

thekkan and Co. Vs. Anitha

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Court : Kerala

Decided On : Jun-05-2003

Reported in : I(2004)BC435; 2004CriLJ58; 2003(3)KLT870

Judge : R. Basant, J.

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

Appeal No. : Crl. A. No. 1021 of 2001

Appellant : thekkan and Co.

Respondent : Anitha

Advocate for Def. : Tomy Sebastian, Adv.

Advocate for Pet/Ap. : K. Gopalan, Adv.

Disposition : Appeal allowed

Judgement :

R. Basant, J.

1. This appeal is preferred by the complainant in a prosecution under Section 138 of the Negotiable Instruments Act, against the acquittal of the respondent/accused by the learned Magistrate.

2. The complainant alleged that the accused had borrowed an amount of Rs. 1,75,000/- in two instalments of Rs. 50,000/- and Rs. 1,25,000/- and had issued Exts. P3 and P4 cheques for the due discharge of the said legally enforceable debt/liability. The said cheques when presented for encashment were dishonoured by the Bank on the ground of insufficiency of funds. The complainant caused registered notices of demand to be issued to the accused as insisted by law. These notices were duly served and acknowledged, but there was no response. No payment was made as demanded. It is in these circumstances that the complainant came to Court with the complaint. In this appeal we are not concerned with the acquittal of the accused in respect of the allegations regarding Ext. P3 cheque. The acquittal in respect of Ext. P4 cheque for Rs. 1,25,000/- alone is assailed in this appeal.

3. Cognizance was taken. The accused entered appearance. She denied the offence alleged against her. Thereupon the complainant was directed to adduce evidence in support of her case. She examined herself as PW1 and proved Exts. P1 to P11. On her side the accused examined herself as DW1 and the Manager of the drawee Bank as DW2. Exts. D1 to 3 were marked.

4. The accused admitted the issuance of Ext. P4 cheque. According to her, she had borrowed an amount of Rs. 1,25,000/- in connection with her business. Deducting the interest, only an amount of Rs. 1,00,000/- was actually paid to her. The specific understanding was that the principal amount of Rs. 1,25,000/- shall be repaid in 10 instalments of Rs. 12,500/- each. The complainant had insisted and the accused had handed over 10 cheques each for Rs. 12,500/- repayable every month. Another cheque for the entire amount of Rs. 1,25,000/- was also handed over as security. Ext. P4 is such cheque allegedly handed over as security.

5. The accused took the stand that the liability has already been discharged in part. According to her, four instalments of Rs. 12,500/- each had been paid by cheque - by honouring the cheques already issued. In respect of three other cheques, amount could not be collected from the bank as the cheques were dishonoured. In respect of those three cheques payments were made by cash.

Thus, according to the accused, seven instalments had been paid and only 3 instalments remained to be paid. Only an amount of Rs. 37,500/- remained to be paid and an amount of Rs. 87,500/- was already paid and discharged. The accused contended that Ext. P4 cheque was issued only as a security and not for the due discharge of any legally enforceable debt/liability.

6. The learned Magistrate on an anxious consideration of all the relevant inputs came to the conclusions that the complainant has not succeeded in proving all the ingredients of the offence punishable under Section 138 of the N.I. Act. It was held that the accused had issued Ext. P4 cheque only as security. As any rate, it was held that the complainant has not succeeded in proving beyond doubt that Ext. P4 cheque was issued for the due discharge of any legally enforceable debt/liability. Accordingly the learned Magistrate proceeded to pass the impugned judgment.

7. The learned counsel for the appellant contends that the learned Magistrate erred grossly in coming to such a conclusion. Such a plea had not even been urged in the reply to the notice of demand. When called upon to explain Exts. D1 to 3 and the oral evidence of DW2, the learned counsel for the complainant contends that only three instalments have been paid and the cheque in question (Ext. P3) was issued by the accused towards the outstanding liability after giving due credit to the amounts already paid. It is in these circumstances contended that the accused had accepted that there was an outstanding liability of Rs. 1 lakh when Ext. P4 cheque was issued on 11.11.1997, the date which it bears.

8. I have considered all the relevant inputs. I must at the very outset consider the nature and quality of the jurisdiction of this court in an appeal against acquittal. Of course, this Court has the jurisdiction to reappreciate the evidence available even in an appeal against acquittal. But such exercise can be undertaken only if the Court is satisfied that appreciation by the lower court is grossly erroneous and the same has resulted in miscarriage of justice.

