Radhakrishnan Vs. Thomas

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SooperKanoon Citation : sooperkanoon.com/729561

Court : Kerala

Decided On : Dec-13-2005

Reported in : I(2007)BC324; [2006]130CompCas618(Ker); 2006(1)KLT150

Judge : R. Basant, J.

Acts : Negotiable Instruments Act, 1881 - Sections 138 and 141; Code of Criminal Procedure (CrPC) - Sections 313 and 357(3); Indian Penal Code (IPC) - Sections 11

Appeal No. : Crl. R.P. No. 193 of 1997

Appellant : Radhakrishnan

Respondent : Thomas

Advocate for Def. : Joby Cyriac, Adv. and; K. Harilal, Public Prosecutor

Advocate for Pet/Ap. : P.S. Krishna Pillai, Adv.

Judgement :
ORDER

R. Basant, J.

1. Can an account maintained in the name of a firm be said to be an account maintained by its Managing Partner? Can the Managing Partner who issued the

cheque be said to-be the drawer of the cheque? These questions arise for consideration in this case.

2. This revision petition is directed against the concurrent verdict of guilty, conviction and sentence (the sentence was modified by the appellate court) imposed on the revision petitioner/accused under Section 138 of the N.I. Act.

3. The cheque is for an amount of Rs. 90,000/- The cheque is issued by the accused as Managing Partner of M/s. Integrated Homoeo Pharmaceuticals, a firm. The complainant alleged that the accused had borrowed an amount of Rs. 90,000/- and had issued the cheque in question, Ext.P1, for the discharge of the said liability. The cheque, when presented, was dishonoured on the ground of insufficiency of funds. A notice of demand was issued. The same was not received and was returned unclaimed. It is in these circumstances that the complainant came to court with this prosecution under Section 138 of the N.I. Act after scrupulously observing the statutory time table.

4. The complainant examined himself as PW1 and Exts.P1 to P6 were marked on his side. The accused admitted that the cheque in the name of the complainant was issued by him. But he took the stand that it was entrusted by him on behalf of the firm to one Chacko for discharge of a liability, which was there to the said Chacko from the firm. The said Chacko, according to the accused, had wanted the accused to issue the cheque in the name of the complainant. That is why he happened to issue such cheque in the name of the complainant. He further asserted that he had contacted the said Chacko, who had agreed to refrain from initiating, any coercive criminal proceedings. But in spite of that this complaint was filed. The accused took up a further stand that the liability had been discharged in full to the said Chacko subsequent to the commencement of this proceedings. No defence evidence was adduced.

5. The courts below concurrently came to the conclusion that the complainant has succeeded in establishing all ingredients of the offence punishable under Section 138 of the N.I. Act. Accordingly they proceeded to pass the impugned judgment. The learned Appellate Judge indulgently modified the sentence and reduced the substantive sentence of imprisonment from S.I. for a period of one year to S.I. for

a period of six months.

6. Arguments have been advanced before me by the learned Counsel for the revision petitioner/accused and the respondent/complainant. The learned Counsel for the revision petitioner raises a point, which admittedly was not raised before the courts below. In as much as the said contention is one of law, the learned Counsel for the petitioner submits that the same may be considered notwithstanding the fact that it had not been specifically raised before the courts below.

7. The contention raised is that in the total absence of any averment or evidence to show that the partnership firm M/s. Integrated Homoeo Pharmaceuticals owed any liability to the complainant, no prosecution can lie against the petitioner/accused, who is only the Managing Partner of the said firm which is a company within the expanded meaning of the expression company under Section 141 of the N.I. Act. It is not specifically alleged or proved that the petitioner is in charge of and responsible to the company for the conduct of its affairs. The learned Counsel for the petitioner, in these circumstances, contends that the prosecution against the petitioner, who is only a signatory on behalf of the firm in the cheque in question -- without even an allegation that the firm/company has committed any offence - is not maintainable. To paraphrase in legal jargon, the contention is that the petitioner/accused is not the drawer of the cheque. The firm/ company is the drawer of the cheque. The petitioner is not and the firm/company alone is, the one who maintained the account with the Bank. In the absence of an allegation that the drawer of the cheque has committed the offence, the petitioner cannot be roped in with the aid of Section 138 of the N.I. Act.

8. The learned Counsel for the petitioner relies on the decision in Anil Hada v. Indian Acrylic Ltd. : 2000 CriLJ373 . In particular, the learned Counsel for the petitioner relies on the following passage, which appears in paragraph 13:

The provisions do not contain a condition that prosecution of the company is sine qua non for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt a Finding that the offence was committed by the company is sine qua non for convicting those other persons.

(emphasis supplied)

In as much as there is not even a whisper of an allegation or proof that the company/ firm - M/s. Integrated Homoeo. Pharmaceuticals -- has committed any offence under Section 138 of the N.I. Act, this prosecution against the petitioner, the Managing Partner, in his individual capacity is not maintainable. The learned Counsel for the petitioner further relies on the decision of this Court in Kumari v. Sankara Raman 2001 (2) KLT 503 and contends that the requisite averment - that the company/firm has committed the offence and the petitioner was in charge of and was responsible to the company for the conduct of the business of the company is not there at all in the complaint. The learned Counsel for the petitioner wants this Court to further note the dictum in the decision reported in Kitex Garments Ltd. v. Ajay Koushik 2002 (1) KLT (SN) 17 Case No. 18 (Single Judge, Madras High Court), wherein it is held that if the company is not the drawer of the cheque, the fact that an employee of the company had issued the cheque cannot expose the company for any culpable liability under Section 138 of the N.I. Act.

