Aboobacker Vs. Ismail

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Court : Kerala

Decided On : Jul-05-2004

Reported in : 2005(1)KLT663

Judge : R. Basant, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 357 and 357(3); Negotiable Instruments Act, 1881 - Sections 138

Appeal No. : Crl.R.P. No. 1671 of 2004

Appellant : Aboobacker

Respondent : ismail

Advocate for Def. : Public Prosecutor

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

Judgement :
ORDER

R. Basant, J.

1. This Revision Petition is 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. 2,30,000/-. The signature in the cheque is admitted. That it was handed over by the accused to the complainant is also not disputed. While the complainant alleged that the cheque was handed over to him towards payment of amounts for articles supplied, the accused contended that it was handed over when a transaction in pepper was anticipated. In short, the accused contended that the cheque was issued not for the discharge of any legally enforceable debt or liability, but it was handed over as security for an intended transaction. The complainant examined himself as PW1 and proved Exts.P1 toP5. Accused examined DWs 1 and 2. DW2 is the accused himself and DW1, a friend of his- to speak about the alleged transaction.

3. Courts below concurrently came to the conclusion that the evidence of PW1 can safely be accepted and that the evidence of DWs 1 and 2, which the courts found is inter se contradictory, is not worthy of acceptance. Courts drew assurance for this conclusion from the circumstance that the notice of demand, though duly received and acknowledged, was not responded to. It is in these circumstances that the courts below proceeded to pass the impugned judgments. While the Trial Court convicted the accused to undergo simple imprisonment for a period of six months, the appellate Court reduced the substantive sentence of imprisonment to one of simple imprisonment for three months. Both Courts directed payment of only an amount of Rs. 10,000/- as compensation. No satisfactory reasons are shown as to why only an amount of Rs. 10,000/- is granted as compensation when the cheque amount is Rs. 2,30,000/-. There is no plea even, of partial discharge. There is no contention that any decree has been passed by a Civil Court in respect of the alleged transaction.

4. Called upon to explain the nature of the challenge raised against the impugned verdict of guilty and conviction, the learned counsel for the petitioner reiterates the contention that there was no legally enforceable debt/liability. Less said about this contention, the better. I do not find any reason to disbelieve the evidence of PW1 or to accept the oral evidence of DWs.1 and 2 in preference to that tendered by PW1. The evidence of PW1 is further supported by the eloquent improbable conduct of the petitioner not responding to the notice of demand, which was duly acknowledged under Ext.P4. It is, of course, true that towards the later stages of

the trial, the accused wanted to take up a contention that Ext.P4 acknowledgment is not signed by him. There is no contention even that the address shown in the notice is not correct. The contention that the signature in Ext.P4 is not his, was not even raised when the complainant was in the witness stand. In these circumstances, I do not find any merit in the challenge raised against the verdict of guilty and conviction. However, the learned counsel for the petitioner submits that if some time were given, an attempt shall be made to settle the matter and report composition to this Court. At any rate he contends that the sentence imposed is excessive.

5. Though the idea of admitting a Revision Petition in the year 2004, to enable the parties to chase a settlement, which they have not been able to reach from the year 1996, when this prosecution was initially launched, does not at all appeal to me, I am satisfied that some time can be greeted to the learned counsel for the petitioner before final orders are passed in the Revision Petition, to report composition.

6. Call this petition again on 14.7.2004 for final disposal or for considering application for composition, if any filed.

7. After 14.7.2004, this matter has come up for hearing thrice. It is reported to the Court that there has been no settlement of the dispute between parties. No composition could be achieved. The learned counsel for the petitioner now only submits that leniency may be shown on the question of sentence.

8. The cheque is for an amount of Rs. 2,30,000/-. The learned Magistrate had imposed a sentence of simple imprisonment for six months and had directed payment of an amount of Rs. 10,000/- as compensation. No default sentence was imposed. The learned Sessions Judge, in appeal, had modified the sentence imposed and reduced the same to simple imprisonment for three months. The learned Sessions Judge further observed that since no arguments are advanced regarding insufficiency of the compensation awarded, he is not persuaded to go into that question. The learned counsel for the petitioner, in these circumstances, prays that the substantive sentence of imprisonment may be avoided or suitably reduced.

