

Subhash Babu Vs. Radhakrishnan

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Court : Kerala

Decided On : Dec-20-2005

Reported in : III(2007)BC69; 2006(3)KLT994

Judge : K. Hema, J.

Acts : Negotiable Instruments Act - Sections 138 and 139; [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 311

Appeal No. : Cri.A. Nos. 1445 and 1446 of 2005

Appellant : Subhash Babu

Respondent : Radhakrishnan

Advocate for Def. : H. Harikumar and; Kollam, Advs. and Public Prosecutor

Advocate for Pet/Ap. : G. Bhagavat Singh, Adv.

Disposition : Appeal allowed

Judgement :

K. Hema, J.

1. In the nature of the peculiar facts in these appeals, these are disposed of by this common judgment.

2. Two complaints were filed by the appellant before a Magistrate's Court against the first respondent herein, alleging commission of offence under Section 138 of the Negotiable Instruments Act (the Act, for short). One of the complaints relates to a cheque dated 15.7.2000 for Rs. 1,00,000/- and the other is with respect to another cheque dated 30.07.2000 for Rs. 75,000/-. On filing the complaints, those were numbered as C.M.P. 812/2001 and C.M.P. 813/2001. The complaint involving the cheque dated earlier was numbered as C.M.P. 812/2001 and the one dated subsequently was numbered as C.M.P. 813/2001.

3. Sworn statements of the complainant were taken in both the cases and those were taken on file as C.C. 115 and C.C. 116 of 2001. But, chronological order was not followed while numbering the cases as calendar cases. Instead of numbering C.M.P 812/2001 as C.C. 115/2001, it was numbered as C.C. 116/2001. So also, C.M.R 813/2001 was taken on file as C.C. 115/2001. Going by the numbers of C.M.R, normally, the cases ought to have been numbered vice versa, it is contended.

4. It is further alleged by the appellant that advocate clerk attached to appellant's counsel's office, by an inadvertent mistake happened to note down the numbers going by the chronological order. He noted down the numbers as C.C. 115/ 2091 and C.C. 116/2001 on the complaints numbered as C.M.P. 812/2001 and 813/2001 respectively. But, this seemingly simple discrepancy in numbering of cases led to a very serious consequence, as far as the complainant-appellant is concerned. Both the Cases ended in acquittal since evidence which ought to have been let in one of the cases was adduced in the other case and vice versa. According to the complainant-appellant, this occurred only on account of an inadvertent error.

5. Photocopies of the documents including the cheques were produced by the appellant along with the complaints filed by him. But, the originals were produced only at the time of evidence, as usually done in similar cases. Because of the wrong numbering of the case by the advocate's clerk as explained above, the originals which ought to have been produced in C.C. 115/2001 were produced in C.C. 116/2001 and vice versa.

6. But, the mistake went unnoticed by both sides. The court also failed to notice the same. When evidence was adduced in the former case, the documents in the latter case were confronted with and vice versa. Oral evidence was let in, going by the details in the documents, cheques etc., which were wrongly produced in both the cases. The evidence, naturally, did not tally with the details in the complaints relating to the amount, date etc. of the cheques and other particulars,

7. But, while witnesses were cross examined, the discrepancies were not brought out, The contradictions in the date of the cheque, the amount etc., as against the details in the complaint were not elicited, since the mistakes were not noted by the cross examiner also. The case happened to be prosecuted, defended and adjudicated, without noticing the crucial error. The accused was questioned by the court also, without noticing that the details in the documents did not tally with the description in the complaints. But, much after the arguments were heard, according to appellant, trial court itself noted the mistake and brought it to the notice of both counsel.

8. Immediately, complainant filed a petition under Section 311 of the Code of Criminal Procedure Code (the Code, for short), with a prayer to recall PW1 and to adduce further evidence to rectify the mistakes which crept in, as explained above. Since photocopies of all the documents had been produced along with the complaints themselves and that by itself established bona fides of the complainant-appellant, a request was made to the court to afford an opportunity to him to correct the genuine mistake. The circumstances under which the mistake crept in were also explained in the petition.

9. But, the trial court dismissed the applications filed under Section 311 of the Code at the time of disposal of the cases. The trial court observed that admittedly, complainant adduced evidence contrary to the allegations made in the complaints and it was not proper to fill up this 'lacuna' by recalling the witness. The request was rejected. The accused was acquitted in both the cases, solely due to the above discrepancy. In the appeals filed against the acquittal, appellant challenges mainly the legality of the dismissal of the petitions filed under Section 311 of the Code and the consequent acquittal.

10. From the facts discussed above, it is quite evident that there was a bona fide mistake on the side of the appellant, while producing the original documents and giving evidence. Such mistake is only human. In such circumstances, it was only just and proper for the court to allow appellant to recall and re-examine himself to explain or correct the mistake. Such a course will not amount to filling up of lacuna. But, the expression 'filling up lacuna' is seen loosely used by the various courts quite often, without understanding the real import of the same.

