IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

CRL.A.No. 826 of 2007 ( )

AGAINST THE ORDER/JUDGMENT IN CC 1083/2003 of J.M.F.C.-I, CHERTHALA.

APPELLANT(S)/COMPLAINANT:

DR.MURUGHYYAN, MEDICAL OFFICER,
SANTHI HOSPITAL, THURAVOOR POST, KUTHIATHODE,
CHERTHALA, ALAPPUZHA DISTRICT.

BY ADVS.SRI.K.MOHAN
SRI.S.SOMAN
SRI.G.JAYANANDA PAI

RESPONDENT(S)/ACCUSED:
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1. M/S.KALAMKERIL FINANCIAL ENTERPRISES,
ADMINISTRATIVE OFFICE, KUTHIATHODE, CHERTHALA,
REPRESENTED BY MANAGING PARTNER, K.K.ANTONY.

2. K.K.ANTONY, MANAGING PARTNER,
KALANKERIYIL FINANCIAL ENTERPRISES,
ADMINISTRATIVE OFFICE, KUTHIATHODE.

3. K.K.KUNJUMON,
KALANKERIL FINANCIAL ENTERPRISES,
ADMINISTRATIVE OFFICE, KUTHIATHODE-688233,
CHERTHALA.

4. DR.K.K.JOHN, CITY DENTAL CLINIC,
CARMEL BUILDING, 2ND FLOOR, HIGH COURT JUNCTION,
ERNAKULAM.

5. K.K.FRANCIS, JYOTHI OIL STORES,
KODANTHURUTHU, KUTHIATHODE, CHERTHALA.

6. K.K.MATHAI, ARD-61, KODANTHURUTHU,
KUTHIATHODE, CHERTHALA.

7. STATE OF KERALA,
REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

R1-6 BY ADV. SRI.M.A.JOSEPH
BY ADV. SRI.SOORAJ T.ELENJICKAL

R7 BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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Crl.Appeal. No. 826 of 2007

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Dated this the 26th day of November, 2015.

JUDGMENT

Aggrieved by the order of acquittal passed by the court of Judicial First Class Magistrate-I, Cherthala for the offence under Section 138 of the Negotiable Instruments Act, the complainant before the court below has come up in appeal after obtaining leave of this Court.

2. The short case put forward by the complainant is that the first accused concern was running a chitty business in which he was a subscriber. Accused Nos. 2 to 6 are the active partners in the business of the firm. The accused had started two chitties, namely, chitty Nos. 19 and 20. He bid the chitty for an amount of Rs.35,000/-. Instead of paying the price amount, the amount was paid by way of Ext.P1 cheque. The cheque was signed by the second accused and one of the other partners. On presentation, the cheque bounced for want of funds. Statutory notice was issued to all the accused and

they received the same on different dates. Since the amount remained unpaid, the complaint was laid.

3. The court before which the complaint was laid, took cognizance of the offence and after following the necessary procedures, summons was issued to the accused, who had entered appearance. Copies of the documents were furnished to the accused and particulars of the offence were read out to them, to which they pleaded not guilty and claimed to be tried. The complainant examined himself as P.W.1 and another person was examined as P.W.2 and Exts.P1 to P10 were marked. After the close of the complainant's evidence, the accused were questioned under Section 313 Cr.P.C. wherein they denied all the incriminating circumstances brought out in evidence against them. Accused Nos. 1, 2 and 3 contended that the cheque is unsupported by consideration and the fourth accused denied having any connection with the firm at all. Accused Nos. 5 and 6 have stated that they have nothing more to say than what was stated by the second

accused. However, they did not chose to adduce any evidence. Later on, a petition under Section 311 Cr.P.C. was filed by the complainant and it was allowed and P.W.2 was examined.

4. On a consideration of the materials before it, the court below came to the conclusion that there was a legally due debt and that Ext.P1 cheque has been issued in discharge of the same. However, the court found that as far as the accused are concerned, the complaint is filed out of time since there is no petition to condone the delay, and therefore the accused are entitled to an acquittal. It was accordingly ordered.

5. Assailing the acquittal of the accused in this case, learned counsel appearing for the appellant contended that the sixth accused was served with notice on 25.8.2003 and if that be so, the last date for filing the complaint is 9.10.2003. The complainant was under the bonafide belief that he could calculate the period from the date on which the notice was last received by any one of the partners. At any

rate, according to the learned counsel, having found that there is an existing liability and that the cheque was issued in discharge of the same, even if there is any delay, it will be only fair and proper for the trial court to grant an opportunity to the complainant to seek condonation of delay.

6. Learned counsel appearing for the respondents points out that notice issued to the sixth respondent in law is as against all the partners and if that be so, the complaint filed is hopelessly barred by limitation. There is no ground to interfere with the order of the court below.

7. Before one goes into the other aspects, it has to be noticed that the finding of the court below is to the effect that there was an existing debt and Ext.P1 cheque was issued to discharge the said debt. The accused seems to have raised several grounds and all of them were found against. Some of the accused contended that they are not partners of the firm and therefore, they could not be attributed with the conduct of the business of the firm.

8. Going by the records available, the court below found that all the accused were actively participating in the business of the firm. If any one of them had a case that he was not an active partner, it is for him to establish the said fact. If it is a registered partnership, all that one needs to be looked into is the articles of association and find out who are the partners.

9. It appears that the Manager of the Bank was also examined as P.W.2. He gave evidence to the effect that the accused are shown as partners of the firm in their books. P.W.1, the complainant gave evidence to the effect that he was compelled to join business by the agents of the first accused. The contention that business by the firm is no longer being continued is found against as there is no evidence to establish or show that some of the partners have retired or ceased to continue as partners.

10. It is not a case where no money is due to the complainant. The version given by the complainant that

amount was due in respect of a debt and it was given in the form of a cheque is not seen disputed nor there was any suggestion to the complainant that the cheque had come into his hands by some other way.

11. Under these circumstances, the court below is justified in coming to the conclusion that there exists a debt and for the discharge of the same, cheque was issued by the firm.

12. True, there is some confusion regarding the delay in filing the complaint. It can be in law said that notice must be issued to all the partners. But the appellant may not labour under the impression that each of them will have to be served with notice and after that complaint can be laid. The delay at the most is one or two days. In this case, it is only one day. Considering the nature of the allegations made in the complaint, the court below ought to have given an opportunity to the complainant to seek condonation of delay. Otherwise, considerable prejudice will be caused to the

complainant.

For the above reason, this appeal is allowed, the impugned order is set aside and the matter is remanded to the trial court for fresh disposal in accordance with law and after hearing both sides. If the complainant moves a petition for condonation of delay, that shall be considered in accordance with law. Both parties will be at liberty to adduce further evidence, if so advised. Parties shall appear before the court below on 16.12.2015. The court below may make every endeavour to dispose of the matter as expeditiously as possible, at any rate, within a period of six months from the date of appearance of the parties.

P. BHAVADASAN,
JUDGE

sb.