(1993) 12 KL CK 0026

High Court Of Kerala

Case No: Criminal R.P. No. 754 of 1992 and Cri. Appeal No. 59 of 1993

Pradeep Chandran		APPELLANT
	Vs	
Nimmi Velappan and Another		RESPONDENT

Date of Decision: Dec. 13, 1993

Acts Referred:

- Contract Act, 1872 - Section 38
- Negotiable Instruments Act, 1881 (NI) - Section 138, 139

Citation: (1994) 1 ALT(Cri) 255 : (1994) 1 CivCC 426 : (1994) CriLJ 2768 : (1994) 3 RCR(Criminal) 555 : (1994) 1 RCR(Criminal) 447

Hon'ble Judges: K.T. Thomas, J

Bench: Single Bench

Advocate: E.V. Nayanar, J.M.H. John David, C.P. Kunhikannan and P. Sukumaran Nair, for the Appellant; Thottathil B. Radhakrishnan and Chellath Franklin, Public Posecutor, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K.T. Thomas, J.
This is a case in which a young lady (Nimmi) has been prosecuted by her husband''s brother (Pradeep). The parties are first cousins also. Nimmi is arraigned as accused and her brother-in-law Pradeep figures as the complainant in the case. If the prosecution version is true, Nimmi cannot escape conviction u/s 138 of the Negotiable Instruments Act (for short ''the Act'')- But if the defence version is true, the complainant is reminiscent of the money lender immortalised by William Shakespere in his drama "Merchant of Venice". The complaint against the accused is that she gave a post dated cheque for Rupees forty thousand which was presented on the due date but was returned dishonoured.

2. Learned Magistrate convicted the accused and sentenced her to pay a fine of Rupees five thousand. She filed an appeal before the Sessions Court. But complainant has come in revision in this court aggrieved by the inadequacy of the sentence imposed on the accused. Hence the appeal filed by the accused has since been withdrawn to this court to be heard along with the revision. Both are being disposed of together by this judgment.

3. The defence version, which seems to be peculiar to this case, is briefly stated below: Complainant requested the accused to give him a bit of land of the accused situate at the rear side of the hotel building in which she conducts her business called "Lobster House". But he expressed her inability to oblige her brother-in-law and then on he was planning to settle score with her. He managed to snatch a blank cheque leaf from the signed cheque leaves entrusted to her husband for the expedient conduct of her business. Complainant filled up the cheque leaf and presented it without her knowledge. She knew about it only when she received notice. Though she made a bid to square up with him she failed to achieve it and she realised that complainant would not yield to anything short of capitulation to his demand. Then she sent the entire amount covered by the cheque to the complainant, through an emissary, but the complainant refused to receive the amount and filed the complaint.

4. Learned Magistrate found her guilty of the offence, but he imposed only a. sentence of fine on her as the learned Magistrate took into account the conduct of the complainant in not accepting the amount offered in open court twice.

5. Though the accused succeeded in showing that the cheque leaf could have been torn out from a cheque book used by her during January, 1990, she did not succeed in rebutting the presumption u/s 139 of the Act that the cheque was issued towards discharge of a legally enforceable debt or liability.

6. Shri. Thottathil B. Radhakrishnan, learned counsel for the accused advanced mainly two contentions. First is that the complainant has no case that the cheque was dishonoured due to want of amount in the account or that the cheque amount exceeded the amount arranged with the bank. Second is that since the accused tendered the amount covered by the cheque after receiving the notice she must be deemed to have made payment of the amount. If either of the contentions gains approval, accused is not liable to be convicted u/s 138 of the Act, according to the learned counsel.

7. Regarding the first contention, all that the complainant has averred in the complaint is that the cheque was dishonoured on the ground "refer to the drawer". Complainant did not state in the complaint that dishonour of the cheque was either due to insufficiency of amount in the account or due to want of arrangement with the bank. Nor did the complainant give any evidence on that aspect. The expression "refer to drawer" used by banks while returning cheques unpaid need not

necessarily be a communication to the effect that the cheque is bounced due to insufficiency of amount in the account. A Division Bench of this court has held in Thomas Varghese Vs. P. Jerome, that "the offence under the Section cannot depend on the endorsement made by the banker while returning the cheque.... The endorsement made by the banker while returning the cheque cannot be the decisive factor". Complainant did not adduce even formal evidence to show that the cheque was returned dishonoured due to insufficiency of amount in the account.

