Rev.Mother Marykutty vs Reni C Kottaram & Anr on 12 October, 2012

Equivalent citations: AIRONLINE 2012 SC 331

Bench: Fakkir Mohamed Ibrahim Kalifulla, B.S. Chauhan

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1594 OF 2012

Rev. Mother Marykutty …Appellant

VERSUS

Reni C. Kottaram & another
…Respondents

J U D G M E N T

Fakkir Mohamed Ibrahim Kalifulla, J.

. The appellant/accused is aggrieved by the judgment dated 17.03.2010 passed in Criminal Appeal No.1707/2007 of the High Court of Kerala at Ernakulam. The respondent herein preferred a complaint against the appellant under Section 142 of the Negotiable Instruments Act (hereinafter called 'the Act') for an offence punishable under Section 138 of the Act. According to the complainant, the appellant/accused entrusted the work of construction of an Old Age Home and a Chapel at Punnaveli, Pathanamthitta District based on an agreement between the appellant and the respondent. According to the respondent, the appellant issued a post dated cheque for Rs.25 lakhs in favour of the respondent towards the outstanding amount due to him for the work done by him. The cheque was dated 21.03.2005. It was claimed that when the cheque was presented by the respondent with his bankers, the same was dishonoured due to insufficiency of funds in the account of the appellant. It was further claimed that though the respondent intimated about the dishonour of the cheque by a lawyer's notice dated 30.03.2005 served on the appellant on 31.03.2005, she came forward with a reply taking the stand that no amount was due and that the respondent stealthily removed two cheques from the custody of the appellant of which the present one was forged and presented for clearance. Before the trial Court the appellant pleaded not guilty. On behalf

of the respondent Exhibits P-1 to P-20 were marked and the respondent examined himself as P.W.1. On behalf of the appellant Exhibits D-1 to D-4 series were marked, in the course of cross-examination of P.W.1. No oral evidence was adduced on behalf of the appellant. When the incriminating circumstances were put against the appellant under Section 313 of Cr.P.C. she denied the same and filed a written statement.

. The trial Court on a detailed analysis of the evidence, placed before it, ultimately held that the appellant was able to rebut the presumption and that there was no circumstance warranting the execution of Exhibit P-1 cheque in favour of the respondent. So holding, the trial Court found the appellant not guilty of the offence under Section 138 of the Act and acquitted her under Section 255(1) of Cr.P.C. Aggrieved by the acquittal of the appellant, the respondent preferred an appeal before the High Court of Kerala at Ernakulam wherein the impugned judgment came to be rendered.

. The High Court while reversing the judgment of the trial Court found the appellant guilty of the offence and sentenced her to pay a fine of Rs.30 lakhs and in default to pay the fine amount directed her to undergo simple imprisonment for 1 ½ years. It was further directed that on realization of the fine amount, the same should be paid to the complainant under Section 357(1) of Cr.P.C. Appellant was also directed to appear before the trial Court on 17.07.2010 to make the payment of the fine amount. It was further directed that in default of appearance before the trial Court, the trial Court would be free to proceed against the appellant for taking coercive steps for executing the sentence.

. At the time when special leave petition was moved, based on the undertaking of the appellant, she was directed to deposit a sum of Rs.25 lakhs in the trial Court within two weeks. Subject to the said condition notice was issued and interim stay was also granted subject to fulfillment of the said condition. Subsequently, it was reported on 10.11.2010 that the amount directed to be deposited was also deposited.

. We have heard Mr. Basava Prabhu Patil, Senior Counsel for the appellant and Shri V. Giri, Senior Counsel for the respondent. We have also perused the material papers placed before us, the judgment of the trial Court as well as that of the High Court.

. Mr. Basava Prabhu Patil, Senior Counsel for the appellant in his submissions primarily contended that the appellant discharged her burden by rebutting the initial presumption contemplated under Section 118 read along with Section 139 of the Act and that having regard to the overwhelming preponderance of probabilities existing in favour of the appellant, the trial Court rightly concluded that the appellant was entitled for the acquittal. The learned Senior Counsel further contended that the overwhelming evidence available on record which was considered by the trial Court, though was referred to by the High Court in the impugned judgment has been completely omitted to be considered while reversing the order of acquittal of the trial Court. The learned Senior Counsel, therefore, contended that the impugned judgment of the High Court was liable to be set aside. Apart from the above submission, the learned Senior Counsel by referring to Sections 8, 9, 138, 139 and 142 of the Act sought to raise a contention based on the specific expression “Holder” and “Holder in due course” used in those provisions to contend that the respondent cannot be said to have fulfilled

the requirement of the said provisions in order to avail the benefits under the provisions of the Act. Learned Senior Counsel relied upon the decision of this Court, M.S. Narayana Menon alias Mani Vs. State of Kerala and another reported in (2006) 6 SCC 39, in support of his submissions.

