

Kochayippa Vs. Suprasidhan

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Court : Kerala

Decided On : Apr-02-2002

Reported in : 2002(2)ALT(Cri)251; 2002CriLJ4803

Judge : M.R. Hariharan Nair, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138

Appeal No. : Crl. A. No. 563 of 1999

Appellant : Kochayippa

Respondent : Suprasidhan

Advocate for Def. : V.N. Achutha Kurup,; B.S. Swathi Kumar,; R. Harikumar

Advocate for Pet/Ap. : Philip M .Varghese and; Vinoj Mathew, Advs.

Judgement :

M.R. Hariharan Nair, J.

1. The novel question posed in this case is whether a complaint under Section 138 of the Negotiable Instruments Act can be maintained if the cheque amount in a post dated cheque is larger than the actual debt due on the date of transaction.

2. The appeal is by the complainant in C.C. No. 554/1997 of the Judicial First Class Magistrate Court, Adoor. He is aggrieved that the complaint filed by him

alleging offence under Section 138 of the Negotiable Instruments Act arising from dishonour of Ext. P1 cheque for Rs. 1 lakh ended in acquittal of the accused (present respondent).

3. The learned counsel for the appellant submitted that the trial court has failed to appreciate the scope and ambit of the presumption arising from Section 139 of the Negotiable Instruments Act and that the acquittal of the accused has resulted in a miscarriage of justice. Reliance was also placed on the fact that Ext. D1 which was produced by the accused to contend that the cheque was issued in connection with a totally different transaction is a forged document as found by the trial court.

4. According to the learned counsel for the respondent, the cheque in question cannot create a cause of action for the complainant in so far as it was admitted by PW1 that only a sum of Rs. 80,000/- was given to the accused on 15.1.1995 whereas the amount mentioned in Ext. P1 cheque bearing date 15.1.1997 is Rs. 1 lakh. The counsel further submits that in view of the admitted fact that the actual consideration that is alleged to have passed is only Rs. 20,000/- lesser than the amount mentioned in the cheque, the cheque is incapable of creating a cause of action under Section 138 of the Negotiable Instruments Act. As regards the finding regarding forgery in the matter of Ext. D1, it is argued that the weakness of the defence case does not enable the complainant to have a walk over and that has to win or lose based on the strength of his own case.

5. On the arguments advanced in the case, the points that arise for decision are:-

(1) Whether the difference in the amount mentioned in the cheque vis-a-vis the amount of consideration that allegedly passed under Ext. P1 is incapable of conferring cause of action to the complainant?

(2) Whether Ext. P1 cheque was issued in discharge of a legal liability?

(3) Whether the first respondent has committed the offence under Section 138 of the Negotiable Instruments Act?

(4) Reliefs.

6. Point No. 1:- It is admitted by PW1 as also in the complaint that only a sum of Rs. 80,000/- was given to the accused on 15.1.1995 and that Ext. P1 is actually for a sum of Rs. 1 lakh. According to the learned counsel for the respondent, the cheque is not for the consideration received and that disables the complainant to file a complaint based on Ext. P1 cheque. The question then is whether the cheque amount should be the same as the amount of consideration that actually passed on the date of transaction.

7. Section 138 of the Negotiable Instruments Act reads as follows:-

'Dishonour of cheque for insufficiency, etc. of funds in the account:- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds (the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

XXX XXExplanation :- For the purpose of this section, 'debt or other liability' means legally enforceable debt or other liability.'

8. A perusal of the aforesaid provision shows that the amount mentioned in the cheque need not be the same as the amount of consideration that actually passed. The words 'in whole or in part' of any debt or other liability assumes significance in this context. Even if the cheque is for a lesser amount than the actual amount of consideration; still a cause of action would be available to the payee under Section 138 of the Negotiable Instruments Act. If that is so the question of a cheque for a larger amount than what is actually received by the accused also would make no difference provided the entire amount so mentioned is necessary to discharge the debt or legal liability.

9. On the facts of this case the difference in amount does not appear to be of significance. The reason is that the date of transaction is 15.1.1995 and the date that Ext. P1 bears is 15.1.1997. The complainant's case, spoken to by PW1 is that post dated cheque was issued to cover the liability arising from the transaction inclusive of the interest on the principal amount for two years that would transpire between the dated of transaction and the date of cheque and that the element of Rs. 20,000/-forming part of the cheque amount represents such interest on the principal amount of Rs. 80,000/- for two years.

10. Ashok Yeshwant Badeve v. Surendra Madhavrao Nighojakar and Anr. (2001 AIR SCW 1099) is authority for the proposition that such a post dated cheque is not a cheque on the date when it is drawn; that it becomes a cheque only on the date written on it and that till that date the post dated cheque would remain a bill of exchange. It transforms itself into a cheque only on the date mentioned in the cheque.

11. It follows from the above that Ext. P1 can be taken as a 'cheque' on 15.1.1997 only. As on that date the liability of the debtor had grown from Rs. 80,000/- to the higher amount of Rs. 1 lakh, inclusive of the interest. Viewed from this perspective, it can be seen that as on 15.9.1997 which is the date of cheque, the debt due to the complainant had become Rs. 1 lakh and in that perspective the fact that the principal debt was different from the cheque amount is not of any consequence. The accused cannot hence get an acquittal on the ground that there is difference between the actual amount received from the creditor and the amount shown in the cheque. The point is found accordingly.