9. I have been taken through all the three decisions referred above. There can be no quarrel with the proposition that the petitioner cannot be made liable for an offence under Section 138 of the N.I. Act without the aid of Section 141 unless he is the drawer of the cheque and the account is maintained by him. The first question therefore is whether the petitioner is the drawer of the cheque. The cheque in this case is drawn by a firm and not a company as understood in law - a juristic person. The drawer is a Partnership firm and a Partnership firm, it is trite, is nothing but a compendious expression to refer to the partners who transact business in partnership in that name. His status as Managing Partner having not been disputed, the mere fact that the account is operated by him in the name of the firm will not in any way help the petitioner/accused to contend that he is not the drawer of the cheque. The firm is the drawer. The firm is nothing but a compendious expression to refer to the partners. In that view of the matter, the petitioner, along with other partners, is the drawer of the cheque. Each partner in law has an individual capacity and has capacity as agent of other partners. Therefore, the petitioner is undoubtedly the drawer of the cheque, notwithstanding the fact that the account stands in the name of the firm, a compendious expression

to refer to partners, including the petitioner, who transact business in such name. The petitioner is, therefore, the drawer of the cheque and the cheque is drawn on an account maintained by him (in his capacity as a partner) with the bank. The fact that the expression 'person' in Section 11 of the I.P.C. would include a firm - a body of persons not incorporated, will not in any way detract against the status of the petitioner as the drawer of the cheque and one maintaining the account with the bank along with other partners. Section 141 of the N.I. Act is only an enabling provision. It does not detract from or militate against the concept of partners maintaining account and they being reckoned as drawers of the cheque when the cheque is signed by them. When a partner, who has not signed the cheque, is sought to be visited with culpability, probably reliance will have to be placed on Section 141 of the Act. But where the drawer of the cheque is a partner on behalf of the partnership, he cannot be heard to contend that he is not the drawer of the cheque or that he is not maintaining any account with the bank. The contention raised cannot, in these circumstances, be accepted.

10. There is yet another way of looking at the problem. Has the firm/company committed any offence? Even assuming that the firm as such (as distinguished from its partners) has no liability to be discharged to the complainant, that will not help the firm to avoid liability under Section 138 of the N.I. Act. It is not the law that the cheque must be one issued by the drawer to the payee for discharge of a liability which is personal between them, to attract culpability under Section 138 of the N.I. Act. A cheque issued to discharge 'any debt or other liability' falls within the sweep of Section 138 of the N.I. Act. The liability of the firm under Section 138 of the N.I. Act cannot also be disputed in the facts and circumstances of this case. Even going by the version in Section 313 statement the cheque was issued in the name of the complainant to discharge the liability of the firm to another. Want of pleadings in the complaint about the complicity of the firm cannot help the petitioner in the facts and circumstances of this case where the issue of the cheque to discharge the liability of the firm is specifically admitted.

11. The firm is also thus shown to have committed the offence under Section 138 of the N.I. Act. It is now trite (See the dictum in Anil Hada supra) that it is not essential to prosecute the firm/company also before the person in charge is sought

to be prosecuted. It is then contended that there is no averment in the complaint that the petitioner was in charge of and responsible to the company for the conduct of its affairs. It is not necessary in every complaint to repeat the words of Section 141 of the N.I. Act - that the indictee was in charge of and is responsible to the company for the conduct of its affairs. The fact that the petitioner is the one who has signed the cheque as Managing Partner of the firm goes miles to assure the court that he was acting and was competent to act on behalf of the firm. Even without a specific averment in the complaint that the petitioner was in charge of and responsible to the company for the conduct of the affairs of the firm a safe conclusion on that aspect can be reached the petitioner having admittedly signed the cheque as Managing Partner of the firm.

12. No other contentions are raised. I have gone through the impugned judgment. I am satisfied that all ingredients of the offence punishable under Section 138 of the N.I. Act have been established satisfactorily.

13. Finally it is contended that the sentence imposed is excessive. On account of reasons beyond his control, the accused has not been able to discharge his liability, it is contended. In these circumstances leniency may be shown on the question of sentence, it is prayed.

14. I have heard the learned Counsel for the accused on the question of sentence and on the question of imposing a direction for payment of compensation under Section 357(3) Cr.P.C. The learned Counsel for the petitioner prays that an appropriate direction under Section 357(3) may be imposed and the petitioner may be spared of a substantive sentence of imprisonment. I have already adverted to the principles governing imposition of a sentence in a prosecution under Section 138 of the N.I. Act in the decision reported in Anilkumar v. Shammy 2002 (3) KLT 852. In the facts and circumstances of this case, I do not find any compelling reasons to insist that the petitioner must serve any deterrent substantive sentence of imprisonment. An appropriate lenient substantive sentence of imprisonment to facilitate invocation of Section 357(3) Cr.P.C. and an appropriate direction under Section 357(3) Cr.P.C. coupled with a default sentence shall serve the ends of justice eminently. In the facts and circumstances of this case, this Court cannot

lose sight of the fact that the complainant has been waiting from 1992 and has by now fought three tier proceedings in court for realisation of the amounts which are admittedly due to him even going by the statement under Section 313 Cr.P.C. given by the accused. The plea of discharge has not been proved at all. The sentence imposed can accordingly be modified. The challenge in this revision petition can succeed only to the above extent.

15. In the result:

(a) This revision petition 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 and to pay an amount of Rs. 1,20,000/- as compensation and in default to undergo S.I. for a period of three months. If realised, the entire amount shall be released to the complainant under Section 357(3) Cr.P.C.

(d) If the petitioner does not appear before the learned Magistrate on or before 15.1.2006, the learned Magistrate shall take necessary steps for execution of the modified sentence hereby imposed.