

Xavierkutty Vs. Sunnymon

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Court : Kerala

Decided On : Sep-23-2005

Reported in : II(2006)BC513; [2006]132CompCas399(Ker); 2006CriLJ1742; 2005(4)KLT432

Judge : K. Thankappan, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 43, 138 and 142 ;Negotiable Instruments Rules - Rule 37; ;Code of Criminal Procedure (CrPC) - Sections 313 and 255(1)

Appeal No. : Crl.A. No. 263 of 1997

Appellant : Xavierkutty

Respondent : Sunnymon

Advocate for Def. : K. Harilal, Public Prosecutor

Advocate for Pet/Ap. : Mathew John, Adv.

Judgement :

K. Thankappan, J.

1. This appeal is filed by the complainant in S.T.No. 926 of 1995 on the file of the Judicial First Class Magistrate's Court-I, Kottayam.

2. The appellant filed the complaint alleging that the accused - first respondent herein committed offences punishable under Sections 138 and 142 of the [Negotiable Instruments Act, 1881](#) (hereinafter referred to as 'the Act'). According to the appellant, the first respondent failed to pay the amount covered by Ext.P1 cheque, which was issued in discharge of a legally enforceable debt, in spite of the notice served on him. The trial court took cognizance of the offence. On the side of the appellant, himself and another witness were examined as PWs. 1 and 2 respectively and Exts.F1 to F7 were produced. No oral or documentary evidence was adduced on the side of the defence. When questioned under Section 313 Cr.P.C., the first respondent denied having issued Ext.P1 cheque in favour of the appellant. After trial, the court below found that the appellant failed to prove that Ext.P1 cheque was issued by the first respondent in discharge of a legally enforceable debt as per Section 138 of the Act and by the impugned judgment acquitted the accused under Section 255(l) Cr.P.C. Aggrieved by the above judgment, the appellant has filed this appeal.

3. Learned Counsel appearing for the appellant submits that the finding entered and the conclusion arrived at by the trial court are against facts and law. Counsel also submits that the trial court went wrong in finding that the appellant - complainant is not entitled to any legal fee other than the fee prescribed by the High Court of Kerala as published in the Kerala Gazette No. 29 dated 22.7.1969 under Notification No. B 1-80/ 61/D1 dated 7.3.1969.

4. The case of the appellant is that he is a practising lawyer and the first respondent who was his client had entrusted with him a case to be conducted before the Motor Accidents Claims Tribunal, Kottayam and Ext. P1 cheque for Rs. 1788/- was issued by the first respondent towards professional fee for conducting the case. It is the further case of the appellant that after having conducted the case, he presented the cheque for encashment and the same was dishonoured as per Ext.P2 memo dated 20.2.1995. On receipt of Ext.P2 memo, the appellant caused a lawyer's notice to the first respondent which was received by him and in spite of receipt of notice, the first respondent did not pay the amount covered by the cheque. It was under the above circumstances that the appellant filed the complaint.

5. Even though the trial court found that Ext.P1 cheque was signed by the first respondent and that the appellant had duly presented the cheque for encashment, on the basis of the case set up by the defence the trial court found that the appellant failed to prove that he was entitled to get an amount of Rs. 1788/- towards professional fees as the rules regarding professional fees do not prescribe such high fees. This Court is of the view that the trial court committed serious error in accepting the case set up by the defence. Rule 37 of the Rules regarding fees payable to Advocates clearly states that nothing in these rules shall be deemed to affect any agreement between an advocate and his client regarding fees. Apart from the above rule, it is categorically held in the decision reported in *United India Insurance Co. Ltd. v. Padmini Amma*, 1986 KLT 86 that the rules regarding fees payable to Advocates framed by the High Court as per B1-80/61/D1 dated 7.3.1969 relate to fees payable to legal practitioners in the High Court and in the Subordinate Courts only and will not apply to Tribunals as such. Further, there was no dispute regarding the signature in Ext.P1 cheque.

6. Now, the question that remains to be considered is whether Ext.P1 cheque was issued in discharge of a legally enforceable debt as contemplated under Section 138 of the Act. As per Section 43 of the Act, a negotiable instrument made without consideration or for a consideration which fails creates no obligation of payment between the parties to the transaction. The evidence adduced by the appellant would show that the first respondent had issued Ext.P1 cheque in favour of the appellant for conducting the case before the Motor Accidents Claims Tribunal, Kottayam, There is also no complaint with regard to the work done by the appellant. After having enjoyed the fruits of his service, the first respondent - accused cannot now retract and say that he had not issued Ext.PI cheque. Ext.PI cheque was issued by the first respondent in favour of the appellant in discharge of a legally enforceable debt. The appellant has succeeded in proving the case against the first respondent.

7. From the discussions made above, this Court is of the view that the judgment under appeal is liable to be set aside. The impugned judgment is accordingly set aside. Now coming to the sentence to be awarded to the first respondent accused, judicial propriety demands that the accused be given an opportunity to be heard

on the question of sentence. Hence, the matter is remanded to the court below only for the purpose of hearing the accused on the question of sentence. The trial court shall take steps to get the presence of the accused before the court immediately on receipt of a copy of this judgment.

The Crl. Appeal is allowed by way of remand.

The Registry is directed to send back the records received from the court below forthwith.

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