12. Point No. 2:- The accused has a contention that there is want of adequate evidence to show that the cheque was issued in discharge of a subsisting legal liability. The defence case argued before me is that there was in fact no transaction at all between the parties and that even if we go by Ext. P6 which is the reply notice allegedly, sent by the counsel for the accused in reply to the statutory notice under Section 138(b) of the Act, the actual amount of consideration admitted is only Rs. 40,500/-. Considering the varying stands taken/by the accused, I do not think that any credibility can be attached to the

version in Ext. P6. It is not a question of the case of the complainant being accepted based on the weakness of the defence case, but the question is of appreciating the veracity of the case set up by the accused. It is specifically mentioned in Ext. P6 that Rs. 40,500/- was in fact received. What the accused stated in answer to the question put to him under Section 313 of the Cr.P.C. was that there was absolutely no money transaction between the complainant and the accused. The two are incongruous between each other. Neither version can hence be believed.

13. What was sought to be presented before the court based on Ext. D1, allegedly an agreement, is a third version. It was contended that two blank cheques were handed over to the son of the complainant who was a chitty foreman and that it was utilising one of those blank cheques that Ext. P1 in the present form was created. The production of Ext. P7 passport of the son of the complainant (unfortunately he passed away in the year 1991) exposed the falsity of the case set up based on Ext. D1. A comparison of the signature of the passport holder in Ext. P7 and the signature contained in Ext. D1 reveals the fact that there is absolutely no comparison between the same. The necessary inference is that Ext. D1 is a forged document. The reliability of the denial contained in answer to the question under Section 313 of the Cr.P.C. has to be appreciated in this perspective also.

14. It is true that PW1 admitted that the money transaction between the parties took place in the presence of one Rajappan and he had not been examined as a witness in the case. But for the availability of the presumption under Section 139 of the Negotiable Instruments Act, the said fact, perhaps, might have had an impact on the culpability of the accused. According to me, the complainant is entitled to the presumption under Section 139 of the Negotiable Instruments Act and it has not been rebutted through appropriate rebuttal evidence.

15. Section 139 reads as follows:-

'Presumption in favour of holder:- 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 for the discharge, in whole or in part, or any debt or other liability'.

16. A Bench of three Judges of the Apex Court defined the scope and ambit of the aforesaid section in *Hiten P. Dalai v. Bratindranath Banerjee*, (2001 AIR SCW 3861) as follows:

'It is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. 'It introduced an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused' (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court 'may presume' a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, 'after considering the matters before it the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'. Section 3: Evidence Act. Therefore, the rebuttal does not have to be conclusively established, but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'.'

17. In view of the clear exposition of law as above, the accused herein cannot be heard to contend that the complainant is not entitled to get the benefit of the presumption. According to me, the said presumption which is validly available to the complainant remains undischarged through appropriate rebuttal evidence of acceptable nature.

18. Point No. 3:- In order to establish the offence under Section 138 of the Negotiable Instruments Act, the complainant has not only to prove that the dishonoured cheque was issued in discharge of legal liability but also that the drawer failed to pay the amount in spite of notice intimating the fact of dishonour. The issuance of notice intimating such dishonour and the fact that there was failure to pay the amount demanded within the time allowed by law stand proved in the present case. Apart from Ext. P6 reply to such notice there was no attempt on the part of the accused to pay the amount demanded.

19. There is one more aspect to be considered. The reason for dishonour mentioned in Ext. P2 slip is 'account closed' and not 'funds insufficient'. But then, it can be seen from the evidence of PW2, who was the Branch Manager of the Federal Bank, that Ext. P1 cheque was issued in a cheque leaf issued to the accused; that it had gone in for collection on 28.1.1997 and that there was no balance in the accused's account in so far as the account had been closed on 23.3.1995. Obviously, the closing of the account took place in between the date of transaction and the date mentioned in the cheque. *Japahari v. Priya* (1993 (2) KLT 141) dealt with a similar case where the cheque was returned unpaid with the endorsement 'account closed'. It was found therein that the contention that for attracting penal liability for the offence under Section 138 of the Negotiable Instruments Act, the account must have been alive at the time of presentation of the cheque is unsound; that if the contention is to be accepted, it would open up a safe escape route for those who fraudulently issue cheques and close the account immediately thereafter to deprive the payees of the cheque of the proceeds and that such a situation would defeat the very object of the innovation made through Act 66 of 1988 by which Section 138 and its allied provisions were inserted in the Act. It was also found that closing of account is one of the modes by which a drawer can render his account inadequate to honour the cheque issued by him and when viewed from that perspective the closing of the cheque would not enable the accused to wriggle out of his liability under Section 138 of the Negotiable Instruments Act. The question is whether there was funds available in the Bank on the date of cheque to honour the same.

20. Viewed from the said perspective, it is obvious from the evidence of PW2, that the accused had failed to ensure that there was a sum of Rs. 1 lakh mentioned in Ext. P1 available for payment to the payee when it came up for collection on 28.1.1997. According to me, the complainant has succeeded in establishing all the ingredients of Section 138 of the Negotiable Instruments Act and hence he is entitled to succeed in the prosecution. The impugned judgment which takes the contrary view deserves to be quashed.

21. Point No. 4:- In view of the aforesaid findings the impugned judgment is reversed and the accused (respondent herein) is convicted of the offence under Section 138 of the Negotiable Instruments Act. An effective sentence can be passed on the accused only after hearing him on that aspect. The respondent is not available in this Court today for the purpose of hearing. I therefore find it fit to remand the matter to the trial court with a direction that an opportunity should be afforded to the accused to be heard on the aspect of sentence. After such hearing appropriate sentence based on the conviction already entered by this Court, including question of payment of appropriate compensation to the complainant will be passed. The case is remanded for this limited purpose.

Crl. Appeal disposed of as above.