(2008) 10 KL CK 0038

High Court Of Kerala

Case No: Criminal Appeal No. 1432 of 2003-C

Joseph Sartho	APPELLANT
Vs	
G. Gopinathan and Another	RESPONDENT

Date of Decision: Oct. 29, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 255(1), 313
- Negotiable Instruments Act, 1881 (NI) - Section 138, 14, 15, 5, 56

Citation: (2009) 1 CivCC 443 : (2008) 4 ILR (Ker) 431 : (2008) 3 KLJ 784 : (2009) 1 RCR(Civil) 608 : (2009) 1 RCR(Criminal) 625

Hon'ble Judges: M.C. Hari Rani, J; K. Balakrishnan Nair, J

Bench: Division Bench

Advocate: Sabu George, for the Appellant; C.K. Sajeev and P. Ravindra Babu, PP, for the Respondent

Final Decision: Dismissed

Judgement

K. Balakrishnan Nair, J.
This is an appeal against acquittal of the 1st respondent/accused, filed by the complainant, after obtaining leave of this Court.

2. The brief facts of the case are the following. The appellant is the complainant in S.T. No. 73/2000, on the files of the Chief Judicial Magistrate''s Court, Alappuzha. The complaint was one u/s 138 of the Negotiable Instruments Act (hereinafter referred to as "the Act"). The 1st respondent issued cheque No. 454255 of Lord Krishna Bank, Alappuzha branch dated 4.6.1999 for an amount of Rs. 4,61,400/- to the appellant to discharge in full a debt due to him. On 9.6.1999, the 1st respondent paid an amount of Rs. 2,26,400/-, as part payment towards the amount due under the aforementioned cheque. The balance amount due to the appellant complainant was only Rs. 2,35,000/-. Since the said balance amount was not paid, the appellant presented the cheque through the Central Bank of India, Kottayam on 30.11.1999

for collection. But, the cheque was returned dishonoured for insufficiency of funds in the account of the accused with the Lord Krishna Bank, Alappuzha branch. The appellant caused to issue a lawyer notice on 7.12.1999 to the 1st respondent accused, informing him of the dishonour of the cheque and also demanding payment of the balance amount due to him. The notice was returned unclaimed So, the appellant preferred a complaint before the Chief Judicial Magistrate''s Court u/s 138 of the Act.

3. On summons, the accused appeared and pleaded not guilty, when the particulars of the offence alleged against him were read over to him. So, from the side of the complainant, he and another were examined as P.Ws. 1 and 2 and Exts.P1 to P9 were marked. The accused was questioned u/s 313 Cr.P.C. He denied the circumstances against him, which Section 313 Cr.P.C. He denied the circumstances against him, which appeared in the evidence of the complainant and which were put to him. No witness was examined from his side. During the cross-examination of PW1, suggestions were made to the effect that what was issued was only a blank cheque, it was issued for an amount of Rs. 2,26,400/- and the same was paid also.

4. The trial court, after considering the evidence on record, found that the accused issued a cheque dated 4.6.1999 to the complainant for an amount of Rs. 2,26,400''-. Thereafter, the cheque was presented, claiming the full amount. On dishonour, the complainant caused to issue a lawyer notice, Ext.P3 dated 7.12.1999, claiming the balance amount due under the cheque, giving credit for the repaid amount of Rs. 2,26,400/-. The accused did not accept the notice. It was returned unclaimed. He has chosen not to pay the balance amount due under the cheque, pursuant to the said notice. The trial court took the view that since the cheque presented was not for the amount due from the accused, no offence was made out u/s 138 of the Act. Therefore, the accused was acquitted u/s 255(1) of the Cr.P.C. Hence this appeal.

5. At the time of final hearing of the appeal before the learned Single Judge, the learned Counsel for the appellant for the appellant relied on the decision of a learned Single Judge of this Court in R. Gopikuttan Pillai v. Sankara Narayanan Nair Crl.A. No. 270/1997 dated 19.3.2003. That was a case where part payment was made towards the amount due under the cheque. When the cheque was dishonoured, it was held that the offence u/s 138 of the Act was made out. On the other hand, the defence relied on the decision of this Court in Supply House Vs. Ullas and Another, , in which another learned Single Judge of this Court took a contrary view, where the amount represented by the cheque was larger than the amount due from the drawer. In view of the apparent conflict between the two decisions, the learned Single Judge, who heard the matter, referred it for decision by the Division Bench.

