //true copy// P.S. to Judge

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