

Hamsa Vs. George

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Court : Kerala

Decided On : Nov-28-2014

Judge : Honourable Mr.Justice K.Harilal

Appellant : Hamsa

Respondent : George

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE K.HARILAL FRIDAY,THE28H DAY OF NOVEMBER20147TH AGRAHAYANA, 1936 Crl.Rev.Pet.No. 2519 of 2003 (A)
----- (AGAINST THE

JUDGMENT

IN CRL.A.NO. 57/1997 of ADDL. SESSIONS JUDGE (ADHOC-I), THALASSERY DATED2108-2003 AGAINST THE

JUDGMENT

IN CC NO.554/1995 of J.M.F.C.,MATTANNUR DATED05 02-1997) REVISION PETITIONER(S)/APPELLANT/ACCUSED:

----- HAMSA, SON OF POKKER, PALISSERY, VAYATHOOR AMSOM AND DESOM, THATTILPALAM, TALIPARAMBA. BY ADVS.SRI.V.RAJAGOPAL SRI.K.N.CHATHUKUTTY RESPONDENT(S)/COMPLAINANT/STATE:

----- 1. GEORGE, S/O. MANI, RESIDING AT VAZHUTHAYIL HOUSE, KEEZHUR AMSOM AND DESOM, KANNUR DISTRICT.

2. STATEREPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT, ERNAKULAM. R2 BY PUBLIC PROSECUTOR, SRI.DHANESH MATHEW MANJOORAN THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 28/11-2014, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: P.T.O. K.HARILAL, J.

===== CRL.R.P. No.2519
OF2003===== Dated this the 28th day of November,
2014

ORDER

The revision petitioner is the accused in C.C. No.554/95 on the files of the Judicial First Class Magistrate Court, Mattannur as well as the appellant in Criminal Appeal No.57/97 on the files of the Addl. Sessions Court (Adhoc-I), Thalassery. He was prosecuted for the offence punishable under Sec.138 of the Negotiable Instruments Act, 1881 (for short, 'the N.I. Act') on a complaint filed by the 1st respondent herein. It is the case of the complainant/1st respondent that the revision petitioner had borrowed an amount of Rs.15,000/- and in discharge of that debt, he had issued Ext.P1 cheque for an amount of Rs.15,000/- to the 1st respondent. But, when the cheque was presented for encashment, the same was dishonoured and returned for want of sufficient funds. Though he had caused to issue a lawyer's notice, the revision petitioner did not pay the cheque amount nor did he sent a reply denying the said liability. Thus, he has committed the offence punishable under Sec.138 of the N.I. Act. Crl.R.P No.2519/2003 2 2. The 1st respondent was examined as Pw1 and the Bank Manager was examined as Pw2. Exts.P1 to P5 were also marked. No evidence had been adduced by the revision petitioner herein. After considering the evidence on record, the learned Magistrate has found the revision petitioner guilty of the offence punishable under Sec.138 of the N.I. Act and convicted thereunder. He was sentenced to undergo Rigorous Imprisonment for six months.

3. Aggrieved by the conviction and sentence, though the revision petitioner had preferred the above appeal, the lower appellate court dismissed the appeal for default on the reason that neither the revision petitioner's counsel nor the revision petitioner was present before the appellate court when the case was taken up for hearing. The legality and propriety of this order is under challenge in this revision petition.

4. It is the case of the revision petitioner that he had issued Ext.P1 cheque to one Joseph and thereafter he had settled the said liability with the said Joseph and he had not returned the cheque. The 1st respondent is the elder brother's son of the said Joseph to whom the respondent had issued Ext.P1 cheque. Thus, Ext.P1 cheque, which was issued to one CrI.R.P No.2519/2003 3 Joseph and not to the 1st respondent. The learned counsel for the revision petitioner cited two decisions namely, 'Kerala Kumaran v. State of Kerala' (1995 (1) KLT789 and 'Lal v. Asst. Excise Commissioner' (2001 (1) KLT840 and contended that the lower appellate court has no power to dismiss the appeal for default on the reason that neither the appellant nor the counsel for him was present before the court. Going by the above decisions, I also find that the lower appellate court should not have dismissed the appeal for default without considering the same on merits. But, as submitted by the learned counsel for the revision petitioner, I am not inclined to remand the case for considering the facts and circumstances of this case. But, I am inclined to consider the matter on merits.

