

Varghese Vs. State of Kerala

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Court : Kerala

Decided On : Jul-27-2001

Reported in : 2002CriLJ1712

Judge : T.M. Hassan Pillai, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 357(1), 357(3) and 431; [Negotiable Instruments Act, 1881](#) - Sections 138

Appeal No. : Crl. R.P. No. 656 of 2001

Appellant : Varghese

Respondent : State of Kerala

Advocate for Def. : Public Prosecutor and; Mathew K. Philip, Adv.

Advocate for Pet/Ap. : V. Rajendran Perumbavoor and; George Varghese Kizhakkambalam, Advs.

Disposition : Revision allowed

Judgement :

ORDER

T.M. Hassan Pillai, J.

1. Heard.

2. Concurrent findings of facts recorded by the courts below (holding the revision petitioner guilty of the offence punishable under Section 138 of the [Negotiable Instruments Act, 1881](#) as amended (for short the Act) are under challenge in this revision preferred by the convicted accused. The 2nd respondent filed compliant against revision petitioner alleging commission of an offence under Section 138 of the Act by him and the gist of the allegation made against him (revision petitioner) was that an amount of Rs. 1,45,000/- was owed by him to the 2nd respondent and in discharge of his liability the revision petitioner issued Ext. P1 cheque drawn on the State Bank of Travancore, Kizhakkambalam Branch and that cheque was returned by the drawee bank unpaid with the remark 'insufficient fund' when presented for collection. On receipt of that information 2nd respondent issued registered notice (Ext.P6) demanding payment of the amount covered by the cheque in question within 15 days of receipt of that notice. He also sent notice under certificate of posting and it was received by the revision petitioner. It was the further case of the 2nd respondent that though registered notice was sent on the correct address, that notice was returned with endorsement 'unclaimed'. It was also asserted in the complaint that within one month of arising of cause of action complaint was filed.

3. The revision petitioner's defence case was that signed cheque kept in the office of revision petitioner (he was at that time Secretary of the Kunnathau Nadu Service Co-operative Society) was stealthily removed by the 2nd respondent.

4. In support of his case, the 2nd respondent got himself examined as PW1 and examined on his side PW2 who is the Bank Manager of the Kizhakkambalam Branch of State Bank of Travancore. Documentrary evidence produced by PW1 was Exts. P1 to P7.

5. The trial court on an appraisal of the evidence came to the conclusion that 2nd respondent established his case that revision petitioner committed the offence punishable under Section 138 of the Act and on conviction trial court imposed on the revision petitioner simple imprisonment for one year and also directed him to pay compensation of Rs. 1,45,000/-.

6. The revision petitioner preferred Crl. Appeal No. 572/2000 before the Sessions Court, Ernakulam and the learned Sessions Judge on reappraisal of evidence affirmed the order of conviction passed by the trial court. However, the appellate court interfered with the sentence awarded by the trial court and reduced the substantive sentence of imprisonment awarded to 15 days simple imprisonment and compensation awarded was enhanced to Rs. 1,52,000/- with a direction that Rs. 1,49,000/- shall be credited to the State as compensation for the loss suffered by the State in terms of judicial time and resources spent for the resolution of the controversy between the parties.'

7. Since the concurrent findings of facts recorded by the courts below are under challenge in this revision, this court will interfere only if it is brought to the notice of this court glaring feature which would otherwise tantamount to gross miscarriage of justice. So the question that is to be decided is whether glaring feature is brought to the notice of this court which would otherwise tantamount to gross miscarriage of justice.

8. I agree with the courts below that cogent and trust worthy evidence has been adduced by the 2nd respondent to prove his case of issuance of ext. P1 cheque dated 13.1.1997 towards discharge of the debt or the liability of Rs. 1,45,000/- owed by the also proved that Ext. P1 cheque when presented for encashment was returned with remarks 'insufficient fund' and 'the account closed' and 'the account closed' (Ext. P2 memo also evidenced that fact).

