

Anilkumar Vs. Shammy

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Court : Kerala

Decided On : Oct-25-2002

Reported in : II(2003)BC466; [2003]116CompCas82(Ker); II(2003)DMC632

Judge : R. Basant, J.

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

Appeal No. : Crl. R.P. No. 947 of 2000

Appellant : Anilkumar

Respondent : Shammy

Advocate for Def. : K.A. Jaleel and; C. Anilkumar, Advs. and; Sujith Mathew

Advocate for Pet/Ap. : Shaijan C. George, Adv.

Disposition : Petition partly allowed

Judgement :

ORDER

R. Basant, J.

1. This Revision Petition is directed against the judgment dated 31st August 2000 passed by the 5th Additional Sessions Judge, Ernakulam in Crl. Appeal No. 485/98. By a common

JUDGMENT / ORDER

rendered in Crl. Appeal 485/98, and Crl. R.P. 43/99, the learned Sessions Judge had upheld the judgment dated 18.11.1998 passed by the learned Judicial First Class Magistrate, North Parur in C.C. 559/96. By the said judgment the learned Magistrate had found the accused guilty of the offence punishable under Section 138 of Negotiable Instruments Act. He was convicted and sentenced to undergo simple imprisonment for a period of one year.

2. The complainant alleged that the revision petitioner/accused had issued Ext. P2 cheque to her for an amount of Rs. Three lakhs. The accused is the brother-in-law of the complainant. When the matrimonial life ran into rough weather, because of differences of opinion between the spouses, an agreement (Ext. P1) was executed between the concerned parties. At the time of settlement of the disputes Ext. P2 cheque for Rs. Three lakhs was allegedly issued by the accused/revision petitioner to the complainant. The said cheque when presented for encashment was dishonoured by the bank on the ground that sufficient amount is not available in the account. Ext. P5 notice of demand was issued. It was duly received and acknowledged. It evoked Ext. P8 reply. But no payment was made as demanded. The accused took the stand that the complainant is not competent to present the cheque before the marriage was dissolved as agreed by the contestants. It was also contended that the cheque was issued under threat, duress and coercion.

3. During the course of trial the complainant examined herself as PW. 1 and the Bank Manager as Pw. 2. Exts. P1 to P10 were marked. During the course of trial the accused repeated his stand, which he took up in Ext. P8 reply notice - that the cheque was not issued for the due discharge of any legally enforceable debt/liability. According to him it was issued under duress. He had no liability to the complainant, it was further alleged. No defence evidence was adduced.

4. The learned Magistrate initially, and the learned Sessions Judge subsequently, came to the conclusion that all ingredients of the offence punishable under Section 138 of Negotiable Instruments Act have been established beyond doubt. Accordingly the learned Sessions Judge proceeded to pass the impugned judgment.

5. The revision petitioner/accused assails the impugned judgment on the following grounds;

1) The courts below erred in coming to the conclusion that the cheque was issued for the due discharge of a legally enforceable debt/liability.

2) The sentence imposed is at any rate excessive.

6. The signature in the cheque is admitted. Ext. P1 agreement is also admitted. As per Ext. P1 agreement Ext. P2 cheque had been issued on 13.2.1996 to discharge a liability. Documentary evidence clearly shows that Ext. P2 cheque was issued by the accused for the due discharge of a legally enforceable debt/liability. There is no merit in the contention, even if true, that the accused had no personal liability to the complainant. The only other contention is that the cheque was issued under threat, coercion and duress. No evidence is there to prove this contention. The conduct of the appellant after the admitted signing and issue of the cheque does not at all support the theory that it was issued under threat, duress and coercion. I find absolutely no reason to invoke the revisional jurisdiction to interfere with the concurrent findings of the courts below regarding culpability of the accused. The challenge fails.