. As against the above submissions Mr. V. Giri, Learned Senior Counsel for the respondent contended that the appellant was prevaricating in her stand as regards the issuance of the cheque, namely, the one in her reply to the lawyer's notice and the other before the Court, in her written statement. The learned Senior Counsel by referring to Annexure R-3 and R-4 contended that the contents of the said documents proved appellant's liability to the respondent and that the appellant miserably failed to rebut the initial presumption relating to the issuance of the cheque in favour of the respondent. As regards the submission based on Sections 8, 9, 138, 139 and 142 of the Act, made by the learned counsel for the appellant it was contended that the said contention has been raised for the first time in this Court and that in any event the status of the respondent as payee/holder of the cheque was duly proved.

. Having heard learned counsel for the respective parties and having bestowed our serious consideration to the contentions raised, at the very outset, we wish to state that while the trial Court made every effort to examine the claim of the respondent as regards the issuance of the cheque by the appellant in his favour and the stand of the appellant by referring to the respective documentary evidence as well as the version of P.W.1 before reaching the conclusion about the guilt of the appellant, we find that the High Court completely failed to consider and appreciate the documents marked on the side of the appellant. We find that though the High Court made a reference to those specific Exhibits, the attention to which was drawn by the learned counsel, namely, Exhibit D-3, Exhibits P-6 to P-8, Exhibits D- 4(A) to D-4(F) series vouchers as well as Exhibit D-4(J) voucher unhesitatingly stated that he did not propose to enter into any finding on merit as the same was unwarranted in the case on hand considering the nature of allegations and claim contained in the case. It also went on to state that in spite of those materials, in its conclusion, the appellant failed to produce whatever records available in her possession to show that no amount was due from her to the respondent. When we made a comparative consideration of the analysis made by the trial Court while holding that no offence was made out as against the appellant, as against the above reasoning of the learned Judge, in the order impugned in this appeal, we are convinced that the High Court has failed to discharge its onerous responsibility of considering the material evidence available on record which were brought to its notice and for the reasons best known, the High Court blatantly declined to examine those materials by simply stating that the same was not warranted.

. In order to appreciate the correctness of the impugned judgment of the High Court, as well as, that of the trial Court, it will be worthwhile to refer to certain conclusions drawn by the learned trial Judge by making specific reference to the various documentary evidence placed before it vis-à-vis the oral version of the complainant himself. The significant admission of the respondent as P.W.1 was noted by the trial Court as under:

> . The construction work entrusted with the respondent had to be completed for a total sum of Rs.78,70,678/- as stated in Exhibit D-

3.

. Respondent admitted that he had not completed the work and that he would have got payment only after the measurement of the quantity of the work done.

. All the amounts received from the accused were noted in Exhibit P-

9. . It was admitted that a sum of Rs.12,60,100/- mentioned in Exhibit D- 4 series voucher was not noted in Exhibit P-9.

. The amount received by him from the accused for conducting earth work was also not included in Exhibit P-9.

. The respondent received various amounts by cheques and cash. He, however, denied the suggestion that the accused gave two cheques to one Joychen Manthurthy by way of security on 23.10.2001 while borrowing Rs.5 lakhs from the said person.

. It was admitted by the respondent that flooring of the building was done by the appellant herself and the expenses were not included in the bill.

. The respondent admitted that he had received Rs.77,31,500/- as per Exhibit P-9 statement while the total amount of work as per Exhibit D-3 agreement was Rs.78,70,678/-.

. The respondent, however, denied the suggestion that excess payments were made by the appellant to him.

. Respondent also admitted that he did not complete the work and the flooring was ultimately done by the appellant herself. . It was not in dispute that the final payment was to be settled only after completion of the work and that the respondent did not complete the work.

. There was no evidence to conclude that any measurement of the work was done and the accounts were settled.

. As regards the variation in the stand of the appellant, namely, the one in the reply notice and the other in the written statement the same did not materially affect the stand of the appellant in the light of the overwhelming evidence in support of her stand. . The fact that the cheque was not in the handwriting of the appellant strengthens the defence version that it was not executed in favour of the respondent.

. There was no reliable documentary evidence adduced by the complainant to hold that a sum of Rs.25 lakhs was due to him warranting execution of Exhibit P-1 cheque.

