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A CRITICAL ANALYSIS OF JOSEPH SARTHO v.
GOPINATHAN 2008 (3) KLJ 784

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This write-up critically examines the decision of the Division Bench of the Kerala High Court in the case of *Joseph Sartho v. Gopinathan* 2008 (3) KLJ 784, wherein sections 15 and 56 of the Negotiable Instruments Act, 1881 were interpreted. The author is of the view that it may not be possible to strictly implement the said judgment in letter and spirit due to the practical difficulties that may be faced by the banks. He opines that the judgment needs to be either reviewed by the High Court by a Larger Bench of the said Court or should be put to test in the Supreme Court.

Introduction

1. Very recently, the Division Bench of the Kerala High Court has passed a judgment in the case of *Joseph Sartho v. Gopinathan* 2008 (3) KLJ 784. The said judgment interpreted sections 15 and 56 of the Negotiable Instruments Act, 1881.

Question under consideration

2. The interesting question which was before the Bench was as to whether the payee or the holder in due course can present a cheque for full amount when actually the drawer of the cheque has paid a portion of the amount and at the relevant point of presentation only the balance amount after adjusting the part-payment so made was due to the presenter? This

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question arose because when the said cheque was not honoured by the bank, the holder of a cheque initiated proceedings under section 138 of the Negotiable Instruments Act. Therefore, a larger question which was considered was : whether in such an event when the cheque was dishonoured, whether the provisions of section 138 were applicable or not?

The High Court came to a conclusion that in any such case where the drawer is to pay less amount than the cheque amount, it is for the payee to endorse a cheque accordingly, and claim lesser amount from the drawee bank and it further held that if the above method is not followed, the payee cannot file section 138 proceedings of the Act. On the contrary, it held that if the payee makes endorsement and submits that lesser the amount and if the said cheque claiming the lesser amount is returned, only then payee has a right to initiate action under section 138 and not otherwise.

Facts of the case

3. The facts of the case are narrated in brief as under :

A cheque dated June 4, 1999 was issued by the accused (defendant) to the complainant (appellant) in discharge of a debt. Thereafter, the complainant received an amount of Rs. 2,26,400 on June 9, 1999 towards the debt. The complainant did not make any endorsement 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's notice was caused to be sent to the accused only for the balance amount, which was not served to the accused. The accused failed to repay the amount demanded. Later, the complainant proceeded under section 138 and the said complaint was dismissed. The point that arose for decision was whether, on facts, the accused had committed the offence under section 138 or not.

A Critical Analysis

4. While deciding this case, it appears that the applicability and need to interpret section 14 of the Act had not been brought to the notice of the High Court because in deciding such cases, namely, as to whether the payee can endorse the cheque without the consent of drawer or whether it is compulsory to have the drawer's sign on the endorsing cheque for lesser amounts is most crucial. In order to arrive at that conclusion, it is necessary for the Court to interpret section 14, which deals with endorsement.

The 'endorsement' can be made only for the purpose of 'Negotiation' and not otherwise. In terms of section 14 'When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute the person the holder thereof, the instrument is said to be negotiated.'

On a simple analysis of section 14, it is clear with respect to the case in question, that a beneficiary/payee of the cheque who presents the cheque for collection, cannot endorse the cheque in his own favour, because the main ingredient of section 14, namely, the transfer of cheque, viz, the right under the cheque to third party does not arise in this case. If the Court had held that the maker of the cheque, upon payment of the part amount, should have made endorsement on the cheque, it would have been a correct proposition of the said provisions.

Apparently, even though the notice issued by the payee claiming the lesser amount was not accepted or could not be served, the Court ought to have found that the intention of the parties, namely, the payee was to claim lesser amount and not otherwise. One can refer to the case decided by the Supreme Court in *C.C. Alavi Haji v. Palapetty Muhammed* [2007] 6 SCC 555 wherein the issue before the Supreme Court was that whether the accused can take a stand that he was not served 15 days notice and escape the clutters of case filed under section 138.

The Court observed that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the Court in respect of the complaint under section 138, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected.

A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under section 138, cannot obviously contend that there is no proper service of notice as required under section 138. In the instant case, the complainant issued lawyer's notice and the same was returned saying that the accused was 'out of station'. Admittedly, on facts, there was no dispute that the claim was only for a lesser amount and, therefore, the accused if he had the intention to pay the amount, could have paid it off. The Court should not have allowed such accused person to take shelter under this technical reason.

Therefore, it is a clear case where the drawer of the cheque based on certain technical reasons and even without accepting notice which contained claim for less amount, had got benefit of non-prosecution under section 138. This will set a bad precedent.

Apart from the legal issues, if this judgment is upheld, it may create a lot of practical difficulties for the bankers. From the bank's side, one can state as under :

"Notwithstanding the legal position as generally understood, there are certain practical difficulties in applying the said provisions, as interpreted in the said judgment, for the simple reason that the banks never pass nor are asked to pass cheque for lesser amount than what is written on the face of

instrument. There is no such practice, besides in spite of section 56 of the Act, which allows such endorsements, such instances are not common nor have there been any instances, to our knowledge and information as regards application of said section as made out by the said judgment. It may also pose reconciliation difficulties in clearing/collection of the instruments, besides it may give room for unscrupulous people to tamper with the records. This is against the accepted banking practices."

One can recall that sometime back, there was a proposal to amend the Negotiable Instruments Act, wherein it was proposed that even if a cheque of Rs. 1,000 comes for honouring and if the amount available in the account is less than Rs. 1,000, say Rs. 500, then the bank should pass cheque for Rs. 500. It appears that thereafter this was not taken up because of the practical difficulties it may create. If the said amendment is carried out to the Negotiable Instruments Act, again it may have repercussion on the subject Kerala High Court's Judgment.

In any case, it may not be possible to strictly implement the said Judgment in letter and spirit due to the practical difficulties that may be faced by banks. The teller at the counter will be put to lot of stress and confusion and instances of errors may become common. Besides, it may lead to a plethora of complaints and suits against the banks. This may accelerate a fraudster to commit fraud.

Conclusion

5. Last but not the least, this judgment needs to be either reviewed by the High Court by a Larger Bench of the said Court or should be put to test in the Supreme Court.