7. Now coming to the question of sentence, I find that the learned Magistrate had imposed a sentence of simple imprisonment for a period of one year under Section 138 of the Negotiable Instruments Act. No direction for payment of compensation was issued. The revision petitioner contends that the sentence imposed is excessive. The complainant had made an attempt to challenge the failure of the court to issue any direction under Section 357(3) CrI. P.C. by filing Criminal Revision Petition 43/99 before the Sessions Court. That Revision Petition was also dismissed by the impugned common order dated 31.8.2000,

8. A fairly important question regarding the appropriate sentence and directions to be imposed/issued in a prosecution under Section 138 of the Negotiable Instruments Act is raised in this Criminal Revision Petition. The courts below have chosen to impose on the accused the maximum sentence of imprisonment for one year permitted under Section 138 of the Negotiable Instruments Act. It is contended that the sentence imposed is grossly excessive and perversely disproportionate to the contumacious culpable responsibility of the offender.

9. The counsel for the complainant on the other hand laments that the complainant has been left high and dry without any-effective redressal of his genuine grievance. No direction for payment of compensation under Section 357 of the Code of Criminal Procedure has been issued it is complained.

10. Section 138 of the Negotiable Instruments Act reflects the anxiety of the Legislature to usher in a new healthy commercial morality among the polity through the instrumentality of the penal law. Here is a classic example where, as part of an attempt to evolve a healthy norm of commercial behaviour, the principle of social engineering through the instrumentality of the penal law is put into operation. What was, prior to the amendment of the Negotiable Instruments Act in 1988 only a moral or civil wrong has been transformed and exalted to the position of a crime by a deft amendment of the statute. Until the polity imbibes the spirit of the change in law and during the early years of enforcement of the amended statutory provision, according to me, it would be unnecessary, unfair and unreasonable to impose a deterrent substantive sentence of imprisonment. The prison is held in awe by the polity. In an offence like this, where the crux and the gravamen is the failure to discharge a monetary liability evidenced by a cheque even after service of a notice as insisted by law, within the stipulated period, an unnecessarily harsh substantive sentence of imprisonment has, according to me, no penological objective to be achieved. Deterrence of course is necessary. A period exceeding one decade having elapsed from the date of the amendment, certainly a prison term can be imposed to secure the interests of deterrence. But deterrence in a case like this does not necessarily depend on the length of the term that the offender spends behind the bars. The very prospect of going to prison, irrespective of the length of the term, is sufficient deterrence for the class of

offenders who are sought to be deterred from the commission of the crime in question. An unduly long term of substantive imprisonment would even be counter productive as that would unnecessarily expose the offender to the deleterious atmosphere of a prison. In these circumstances I am of opinion that while it would be proper and apposite to impose a substantive sentence of imprisonment on an offender under Section 138 of the Negotiable Instruments Act, considerable care must be employed to ensure that the term of imprisonment is not unduly and unnecessarily long. In the facts of the case I am of opinion that imposition of a sentence of imprisonment for one year is unnecessary.

11. I do further note that the courts below have not alertly perceived the plight of the complainant. In spite of several binding precedents like Hari Kishan and State of Haryana v. Sukhbir Singh and Ors. (AIR 1988 SC2127) it is unfortunate that courts are not perceiving the necessity to compensate the victim. The plight of the third party to the crime cannot be ignored or overlooked by the system except at its own peril. The complainant in this case has also extended a helping hand to the system in its quest to introduce a new healthy commercial morality. He has taken up on his shoulders the burden to prosecute the accused. It must be the earnest endeavour of the system to ensure that the victim of the time is adequately compensated. Such victim cannot be compelled to run from court to court for the redressal of his genuine grievances. Section 357 of the Code of Criminal Procedure embodies the anxiety and the yearning of the Legislature to ensure that the victim is compensated adequately.

12. The work pressure on the judicial system is enormous. It must be the endeavour of all functionaries to ensure that multiplicity of proceedings is avoided to ease/release the work pressure on the system. In that view of the matter also every court has the duty to insist and ensure that the complainant is not compelled to simultaneously prosecute civil remedies along with the prosecution under Section 138 of the Negotiable Instruments Act initiated by him.