9. A look at the law in this context will be apposite. In all prosecutions an accused has to be presumed to be innocent until his guilt is proved beyond doubt. A prosecution under Section 138 of the Negotiable Instruments Act is no exception to this general rule. But in a prosecution under Section 138 of the N.I. Act the

complainant is armed with a presumption under Section 139 of the N.I. Act. On proof of the essential requisites a presumption Under Section 139 of the N.I. Act can be drawn. The presumption, of innocence against the accused is weakened to this extent. But the presumption under Section 139 of the Act is not an irrebuttable presumption of law. It is only a rebuttable presumption of fact. It, is open to the accused to rebut the said presumption. The accused may adduce evidence on his side or rely on the inherent improbabilities of the prosecution case. He may also rely on the circumstances which have been brought out specifically in the course of examination of prosecution witness. The burden on the accused is certainly not as heavy and as onerous as the initial paramount burden on the presumption to prove the guilt of the accused beyond reasonable doubt. An accused must discharge the burden under Section 139 N.I. Act. The burden on him is akin to the burden on an accused taking shelter under one of the general exceptions to criminality under the Penal Code. He must discharge the burden undoubtedly. But his attempt to discharge the burden will be measured/tested on the inferior yardstick/touchstone of probabilities and possibilities. He must discharge the burden as a party in a civil suit. All the same he must definitely establish his case as a litigant in a civil case is expected to.

10. On an anxious consideration of all the relevant inputs I choose to concur with the learned Magistrate on the crucial findings of fact entered by him. The following findings of fact appear to be well established and beyond controversy on the basis of the materials available.

(a) The accused had borrowed Rs. 1,25,000/- from the complainant on 11.10.1996 and had agreed to repay the same in 10 monthly equal instalments of Rs. 12,500/- each.

(b) The interest payable (whatever be the amount) was paid in advance and the liability was only to repay the amount in 10 instalments of Rs. 12,500/-

(c) To discharge the said liability 11 cheques were issued, 10 of them for an amount of Rs. 12,500/- each. Those cheques were all dated cheques and all relevant entries were made before the cheques were handed over.

(d) The 11th cheque was for Rs. 1,25,000/-. All the relevant entries were made by the accused before the cheque was handed over. Here there is a dispute as to whether the date was affixed by the accused before it was handed over or not. On this aspect I have no hesitation to accept the case of the complainant that the cheque bore the date 11.11.1997 when it was handed over to him. A perusal of the evidence of DW1 shows that atleast in respect of Ext. P3 transaction she admits that the 11th cheque for the entire amount was dated when it was handed over. Admittedly the transaction of Rs. 50,000/- was on 11.7.1996 and Ext. P3 cheque, in addition to 10 cheques of Rs. 5,000/- was handed over after affixing the date. No worth while reason exists for a different methodology in respect of Ext. P4 alone. It is in these circumstances that I come to the conclusion that Ext. P4 was also dated and all entries were made before it was handed over by the accused to the complainant.

(e) The specific understanding at the time of handing over the 11 cheques, including Ext. P4, was that if the entire amount of Rs. 1,25,000/- were not paid before the date of Ext. P4 (11.11.1997) Ext. P4 shall be presented and encashed by the complainant.

(f) Notwithstanding the controversy about the actual number of instalments paid, it is conceded that the entire amount due under the 10 cheques for Rs. 12,500/- each was not paid before 11.11.1997.

(g) Ext. P4 cheque was presented for encashment by the complainant after 11.11.1997, the date which it bore as he was expected and understood to do.

(h) It was dishonoured on the ground of insufficiency of funds and the complainant had come to Court with the complaint after observing all statutory formalities.

11. On the above findings of fact, I find absolutely no doubt or hesitation. Those finding of facts are absolutely justified by the materials available on record.

12. The next question is whether Ext. P4 can, in these circumstances, be said to be a cheque issued for the discharge of a legally enforceable debt/liability. There was a liability to pay Rs. 1,25,000/- Parties agreed and understood that this liability

must be discharged by making monthly payments of Rs. 12,500/- each for 10 months. Parties also agreed that if there is default, the 11th cheque would be presented after the date which it bore (11.11.1997). Thus the cheque was presented properly, legally and as agreed to and understood by the parties to the transaction. It must be held that Ext. P4 was issued for the discharge of a legally enforceable debt/liability. It was presented for encashment as agreed and understood by the parties. Of course if the cheque were encashed and by encashment of the cheque the complainant come to enjoy more amount than what he was legally entitled to, he would have been liable in a suit for accounting to return amounts, if any. But that is far from saying that Ext. P4 cheque was not issued for the discharge of any legally enforceable debt/liability.

