**Venugopalan Vs. Moosa**

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**SooperKanoon Citation** : sooperkanoon.com/718331

**Court** : Kerala

**Decided On :** Feb-23-2004

**Reported in** : II(2004)BC566; [2005]128CompCas1003(Ker); 2004CriLJ2220; 2004(1)KLT1079; [2004]53SCL199(Ker)

**Judge** : R. Basant, J.

**Acts** : Negotiable Instruments Act, 1881 - Sections 138

**Appeal No.** : Crl. A. No. 867 of 1995

**Appellant** : Venugopalan

**Respondent** : Moosa

**Advocate for Def.** : R. Bindu Sasthamangalam, Adv.

**Advocate for Pet/Ap.** : Thomas Antony, Adv.

**Disposition** : Appeal allowed

**Judgement** :

**R. Basant, J.**

1. Does the use of the word 'guarantee' in Ext.P7 complaint convey that the cheque was not issued for the due discharge of a legally enforceable debt/liability? This is the question which is raised for the consideration of this Court in this

appeal.

2. The complainant - the Regional Officer, Sports and Youth Affairs, Central Government of India, alleged that the respondent/accused - a close friend of his, had borrowed an amount of Rs. 20,000/- from him and had issued Ext.P1 cheque for Rs.22,000/- dated 19.2.1991 for the due discharge of the said liability (including interest). The cheque, when presented for encashment, was dishonoured on the ground of 'insufficiency of funds'. Thereafter, the complainant came to court after scrupulously observing the statutory time table.

3. Cognizance was taken. The accused entered appearance and denied the offence. Thereupon, the prosecution examined PWs.1 to 5 and proved Exts. P1 to P12. PW1 is the complainant. PW2 was the Mayor of Calicut who tried to mediate the disputes between the parties and effect a settlement. PWs.3 to 5 are Managers/employees of the Banks. The accused admitted that he had signed Ext. cheque and had handed the same over to the accused. But according to him, this was not issued for the due discharge of any legally enforceable debt/liability. The crux of his contention is that there were some underhand dealing between him and the complainant. The complainant had undertaken to give him orders for supply of certain furniture for the Youth Hostel. Payment for the said work was to be given to the accused by cheques/drafts. The accused was to encash cheques and drafts but was expected to return certain percentage as commission (kick back) to the cmplainant. Before the work was granted and the work commenced, the complainant wanted two blank signed cheques and blank signed stamp papers to be handed over by him to the complainant as security. Ext.P1 is one such cheque. That was misused by the complainant. Accused examined himself as DW1. He proved Ext.D1 reply notice.

4. The learned Magistrate came to conclusions in favour of the complainant on all other aspects. But on the question whether the cheque was issued for the due Discharge of a legally enforceable debt/liability, the learned Magistrate held that there was no sufficient and proper evidence. For this sole reason, the prosecution ended in acquittal.

5. Arguments have been advanced by the learned counsel for the rival contestants. The learned counsel for the appellant/complainant contends that the learned Magistrate had totally misdirected himself in law and on facts. It was preposterous for the learned Magistrate to conclude that the cheque was not issued for the due discharge of a legally enforceable debt/liability. On the basis of Ext.P7, such a conclusion should not have been reached. The learned Magistrate did not properly apply his mind to the presumption available under Section 139 of the N.I. Act. In these circumstances, the impugned judgment of acquittal may be set aside, it is prayed.

6. I am in agreement with the learned counsel for the appellant. The learned Magistrate appears to have taken a view in favour of the accused only on the basis of Ext.P7 complaint filed by the complainant before the police. A careful reading of the said complaint, according to me, cannot at all lead a court to the conclusion that the cheque was not issued for the due discharge of any legally enforceable debt/liability. The very specific averment in Ext.P7 complaint which has been extracted by the learned Magistrate in the judgment reads as follows:

'Mr. Moosa on acquaintance requested me for a loan of Rs. 20,000/- on the guarantee of achequeof State Bank of Travancore for Rs.22,000/-and plain court fee stamp paper of Rs. 15/-with an assurance that he will repay me back on 16.3.1991'.

7. The above averments very clearly convey that though the word 'guarantee' is used, the cheque was, in fact, issued only for the due discharge of a loan/liability. In common parlance when an amount is advanced on the promise that the cheque issued by the drawer can be presented in bank and repayment secured, it is said that the cheque is a guarantee for repayment and is received as guarantee or security for repayment. The loan is paid on the security or guarantee of the cheque, the laity might say. This cannot persuade the courts to jump to the conclusion that the cheque is not issued for the due discharge of any legally enforceable debt/liability. It would be puerile to read into Ext.Pl any such conclusion. I do 'hot, in these circumstances, agree with the approach made by the learned Magistrate.

8. The learned Magistrate further took note of the fact that the repayment was agreed to be made on 16.3.91. The learned counsel for the appellant contends that this is giving artificial significance to an inadvertent error in the typing of the date. Ext.P7 read as a whole and read along with Ext.Pl must clearly covey that the date on which there was an agreement to pay was '16.2.1991' and not '16.3.91'. The next paragraph of Ext.P7 would clearly and eloquently convey this. I am, in this circumstances, satisfied that the reasons on which the judgment of acquittal is founded are shaky and unacceptable. According to me, the learned Magistrate should have held that the cheque has been issued for the due discharge of a legally enforceable debt/liability.

9. No other grounds are urged to support the judgment of acquittal. I am satisfied that all ingredients of the offence punishable under Section 138 of the N.I. Act have been established. In the absence of any contention, it is unnecessary for me to advert to the other ingredients in detail.

10. The above discussions iead me to the conclusion that the impugned judgment of acquittal does warrant interference. The challenge succeeds.

11. Coming to the conclusion of sentence, I have already adverted to the principles governing imposition of sentence in a prosecution under Section 138 of the N.I. Act in the decision reported in Anilkumar v. Shammy, 2002 (3) KLT 852. I am satisfied that a deterrent substantive sentence of imprisonment need not be imposed. An appropriate direction under Section 357(3) of the Cr.P.C. coupled with a default sentence shall eminently meet the ends of justice.

12. In the result:

(a) This appeal is allowed.

(b) The impugned verdict of not guilty and acquittal are set aside.

(c) The respondent/accused is found guilty, convicted and sentenced under Section 138 of the N.I. Act to undergo imprisonment till the raising of Court and to pay an amount of Rs. 30,000/- as compensation and in default, to undergo simple imprisonment for a period of three months. The amount, if realised, shall be

released entirely to PW1/complainant.

13. The learned Magistrate shall take necessary steps to execute the sentence hereby imposed. The respondent/accused shall appear and his sureties shall produce him before the learned Magistrate at 11 a.m. on 3.5.2004 for execution of the sentence. Needless to say, the learned Magistrate shall be at liberty to invoke his powers under Section 446 of the Cr.P.C. against the petitioner and his sureties if the petitioner does not appear before the learned Magistrate as directed.