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Court : Kerala

Decided On : Oct-19-2006

Reported in : 2006(4)KLT800

Judge : R. Basant, J.

Acts : Negotiable Instruments Act, 1881 - Sections 138 and 139;

Appeal No. : Crl. R.P. No. 1220 of 2004

Appellant : Lekha

Respondent : Manickan

Advocate for Def. : M.T. Sureshkumar, Adv.,; R. Renjith and C. Kamappu, Public Prosecutors

Advocate for Pet/Ap. : Jacob Sebastian, Adv.

Judgement :
ORDER

R. Basant, J.

1. Is the battle lost for want of the horse shoe nail? Does the innocuous defect made by the counsel while describing the name of the petitioner in the notice of demand result in the loss of this legal battle for him? These are the questions that

fall 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. 2.25 lakhs. It bears the date 14.11.1996. The petitioner now faces a sentence of S.I for a period of three months. There is a further direction to pay an amount of Rs. 2.5 lakhs as compensation and in default to undergo S.I for a period of three months.

3. Signature in the cheque is admitted. Notice of demand, which was duly received and acknowledged, succeeded only in evoking Ext.P6 reply. No payment was made. The complainant in these circumstances came to court after observing the statutory time table scrupulously. He examined himself as PW1 and the manager of the drawee bank as PW2. Exts.Pl to P7 and Ext.Xl were marked by the complainant. The accused did not tender any oral evidence. Ext.Dl, an agreement was marked on the side of the accused when PW1 was in the witness stand.

4. The accused appears to have taken two conflicting defences on merits. She contended that a blank signed cheque was handed over by her to her husband and by her husband to the complainant. The said blank cheque was being misutilised by the complainant to stake a false claim, it was contended. Alternatively an incongruent version was also sought to be advanced that the complainant was the driver of the petitioner and her husband and that he had stolen the signed blank cheque from the possession of the petitioner and had misutilised the same.

5. In the notice of demand-Ext.P3 issued by the counsel for the complainant, a mistake appears to have crept in. Instead of describing the complainant as K.N. Manikyan, which he really is, the name of the complainant was shown as K.N.Murukesan by the counsel. In all other particulars, the details of the payee/complainant tallied with the details of the person on whose behalf Ext.P3 notice was sent. The accused attempted to take advantage of this mistaken description of the name of the complainant in Ext.P3.

6. The courts below concurrently came to the conclusion that the complainant has succeeded in establishing all elements of the offence punishable under Section 138 of the N.I. Act and that the accused has not succeeded in proving or probabilising his version. The courts further held that the innocuous error in the description of the name of the complainant cannot deliver any advantage to the petitioner in as much as there was and could be no doubt or confusion about the identity of the person on whose behalf the counsel had issued the notice of demand-Ext.P3. Accordingly they proceeded to pass the impugned concurrent judgments.

7. Counsel have advanced their arguments before me. The learned Counsel for the petitioner reiterates the contentions that were raised before the courts below.

8. Less said about the contention of misutilisation of the cheque by the complainant, the better. We have primarily the evidence of PW1 to explain the circumstances under which PW1 came into possession of Ext.Pl cheque admittedly drawn on a cheque leaf issued to the petitioner by her bank to operate her account and which admittedly bears the signature of the petitioner. The crucial question is whether the oral evidence of PW1 can be accepted. His evidence is supported eminently by his ability to produce Ext.PI cheque. No contra evidence has been adduced. But the accused can always contend that the evidence adduced by the complainant does not prove the drawal - ie. the execution and handing over, of the cheque. The drawal has to be proved by the complainant and in the proof thereof, the presumption under Section 139 of the N.I. Act can be of no help to the complainant. Only when the drawal of the cheque - execution and handing over, is proved, can the complainant be held to be a holder of the cheque. Only thereafter will the presumption under Section 139 of the N.I. Act be available to the holder of a cheque.