9. 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 reported in Anilkumar v. Shammy, 2002 (3) KLT 852. While I am satisfied that there are no compelling circumstances in this case to justify the insistence that the petitioner must undergo incarceration in prison, I am certainly convinced that the petitioner who seeks leniency must do justice himself and must be willing to compensate the complainant reasonably for the loss suffered by him.

10. There can be no quarrel on the question of law now after the decisions of the Supreme Court reported in Suganthi Suresh Kumar v. Jagdeeshan, (2002) 2 SCC 420 and K. Bhaskaran v. Sankaran Vaidhyan Balan, (1999) 7 SCC 510. The powers under Section 357(3) of the Cr.P.C. can certainly be invoked by an appellate or revisional court and a default sentence can be prescribed to enforce compliance with such a direction for payment of compensation. Depending on the facts and circumstances of the case, the appellate/ revisional court will be certainly justified in issuing a direction under Section 357(3) of the Cr.P.C. or modifying a direction already issued. The mere fact that the Trial Court or the appellate Court had not invoked such powers or that such powers, though invoked, have not been justly, fairly and reasonably invoked cannot affect the power and jurisdiction of the revisional court to issue an appropriate direction under Section 357(3) of the Cr.P.C.

11. The learned counsel for the petitioner only contends that this is not a fit case where this revisional Court while reducing the substantive sentence of imprisonment would be justified in issuing any revised direction under Section 357(3) of the Cr.P.C. which would adequately compensate the complainant. In these circumstances, while pleading strenuously that the impugned deterrent substantive sentence of imprisonment may be reduced, the learned counsel for the petitioner stoutly and vehemently contends that the direction for payment of compensation cannot and may not be enhanced.

12. I am unable to accept this contention at all. If this Court did not have the option to issue an appropriate direction under Section 357(3) of the Cr.P.C, this Court would certainly not be inclined to modify the impugned sentence. The trial having

been held before the Court of the First Class Magistrate, fine exceeding Rs. 5,000/- cannot be imposed. Therefore, by resort to the powers to impose fine and the provisions of Section 357(1) of the Cr.P.C, just compensation cannot be directed to be paid.

13. The Courts below have concurrently held, and I have concurred with the said conclusion, that the cheque was issued for the due discharge of a legally enforceable debt/liability. If that be so, permitting the accused to avoid a substantive sentence of imprisonment before he makes amends fully and adequately for the culpable indiscretion committed by him would certainly be unjust and improper. The mere fact that the complainant has not specifically preferred any challenge against the inadequacy of the compensation ordered to him, will not justify the Courts being oblivious to such injustice. May be, the complainant was sure that in view of the substantive sentence of imprisonment the accused would seek settlement and composition at later stages of the proceedings. Therefore, the mere fact that the complainant had not challenged the inadequate direction for payment of compensation under Section 357(3) of the Cr.P.C. cannot justify the Courts ignoring that reality. I must hasten to note that there is no contention that the cheque amount has been paid or that any decree has been passed by the Civil Court for the cheque amount or any part of it.

14. The learned counsel for the petitioner then falls back on the decision reported in Mangilal v. State of M.P., AIR 2004 SC 1280 = 2004 SCC (Cri) 1085. He submits that the accused is entitled for an opportunity to be heard before a direction under Section 357(3) of the Cr.P.C. is issued or modified to his prejudice. There can be no dispute on that proposition and the Supreme Court has clearly recognized the right of the accused to be heard before he is visited with an order under Section 357(3) of the Cr.P.C. That must certainly apply to upward modification of a direction under Section 357(3) of the Cr.P.C. also.

15. But the opportunity contemplated is only one to satisfy the principles of natural justice. It is not an empty or ritualistic formality. In this case, the accused wants the substantive sentence of imprisonment to be reduced. He has been heard on that question. It has been conveyed to him that if the substantive sentence of

imprisonment were to be reduced, he will have to make amends. Thus, he has been given a real opportunity to make his submissions on the question of sentence including the question of reducing the substantive sentence of imprisonment and issue of an appropriate direction for payment of compensation. I am, therefore, perfectly satisfied that the accused has been given an opportunity in consonance with the principles of natural justice before the direction under Section 357(3) of the Cr.P.C. is modified.

