

Dhanesh.K Vs K.Suresh Babu

Court: High Court Of Kerala

Date of Decision: Aug. 2, 2023

Acts Referred: Code of Criminal Procedure, 1973 " Section 313(1)(b), 397, 401
Negotiable Instruments Act, 1881 " Section 20, 87, 118, 138, 139

Hon'ble Judges: A. Badharudeen, J

Bench: Single Bench

Advocate: P.U.Shailajan, Nidheesh T.P, Midhun Sudarsanan P., M P Prasanth

Final Decision: Dismissed

Judgement

A. Badharudeen, J

1. This Revision Petition has been filed under Sections 397 and 401 of the Code of Criminal Procedure. The revision petitioner is the sole accused in

S.T.C.No.626/2015 on the files of the Judicial First Class Magistrate, Thalassery. The revision petitioner impugns judgment dated 28.02.2018 in the

above case, whereby the revision petitioner was found guilty for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881

(hereinafter referred to as the 'N.I Act' for easy reference) and sentenced to undergo simple imprisonment for a period of 3 months and to pay fine of

Rs.10,65,000/-. In default of payment of fine, to undergo simple imprisonment for a period of 3 months also was imposed. Challenging the above

verdicts, the revision petitioner filed Crl.Appeal No.57/2018 before the Additional Sessions Court-IV, Thalassery. The Additional Sessions Judge,

Thalassery heard the Crl.Appeal on merits and confirmed the conviction, while modifying the sentence. Accordingly, the appellate court sentenced the

revision petitioner to undergo simple imprisonment till rising of court and to pay fine of Rs.10,65,000/- and in default of payment of fine, the accused

was directed to undergo simple imprisonment for 3 months.

2. Heard the learned counsel for the revision petitioner on admission and the learned Public Prosecutor appearing for the 2nd respondent. Notice to the

1st respondent stands dispensed with.

3. I shall refer the parties in this Revision Petition as 'complainant' and 'accused' for convenience.

4. The prosecution case is that the accused, who is familiar to the complainant borrowed Rs.9 lakh from the complainant on 18.06.2014 and in

repayment of the said sum, he had issued cheque dated 22.12.2014 for the said sum, drawn from North Malabar Gramin Bank, Kannur. When the

cheque was presented for collection, the same got dishonoured for the reason 'insufficient fund'. Accordingly legal notice demanding the amount

was issued. Even after acceptance of notice, no amount was repaid. Accordingly, the complainant launched prosecution alleging commission of

offence punishable under Section 138 of the N.I Act.

5. The trial court tried the matter. During trial, PW1 examined and Exts.P1 to P12 were marked on the side of the complainant.

6. Even though opportunity was given to the accused to adduce evidence after his questioning under Section 313(1)(b) of Cr.P.C, no defence evidence

adduced.

7. After hearing both sides and on appreciation of the evidence available, the trial court convicted and sentenced the accused. In Crl.Appeal

No.57/2018, the learned Additional Sessions Judge confirmed the sentence while modifying the sentence as indicated above.

8. Being aggrieved by the concurrent verdicts, this revision petition has been filed. The main challenge raised in this revision petition is that in the

complaint the transaction and nature of transaction were not stated and the same were not stated in the notice and in the chief affidavit filed by the

complainant also. Therefore, the complaint did not contain necessary details. In fact, this contention was raised before the trial court relying on the

decision of this Court reported in [2016 (4) KHC 901 : 2016 (4) KLT 233], Diwakaran v. State of Kerala.

9. In fact, the decision reported in Diwakaran v. State of Kerala (supra) was overruled by decision of a Division Bench of this Court reported in

[2021 (2) KLT 567], Basheer v. Usman Koya. Therefore, the ratio laid down in Diwakaran v. State of Kerala's case (supra) is no more available.

