

Kerala High Court

Abdul Razak vs Yousaf on 22 May, 2006

Equivalent citations: 2006 (3) KLT 58

Author: K A Gafoor

Bench: K A Gafoor

JUDGMENT K.A. Abdul Gafoor, J.

1. The appellant did not succeed in his complaint against the respondent alleging offence under Section 138 of the Negotiable Instruments Act. Therefore, this appeal.

2. Ext.P1 is the cheque in question for an amount of Rs. 40,000/-. Ext.P2 memo issued from the bank discloses that it bounced for want of sufficient fund in the account of the respondent. Ext.P5 discloses that the statutory notice was returned unserved, even though due intimation was given from the post office to the addressee, the respondent/accused. It was in the above circumstances, the complaint was filed.

3. The case of the complainant was that there was some dealings between the parties and when it terminated, the accused was found indebted to the complainant to the tune of Rs. 40,000/- and accordingly, Ext.P1 cheque dated 4.4.1996 was issued in discharge of that debt, which bounced, as mentioned above and the demand for payment was not met, in spite of the statutory notice. Therefore, an offence under Section 138 of the Act has been made out.

4. The defence put forward by the accused was that he and the complainant did have a partnership business of conducting fast food restaurant. The arrangement was terminated. Accordingly a deed in that regard was drawn up and it revealed that an amount of Rs. 40,000/- was due from the accused to the complainant with an undertaking to promptly pay it in monthly instalments of Rs. 3,000/-. In security thereof, he entrusted a cheque to the brother of the complainant. It is also mentioned in the agreement. But the agreement was produced by none other than the complainant himself, but he did not prove it in evidence. During cross-examination of PW.1 on behalf of the accused, the agreement was marked as Ext.P6 and the agreement is admitted by the complainant. The agreement recites that an amount of Rs. 40,000/- was due on termination of the business and for settlement of the account of the partnership, the accused has undertaken to pay it in monthly instalments of Rs. 3,000/- and that he had delivered a cheque to one Usman, the brother of the complainant as guarantee for due payment. The factum of drawal of the cheque and its number are mentioned in detail in Ext.P6 and it discloses that the cheque so given to Usman was having the number 1281075 and drawn on the Thalassery Branch of Vijaya Bank. Ext.P1 is the said cheque bearing the very same amount, date and number. Thus Ext.P1 cheque, as is revealed by Ext.P6 agreement and admitted by the complainant is given by the accused to Usman and not to the appellant/complainant.

5. An offence under Section 138 of the Act could be proved only when a cheque, drawn by a person on an account maintained by him with a bank for payment of any amount to another person in discharge of whole or part of any debt or liability, is returned or bounced for want of sufficient fund in the account maintained by the drawer. In this case, admittedly, the cheque is not one drawn by the accused in favour of the complainant for any amount payable by him, but it is drawn by the

accused and handed over to Usman, the brother of the complainant. The cheque drawn and handed over to Usman could not have been made use of by the complainant, unless the complainant has a case that the accused did not honour the agreement in Ext.P6 and that consequent on that, Usman had handed over the cheque and thus, he became a holder in due course. He does not have such a case. The transaction relating to the cheque is thus not as alleged in the complaint. Therefore, the offence under Section 138 of the Act is not made out. There is no reason for interference with the order of acquittal of the respondent.

Appeal, therefore, fails and is accordingly dismissed.