16. Looking at the problem from another angle also, I am satisfied that there is no infraction of the principles of natural justice. At any rate, I do not propose to impose a default sentence exceeding the substantive sentence of imprisonment already imposed. In these circumstances, no order to the prejudice of the accused is proposed to be passed. He has been given sufficient opportunity to be heard also. In these circumstances, infraction of the right of opportunity to be heard recognized in the dictum in Mangilal's case (cited supra) does not at all arise.

17. The nature of hearing contemplated before an order under Section 357 of the Cr.P.C. is passed must certainly depend upon the facts and circumstances of each case. In a prosecution under Section 138 of the N.I. Act, quantification of the amount of compensation does not pose any serious problem. The Court while convicting the accused must have come to the conclusion that the cheque was issued for the due discharge of a legally enforceable debt/liability. While awarding the compensation, the cheque amount is the most vital input. The period of delay in securing justice is another relevant input. The possible expenses incurred for prosecution is yet another input. In these circumstances, I am certainly satisfied that no separate evidence is really necessary be ascertain the quantum of compensation. It having been found satisfactorily that the accused had issued the cheque for the discharge of a legally enforceable debt/ liability, much of evidence is not required to prove his obligation to repay and his ability to repay.

18. The accused was facing trial in summons procedure and no separate opportunity to be heard on the question of sentence is contemplated. An accused is expected to adduce all relevant evidence in the course of trial. Thus, opportunity to adduce evidence on relevant aspects has already been given to the accused. In

these circumstances, I find no merit in the contention that the matter should be sent back to the Court below for considering imposition of an appropriate direction under Section 357(3) of the Cr.P.C.

19. The fact that such course has been adopted by the Supreme Court in Suganthi Suresh Kumar's case (cited supra) is no reason for this Court to concede the luxury of such a further opportunity to the accused. It must alertly be noted that the fact situation in the said case was totally different. In that case the Supreme Court was considering the sentence of imprisonment till rising of Court and a fine of Rs. 5,000/-imposed on the accused. In this case, a substantive sentence of imprisonment for three months is already imposed. This Court is considering the reduction of the said substantive sentence of imprisonment.

20. It is contended, relying on the decision reported in Niranjan Lal v. Attar Singh (1990 SCC (Cri) 607), that in that event the revision will have to be admitted and notice ordered to the complainant as the complainant has also a right to be heard on the question of sentence. Here again, I note that principles of natural justice can come to the help of a person only when the Court contemplates passing of an order adverse to his interest. By reducing the substantive sentence and by imposing an appropriate direction under Section 357(3) of the Cr.P.C. with a default sentence, interests of the complainant are not, in any way, affected adversely. In these circumstances, the contention raised by the accused that principles of natural justice would be violated in so far as the complainant is concerned cannot also be accepted.

21. I am, in these circumstances, satisfied that the challenge in this Revision Petition can succeed only to a limited extent. The substantive sentence of imprisonment can be modified and reduced, zealously ensuring at the same time that the complainant, who has been compelled to fight two rounds of legal battle by now and to wait from 1996, is adequately compensated.

22. In the result:

(a) This revision Petition is allowed in part.

(b) The impugned concurrent 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 the Court and to pay an amount of Rs. 2,50,000/- (Rupees Two lakhs fifty thousand only) as compensation and in default, to undergo a simple imprisonment for a period of 60 days. If realised, the entire amount shall be realised to the respondent/ complainant.

23. In the nature of the relief granted in this Revision Petition, I am satisfied that it is not necessary to issue notice to the respondent/complainant.

24. The learned Magistrate shall take necessary steps to execute the modified sentence hereby imposed. The petitioner shall appear and his sureties shall produce him before the learned Magistrate at 11 a.m. on 27.9.2004 for execution of the modified sentence. Needless to say, the learned Magistrate shall be at liberty to invoke his powers under Section 446 of the Cr.P.C. against the petitioner and his sureties if the petitioner does not appear before the learned Magistrate, as directed.