Another challenge raised is that the complainant did not disclose the source of income to advance the amount. It is interesting to note that this

contention also was raised before the trial court and the trial court found that the complainant produced Exts.P6 to P12 to prove the source of income

and, therefore, the contention raised by the accused on the ground that the complainant had no source of income to advance the cheque amount was

found against. Para.3.2 of the judgment of the trial court is relevant in this context and the same is extracted hereunder:

3.2. To prove sources of income of PW1, he produced exhibits P6 to P12. PW1 had taken part in the Gulf War (Iraq War). Exhibits P7, a letter addressed to Union

Bank and exhibit P8, a letter of External Affairs Ministry (Special Kuwait Cell) show that PW1 got compensation paid to him via his bank accounts. \$ 4900 (U S

Dollar) came to his account in Union Bank, Thalassery Branch and \$ 8500 U S dollar) came to his account in Syndicate Bank, Thalassery Branch. Exhibit P6, P9

and P10 are respectively the pass books of his bank accounts in Corporation Bank, SBI and Union Bank; all of Thalassery Branch. He has accounts in Syndicate

bank, Axis Bank, Union Bank, SBI, Vijaya Bank, Corporation Bank, etc. He had assigned his 56 cents of properties as per exhibits P11 and P12. He assigned them

for Rs.5,00,000/- (five lakhs). He owns a building wherein his wife runs a Beauty Parlour and business in garments. He had availed gold loans and used to get

interest from his deposits in the bank.

10. The courts below found that the evidence adduced by PW1 supported by Exts.P1 to P12 are sufficient to discharge the initial burden cast upon the

complainant in the matter of transaction led to execution of the cheque and therefore the complainant could avail presumptions under Sections 118 and

139 of the N.I Act.

11. No doubt, law regarding presumption is well settled.

12. In this connection, I would like to refer a 3 Bench decision of the Apex Court in [2010 (2) KLT 682 (SC)], R angappa v. Mohan. In the above

decision, the Apex Court considered the presumption available to a complainant in a prosecution under Section 138 of the N.I Act and held as under:

“The presumption mandated by S.139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned

observations in Krishna Janardhan Bhat [2008 (1) KLT 425 (SC)] may not be correct. This is of course in the nature of a rebuttable presumption and it is open to

the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an

initial presumption which favours the complainant. S.139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative

objective of improving the credibility of negotiable instruments. While S.138 of the Act specified a strong criminal remedy in relation to the dishonour of cheques,

the rebuttable presumption under S.139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made

punishable by S.138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is

usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and

interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling

justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an

accused has to rebut the presumption under S.139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able

to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. Accused can rely on the

materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of

his/her own.

13. In the decision reported in [2019 (1) KLT 598 (SC) : 2019 (1) KHC 774 : (2019) 4 SCC 197 : 2019 (1) KLD 420 : 2019 (2) KLJ 205 : AIR 2019

SC 2446 : 2019 CriLJ 3227], B. Ir Singh v. Mukesh Kumar, the Apex Court while dealing with a case where the accused has a contention that the

cheque issued was a blank cheque, it was held as under:

"A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person

who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for

payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly

signed by the drawer. If the cheque is otherwise valid, the penal provisions of S.138 would be attracted. If a signed blank cheque is voluntarily presented to a

payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on

the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

14. In a latest 3 Bench decision of the Apex Court reported in [2021 (2) KHC 517 : 2021 KHC OnLine 6063 : 2021 (1) KLD 527 : 2021 (2) SCALE

434 : ILR 2021 (1) Ker. 855 : 2021 (5) SCC 283 : 2021 (1) KLT OnLine 1132], K. Alamani Tex (M/s.) & anr. v. P. Balasubramanian the Apex Court

considered the amplitude of presumptions under Sections 118 and 139 of the N.I Act it was held as under:

"Adverting to the case in hand, we find on a plain reading of its judgment that the Trial Court completely overlooked the provisions and failed to appreciate

the statutory presumption drawn under S.118 and S.139 of NIA. The Statute mandates that once the signature(s) of an accused on the cheque/negotiable

instrument are established, then these 'reverse onus' clauses become operative. In such a situation, the obligation shifts upon the accused to discharge the

presumption imposed upon him. Once the 2nd Appellant had admitted his signatures on the cheque and the Deed, the Trial Court ought to have presumed that the

cheque was issued as consideration for a legally enforceable debt. The Trial Court fell in error when it called upon the Complainant-Respondent to explain the

circumstances under which the appellants were liable to pay.