8. Learned counsel for the complainant tried to meet the said contention by pointing out that in the notice sent by the complainant it was stated that the cheque was given "without fund". He argued that the said statement in the notice may be taken as sufficient evidence to prove that the cheque was returned due to insufficiency of amount in the account. I am not impressed by the contention since even according to the complainant the cheque dated 4-2-1991 was given on 7-11-1990. On the date when the cheque was issued, there need not be sufficient amount in the account. The crucial date for the offence u/s 138 of the Act is the date of presentation of the cheque for encashment. It is enough that money reaches the account just before the presentation. So, the mere fact that the account was short of the amount when the cheque was drawn, is of no consequence for the drawer as for his liability u/s 139 of the Act.

9. The second contention advanced by the learned counsel was sought to be expatiated on the premise that the accused had performed her part in making the payment and therefore, the payee cannot concoct an offence by repudiating the tender. One of the postulates for constituting the offence u/s 138 of the Act is contained in clause (c) of the proviso to the Section, which reads thus:

provided that nothing contained in this section shall apply unless:-

(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 15 days of the receipt of the said notice.

10. Evidence in this case shows that though the accused disclaimed liability to pay the cheque amount, she still made an offer to pay the amount in order to avert a criminal prosecution against her, but the complainant did not accept it. In support of the said defence version, DW 2, was examined who said that he met the complainant with the entire amount on behalf of the accused after receiving the notice and offered to make the payment "to avert Nimmi being arraigned in a criminal court." Cross-examination was too meagre on that aspect and thus, for all practical purposes, the evidence of DW 2 remains unshaken.

11. There are two other circumstaces to believe the aforesaid defence version. Learned Magistrate has noted in the judgment that on 22-8-991 defence counsel tendered the entire amount with interest in open court, but complainant did not accept the amount saying that he did not want the money but only the judgment.

Again on another occasion (30-10-1991) accused repeated the offer and complainant declined to accept it. Learned Magistrate has noted it in the proceedings paper. From the above circumstances, I am inclined to believe the version of the accused that after receiving the notice the amount was tendered but the complainant refused to accept it.

12. Under law when a person has tendered the amount payable by him he must be deemed to have discharged his obligation and the creditor is bound to accept the tender. In the book "The Law of Tender" by G.L.B. Harris the author has remarked that "Tender is one of those radiant gems of elemental justice which gleams with augmented lustre in the polished jural systems". As between debtor and creditor it was recognised rule in equity that if the creditor refused to accept the tender of the debt, the debtor was not liable to suffer any consequence for non-performance of his part. The said principle in equity has been woven into the statutory law as could be seen from Section 38 of the Contract Act.

13. In Dasharathi Ghosh Vs. Khondkar Abdul Hannan, it has been held that the effect of a valid tender is to stop the running of interest on the amount payable. "A valid tender on a contract of debt is as much a performance and discharge of a debtor''s duty as actual payment". A Division Bench of Allahabad High Court has held in Salik Ram Upadhia Vs. B. Jai Gopal Singh, that if the amount due is tendered either by the debtor or his agent, the creditor is bound to accept it and if he does not accept he is not entitled to claim interest after the date of such tender. Another division bench of Orissa High Court has held in Pyari Mohan Das Vs. Durga Sankar Das and Another, that a valid tender satisfies all the requirements of performance even in case of wrongful refusal to accept the tender.

14. In this case when the accused made tender of the amount after receiving notice, she cannot be visited with any consequence envisaged for non-payment of the amount.

15. For the aforesaid reasons accused cannot be held guilty of the offence. I, therefore, allow the appeal and set aside the conviction and sentence passed on the accused and acquit her. Crl. R.P. filed by the complainant is dismissed.