5. Going by the impugned judgment passed by the trial court, it is seen that Ext.P1 cheque was issued by the revision petitioner to the 1st respondent for an amount of Rs.15,000/- only. It is the case of the revision petitioner that the said cheque was issued to one Joseph and even though the liability with the said Joseph was settled, he had not returned the cheque to the revision petitioner and the same was misused CrI.R.P No.2519/2003 4 for prosecuting the revision petitioner so as to harass him. The 1st respondent was examined as Pw1 and the Bank Manager who returned the cheque for want of sufficient funds was examined as Pw2. Exts.P1 to P5 were also marked to prove the return of cheque. After considering the evidence on record, the trial court found that the complainant/1st respondent has discharged the initial burden of proving the execution and issuance of cheque

successfully and he is entitled to get the presumption under Sections 139 and 118(a) of the N.I. Act.

6. Admittedly, no evidence had been adduced by the revision petitioner even though he contended that Ext.P1 cheque was issued to one Joseph and he had no transaction with the 1st respondent. So also, he miserably failed to brought out any circumstances to disbelieve the case of the complainant by examining the complainant. In the above context, the trial court can be justified in finding that the 1st respondent successfully discharged the initial burden of proving the execution and issuance of the cheque. But the revision petitioner miserably failed to rebut the presumption under Secs.118(a) and 139 of the N.I. Act, which stood in CrI.R.P No.2519/2003 5 favour of the 1st respondent. There is no illegality or impropriety in the findings of the trial court. I do not find any kind of perversity in the appreciation of evidence. Hence, the conviction entered will stand confirmed.

7. The learned counsel for the revision petitioner further contended that the sentence imposed on the revision petitioner is excess, harsh and disproportionate with the nature and gravity of the offence. I find some force in the argument advanced by the learned counsel for the revision petitioner in view of the legal position well settled by the Apex court of India.

8. The Supreme Court, in the decision reported in 'Kaushalya Devi Massand v. Roopkishore' (AIR 2011 SC2566, held that the offence under Sec.138 of the N.I. Act is almost in the nature of civil wrong which has been given criminal overtone, and imposition of fine payable as compensation is sufficient to meet the ends of justice. Further, in the decision reported in 'Vijayan v. Baby' (2011 (4) KLT355, the Supreme Court held that the direction to pay the compensation by way of restitution in regard to the loss on account of the dishonour of the cheque should be practical and CrI.R.P No.2519/2003 6 realistic. So, in a prosecution under Sec. 138 of the N.I. Act, the compensatory aspect of remedy should be given much priority over punitive aspect.

9. In view of the above decisions, I find that the sentence imposed on the revision petitioner is a little excessive and disproportionate with the nature and gravity of the offence. Hence the substantive sentence of Rigorous Imprisonment for six

months imposed by the trial court will stand reduced to simple imprisonment for one day till the rising of the court.

10. In the result, sentence will stand modified as given below: (i) The revision petitioner shall undergo simple imprisonment for one day till rising of the court. (ii) The revision petitioner shall pay a compensation of Rs.15,000/- (Rupees fifteen thousand only) to the 1st respondent under Sec.357(3) of the Cr.P.C, within a period of two months from today and produce evidence thereof. (iii) The revision petitioner shall appear before the trial court to suffer substantive sentence of simple imprisonment as ordered above on or before 28-01-2015 CrI.R.P No.2519/2003 7 with sufficient proof to show payment of compensation. (iv) In default, the revision petitioner shall undergo simple imprisonment for a period of one month. This Criminal Revision Petition is disposed of accordingly. Sd/- K.HARILAL, JUDGE. //true copy// P.S. To Judge St/-

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