IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 6TH DAY OF OCTOBER 2015/14TH ASWINA, 1937

CRL.A.No. 1084 of 2004 ( )

AGAINST THE JUDGMENT IN CC 156/2002 of J.M.F.C.-I, ALUVA, DATED 19-02-2004
&
AGAINST THE ORDER/JUDGMENT IN Crl.L.P.326/2004 of HIGH COURT OF KERALA DATED 07-06-2004

APPELLANT(S)/COMPLAINANT:

K.M.IBRAHIM, KURUDIYIL HOUSE,
AMBUNAD, EDATHALA, ALUVA EAST,
ERNAKULAM DISTRICT.

BY ADV. SRI.KURIAN ANTONY EDASSERY

RESPONDENT(S)/ACCUSED:

1. **A.N.MOHANAN, DIVISION 43,**
   HOUSE NO.43/2572, S.R.M.ROAD, COCHIN-18.

2. **STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

R1 BY ADVs.SRI.M.GOPIKRISHNAN NAMBIAR
SRI.P.BENNY THOMAS
SRI.K.JOHN MATHAI
SRI.P.G.JAYASHANKAR
KUM.P.G.GAYATHRI

R2 PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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K. RAMAKRISHNAN, J.

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Crl. Appeal No.1084 of 2004

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Dated this the 6th day of October, 2015

J U D G M E N T

Complainant in C.C.No.156/2002 on the file of the Judicial First Class Magistrate Court, Aluva, is the appellant herein. The case was taken on file in the lower court on the basis of a private complaint filed by the appellant against the accused under Section 138 of the Negotiable Instruments Act, (hereinafter called 'the Act').

2. The case of the complainant in the complaint was that, the accused borrowed a sum of ₹2,30,000/- on 25.03.1993 and in discharge of that liability, he issued Ext.P1 cheque dated 10.12.1995 for an amount of ₹2,45,000/- including interest. The complainant presented cheque through State Bank of Travancore, Perumbavoor Branch and it was dishonored by the drawee bank on 09.01.1996 and this was intimated to the complainant by his banker by intimation letter dated 11.01.1996. According to the complainant, he received the intimation letter on

19.01.1996 and issued Ext.P3 notice on 27.01.1996 vide Ext.P4 postal receipt and the same was returned by the addressee. Accused had not paid the amount. So he had committed the offence punishable under Section 138 of the Negotiable Instruments Act. Hence the complaint.

3. Originally the case was taken on file as C.C.No.282/1996. Since the accused was absconding, the case against the accused was transferred to the register of long pending cases as L.P.No.5/2000. Thereafter when he surrendered, it was refiled as C.C.No.156/2002. When the accused appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, the complainant himself was examined as PW1 and Exts.P1 to P5 were marked on his side. Thereafter he filed an application to re-open the evidence and that petition was dismissed and the complainant filed writ petition before this court as WPC No.29858/2003(D) and the order was set

aside and the application was allowed and opportunity was given to the complainant to re-open evidence and adduce evidence. Thereafter PW2 the bank manager was examined. After closure of the complainant's evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that, he was in Saudi Arabian Jail for the last 10 years for want of travel documents and thereafter he was deported to India and he came to know about the case only during September, 2001. No defence evidence was adduced on his side. After considering the evidence on record, the court below found that notice was sent out of time and as such the complaint is not maintainable and acquitted the accused under Section 255(1) of the Code of Criminal Procedure. Aggrieved by the same, the present appeal has been preferred by the appellant /complainant in the lower court along with leave petition as Crl.M.P.No.326/2004 and that application was allowed and leave was granted and the appeal was admitted.

4. Heard the Sri.Kurian Antony (Edassery), counsel for the appellant, Sri.P.G.Jayashankar, counsel appearing for the first respondent and Sri.Jibu P. Thomas, Public Prosecutor appearing for the State.

5. The counsel for the appellant submitted that, the court below was not justified in acquitting the accused on the technical ground that the notice was sent out of time. It will be seen from the dishonor memo with the covering letter of the bank was dated 11.01.1996 and that it was sent by registered post. According to him, he received the notice only on 19.01.1996 and the notice was issued on 29.01.1996 within 15 days. He had even taken steps to summon the despatch register of the bank. But PW2 had produced a document to show that it is not with them as the same was destroyed and they were expected to keep such

register only for five years. So when a registered notice was issued, there is possibility of some time being taken for delivery. So there is nothing to disbelieve the evidence of PW1 regarding this aspect and the court below should have given some margin for that delay which is quite possible and reasonable especially when the accused was absconding and the evidence regarding this aspect could not be produced due to lapse of time. So according to him, the court below was not justified in acquitting the accused on that technical ground and the notice was proper and it was sent within time.

6. On the other hand, learned counsel appearing for the first respondent submitted that, on going through the documents produced, it will be seen that the dishonor memo was dated 09.01.1996 and it was sent along with covering letter dated 11.01.1996, but the notice was sent only on 29.01.1996, which is beyond 15 days of receipt of the intimation letter. So under the circumstances, court

below was perfectly justified in acquitting the accused and no interference is called for.

7. The case of the complainant in the complaint was that, the accused borrowed a sum ₹2,30,000/-, during 1993 namely 25.02.1993 and he issued Ext.P1 cheque dated 10.12.1995 for ₹2,45,000/- in discharge of that amount including the interest and he presented the cheque on 20.12.1995 and it was dishonoured for the reason 'funds insufficient' evidenced by Ext.P2 dishonour memo, dated 09.01.1996. It is seen from the covering letter attached to the dishonour memo sent by the collecting bank that it was dated 11.01.1996. It is true that it was written on the top of the intimation letter ‘Reg’ probably it may represent that it was sent by Registered Post. PW2, the bank manager also deposed that normally they may either deliver the intimation letter directly or they may sent it by registered post. Bank could not produce any document to show the date on which the intimation letter was dispatched to the

complainant. In the absence of any evidence, it can only be presumed that it was despatched on 11.01.1996. If it is a registered letter, it will be sent in a cover, which will show the date of delivery of the letter to the addressee. But the complainant had not produced the cover in which Ext.P2 was received by him. So under the circumstances, it can only be presumed that, he would have received the notice either on 11.01.1996 or on the next day, that is on 12.01.1996, as the place between the bank and his residence is not so far. It will be seen from Ext.P4 notice, though it was dated 27.01.1996, the returned notice shows that, it was sent only on 29.01.1996. If that be the case, the notice was issued beyond 15 days of the receipt of intimation regarding the dishonor by the complainant and that is beyond time. So under the circumstances, it cannot be said that a notice was sent within 15 days of receipt of intimation regarding the dishonour as contemplated under Section 138 of the Negotiable Instruments Act and if the notice was sent beyond time, it cannot be said that, it was proper notice and the complaint filed on that basis is not maintainable and so the court below was perfectly justified in acquitting the accused giving him that benefit under Section 255(1) of the Code of Criminal Procedure and the finding of the court below on this aspect does not call for any interference in the absence of any convincing evidence adduced on the side of the appellant to prove that he had received the intimation letter only on 19.01.1996 as claimed by him and the notice sent by him is within time. So the appeal lacks merits and the same is liable to be dismissed.

In the result, the appeal fails and the same is hereby dismissed. The order of acquittal passed by the court below against the appellant is hereby confirmed.

Office is directed to communicate this judgment to the concerned court, immediately.

Sd/-
K. Ramakrishnan, Judge
//True Copy//
P.A. to Judge

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