6. We heard the learned Counsel on both sides. In this case, the facts of the case were not disputed before us by both sides. So, we may state that it is common case that a cheque dated 4.6.1999 was issued by the accused to the complainant in discharge of a debt. Thereafter, the complainant received an amount of Rs.

2,26,400/- on 9.6.1999 towards the debt. The complainant did not make any indorsement regarding receipt of the said amount on the cheque, but, later, presented the cheque for collection, claiming the entire amount shown in it. When the cheque was dishonoured, a lawyer notice was caused to be sent to the accused only for the balance amount. The accused failed to repay the amount demanded. The point that arises for decision is whether on the facts, the accused has committed the offence u/s 138 of the Act.

7. The learned Counsel for the appellant Sri. Sabu George relied on the decisions of this Court in R. Gopikuttan Pillai v. Sankara Narayanan Nair Crl. A.270/1997 and M/s. Thekkan and Company Vs. M. Anitha, . The learned Counsel further submitted that upon receipt of notice, the accused should have paid the balance amount due under the cheque to escape from the offence u/s 138 of the Act. If the contention of the 1st respondent is accepted, any drawer of the cheque can pay some amount to the drawee and escape from the liability u/s 138. The purpose of the amcndment introduced to the Negotiable Instruments, in making the dishonour of a cheque an offence in certain circumstances, is to maintain transparency in commercial transactions and also to sustain the credibility of transactions by cheques.

8. So, an interpretation which serves the purpose of the statute should be adopted. In support of that submission, the learned Counsel for the appellant relied on the decisions of the Apex Court in NEPC Micon Limited and Others Vs. Magma Leasing Limited, and M/s. Dalmia Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd., . On the other hand, the learned Counsel for the 1st respondent Sri. C.K. Sajeev submitted that Section 138 being a penal provision, the same should be interpreted strictly and if there is any doubt, it should go in favour of the accused. The learned Counsel relied on the decision of this Court in Supply House v. Ullas (supra). He also relied on the decision of the Apex Court in Rahul Builders Vs. Arihant Fertilizers and Chemical and Another, , wherein, at para 10, it was observed that penal provisions contained in Section 138 should be construed strictly. The learned Counsel also submitted that Section 138 is not a substitute for a suit for money. He brought to our notice Section 56 of the Act. Since the appellant did not make any indorsement of the amount received, on the cheque, it has lost its negotiability, it is submitted.

9. The learned Public Prosecutor Sri. P. Ravindra Babu supported the above submission of the learned Counsel for the 1st respondent, made relying on Section 56 of the Act. He submitted that in view of Section 56, the appellant could have claimed only the balance amount due under the cheque. Since he presented the cheque for collection of the entire amount, he offence u/s 138 is not made out, submitted the learned Public Prosecutor.

10. Before dealing with the rival contentions, we think, it will be fruitful to refer to some of the relevant provisions of the Negotiable Instruments Act. Section 6 of the Act defines cheque as follows:

A ''cheque'' is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand....

Bill of exchange is defined in Section 5 as follows:

A ''bill of exchange'' is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order, of a certain person or to the bearer of the instrument.

Section 14 defines negotiation in the following manner:

When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.

Section 15 defines indorsement as follows:

When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on-the back or face thereof or on a slip of paper annexed thereto, or to signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the ''indorser''.

(Emphasis supplied)

The above Section envisages any number of indorsement on the reverse of the cheque and if there is not sufficient space to make further indorsement, a slip of paper ban be annexed to it, to get over the said difficulty. Section 56 of the Act, which is very relevant in this case, reads as follows:

Indorsement for part of sum due: No writing on a negotiable instrument is valid for the purpose of negotiation is such writing purports to transfer only a part of the amount appearing to be due on the instrument; but where such amount has been partly paid a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance.

(Emphasis supplied)

In this case, admittedly, a portion of the amount covered by the cheque was repaid. The same was not indorsed by the drawee on the cheque. In view of the above position, the appellant could not have negotiated that cheque for the full amount. For the very same reason, he also could not have presented it for collection of the full amount. He was entitled to get only the balance amount. Therefore, he must have made an indorsement of the amount received and presented the cheque, to collect the balance amount due.