13. Naturally the next question arises whether the accused could have avoided culpable liability under Section 138 of the N.I. Act if he paid the balance amount which were due on receipt of the notice. Under the proviso (c) to Section 138 of the Act, the drawee of the cheque has the obligation to pay 'the said amount of money' 'within 15 days of receipt of the said notice'. The question is whether payments made prior to the receipt of the notice or even prior to the presentation of the cheque can be reckoned as sufficient discharge of this obligation to pay the amount. According to me, there is nothing in the language of Section 138 which precludes a Court from taking into account prior payments made - before the presentation of the cheque or before the receipt of the notice in deciding whether the amount due under the cheque has been paid. It will be open to the accused to show that he had made payment of the amount due under the cheque either before or after the presentation of the cheque/on receipt of the notice. If he satisfies Court that within 15 days of receipt of the notice the entire amount or the outstanding amount due under the cheque has been paid and discharged, he would certainly be entitled to avoid culpable liability under Section 138 of the Act. Prior discharge - even prior to the notice of demand under Section 138 of the Act - must certainly be accepted as a valid defence under Section 138 of the Act. The mere fact that such discharge is prior to the notice of demand or even prior to the presentation and dishonour of the cheque would not disentitle an accused to contend that the amount due under the cheque has been paid and discharged. The expression 'the said amount of money' and 'within 15 days of receipt of the

said notice' cannot lead a Court mechanically to the conclusion that any payment made in part or in full prior to the date of receipt of the notice cannot be given credit to. It would be unjust to read proviso (c) to Section 138 in such a mechanical and literal manner. The court was in these circumstances bound to consider the plea of discharge urged by the accused.

14. A plea of discharge must certainly be proved by the person raising such plea - whether the proceedings be civil or criminal. According to the accused she had paid a total amount of Rs. 87,500/- which is equal to seven instalments which she had agreed to be paid. According to her four such payments were made by cheques. Three such payments were made by cash. Three payments - a total of Rs. 37,500/- admittedly remained undischarged. We have evidence from Exts. D1 and D2 and the oral evidence of DW2 that three such payments were made by cheques. Those cheques are produced in Exts. D1 and D2 series. There is significant absence of evidence to show that any other cheque issued by the accused to the complainant was actually encashed. There is significant and total absence of evidence to show that the three remaining instalments have been paid by cash. Such pleas of discharge remain unsubstantiated. No Court can accept and act upon such a plea.

15. It follows from the above discussions that the accused had paid Rs. 37,500/- by three cheques to discharge the liability under Ext. P4 cheque. The balance amount of Rs. 87,500/- remained unpaid even after the expiry of 15 days from the date of receipt of notice. It follows, in these circumstances, that the complainant has succeeded in establishing the offence alleged under Section 138 of the N.I. Act.

16. Acceptance of a contra plea would lead to the ridiculous conclusion that a complainant, who had indulgedly accepted part-payment will not be entitled to resort to the provisions of Section 138 of the Act. More dangerously, an accused who has made part payment will not be entitled to raise the same as a defence in a prosecution under Section 138 of the Act. Both results would be unjust and unconscionable and therefore such interpretation cannot certainly be preferred.

17. The above discussions lead me to the conclusion that the learned Magistrate was in gross error in coming to the conclusion that Ext. P4 cheque was not issued for the due discharge of a legally enforceable debt/liability. In view of the presumption under Section 139 of the N.I. Act and in view of the proved circumstances that the cheque (Ext. P4) was issued on the specific understanding that the same can be presented and encashed if the entire amounts were not otherwise paid before the date of the cheque, it cannot be held that Ext. P4 was not issued for the discharge of a legally enforceable debt/liability. The judgment of acquittal therefore does warrant interference. The challenge succeeds.

18. No other contentions are raised by the learned counsel for the respondent/accused to avoid culpable liability under Section 138 of the N.I. Act.

19. Coming to the question 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 *Anilkumar v. Shammy* (2002 (3) KLT 852). - In the facts and circumstances of this case, I am satisfied that it is not necessary to impose a deterrent substantive sentence of imprisonment. A lenient substantive sentence of imprisonment coupled with an appropriate direction under S.357(3) Cr.P.C. shall serve the interest of justice eminently.

20. In the result

(a) This appeal is allowed.

(b) The impugned judgment is set aside.

(c) The respondent/accused is found guilty, convicted and sentenced under Section 138 of the N.I. Act to undergo imprisonment till rising of Court. She is further directed to pay an amount of Rs. 87,500/- as compensation under Section 357(3) Cr.P.C. and in default to undergo S.I. for a period of three months. The amount, if realised, shall be released entirely to the complainant.

21. It is further observed that the direction under Section 357(3) Cr.P.C. shall not in any way affect the right of the parties to insist on accounting and claim amounts, if any, due to them on settlement of the accounts between them.

22. The learned Magistrate shall take necessary steps for execution of the sentence hereby imposed. The respondent/accused shall appear before the learned Magistrate on 14.8.2003 for execution of the sentence.

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