

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 27TH DAY OF OCTOBER 2015/5TH KARTHIKA, 1937

CRL.A.No.1776 of 2004 ()

AGAINST THE ORDER IN Cr1.L.P. 464/2004 of HIGH COURT OF KERALA,
DATED 27-10-2004

&

AGAINST THE ORDER IN CC127/2002 of JMFC-V, THIRUVANANTHAPURAM
(SPL.COURT-MARKLIST CASES), DATED 19-05-2004

APPELLANT(S)/COMPLAINANT:

M.PRASAD,
JAGATHY, THIRUVANANTHAPURAM, NOW RESIDING AT
T.C.16/922 (3), PRASANTHI, SREE KRISHNA NAGAR,
JAGATHY, THIRUVANANTHAPURAM.

BY ADVS.SRI.PHILIP T.VARGHESE
SRI.N.SASI

RESPONDENT(S)/STATE AND ACCUSED:

1. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.
2. P.C. JOHN, VYSAKH, ULLAS NAGAR,
PEROORKADA P.O., THIRUVANANTHAPURAM, NOW
RESIDING AT SUB DIVISION ENGINEER GROUP,
CHERUVATHUR TELEPHONE EXCHANGE, CHERUVATHUR P.O.,
KASARGOD DISTRICT.

R2 BY ADV.SRI.SUNIL JACOB JOSE,
R1 BY PUBLIC PROSECUTOR SRI.JIBU P. THOMAS.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

Crl. Appeal No.1776 of 2004

Dated this the 27th day of October, 2015

JUDGMENT

Complainant in C.C.No.127/2002 on the file of the Judicial First Class Magistrate Court-V (Special Court for Mark List Cases), Thiruvananthapuram is the appellant herein. 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 called 'the Act').

2. The case of the complainant in the complaint was that, the accused borrowed a sum of ₹1,29,000/- and in discharge of that liability he had issued a cheque for ₹1,29,000/- including the interest, which when presented was dishonoured for the reasons 'funds insufficient' and in spite of notice issued, he had not paid the amount and thereby he had committed the offence punishable under Section 138 of the Negotiable Instruments Act. Hence the complaint.

3. When the accused appeared before the court

below, the particulars of offence were read over and explained to him and he pleaded not guilty. Thereafter the case was posted for evidence of the complainant as last chance on 19.04.2004. On that day the complainant was absent and an application for condoning his absence was filed and that was dismissed on the ground that he was continuously absent and it is posted as last chance and acquitted the accused under Section 256(1) of the Code of Criminal Procedure. Aggrieved by the same, the above appeal has been preferred by the appellant along with special leave petition as Crl.L.P.No.464/2004 and leave was granted and appeal was admitted to file.

4. Heard Sri.Sasi.N, counsel for the appellant, Sri.Sunil Jacob Jose, counsel appearing for the second respondent and Sri.Jibu P.Thomas, learned Public Prosecutor appearing for the first respondent/ State.

5. The counsel for the appellant submitted that it cannot be said that the complainant was not diligent in

prosecuting the case. He was an employee in BSNL and since he could not get leave, he could not appear and in fact he was represented by counsel and an application has been filed. Further on several occasion he was present, at that time the case was adjourned due to the request of the accused. So he prayed for an opportunity.

6. On the other hand, the counsel for the 2nd respondent submitted that there is no illegality committed by the court below, as it will be seen that he was not diligent in prosecuting the case.

7. It is an admitted fact that the complainant filed a complaint under Section 138 of the Negotiable Instruments Act, originally before the Judicial First Class Magistrate Court-III, Thiruvananthapuram and it was taken on file originally as C.C.No.315/2001 in that court and the presence of the accused could be procured only after issuing non bailable warrant. Thereafter the case was withdrawn and made over to Judicial First Class Magistrate

Court-V, for disposal by the orders of the Chief Judicial Magistrate, where it was re-numbered as C.C.No.127/2002. It is seen from the file that after the appearance of the complainant the presence of the accused could be procured only on 04.02.2003, on which date, the particulars of offence were read over and explained to him and he pleaded not guilty and the case was posted to 30.12.2003 for the evidence of the complainant. On that day the complainant was absent and it was adjourned to 06.02.2004 for evidence of the complainant with an observation that no further time will be granted. On that day there was no sitting and it was adjourned by notification to 03.03.2004. On 03.03.2004 both the accused and the complainant were present and there was an application filed by one Jayaprakash. Accordingly the evidence of the complainant was adjourned to 20.04.2004. So on that day it cannot be said that due to fault of the complainant that evidence could not be recorded. On 20.04.2004, the complainant was absent and

he was represented by counsel and the application was allowed and it was posted to 19.05.2004 for evidence of the complainant as last chance. On that day the complainant was absent and he was represented by counsel and an application was filed for condoning his absence. It was on that day, the learned magistrate rejected the application and dismissed the complaint and acquitted the accused by the impugned order which reads as follows:

“Complainant absent, filed application. Accused present. Complainant is continuously absent. Today case is posted for complainants evidence as last chance. From 30.12.2013 onwards the case is posted for evidence of the complainant. The application filed by complainant rejected. Complainant is not vigilant in prosecuting the case. Hence the complaint dismissed and accused is acquitted under Section 256(1) Cr.PC”.

8. Section 256 of the Code of Criminal Procedure reads as follows:

256. Non-appearance or death of complainant -

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything herein before contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day;

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

9. It is true that power has been given to the court under Section 256 of the Code of Criminal Procedure to acquit the accused, if the complainant was absent and the court was satisfied that he was not diligent in prosecuting the case. In this case, it cannot be said that he was not diligent in prosecuting the case. He was present on 03.03.2004, when the case was posted for his evidence and on that day the evidence was not taken for no fault of the complainant. It is true that on the next day on 20.04.2004 he was absent, but he was represented by counsel. On

19.05.2004 also the complainant was absent, but he was represented by counsel and an application was filed to condone his absence. So it cannot be said that he was not diligent in prosecuting the case as observed by the court below warranting exercise of power to acquit the accused for non-appearance of the complainant on that day. Court ought to have given one more opportunity to the complainant to adduce evidence. So considering the circumstances, this court feels that an opportunity has to be given to the complainant to proceed with the case for which the order passed by the court below acquitting the accused has to be set aside and the matter has to be remitted to the court below for fresh disposal.

So the appeal is allowed and the order of acquittal passed by the court below against the 2nd respondent is set aside and the matter is remitted to the court below for fresh disposal in accordance with law. The court below is directed to take the case on file and give an opportunity to

the complainant to adduce evidence and then after complying with the procedure dispose of the case afresh in accordance with law. Parties are directed to appear before the court below on 16.12.2015. Considering the fact that the case is of the year 2002 (originally taken on file in the year 2001), court below is directed to dispose of the case as expeditiously as possible at any rate with three months from the date of receipt of the order or from the date on which the case is posted for appearance of the parties which ever is later.

Office is directed to communicate this order to the court below at the earliest and also sent back the records to the court below forthwith so as to reach the court below before the date mentioned above.

Sd/-

K. Ramakrishnan, Judge

//True Copy//

P.A. to Judge