

Rathikumar Vs. Santhamma

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Court : Kerala

Decided On : Sep-26-2006

Reported in : II(2007)BC571; 2007CriLJ2643; 2006(4)KLT308

Judge : R. Basant, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138 and 139; Code of Criminal Procedure (CrPC) - Sections 357(3)

Appeal No. : Cri. R.P. No. 3296 of 2006

Appellant : Rathikumar

Respondent : Santhamma

Advocate for Def. : V.T.K. Mohanan, Public Prosecutor

Advocate for Pet/Ap. : R. Vinod, Adv.

Disposition : Petition allowed

Judgement :

ORDER

R. Basant, J.

1. Does the admission that the cheque was issued as security for repayment of the loan take the transaction out of the sweep of Section 138 of the N.I. Act? This is

the relevant question that falls for consideration in this revision petition directed against a concurrent verdict of guilty, conviction and sentence in a prosecution under Section 138 of the N.I Act.

2. The cheque is for an amount of Rs. 20,000/-. It bears the date 1.1.2001. The petitioner now faces a sentence of S.I. for a period of two months. There is also a direction to pay an amount of Rs. 20,000/- as compensation and in default to undergo S.I. for a period of one month.

3. The signature in the cheque is admitted. The notice of demand was duly received and acknowledged. But no reply is produced and proved. It is undisputed that a reply was sent and received by the counsel for the complainant. The complainant examined herself as PW1 and proved Exts.P1 to P7. In the reply notice and in the course of the trial, the accused took up the stand that the cheque was issued as a signed blank cheque as security not to the complainant, but to her deceased husband as security for the due discharge of the liability in a transaction for a much lesser amount of Rs. 10,000/-. The said amount had been paid and discharged also without voucher. The complainant's husband had thereafter committed suicide. The complainant was misutilising the said cheque to stake such a false claim. The accused examined a witness as DW1. The purpose of examination of this witness is to show that discharge without voucher of the liability to the deceased husband of the complainant was made..

4. The courts below, in these circumstances, concurrently came to the conclusion that the complainant has succeeded in establishing all ingredients of the offence punishable under Section 138 of the N.I. Act Accordingly they proceeded to pass the impugned concurrent judgments.

5. Called upon to explain the nature of challenge which the petitioner wants to mount against the impugned concurrent judgments, the learned Counsel for the petitioner reiterates the contention's that have been raised before the courts below. In addition he raises a further contention that even admittedly, going by the notice of demand, Ext.P3, the cheque was issued only as security and not for the discharge of a legally enforceable liability. I have been taken through the relevant evidence in the case.

6. The first contention raised before this Court that the cheque was issued admittedly only as security cannot obviously stand. I have been taken through the notice of demand, Ext.P3. In that it is very clearly stated that the amount was borrowed and as security for repayment the cheque was issued. It is true that the word security is repeated twice in Ext.P3 notice. But according to me it would be myopic to come to the conclusion from that expression employed in the notice that the cheque was not issued for the discharge of any legally enforceable debt/liability. When repayment is assured by issue of a cheque, in common parlance the laity may refer to such handing over of the cheque for discharge of the liability as a conduct to assure and secure payment and discharge of the liability. It would be impermissible from that expression used, which, according to me, only conveys that the lending/borrowal was on the strength of the cheque issued for the discharge of the liability, to conclude that the cheque was not issued for the discharge of any liability. The inexact expression used in the notice of demand even assuming that it does not mean 'on the strength of' and means 'on the security of ' cannot in any way deliver any advantage to the petitioner. The cheque will continue to be one issued for the discharge of liability as contemplated under Section 138 of the N.I. Act. The crucial question is only whether the cheque was drawn - written, signed and delivered, to the complainant by the petitioner.

7. The contention that there was no transaction between the petitioner and the complainant and that the real transaction was with the complainant's husband and the petitioner remains in the realm of an unsubstantiated contention. That contention is contra indicated by the evidence of PW1 and her ability to produce Ext.P1 cheque, which is admittedly issued to the petitioner by his bank to operate his account and which admittedly bears the signature of the petitioner, While appreciating the evidence of PW1 about the handing over of the cheque, it is relevant to note the defence which is set up. It is the case of the petitioner that the cheque was handed over to the husband of the complainant and that the said transaction was completed and liability discharged by payment of money through DW1. If that be so, it passes one's comprehension as to why the blank signed cheque given as security was not taken back. There is no explanation as to why DW1 did not take any acknowledgment/ voucher from the deceased husband of the complainant when the liability was discharged and the transaction closed. The

inherent improbability in the case of discharge pleaded by the petitioner is also one circumstance that must go to assure the court about the acceptability of the oral evidence of PW1. Once the oral evidence of PW1 is accepted, the presumption under Section 139 of the N.I. Act comes into play. That burden has not been discharged by the petitioner. The plea of discharge through DW1 is also so fragile and brittle that it must fall to the ground as improbable and unacceptable. No other contentions on merits have been raised. I am satisfied that the challenge on merits must, in these circumstances, fail.

8. The learned Counsel prays that leniency may be shown on the question of sentence. I find merit in the prayer for leniency. 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 in *Anilkumar v. Shammy* 2002 (3) KLT 852. In the facts and circumstances of the case, I do not find any compelling reasons which can persuade this Court to insist on imposition of any deterrent substantive sentence of imprisonment on the petitioner. Leniency can be shown on the question of sentence, but subject to the compulsion of ensuring adequate and just compensation to the victim/complainant, who has been compelled to wait from 2001 and to fight two rounds of legal battle for the redressal of his genuine grievances.

9. In the nature of the relief which I propose to grant, it is not necessary to wait for issue and return of notice to the respondent.

10. In the result:

(a) This revision petition is allowed in part.

(b) The impugned verdict of guilty and conviction of the petitioner under Section 138 of the N.I. Act are upheld.

(c) But the sentence imposed is modified and reduced. In supersession of the sentence imposed on the petitioner by the courts below, he is sentenced to undergo imprisonment till rising of court. He is further directed under Section 357(3) Cr.P.C. to pay an amount of Rs. 27,000/- (Rupees twenty seven thousand

only) as compensation and in default to undergo S.I. for a period of one month. If realised the entire amount shall be released to the complainant.

11. The petitioner shall appear before the learned Magistrate on or before 30.11.2006 to serve the modified sentence hereby imposed. The sentence shall not be executed till that date. If the petitioner does not so appear, the learned Magistrate shall thereafter proceed to take necessary steps to execute the modified sentence hereby imposed.

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