

P. Gopakumar Vs. B. Anil Kumar and Another

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Court : Kerala

Decided On : Sep-06-2011

Reported in : 2011(4)KLT39(SN)(C.No.37); 2011(4)KLJ82; 2011(3)KHC850

Judge : S.S. Satheesachandran

Appeal No. : Crl.Rev.Pet.No.2810 of 2010

Appellant : P. Gopakumar

Respondent : B. Anil Kumar and Another

Judgement :

The revision is by the accused, who has been convicted of the offence under Section 138 of the Negotiable Instruments Act, for short, the 'N.I. Act', concurrently, by the two inferior courts. The learned Magistrate, on his conviction, had sentenced him to undergo simple imprisonment for three months and to pay a sum of Rs.3 lakhs as compensation and in default to undergo simple imprisonment for three months. Confirming the conviction, in appeal, the learned Sessions Judge modified the sentence reducing the substantive term of imprisonment to one day, till the rising of the court, retaining the sum of compensation, but, converting it to one of fine, reducing the default term of imprisonment to two months. Fine amount, if realized, was directed to be paid as compensation to the complainant. Feeling aggrieved, the accused has preferred this revision.

2. Notice given, the 1st respondent/complainant has entered appearance. I heard the counsel on both sides. The main thrust of attack pressed into service by the learned counsel for the petitioner/accused, to assail his conviction concurrently rendered by the two inferior courts, is that the challenge against the execution of Ext.P1 cheque, and, also the denial of the transaction with the complainant over that instrument, was not appreciated and considered in accordance with the settled principles of law. The defence canvassed by the accused that Ext.P1 cheque in blank form with signature alone was handed over to the complainant in relation to a totally different transaction, in respect of which oral and documentary evidence was placed, was discarded by the court below overlooking that defence version need be shown only as probable and it need not be proved with meticulous precision for its acceptance, according to the counsel. The application moved by the accused before the appellate court permitting him to lead additional evidence to prove the documents already tendered, and also to examine one more witness, was not considered nor any order passed on such application before entering into a decision on the merits of the appeal and that has caused great prejudice and denial of justice to the accused, is the submission of the counsel. The learned counsel relied on NarayanaMenon v. State of Kerala (2006 (3) KLT 404), Krishna Janardhan Bhat, v. Dattatraya Hegde (2008 (1) KLT 425 (SC)), Kumar Exports v. Sharma Carpets (2009 (1) KLT 197 (SC) and Padmanabha v. Vasudevan Namboodiri (2010 (3) KLT 216) to support the challenges raised that where execution of the cheque is denied it has to be proved, to draw the presumptions covered by the Statute, and, also, that the burden of proof cast upon the accused to rebut such presumptions, and also the defence, if any, raised even if it is shown that the cheque was handed over by him, has to be tested on the preponderance of probabilities. The learned counsel has also drawn my attention to the decision in Rangappav. Mohan (2010 (2) KLT 682 (SC)) wherein some of the observations made in Krishna Janardhan Bhat's case (cited supra) have been found to be not correct, submitting that the ratio of the decision in Krishna Janardhan Bhat's case (cited supra) that the question as to whether the presumption stood rebutted or not has to be determined keeping in view the other evidence on record still remain undisturbed and intact. Both the courts below have not appreciated the evidence tendered in the case, more particularly, the defence

evidence in examining whether the presumptions stood rebutted especially where the execution of the cheque which was disputed was not established, and as such, the drawing of the presumption to sustain the complainant's case was impermissible, is the submission of the counsel. Conviction of the accused is, therefore, patently erroneous and liable to be set aside, submits the counsel.

3. Per contra, the learned counsel appearing for the 1st respondent/complainant pointing out the limited scope of exercise of revisional jurisdiction in examining the correctness, propriety and legality over a finding of guilt concurrently rendered by two inferior courts, submitted that there is no infirmity, leave alone, any illegality over the conviction entered against the accused for the offence imputed, which, according to the counsel, is fully supported by unimpeachable legal evidence. Not only that no reply was sent to the statutory notice issued on dishonour of the cheque, defence canvassed belatedly in trial disputing the execution of the cheque and also the transaction with the complainant over that instrument setting up a story that it was only a security for discharging liability to another, that too, under a transaction where there was joint liability of both the accused in the complaint, was shown to be so improper and unworthy of any defence, and it was rightly and correctly turned down by the courts below, according to the counsel. There is also no merit that opportunity was denied to lead additional evidence by the appellate court especially in a case of this nature where the defence canvassed itself was shown to be devoid of any merit, submits the counsel. Conviction entered against the accused and also the sentence as modified by the learned Sessions Judge, both of them, do not suffer from any infirmity and there is no merit in the appeal, is the further submission of the counsel urging for dismissal of the revision.