11. It is therefore, worthy to refer to the decision of the Supreme Court in *Rajendra Prasad v. Narcotic Cell* : 1999 CriLJ3529 wherein, the connotation of the term, 'lacuna' is well explained as follows:

Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

12. Explaining an apparently, inadvertent or genuine error which had crept in, while producing documents and adducing evidence on the basis of such documents, will not amount to filling up of lacuna. 'Lacuna' as per dictionary means, 'blank, empty part; missing portion'. The re-examination of the appellant was sought for in these cases, not to fill up any 'blank, empty part or missing portion' in the evidence. The appellant had, in fact, already placed before the court, all the details which are required to establish the averments made in the complaint. There was no vacuum or emptiness which he had to fill up by a further examination. He only wanted to draw the attention of the court as to how he committed the inadvertent mistake, while producing documents and giving evidence, and explain the same. This is not filling up of lacuna.

13. No litigant should suffer in a court of law because of a mere bona fide mistake. The court must be wakeful to the simple reality that no litigant would ever slaughter his own case by an inadvertent error. If the court can identify that the mistake is a genuine one, which is not intended to defeat the opponent by dubious methods or to frustrate the course of justice, it must hurry to protect ends of justice. If a witness is sought to be recalled and examined to explain an honest error, it has to be allowed under Section 311 of the Code, because the said provision permits the court to adopt such a course, if it finds it essential for taking a 'just decision' of the case.

14. Section 311 of the Code reads as follows:

Power to summon material witness, or examine person present.- Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

Section 311 of the Code, as the provision connotes, is an enabling provision. The court's concern, while exercising powers under the said Section must be, to apply the beneficial provision whenever and wherever it is found essential, for taking a just decision of the case. But, it shall not search for reasons to refuse the request for re-examination of a witness, because it is the solemn duty of every court to take a just decision in any case. The crucial test under Section 311 of the Code will be to confirm whether recalling, summoning etc. of a witness is essential to take a 'just decision' of the case.

15. The expression, 'just decision' referred to in Section 311 of the Code has a great significance. It cannot be viewed and understood lightly. The word, 'just' as per the dictionary means, 'that what most people consider to be normally fair and reasonable'. It also means, 'in accordance with what is right'(vide Oxford Advanced Learner's Dictionary of Current English, Twelfth Indian Impression).

16. If a party commits a genuine mistake by wrongly producing a document which he ought to have produced in another case and he also leads evidence based on such document, without noticing the error and also bonafide believing that the document pertains to the very same case, any reasonable person can discover that it was obviously a mistake. If a decision is taken in the case, even after being fully aware of the bona fide error, without allowing the party to correct or explain the same, such a decision will not be a 'just' one, in the real sense of the word. It will not be a decision 'which most people consider to be normally fair and reasonable'. It will not be a decision 'in accordance with what is right'.

17. If the court decides to acquit the accused, after refusing the request to correct or explain the inadvertent error, such a decision will be an unjust and unfair decision. Therefore, the order of acquittal passed in this case, after dismissing the petition under Section 311 of the Code on the ground that examination of the witness will amount to filling up of lacuna, is illegal.

18. Learned Counsel for the first respondent, however, argued that no offence is made out in this case under Section 138 of the Negotiable Instruments Act (N.I. Act, for short) and hence the case may not be ordered to be re-opened. I cannot accept this argument for the following reasons. First of all, the trial court found, going by the evidence adduced on behalf of the appellant that a cheque was issued by the accused for a specified amount drawn on his account for discharge of a legally enforceable debt and a notice was issued under Section 138 but no evidence was adduced to rebut the presumption under Section 139 of N.I. Act etc.

19. Despite these findings, the case ended in an acquittal only because the error remained unexplained, consequent to which, there was inconsistency between the allegations in the complaint and the evidence relating to date of cheques, amounts etc. In the above circumstances, I find this is a fit case wherein the appellant should be given an opportunity to recall and re-examine the witness or witnesses to explain the discrepancy. Such a course will be necessary to take a just decision of the case and the case has to be remanded for disposal in accordance with law. In this context, it is necessary to mention that both sides submitted that to avoid delay, it is enough if notice is issued by trial court to the counsel appearing on

either side instead of the parties, after remand.

In the result,

1) the order passed by the trial court in the petition filed under Section 311 of the Code and the orders of acquittal passed in C.C.I 15/2001 and C.C. 116/2001 are set aside.

2) Both the above cases are remanded to the trial court for fresh consideration and disposal in accordance with law. The court below is directed to recall appellant and allow him to be re-examined after affording a reasonable opportunity to both sides to contest the cases on merit.

3) The cases shall be disposed of within three months from the date of receipt of copy of this judgement.

Both these appeals are allowed.

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