. There was no amount legally due to the respondent to hold that Exhibit P-1 cheque was as a matter of fact issued by the appellant in favour of the respondent in order to hold that he was a holder of

the cheque.

. It was based on the above reasoning, the trial Court ultimately concluded that no offence was made out as against the appellant under Section 138 of the Act in order to convict her under Section 142 of the Act. While such an elaborate consideration was made by the trial Court for acquitting the appellant, it will be appropriate to refer to the nature of consideration made by the High Court which has been stated in paragraph 13 of the impugned judgment, which is to the following effect:

> "13. Another point vehemently raised by the counsel for the respondent/accused is that no amount is due from the accused to the complainant so as to issue Ext.P1 cheque. In order to substantiate the above submission, the learned counsel has taken me through the documents namely, Ext.D3, Exts.P6 to P8 final bills and Ext.D4(A) to D4(F) series vouchers and also Ext.D4(J) voucher. Regarding this submission, I am not proposed to enter into any finding on merit as the same is unwarranted in the present case considering the nature of allegations and claim contained in this case. But from the materials and evidence on record, it is crystal clear that the accused miserably failed to produce whatever records which she was in possession to show that no amount is due from the accused to the complainant. On the other hand, the attempt was to interpret and explain the documents produced by the complainant. Admittedly, no payment was made to the complainant otherwise than through the vouchers and cheques. If that be so, by producing those documents, the defence plea can be established. But there was no attempt in this regard. When the accused has admitted the transaction claimed by the complainant and the complainant has established his claim that there was outstanding amounts due from the accused to the complainant out of the contract work undertaken by him under Ext.D3 agreement, it is for the accused to establish that no amount is due to the complainant by producing cogent and concrete evidence if they are sticking on their stand.
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> (underlining is ours) . We can understand if the High Court had considered those Exhibits, the attention of which was drawn to it and stated as to how it was not in a position to agree with the conclusions drawn by the learned trial Judge. The above statement contained in paragraph 13 of the impugned judgment discloses that the attention of the High Court was drawn to the specific Exhibits which were relied upon by the appellant and referred to by the learned trial Judge to reach a conclusion about the guilt or otherwise of the appellant. After referring to those Exhibits, unfortunately, we find that in the very next sentence the High Court proceeded to state that the appellant failed to produce any material which was in her possession to show that no amount was due from the appellant to the respondent. Such an approach of the High Court, in our considered opinion, has displayed the total perversity in its approach while reversing the order of the trial Judge. Even, Mr. V. Giri, learned Senior Counsel for the respondent in spite of his best efforts was unable to convince us to support the above conclusion found in the judgment of the High Court.

. That apart having considered the conclusions of the learned trial Judge, we find that those conclusions were drawn by adducing cogent and convincing reasoning and we do not find any fault in the said conclusions drawn by the learned trial Judge. In the circumstance, the principles set out in the decision relied upon by the learned counsel for the appellant in M.S. Narayana Menon alias Mani (supra) as regards the presumption to be drawn and the preponderance of probabilities to be inferred, as set out in paragraphs 31 to 33, are fully satisfied. Those principles, set out in paragraphs 31 to 33, can be usefully referred to which are as under:

"31. A Division Bench of this Court in Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal albeit in a civil case laid down the law in the following terms: (SCC pp. 50-51, para 12) "12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt." This Court, therefore, clearly opined that it is not necessary for the defendant to disprove the existence of consideration by way of direct evidence.

32. The standard of proof evidently is preponderance of probabilities.

Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.

33. Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another." . Applying the abovesaid principles to the case on hand, we find that the judgment of the trial Court in having drawn the conclusions to the effect that the appellant sufficiently rebutted the initial presumption as regards the issuance of the cheque under Sections 138 and 139 of the Act, was perfectly justified. We also find that the preponderance

of probabilities also fully support the stand of the appellant as held by the learned trial Judge. The judgment of the High Court in having interfered with the order of acquittal by the learned trial Judge without proper reasoning is, therefore, liable to be set aside and is accordingly set aside. Consequently, the conviction and sentence imposed in the judgment impugned is also set aside.

. Having regard to our above conclusions, the amount deposited by the appellant with the trial Court in a sum of Rs.25 lakhs with accrued interest, if any, shall be refunded to her forthwith on production of a copy of this judgment. The appeal stands allowed with the above directions.

……J. [Dr. B.S. Chauhan] ……J. [Fakkir Mohamed Ibrahim Kalifulla] New Delhi;

October 12, 2012