4. The complainant's case was that a sum of Rs.1 lakh was initially provided to accused as a loan, and out of which Rs.25,000/- was given by cheque. On the request of the accused for financial assistance, later, the complainant availed loan from a bank for Rs.2 lakhs and that amount was also handed over to him. To discharge the outstanding liability on the loans availed, the accused issued Ext.P1 cheque for Rs.3 lakhs, was his case. In evidence, he also stated that to meet the financial needs of the accused, along with the accused, he had approached the Bank manager. Financial assistance from the bank to the accused was declined

since he was not an account holder and also not a person hailing within the local area covered by that bank. In such circumstances, the complainant applied for a loan availed Rs.2 lakhs and that amount was also paid to the accused, was his case. The case so canvassed by the complainant at least to the extent that he had approached the bank with the accused to avail a loan for him is supported by the evidence of the Bank manager, examined by the accused as one of his witnesses, DW1. Why the loan requested for by the accused could not be provided was also spoken to by the Bank manager. The loan was availed according to the complainant on a specific understanding that it would be discharged by the accused in 25 instalments without default. After making the first instalment, the loan repayment was defaulted by the accused, is the further case of the complainant. Ext.P1 cheque was issued by the accused voluntarily towards the sum covered by the loans obtained from him, and when the instalment payment defaulted, he was constrained to present the cheque, and on such presentation, it got dishonoured, according to the complainant. The accused had set up a rival version that he and the complainant were office bearers of an Association, and to discharge urgent financial commitments of that Association, a sum of Rs.1 lakh was obtained from DW3 issuing him a cheque of the Association. That cheque was got dishonoured on presentation. Complainant was in need of money to purchase the property. For that purpose and also to discharge the liability of DW3, which was outstanding against both of them, a sum of Rs.2 lakhs was taken as loan from the bank, and to honour the commitment to discharge his liability for clearing off the debt due to DW3, he had issued a blank signed cheque to the complainant. He also stood as a surety to the loan transaction. The above version of the accused was sought to be proved by examining DW3 apart from examining himself as DW2 in the case. Ext.D3 statement of account of DW3 showing that previously a cheque issued to him from the Association, in which the complainant and accused were office bearers, was dishonoured on presentation, has also been pressed into service to show that the version presented by him was probable and acceptable. The learned Magistrate, after appreciating the materials on record, found the case of the complainant, trustworthy, and the defence version projected by the accused, unworthy of any merit. The learned Sessions Judge, after reappraisal of the evidence, has concurred with the view so formed by the learned

Magistrate to sustain the finding of guilt against the accused for the offence imputed.

5. Is there any merit in the challenges canvassed by the accused to assail the concurrent finding as stated above arises for consideration in this revision. First of all, it has to be taken note that in exercise of supervisory jurisdiction, a finding of fact based on evidence tendered in the case is not liable to be disturbed unless it is shown to be perverse or that it could not have been legitimately formed on the materials on record or it is patently erroneous and unsustainable under law. The accused had set up a defence version and attempted to lead evidence in support thereof is not a ground enabling him to impeach the finding of fact entered adversely against him discarding his defence, unless he is capable of showing that the finding so entered is perverse. The onus to prove his case is on the complainant, and to challenge his case, the accused need only show the probability of his defence, that alone, is not sufficient to invoke the revisional jurisdiction to disturb the concurrent finding on a disputed question by the two inferior courts. What is evidence from the judgments of the courts below and also the submissions made by the counsel on both sides that the finding of guilt as against the accused has been rendered concurrently by the courts below after meticulous analysis of the rival versions presented by the parties, scrutinizing the materials produced in the case. Whatever be the defence set up in trial to resist the prosecution of the accused, it is seen, after acknowledging the statutory notice issued informing him of the dishonour of Ext.P1 cheque demanding the sum covered thereunder, he did not even respond by a reply, if not with payment. The issue of a notice on dishonour of the cheque to the drawer is not an empty formality, but, a statutory requirement to be complied with within the time limit from the date of intimation of dishonour, by payee or holder in due course, to enable him to file a complaint against the drawer under Section 138 of the N.I. Act. No tenable explanation was offered by the accused why no reply was sent to the notice if at all he has a case that he had no personal liability to be discharged to the complainant otherwise as an officer bearer of the association, and, that too, for a lesser sum than what is stated in Ext.P1 cheque. The defence projected was belatedly taken during the trial without any merit whatsoever, to wriggle out of the penal consequences arising from the dishonour of the cheque. Though the

