

**Sanal Kumar Vs. Rajeev Kumar**

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**Court :** Kerala

**Decided On :** Feb-20-2003

**Reported in :** 2004(1)ALD(Cri)865; III(2004)BC162; 2004(1)KLT689

**Judge :** R. Basant, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 377, 378, 394 and 394(2); Kerala Criminal Rule of Practice - Rule 258; Negotiable Instrument Act, 1881 - Sections 138

**Appeal No. :** C.R.A. No. 210 of 1994

**Appellant :** Sanal Kumar

**Respondent :** Rajeev Kumar

**Advocate for Def. :** V.R. Kesava Kaimal, Adv.

**Advocate for Pet/Ap. :** M.M. Abdul Azeez, Sr. Adv.,; Babu Karukapadath and; Vahe

**Disposition :** Appeal allowed

**Judgement :**

**R. Basant, J.**

1. This appeal is directed against a judgment of acquittal rendered by the learned Magistrate in a prosecution under Section 138 of the Negotiable Instruments Act.
2. The Complainant/appellant alleged that the accused had agreed to pay an amount of Rs. 1 lakh to the complainant for constructing a house as directed by him. The work was completed. Only an amount of Rs. 61,000/- was paid. For discharge of the liability to pay the balance amount of Rs. 39,000, Ext. P1 cheque was issued. 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. P2 and P3 are the memoranda of dishonour and intimation. Notice of demand Ext. P4 was issued as required by law. It succeeded in evoking only Ext. P5 response. Payment was not made. It was in these circumstances that the complainant came to court with this complaint under Section 138 of the Negotiable Instruments Act.
3. The accused denied the offence. The complainant examined himself as PW1. Exts. P1 to P5 were marked. In the reply notice Ext. P5 as also by examining his mother as DW1 and by marking Exts. D1 to D5 the accused took up a plea that the cheque was not issued for the discharge of a legally enforceable debt/liability. The issue of the cheque was admitted. The contention was that the cheque was obtained by 'using force, fraud and coercion'.
4. The learned Magistrate accepted the contention of the accused that the house was constructed in the property of DW1 and that the liability, if any, to the complainant was that of DW1. Ext. P1 cheque was not thus issued by the accused for the discharge of any legally enforceable debt/liability which he had towards the complainant, it was held. Accordingly the learned Magistrate proceeded to pass the impugned judgment of acquittal.
5. After the application for leave was presented, the complainant expired and this court by order dated 30.5.1994 allowed CrI.M.P. 737 of 1994 and permitted the complainant's brother to prosecute the appeal preferred by the complainant. Leave for filing the appeal was also granted.

6. Before me the learned counsel for the appellant/complainant's brother and the respondent/accused have advanced their arguments. The learned counsel for the respondent/accused first of all contends that this appeal has now abated. It is not possible for any person other than the complainant to prosecute the appeal. He further contends that leave was granted to the complainant's brother in Crl.M.P.737 of 1994 not for prosecuting the appeal but only in the application for grant of leave to appeal. It is then submitted that the complainant had taken back Exts. P1 to P5 marked before the court below and has chosen to reproduce them before this Court only. That course is impermissible, it is contended. Under Rule 258 of the Kerala Criminal Rules of Practice the documents can be returned only after the proceedings finally come to a conclusion. Subsequent production of the returned documents before the appellate court is not justifiable. On merit it is contended that the cheque was not issued for the discharge of a legally enforceable debt/liability. Non-examination of the Manager of the bank is fatal, it is further contended.

7. I have anxiously considered all these contentions. Section 394 of the Code of Criminal Procedure deals with abatement of appeals. An appeal under Section 378 (which the present appeal is) would abate under Section 394(1) only on the death of the accused. Section 394(1) therefore does not apply in this case where it is the complainant who is dead. Section 394(2) applies only to 'every other appeal under this Chapter' (Chapter XXIX) and the said sub-section cannot also have any application. I cannot accept the argument that Section 394(2) applied to all appeals which have not abated under Section 394(1). Section 394(2), it is very clear, can apply only to all appeals under Chapter XIX other than those under Section 377 and 378. Section 394(1) does not at all suggest the course which the proceedings will take if the death of an appellant in an appeal under Section 377 or 378 Crl.P.C., takes place. Such appeals have to be disposed of on merits by the appellate Court. The decisions reported in *Khetu Mohton v. State of Bihar* (AIR 1971 SC 66) and *Ismain v. Samuel* (1995 (1) KLT 1) support this conclusion of mine.

8. It is by now well settled that on the death of a complainant the court has the discretion to permit a relative of the complainant to continue the prosecution. In

these circumstances, I find no merit in the contention that death of the complainant/appellant in an appeal under Section 378 CrI.P.C. would ipso facto result in abatement of the appeal. The decisions reported in Shanti Balagopal v. Benilde (1995 (2) KLT 488) and Jayarajan v. Jayarajan (1992 (2) KLT 586) clearly show that death of complainant does not necessarily bring the proceedings to termination and it is open to a court to permit any interested person to continue to prosecute the criminal proceedings initiated by the deceased complainant. In that view of the matter it must certainly be possible for such representative of the estate of the complainant to prosecute the appeal also. It would be unreasonable to assume that the death of the complainant would not terminate the original proceedings but would terminate the appellate, proceedings. The fact that death of the appellant had taken place during the pendency of the petition for leave and not after the appeal was formally admitted to file cannot also have any bearing on the right of the representative of the complainant to continue the challenge in appeal. I do not in these circumstances find any merit in the contention that the appeal has abated either under Section 394(1) or 394(2) of the Code.