13. The contention that the State would lose in terms of court fee which would otherwise have been payable if the complainant had opted the civil remedy does not appeal to me. That cannot certainly be a logical, reasonable or satisfactory

justification for the courts refusing to invoke the powers under Section 357 of the Code to compensate the victim.

14. The contention that Section 357(3) of the Criminal Procedure Code permits payment of 'compensation' only and that the amount due under the cheque cannot be reckoned as compensation for the purpose of Section 357(3) does not also appeal to me at all. According to me the expression 'compensation' is used under Section 357(3) not in any technical sense, and must certainly include payment due to the victim under the cheque in respect of which the offence under Section 138 of the Negotiable Instruments Act is committed. It is unnecessary, considering the purpose which Section 357(3) has to serve, to import any special or technical meaning to the expression 'compensation' used there.

15. The fact that powers under Section 138 are misused by unscrupulous money lenders is urged as a reason which should persuade the courts not to invoke the powers under Section 357(3) in a prosecution under Section 138 of the Negotiable Instruments Act. I find absolutely no merit in this contention also. A verdict of guilty is entered under Section 138 of the Negotiable Instruments Act only if the court is satisfied beyond reasonable doubt that all the ingredients of the offence are established including the ingredient that the cheque was issued for the discharge of a legally enforceable debt/ liability. Possibility of misuse must be deemed to be eliminated as the invocation of powers under Section 357(3) is to be considered only after a verdict of guilty and conviction.

16. Misplaced sympathy cannot also have any place in the criminal adjudicatory process. It would be myopic to assume that the purpose of the Legislature was only to ensure that the payee gets the amount. It is equally the purpose of the Legislature to ensure that account holders make use of their cheques carefully, diligently and with the requisite caution so that the intended healthy commercial morality would prevail in the economy. That cannot be achieved unless the account holders are deterred from callous, indifferent and irresponsible issue of blank cheques to suit their convenience even on the insistence of unscrupulous money lenders. Every cause may have its martyrs and intelligent, humane and compassionate use of the discretion in sentencing by the courts alone can

perhaps ensure the interests of justice.

17. I am in these circumstances of the opinion that normally in a successful prosecution under Section 138 of the Negotiable Instruments Act a direction under Section 357 must follow. If there are sufficient and compelling reasons, the court must specify such reasons in the judgment and then only choose not to invoke the powers under Section 357 of the Criminal Procedure Code. All subordinate courts shall zealously ensure compliance with the above direction.

18. In the facts and circumstances of this case I am satisfied that imposition of a sentence of simple imprisonment for one month coupled with a direction under Section 357(3) of the Code to pay an amount of Rs. 3,10,000 as compensation to the complainant and a default sentence of simple imprisonment for 60 days would eminently advance the interests of justice. The total period of imprisonment even after the penalty for default would be well below the impugned sentence of simple imprisonment for one year and in these circumstances proviso to Section 386 Cr. P.C. will not be offended also.

19. In the result

(a) This Revision Petition is allowed in part.

(b) The impugned verdict of guilty and conviction of the revision petitioner under Section 138 of the Negotiable Instruments Act are upheld

(c) But the sentence imposed on the revision petitioner is modified and reduced. In supersession of the sentence imposed on the revision petitioner he is sentenced under Section 138 of the Negotiable Instruments Act to undergo simple imprisonment for a period of one month.

(d) He is further directed to pay an amount of Rs. 3,10,000 (Rupees Three Lakhs Ten Thousand) as compensation under Section 357(3) Crl. P.C. In default of payment of compensation he shall undergo simple imprisonment for a further period of sixty days.

20. The revision petitioner shall appear and his sureties shall produce him before the learned Magistrate on 1.1.2003 for execution of the modified sentence hereby imposed. Needless to mention, the learned Magistrate shall be at liberty to initiate proceedings against the accused and his sureties if he does not appear before the learned Magistrate as directed. The Registry shall forthwith send back the records to the trial court.

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