9. The crucial question then is whether the oral evidence of PW1 can be accepted. On broad probabilities, there is no reason to doubt or suspect the statements on oath of PW1. The fact that the accused has no consistent, congruent, reasonable and probable explanation as to how the cheque travelled from her possession to that of the complainant is certainly a crucial aspect while considering the

acceptability of the evidence of PW1. So reckoned, I find that the courts below were absolutely justified in choosing to accept and act upon the oral evidence of PW1 discarding the incongruent versions advanced by the petitioner/accused.

10. The execution and handing over of the cheque thus stand established convincingly. With that arises the presumption under Section 139 of the N.I. Act. No attempt whatsoever has been made by the accused to rebut the presumption under Section 139 of the N.I. Act. It is not essential that the accused should adduce evidence of his own to rebut the presumption under Section 139 of the N.I. Act. It is enough if he succeeds in discharging the burden to rebut the presumption by the cross examination of the complainant or by bringing in probabilities in his favour and improbabilities against the complainant. But he has to prove as insisted by Section 139 of the N.I. Act read with Section 3 of the Evidence Act, that his version is probable and acceptable and competes in probabilities convincingly with the version of the complainant. That burden remains undischarged in the facts and circumstances of this case.

11. We now come to the contentions raised against the validity of the notice of demand. Proviso 'b' makes it very clear that notice of demand must be given by the payee or the holder in due course of the cheque to the drawer of the cheque. There can be no dispute or doubt on that proposition. Notice must be given by the payee or the holder in due course. The evidence of PW1 shows that it was he who gave Ext.P3 notice through his counsel. But the name of PW1 is mis described in Ext.P3. The mis description does not alter or change the person who gave the notice. An inadvertent, of course, careless and crucial error has been committed by the counsel. But that error does not militate against the identity of the person who had given the notice of demand-Ext.P3.

12. Did the sender or the recipient have any doubt about the identity of the recipient? If there is a reasonable doubt or confusion about the identity of the sender, this contention would certainly require a closer scrutiny. But the sequence of events in this case clearly shows that there was absolutely no confusion, doubt or vagueness about the identity of the person on whose behalf the counsel had sent Ext.P3 notice. A reading of Exts.P-3 and P6 as also Ext.Pl is necessary to

resolve this controversy. Admittedly, the accused knew that the cheque in question described in detail in Ext.P3 was in the possession of the complainant. That is why we find in Ext.P3, reference to an earlier notice dt.30.11.96 sent by the accused to the complainant. In Ext.P6 reply, there is reiteration of such an earlier notice sent on 30.11.96. Thus either the sender or the recipient was left with not a semblance of doubt or confusion about the identity of the sender. The complainant had sent the notice. The accused knew and understood that it was the complainant who had sent Ext.P3 notice. In these circumstances, the innocuous and inadvertent error in the description of the name of the accused is of no consequence and does not at all militate or derogate against the validity of the notice issued under Section 138 of the N.I. Act. The challenge raised on this aspect must also in these circumstances fail.

13. The learned Counsel for the petitioner prays for leniency. 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 reported in Anilkumar v. Shammi 2002 (3) KLT 852. I am satisfied that there are no compelling reasons which can persuade this Court to insist on imposition of any deterrent substantive sentence of imprisonment. Leniency can be shown on the question of sentence, but subject only to the compulsion of ensuring adequate and just compensation for the victim/complainant, who has been compelled to fight three rounds of legal battle by now and to wait for about a decade for the redressal of his grievances. He deserves to be compensated satisfactorily. The challenge can succeed only to the above extent.

14. In the result:

a) This Crl.R.P. 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 to pay an amount of

Rs. 2,55,000/- (Rupees Two Lakhs Fifty Five Thousand only) as compensation and in default to undergo S.I. for a period of 3 months. If realised theentire amount shall be released to the complainant.

15. The petitioner shall appear before the learned Magistrate on or before 30.12.2006 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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