

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

WEDNESDAY, THE 1ST DAY OF JULY 2015/10TH ASHADHA, 1937

CRL.A.No. 69 of 2004 (A)

AGAINST THE ORDER IN CrI.L.P. 535/2003 of HIGH COURT OF KERALA DATED
10-11-2003

AGAINST THE ORDER IN ST 41/2002 of JUDICIAL FIRST CLASS MAGISTRATE
COURT-V, TVM (SPL.COURT-MARKLIST CASES) DATED 05-09-2003

APPELLANT(S)/COMPLAINANT:

K.R.LALU, SOLE PROPRIETOR OF BRITISH
INDIAN SHIRTS, SARUJA, T.C.7/1729(2)
PANGODE, THIRUMALA P.O., THIRUVANANTHAPURAM.

BY ADV. SRI.BLAZE K.JOSE

RESPONDENT(S)/ACCUSED:

1. H.MAHEEN, PARUTHITHOPPU VEEDU,
NEAR SPIN MILL, BALARAMAPURAM P.O.
THIRUVANANTHAPURAM.
2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SMT. T.Y.LALIZA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

dlk

C.T.RAVIKUMAR, J

Crl.A. No. 69 of 2004

Dated this the 1st day of July, 2015

JUDGMENT

This appeal is directed against the order dated 5.9.2003 in S.T.No.41/2002 passed by the Court of the Judicial First Class Magistrate-V (Special Court for Marklist Cases), Thiruvananthapuram. The appellant herein was the complainant therein. He filed the complaint which was taken on file and registered as S.T.No.41/2002 alleging commission of offence under section 138 of the Negotiable Instruments Act by the first respondent herein. Though notice was duly served on the first respondent he has not chosen to enter appearance and to resist this case.

2. I have heard the learned counsel for the appellant and also the learned Public Prosecutor.

3. Evidently, the appellant filed the complaint alleging that the first respondent issued a cheque No.027777 dated 16.9.1999 drawn on Balaramapuram Service Co-Operative Bank No.T-14, Balaramapuram for an amount of ₹85,000/- towards the

value of certain goods purchased by him from the complainant. It is also alleged therein that the said cheque on its presentation was bounced owing to paucity of fund in the account maintained by the first respondent. The petitioner also alleged therein that though statutory notice was issued within the statutorily prescribed period intimating the first respondent-accused regarding the dishonour of the cheque and calling upon him to pay the amount due he had failed to effect payment of the amount within the statutorily prescribed period. Evidently, it is with such allegation that the complaint was filed. When the matter was taken up for consideration on 5.9.2003 the complainant was absent. There was no representation and there was no application. The process was also not paid. In the circumstances, the court below found that the presence of the complainant was highly necessary on 5.9.2003 and since he was absent and there was no representation the matter could not be proceeded with. Having formed such an opinion the court below acquitted the accused-first respondent under section 256(1) of the Code of Criminal Procedure. The court proceedings would reveal that in S.T.No.41/2002 summons was issued to the accused but, he has failed to appear. It would also reveal that

owing to his non-appearance non-bailable warrant was issued to the accused-first respondent. The case was then posted to 5.9.2003. True that, there was no representation and no process was taken though non-bailable warrant was ordered. Evidently, the findings of the court below would reveal that the presence of the complainant was highly necessary on that day and in his absence the case could not have been proceeded with and consequently acquitted the accused under section 256(1), Cr.P.C. A perusal of the provisions under section 256(1) would reveal that it is incumbent on the court to consider whether it would be proper to adjourn in case of non appearance of the complainant the case to some other day and if on such consideration it was found that the personal attendance of the accused was highly necessary for proceeding further then and then only the power under section 256 (1), Cr.P.C should be invoked to acquit the accused. Evidently, in this case summoned was earlier issued to the accused. However, on the appointed day for the appearance of the accused he had not appeared. The said circumstances constrained the trial court to issue non-bailable warrant against him. True that, the petitioner has not paid the process. A scanning of the provisions would

reveal that for the invocation of the power under section 256(1) two constraints are imposed statutorily. Firstly, the court should form an opinion that it is not proper to adjourn the hearing and that the personal attendance of the complainant is highly necessary. True that, in this case the court arrived at such a finding that the presence of the accused was highly necessary. Section 256(1), Cr.P.C mandates that before acquitting the accused owing to the absence of the complainant the court was bound to form an opinion as to whether it was improper to adjourn the case for hearing to some other day. In this case, evidently, non-bailable warrant was ordered owing to the absence of the accused on an earlier occasion in such circumstances I am of the view that the court below was not justified in forming an opinion that the case could not have been adjourned for hearing to some other day and to proceed with that case on that day the attendance of the complainant was highly necessary. Even if the complainant was present on that day no effective steps could have been taken as the accused was not available and a warrant was pending against him. True that, the appellant has failed to take steps. Taking into consideration of all such aspects I am of the view that though

discretion was vested with the court in view of the provisions under section 256(1) it was not exercised judicially in the case on hand. It is also to be noted that even in this proceedings despite the receipt of a notice the first respondent-accused has not entered appearance to resist the case. Taking into account all the aforesaid aspects I am inclined to allow this appeal. Consequently the order dated 5.9.2003 in S.T.No.41/2002 of the Court of the Judicial First Class Magistrate-V (Special Court for Marklist Cases), Thiruvananthapuram is set aside and S.T.No.41/2002 is restored in to the files. The learned Magistrate shall proceed with the case in accordance with law. Registry shall transmit the records forthwith.

Sd/-

C.T.RAVIKUMAR,JUDGE.

dlk