9. It is then contended that the complainant's brother is not a legal heir of the deceased complainant and therefore he cannot represent the estate of the deceased complainant to further prosecute the appeal. When the deceased complainant's brother sought leave to get impleaded in the proceedings by filing CrI.M.P.737 of 1994 that application was allowed without opposition. I find no reason to assume that the complainant's brother does not represent his estate. I find absolutely no reason to come to such a conclusion. The contention that the brother of the deceased complainant cannot further prosecute this criminal proceedings is hence found to be without any merit. CrI.M.P 737 of 1994 having been allowed without any opposition, that contention raised cannot be entertained at this stage. I repeat that there is no material before me even at this stage to conclude that the deceased complaint's brother dose not truly, effectively represent his estate. Nor is it the requirement of law that such person must be a legal heir of the deceased complainant. Any near relative can be permitted to continue to prosecute the appeal. The contention to Section 394 makes the position clear.

10. Leave was granted to the brother to prosecute only the application for grant of leave under Section 378 CrI.P.C. No leave has been granted to him to prosecute the appeal itself, it is next contended. I find this argument to be without any merit. Leave having already been granted admittedly to prosecute the application for leave for filing the appeal, it is meaningless to contend that a separate permission must be secured to prosecute the appeal. If any further permission were required, the court can have no hesitation to grant such permission here and now.

11. A technical objection is raised that records having been taken back under Rule 258 of the Kerala Criminal Rules of Practice, the complainant cannot be permitted to produce them against before this Court. I find absolutely nothing in the language of Rule 258 which can lead a court to the conclusion that the documents once returned cannot even be taken back to file. Even assuming that records have been wrongly or incorrectly returned under Rule 258 by the Court below, the same cannot operate as a bar against the appellate court receiving back those documents to enable it to dispose of the appeal properly. In this case the appellant's brother who has been permitted to prosecute the appeal has produced before this Court such records which are taken back. There is no trace of doubt on the genuineness of the documents. The technical objection that the documents marked cannot be received or perused at the appellate stage is thus found to be without any merit.

12. Coming to the merits, the first contention is that the cheque has been issued not for the discharge of any legally enforceable debt/liability. The amount was allegedly due in contention with construction of a residential building. I am prepared to accept the contention of the respondent-accused that the building was constructed in the property of DW1, the mother of the accused. It is by now trite (See *Alexander v. Joseph Chacko*, 1993 (2) KLT 326) that the cheque in question need not necessarily be issued by the drawer to the payee for the discharge of a personal liability of such drawer to the payee. A person can certainly issue a cheque to the payee for the discharge of the liability of another. Such a cheque does not fall outside the purview/ sweep of the provisions of Section 138 of the Negotiable Instruments Act. The cheque need be issued for the discharge of 'any' legally enforceable debt or liability. The position having been settled in the

decision referred above, it is not necessary for me to advert in any further detail to this contention. Less said about the contention that Ext.P1 cheque was obtained under threat, force and coercion, the better. There is no attempt before me to support that contention. The conduct of the accused after he parted with the cheque, knocks, the bottom out of this theory.

13. The Manager of the Bank has not been examined, it is next contended. Memo of dishonour and intimation have been produced. PW1 has asserted on oath and in the notice of demand Ext. P4 that the dishonour was on the ground of insufficiency of funds. Significantly in the reply notice Ext.P5 or at any stage before the court below there is no whisper of a contention that the cheque was dishonoured for any other reason. The fact that the reason shown in the memorandum of dishonour is 'refer to drawer' does not and cannot at all militate against the case of the complainant that the cheque was dishonoured on the ground of insufficiency of funds. On the basis of the totality of evidence available, the conclusion appears to be inescapable that the cheque was dishonoured on the ground of insufficiency of funds. No other contention were raised. It follows that the appeal is maintainable and the impugned verdict of acquittal cannot be legally sustained. The challenge succeeds.

14. Coming to the question of sentence I note that the cheque in question is dated 5.3.1989. Section 138 of the Negotiable Instruments Act was brought into the statute book only in 1988. I have already adverted to the principles relating to imposition of sentence in prosecution under Section 138 of the Negotiable Instruments Act in the decision reported in I.C.D.S. Ltd. v. Beena, (2002 (3) KLT 218). I am satisfied that a sentence of fine coupled with a direction under Section 357(1) CrI.P.C. shall meet the ends of justice eminently in this case.

15. In the result

i. This appeal is allowed.

ii. The impugned judgment is set aside.

iii. The respondent-accused is found guilty, convicted and sentenced under Section 138 of the Negotiable Instruments Act to pay a fine of Rs. 47,500 and in default to undergo simple imprisonment for a period of three months.

iv. Out of the fine amount if realised an amount of Rs. 45,000/- shall be released to the legal heirs of the deceased complainant under Section 357(1) of the CrI.P.C.

16. The respondent shall appear before the court below on 31.5.2003 if the fine amount is not paid by then. The court below shall then take necessary steps for execution of the default sentence hereby imposed.

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