11. Section 138 of the Act is quoted below for convenient reference:

138. Dishonour of cheque for insufficiency, etc., of funds in the account: Where any cheque drawn by a person on an account of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account if insufficient to honour the cheque or that it exceeds the amount arranged made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both;

Provided that nothing contained in this Section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier,

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation: For the purposes of this section, ''debt or other liability'' means a legally enforceable debt or other liability.

(Emphasis supplied)

Going by the above provision, a cheque must be for payment of any amount of money to another person for discharging in whole or in part of any debt or other liability. In this case, once part payment was received, the cheque no longer was one for payment of money for discharging in whole or in part of any debt or other liability. In fact, the amount covered by the cheque was admittedly larger than the amount of debt or liability. The whole amount of debt or liability was lesser than the amount represented by the cheque. So, if the cheque for such as amount was dishonoured, the same will not be an offence u/s 138 of the Act. Normally, a penal law has to be interpreted strictly. If there is any vagueness in the law, the benefit of the same should go to the accused. The Apex Court in NEPC Nicon Ltd. v. Magma Leasing Ltd. (supra) and Dalmia Cement (Bharat) Ltd. v. Galaxy Traders and Agencies Ltd. (supra) has not stated anything against the above general principle. What was stated in the facts of those cases was that though Section 138 is a penal statute, the court should interpret it, taking into account the legislative intent and purpose, so as to suppress the mischief and advance the remedy. But, in Rahul Builders Vs. Arihant Fertilizers and Chemical and Another, , the Hon''ble Supreme Court re-stated the settled principle of penal law that a penal provision like Section 138 should be

interpreted strictly.

12. In this case, we fee that there is not much scope for interpreting the provisions in the statute. Going by the plain words of the Section, the cheque presented for encashment should be one for payment in full or part of the debt due. In this case, admittedly, the cheque was for an amount higher than the amount due on the date it was presented for encashment. The law contemplates making of an indorsement by the drawee on the back of the cheque regarding the part payment received. So, we are of the view that the 1st respondent cannot be found guilty of the offence u/s 138 of the Act, for not making arrangement to honour the cheque for an amount more than what is due from him. If he had made arrangement for honouring the cheque, he would have to go after the appellant to get back the substantial amount paid by him earlier. Therefore, we find it difficult to subscribe to the view that the accused has committed the offence, as he failed to pay the balance amount, on issuance of notice by the appellant.

13. The appellant point out that in the account of the 1st respondent, there was not sufficient amount to pay the balance amount due under the cheque. Further, he could have escaped from the liability by paying the balance amount, pursuant to the lawyer notice. We think, the liability to pay the amount on receipt of notice arises, if only the cheque was for an amount to discharge in whole or in part of the liability of the accused. In this case, the above essential ingredient of the offence is absent. But, the learned Counsel for the appellant relied on the observation of the learned Single Judge in para 17 of the judgment in R. Gopikuttan Pillai (Crl.Appeal No. 270/1997), which reads as follows:

17. I am conscious that in an appropriate case the question may arise for consideration whether dishonour of the cheque was on the ground of insufficiency of funds if the funds were sufficient to pay the outstanding liability but not the entire liability under the cheque. That question does not specifically arise for consideration in this case. According to me the dishonour of the cheque, even in such a case where the amount available in the account is sufficient to cover the outstanding liability but not sufficient to cover the entire amount liable to be paid under the cheque, would be for want of sufficient funds. As the drawer can, as indicated earlier, avoid culpable liability by proving discharge under proviso (c) of the entire amount (including the payments made prior to the dishonour of the cheque), this interpretation is not likely to result in any failure/miscarriage of justice. If the honouring of the cheque for the entire amount by the bank were to result in any excess payments being made, civil remedy to claim return of the amount would be available to the drawer. If the purpose of Section 138 of the Negotiable Instruments Act is to ensure that the cheque transaction has as much credibility as a cash transaction, the interpretation that partial discharge of liability under the cheque prior to presentation of the cheque for encashment would extinguish the remedy u/s 138 of the Negotiable Instruments Act for a payee must certainly be

avoided. Such a myopic interpretation would not advance the purpose and object of this legislation which attempts to usher in a new commercial morality essential for the health and growth of the economy.

