

Unnikrishnan Vs. Ramankutty

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Court : Kerala

Decided On : May-30-2006

Reported in : 2006(3)KLT926

Judge : K.A. Abdul Gafoor, J.

Acts : Negotiable Instruments Act, 1981 - Sections 138 and 142

Appeal No. : Crl.A. No. 1028 of 2001

Appellant : Unnikrishnan

Respondent : Ramankutty

Advocate for Def. : Santheep Ankarath, Adv.

Advocate for Pet/Ap. : Preethy Karunakaran and; Bijimol Jose, Adv.

Disposition : Appeal allowed

Judgement :

K.A. Abdul Gafoor, J.

1. The complaint filed by the appellant, alleging offence punishable under Section 138 of the N.I. Act against the first respondent did not succeed. Therefore, this appeal. Taking into account the fact that the appellant had presented the cheque in question thrice, on 1.1.1998, 2.1.1998 and 7.3.1998 and that he had issued two

notices, the first on 13.1.99 after the 2nd presentation which returned unserved as no such addressee and a second one on 13.3.1998, after the third presentation which really reached the addressee, the respondent, the court below found that the complaint was filed beyond 30 days of the date when the cause of action arose, with reference to the first among these two notices. The court below also found that there was difference in ink and handwriting with regard to the filling of the cheque as well as signature there on.

2. As regards the second ground now it is now trite that when the cheque is admittedly signed by the drawer irrespective of the fact that, that had been filled up by any other person putting the date and amount, the drawer cannot get absolved or the liability under Section 138 because he has to rebut the statutory presumption against him by adducing further evidence that it was not one given in discharge of the liability that he owed to the payee either in whole or in part. Such an evidence is absent in this case.

Therefore, the second ground on which the acquittal was recorded by the court below is not sustainable.

3. Whether the complaint was filed beyond the period of limitation with reference to the service of notice is the moot question that has to be considered.

4. Admittedly the cheque was presented on a second time on 2.1.1998. It bounced and a notice was issued. It is in evidence that it was returned back to the sender on the reason that there was no person as the addressee shown on the registered cover. This fact is not disputed. Thus the notice sent on 13.1.1998 demanding payment of the amount never reached the accused. Then the cheque was presented for the 3rd time for encashment, on 7.3.1998. It did have the same fate in the third time as well. This resulted in the second notice on 13.3.99 demanding payment of amount. It really reached the accused. He responded as well to the said notice. The complaint has been filed within 30 days from the date of receipt of this second notice. It is not in dispute, if the service of the second notice is taken as the basis for cause of action, that the complaint has been filed within the period of limitation whereas, if the first notice is taken, the complaint has been filed beyond the period of limitation provided for in clause (b) of Section 142.

5. The accused relies on the decision in Kannan v. Kothandan 1995 (2) KLT Short Note 75. The evidence in the case on hand shows that the complainant had sent the first notice after second presentation on 13.1.1998. Though, it did not reach the addressee, he had contacted the addressee and told him that the cheque had bounced. Therefore, there was notice to the drawer/accused by words from the complainant preceded by a notice, which he did not receive. Therefore the cause of action had arisen within 30 days of communicating that fact orally by the complainant to the accused. True, he would have been right in saying so, if he had been aware of the contents of the first notice sent on 13.1.1998. Unfortunately, going by the evidence on record it did not reach him. It returned back to the sender on the reason that there was no such addressee, meaning thereby it had never come to the knowledge of the addressee. In such circumstances, by reason of that notice no cause of action had arisen, in so far as he did not receive that notice. True the complainant had orally told him about the bouncing of the cheque. But the demand in terms of clause (b) of the proviso under 138 shall be in writing and in the form of a notice. The mere communication about the bouncing of the cheque will not satisfy the statutory requirement, to give rise to a cause of action. Therefore the contention of the accused cannot be accepted.

6. At the same time, the counsel for the complainant is well footed to submit that the cause of action had arisen in this case only after the second notice issued, on bouncing the cheque on the third occasion, which was received by the accused. It has been held by the Supreme Court in the decision in Sadanandan Bhadrar v. Madhavan Sunil Kumar 1998 (2) KLT 765 (SC), relied on by the counsel for the appellant, that

Section 138 does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity' and that the combined reading of Sections 138 and 142 of the Act 'leaves no room for the doubt that the cause of action within the meaning of Section 142(c) arises - and can arise - only once' and that was, on 'immediately on his failure to make the payment within fifteen days of the receipt of the notice served in accordance with clause (b) of the proviso to Section 138.' Of course, as held by the Supreme Court 'that necessarily means that for similar failure after service of fresh notice on subsequent dishonour the

drawer cannot be liable for any offence nor can the first offence be treated as non est so as to give the payee a right to file a complaint treating the second offence as the first one.

7. In this case the first notice did not reach the drawer. In such circumstances the cause of action in this case had arisen only with reference to the receipt of second notice issued on 13.3.1998. Therefore, the complaint has been filed within the time.

8. Accordingly, the acquittal of the respondent has to be set aside and he has to be found guilty of the offence punishable under Section 138 of the Negotiable Instruments Act as complainant has proved bouncing of the cheque Ext.PI for want of sufficient fund in the account maintained by the accused and failure to pay the amount, in spite of the demand in the second notice, issued on 13.3.1998, as discussed above.

9. Accordingly, the respondent is convicted of the offence punishable under Section 138 and he is sentenced as follows:

i. He shall undergo imprisonment for a day until the rising of the court on 4.12.2006, when he shall appear to receive the sentence.

ii. He shall also pay a compensation of Rs. 2 lakhs on or before the said date, failing which he shall undergo simple imprisonment for six months. The compensation amount if collected shall be paid to the appellant/ complainant.

iii. The accused will have his option to pay the amount directly to the complainant and to produce the necessary discharge from the complainant before the said date.