accused had got a case that the cheque was issued in blank form with signature alone, he did not make any attempt to prove that the other entries in the instrument were written by a different hand. The denial of execution and transaction canvassed by him belatedly in trial, necessarily, has to be appreciated in the totality of the facts and circumstances presented in the case. The proposition laid down in the decisions relied by the counsel that where execution is denied it has to be proved to sustain the prosecution of the drawer of a dishonoured cheque, for the offence under Section 138 of the N.I. Act is well settled. But, what is the rigour of proof that is required to prove the execution even where there is denial by the maker depends upon the facts and circumstance involved in the case. There is no room for doubt that the evidence of the complainant where it is found to be credible and trustworthy is sufficient to conclude that the cheque was duly executed by the maker towards discharge of a debt or liability towards him. Whether corroboration to his evidence on that disputed question is required or not has to be looked into with reference to the facts proved and not solely on the basis that a defence raised challenging the execution. Corroboration after all is a rule of prudence and not one of law. Both the courts below have found that the defence canvassed by the accused denying the execution of the cheque setting up a rival version was totally devoid of any merit. He has challenged the execution, examined some witnesses and also moved some applications before the appellate court, do not substantiate the defence canvassed for. The falsity and improbability of his defence has, in fact, been brought out from the evidence of DW1, the manager of the bank, who has stated that initially the loan, through the complainant, was requested for to meet his needs and not that of any Association. No animus or illwill of DW1 towards the accused is shown, nor has he got any such suggestion. In the loan transaction availed by the complainant from the bank of DW1, the accused stood as a surety, and he had tendered his life insurance policies also to guarantee the repayment adds credence to the version of the complainant that the loan was availed in his name to meet the financial needs of the accused, when such a loan from the bank could not be extended directly to the accused. The evidence let in by DW3, which had been appreciated meticulously by the learned Sessions Judge, to substantiate the defence pleaded by the accused, was found totally unbelievable, and in fact,

the learned Sessions judge has observed that he is a 'hired witness'. No infirmity over the appreciation of the evidence of DW3 to form a conclusion as above by the learned Sessions Judge has been pointed out before me. When such be the case, the denial of opportunity to the accused to prove the document produced (Ex.D3) and also for examination of the manager of the bank, filing application before the appellate court, which has been canvassed in the revision to assail his conviction, has to be taken note of only for its rejection. Where the evidence of DW3 itself is shown to be unworthy of any merit the other materials tendered by the accused to show of the alleged transaction which the complainant and accused together had with DW3, have no value at all. The decisions relied by the counsel have no application to the facts of the case where negating the denial of execution of the cheque by the accused, on the proved facts involved, both courts have concurrently accepted the case of the complainant to sustain the prosecution of the accused, to enter a finding of guilt against him. Raising a plea of denial of execution setting up a rival defence version, is not sufficient to seek the aid of the aforesaid decisions, especially where the case of the complainant, as proved by the materials tendered, show that the plea of denial raised by the accused is false. Conviction entered against the accused, I find, is fully supported by unimpeachable legal evidence, and the challenges raised are meritless. Sentence, as modified by the learned Sessions Judge in appeal also does not warrant any interference.

6. The learned counsel for the petitioner/accused, in the alternative, has requested for grant of time to pay the find awarded to avoid the default term of imprisonment. Taking note of the facts and circumstances presented and also the submissions made by the counsel, I find time as indicated hereunder can be provided for payment.

7. Affirming the conviction and sentence, the accused is directed to appear before the judicial First Class Magistrate Court - III, Kochi on 21.11.2011 to serve out the substantive term of imprisonment for a day, till the rising of the court and to report the payment of the find. Till the date fixed as above, the learned Magistrate is directed to keep in abeyance the execution of his sentence. In default of his appearance and non-payment of the compensation, the learned Magistrate shall

execute the sentence taking appropriate steps in accordance with law.

Revision is dismissed with the above directions.

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