(Emphasis supplied)

We think that for effectuating the purpose of the Act, the words of the statute cannot be stretched, to make a conduct an offence, when the essential ingredient of the offence that the cheque should represent the amount due to the payee or part of it, on the date of presentation of it for collection/encashment is absent. It is one of the fundamental principles of law that penal law should not be vague. The injunctions of a penal law must be clear and specific. In this context, it is apposite to quote the words of Douglas, J. in Krishian v. Board of Regents (1967) 385 U.S. 589, which read as follows:

...a law fails to meet the requirements of the Due Process Clause if it is so vague and standard less that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.... Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government to impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.

The same view has been expressed by our Apex Court in Kartar Singh v. State of Punjab . The relevant portion of the judgment reads as follows:

130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic pot icy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to steer far wider of the unlawful zone...than if the boundaries of the forbidden areas were clearly marked.

14. In R. Gopikuttan Pillai''s case (supra), we notice that by interpreting Section 138, it has been made vague. Its injunctions were made wider. Based on that interpretation, the commissions/omissions of the accused have been made the basis of an offence. In view of Section 56, the appellant could have claimed only the balance amount. Towards the amount due under a cheque, if some amount is received, the same has to be indorsed on the reverse of the cheque. The law of banking contemplates several such indorsements and if there is no space for

making any indorsement on the reverse of the cheque, it may be made on a slip of paper annexed thereto, which is called allonge in banking circles. In Bhashyam & Adiga''s Negotiable Instruments Act (18th Edition revised by Justice Ranganath Misra) allonge is described as follows:

Allonge - The signature to operate as a negotiation must be written on the instrument itself, for, an assignment in writing not on the instrument itself is not an indorsement. But it may sometimes happen that by rapid circulation, the back of the paper is completely covered by indorsements, then the holder may tack on to or paste a piece of paper and the indorsements may be made thereon, it then becomes part of the bill. Such addition is called an allonge which is thus described by Couch, C.J., ''an allonge is a slip of paper annexed to a bill upon which, there being no legal limit to the number of indorsements, When there is no room to write them all distinctly on the back of the bill, the supernumerary indorsements may be written. It is annexed by the holder in order that he may write the indorsement and they do not require fresh stamps.'' Allonges are found in countries where the Geneva Convention No. 3313 of 7th June, 1930 has been adopted.

In India, attachment of a slip of paper to the cheque is statutorily recognized in Section 15 of the Act.

15. The attempt of the appellant to encash the cheque without indorsing the amount already received is perilously bordering dishonesty. It appears, the appellant thinks, if some indorsement is made on the reverse of the cheque, it may become invalid. Under this mis-apprehension, the appellant has contended that the drawer of the cheque, by making some payment to the drawee, can make the cheque invalid. With great respect, we may point out that the learned Judge also fell into the very same error in R. Gopikuttan Pillai (supra), while dealing with the contention that part payment will bar the remedy u/s 138. So, the action of the appellant in this case, of presenting the cheque claiming the entire amount, is plainly illegal and the same cannot be the spring board for an action against the 1st respondent/accused u/s 138 of the Act.

16. We are not referring in detail the other decision cited, as they are not strictly relevant on the facts of this case. As mentioned earlier, we have no doubt in our mind that for the bouncing of a cheque, which did not represent the amount or part of the amount due to the appellant, the accused cannot be made liable. The reasons given by the learned Judge for taking the contrary view in "R. Gopikuttan Pillai" and the apprehensions voiced by the learned Counsel for the appellant concerning part payment, cannot be accepted, in view of the provisions contained in Section 56 read with Section 15 of the Act. If the drawee made indorsement regarding the part payment on the cheque and claimed only the balance amount and if it bounced, the offence u/s 138 would have been made out and the 1st respondent accused would have been liable for punishment. In the absence of any vagueness in the provision, we find it difficult to accept any other view. In the result, we overrule the decisions in

R. Gopikuttan Pillai v. Sankara Narayanan Nair Crl.A. No. 270/1997 and M/s. Thekkan and Company Vs. M. Anitha, . We find nothing wrong with the judgment of the trial court acquitting the 1st respondent. Accordingly, the Criminal Appeal is dismissed. No costs.