

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 29TH DAY OF SEPTEMBER 2015/7TH ASWINA, 1937

CRL.A.No. 669 of 2003 ()

AGAINST THE ORDER IN Cr1.MC 1393/2003 of HIGH COURT OF KERALA

AGAINST THE JUDGMENT IN CC 420/2001 of J.M.F.C.-II, KANJIRAPPALLY

APPELLANT/COMPLAINANT:

SRI.E.K. TOMY,
ELAMTHOTTAM,
PROPRIETOR,
ELEMTHOTTAM T.V.LAND
MANIMALA.

BY ADV. SRI.LIJI.J.VADAKKEDOM

RESPONDENTS/ACCUSED & STATE:

1. ELSAMMA JOSE,
MAKKOLLIVEEDU,
ULLAYAM BHAGOM,
KADAYANIKKAD KARA,
VELLAVOOR VILLAGE.

2. STATE OF KERALA REP. BY
ITS PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

R2- BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 29-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

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Crl.A.No.669 of 2003
.....

Dated this the 29th day of September, 2015.

JUDGMENT

The complainant in C.C.No.42/2001 on the file of the Judicial First Class Magistrate Court-II, Kanjirappally is the appellant herein.

2. The case was taken on file on the basis of a private complaint filed by the complainant under section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act'). The case of the complainant in the complaint was that the accused used to purchase articles on credit from his concern and there is an amount of Rs.9,300/- due and in partial discharge of an amount of Rs.3,500/-, he had issued a cheque dated 1.10.2000 drawn on Vellavoor Service Co-operative Bank, which when presented was dishonoured for the reason 'not arranged for'. The complainant issued notice demanding payment and intimating the dishonour. But the accused had not paid the amount. So he has committed the offence punishable under section 138 of the Act. Hence the complaint.

3. The complaint was taken on file after recording sworn statement on 23.1.2001. Thereafter presence of the accused could not be procured and later his presence was procured and on 2.11.2002 the complainant and the accused were absent and their absence was condoned and it was posted to 30.11.2002 as last chance for the evidence of the complainant. On 30.11.2002 there was no sitting and it was notified to 16.1.2003. On that day, the complainant as well as the accused were absent and applications were filed and absence of the accused was condoned but absence of the complainant was not condoned and his application was rejected and the accused was acquitted under section 256 (1) of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). Aggrieved by the same, the present appeal has been preferred by the appellant with special leave as Crl.M.C.No.1393/2003 and leave was granted and the appeal was admitted to file.

4. Though notice was served on the respondent, there is no appearance.

5. Heard Sri.Liji J. Vadakkedom, counsel for the appellant and Sri. Jibu P. Thomas, Public Prosecutor appearing for the second respondent.

6. Counsel for the appellant submitted that it is not a

case where the complainant was not interested in prosecuting the case. In fact, an application has been filed to condone his absence and that application was rejected and he was acquitted which is not proper.

7. It is seen from the proceedings paper that though the complaint was taken on file in the year 2001 and on several occasions the complainant was present but evidence was not recorded. It is being posted for complainant's evidence from 1.6.2002 onwards and from that day onwards, the complainant was absent. But it cannot be said that he was not represented by counsel and he was not interested in prosecuting the case. Under section 256 (1) of the Code, it is not mentioned that merely because the complainant was absent, the case must be ended in acquittal. The court can even adjourn the case on sufficient grounds for giving liberty to the complainant to adduce evidence. In this case, the complainant was represented by counsel. An application has been filed on the side of the complainant stating that he was laid up and that was the reason why he could not appear but the court below rejected the application even on the day though the accused was absent but his absence was condoned on application. So under the circumstances, this Court feels that an opportunity has to be

given to the complainant to adduce evidence and get the case decided on merit. So for that purpose the order of acquittal passed by the court below has to be set aside and the matter has to be remanded to the court below for fresh disposal in accordance with law.

So the appeal is allowed and order of acquittal passed by the court below is set aside and the matter is remitted to the court below for fresh disposal in accordance with law. The complainant is directed to appear before the court below on 16.11.2015. The court below is directed to take the complaint on file and after procuring presence of the accused and giving liberty to the complainant to adduce evidence, dispose of the case afresh in accordance with law.

Office is directed to communicate a copy of this judgment and send back the records to the court below at the earliest so as reach that court before 16.11.2015 on which date the complainant was directed to appear before the court below.

Sd/-

K. RAMAKRISHNAN, JUDGE.

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/true copy/

P.S to Judge

K. RAMAKRISHNAN, J.

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Crl.A.No.669 of 2003

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29th September, 2015.

JUDGMENT