.....

18. Even if we take the arguments raised by the appellants at face value that only a blank cheque and signed blank stamp papers were given to the respondent,

yet the statutory presumption cannot be obliterated. It is useful to cite *Bir Singh v. Mukesh Kumar* (2019 (1) KHC 774 : (2019) 4 SCC 197 : 2019 (1) KLD 420 :

2019 (1) KLT 598 : 2019 (2) KLJ 205 : AIR 2019 SC 2446 : 2019 CriLJ 3227], P.36., where this Court held that:

“Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under S.139 of the

Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.”

15. Thus the law is clear on the point that when the complainant discharged the initial burden to prove the transaction led to execution of the cheque,

the presumptions under Sections 118 and 139 of the N.I Act would come into play. No doubt, these presumptions are rebuttable and it is the duty of

the accused to rebut the presumptions and the standard of proof of rebuttal is nothing but preponderance of probabilities.

16. It has been settled in law that the accused can either adduce independent evidence or rely on the evidence tendered by the complainant to rebut

the presumptions.

17. In fact, nothing substantiated, by the learned counsel for the accused/revision petitioner that the concurrent verdicts as well as the

modified sentence imposed by the Sessions Court require interference in any manner. This Court while sitting in revision cannot re-appreciate the

evidence to have a contra finding as the power of revision available to this Court is very limited.

18. In this context, I am inclined to refer the power of revision available to this Court under Section 401 of Cr.P.C r/w Section 397, which is not wide

and exhaustive to re-appreciate the evidence to have a contra finding. In the decision reported in [(1999) 2 SCC 452 : 1999 SCC (Cri) 275]S, *tate of*

Kerala v. Puttumanal Illath Jathavedan Namboodiri, the Apex Court, while considering the scope of the revisional jurisdiction of the High Court,

laid down the following principles (SCC pp. 454-55, para 5):

“5. In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the

correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court

for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second

appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the

same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the

notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinising the impugned judgment of the High Court from the

aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the

respondent by reappreciating the oral evidence. ...

19. In another decision reported in [(2015) 3 SCC 123 : (2015) 2 SCC (Cri) 19]S, anjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke, the

Apex Court held that the High Court in exercise of revisional jurisdiction shall not interfere with the order of the Magistrate unless it is perverse or

wholly unreasonable or there is non-consideration of any relevant material, the order cannot be set aside merely on the ground that another view is

possible. Following has been laid down in para.14 (SCC p.135) :

“14. ... Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any

relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is

possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to

do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under Sections 397 to 401 Cr.P.C is not to be equated

with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous

or glaring unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised

arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction.

17. The said ratio has been followed in a latest decision of the Supreme Court reported in [(2018) 8 SCC 165], Kishan Rao v. Shankargouda. Thus

the law is clear on the point that the whole purpose of the revisional jurisdiction is to preserve power in the court to do justice in accordance with the

principles of criminal jurisprudence and, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own

conclusion on the same when the evidence had already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring

feature is brought to the notice of the court which would otherwise tantamount to gross miscarriage of justice. To put it otherwise, if there is non-

consideration of any relevant materials or fundamental violation of the principle of law, then only the power of revision would be made available.

20. On perusal of the available materials conviction as well as the modified sentence under challenge in this revision do not require interference of this

Court. Hence this revision must fail.

21. Accordingly, the Revision Petition is dismissed.Ã, Since the cheque in this matter is of the year 2014, three months' time is granted to the revision

petitioner to pay the fine and to undergo the sentence imposed by the appellate court. Therefore, the execution of sentence shall stand deferred till

31.10.2023. The revision petitioner shall appear before the trial court on 01.11.2023 to pay the fine or to undergo the default sentence.

22. If the revision petitioner/accused fails to appear before the trial court, the trial court is directed to execute the sentence without fail.

The Registry is directed to forward a copy of this order to the courts concerned for information and compliance.