9. PW1 (complainant) got information regarding the bouncing of cheque on 26.4.1997 and registered notice Ext. P6 in terms of proviso to Section 138B was sent by the 2nd respondent claiming the amount covered by Ext. P1 cheque to the revision petitioner on 29.4.1997. It is also in evidence that he sent notice under certificate of posting and that notice was received by the revision petitioner (Ext. P5 evidenced that fact). It is not disputed before me by sent on the correct address of the revision petitioner and he submitted fairly that as the notice was notice was returned with the endorsement 'unclaimed' and as it was sent on the correct address court could very well proceed on the premise that notice was received by the revision petitioner. Therefore, I have to proceed on the basis that valid notice

was sent and it is not the case of the revision petitioner that either within 15 days of receiving back of registered notice by PW1 or within 15 days of receipt of notice issued under certificate of posting he had paid the amount covered by Ext.P1 cheque.

10.The evidence given by the PW2, the Branch Manager of the drawee bank would show that on the date of presentation on the cheque for encashment the amount lying to the credit of the revision petitioner in the account maintained by the drawee bank was only Rs. 577/- and Ext. P7 ledger extract maintained by the drawee bank would show that the account of the revision petitioner was not closed by him at the time of presentation of Ext.P1 cheque for encashment. So I fully agree with the findings recorded by the courts below that the revision petitioner committed offence punishable under Section 138 of the Negotiable Instruments Act and he is rightly convicted for the said offence.

11. There is substance in the contention of the revision petitioner that the learned Sessions Judge unnecessarily without any warrant or Justification directed Rs. 3,000/- 'shall be credited to the State as compensation for the loss suffered by the State in terms of judicial time and resources spent for the resolution of the controversy between the parties.' That part of the direction of order given by the learned Sessions Judge is liable to be overturned on the ground that it is plainly clear from Section 357(1)(a) that when passing the judgment the court is competent to order whole or part of fine recovered to be applied in defraying the expenses properly incurred in the prosecution only if the court imposes a sentence of fine or fine forms part of the sentence. The learned Sessions Judge had not imposed any fine or fine formed part of any sentence imposed by him. Under Section 357(3) cr.P.C. when passing a judgment accused can be ordered to pay by way of compensation such amount as may be specified in the order to the person who had suffered any loss or injury by reason of the act for which the accused person has been so sentenced only when a court imposes a sentence of which fine does not form a part. In other words Court is clothed with authority to order when passing judgment whole or a part of fine recovered to be applied in defraying the expenses properly incurred in the prosecution only if fine recovered to be applied in defraying the expenses properly incurred in the prosecution only if

fine is imposed or fine also formed part of sentence. I am at a loss to understand the rationale or *raison d'être* of passing such an order by the learned Sessions Judge. Administration of criminal justice is as a matter of general policy a function which state as the guardian of law and order. It is to be pointed out that barring a few exemptions in criminal matters the party who is treated as the aggrieved party is the State which is the custodian of social interests of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interest of the community to book. Access to justice to every bonafide seeker is democratic dimension of remedial jurisprudence. Object of Section 138 is not to be forgotten and the object is to promote the efficacy of the banking operations and to ensure credibility in transacting business through cheques. Since administration of justice is the function of State how it is possible to say State 'suffered loss in terms of judicial time and resources spent for the resolution of the controversy between the parties.' Further it is not discernible from the impugned order from whom the learned Sessions Judge got the materials to determine the expenses properly incurred in the prosecution or what were the materials available before him to give a portion of the compensation (Rs. 3,000/-) to State. I have waded through the records in vain to find out any such material. Therefore the entire compensation (Rs. 1,52,000/-) is directed to be paid to the 2nd respondent. In case of default in payment of the compensation awarded the 2nd respondent is directed to recover the same by proceeding against the revision petitioner under Section 431 Crl. P.C.

In the result, the revision is allowed in part setting aside that part of the order passed by the learned Sessions Judge for crediting to the State Rs. 3,000/p as compensation 'for the loss suffered by the State in terms of judicial time and resources spent for the resolution of the controversy between the parties'. Entire compensation awarded is directed to be paid to the complainant/2nd respondent. 2nd respondent is directed to resort to the provisions Section 431 Cr.P.C. to recover the entire compensation of Rs. 1,52,000/- in case of failure of the revision petitioner to pay the compensation within two months from today.