

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 11TH DAY OF DECEMBER 2015/20TH AGRAHAYANA, 1937

CRL.A.No. 1833 of 2004 (A)

AGAINST THE ORDER/JUDGMENT IN ST 93/2004 of C.J.M.PATHANAMTHITTA

APPELLANT(S)/COMPLAINANT:

**P.PUSHPANGADAN, S/O GOPALAN
KIZHAKKUMMANNIL HOUSE, OMALLOOR P.O., PATHANAMTHITTA.**

**BY ADVS.SRI.P.VIJAYAKUMAR
SRI.C.R.REGHUNATHAN
SRI.B.HARRYLAL**

RESPONDENT(S)/ACCUSED & STATE:

- 1. SALIM, AJAYA BHAVAN, MAVUNIKKUNNATHIL
KAIPUZHA NORTH, KULANADA, PATHANAMTHITTA.**
- 2. STATE OF KERALA REPRESENTED BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

R2 BY PUBLIC PROSECUTOR SMT SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

LSN

K.RAMAKRISHNAN, J.

Crl.Appeal. No.1833 of 2004

Dated this the 11th day of December, 2015

JUDGMENT

The appeal was filed by the original complainant in ST 93/03 on the file of the Chief Judicial Magistrate Court, Pathanamthitta is the appellant herein. The above case was taken on file on the basis of a private complaint filed by the complainant against the accused alleging offence under Section 138 of the Negotiable Instrument Act (hereinafter referred to as 'the Act').

2. It is alleged in the complaint that accused borrowed a sum of Rs.60,000/- and in discharge of liability, he had issued the disputed cheque No.0170687 dated 02.01.2003 drawn on Indian Overseas Bank, Njettoor-Kulanada Branch in favour of the complainant. The complainant presented the cheque for collection and the same was dishonored for the reason funds insufficient in the account of the accused. The complainant issued the statutory notice under the Act to the accused intimating notice and demanding payment of the amount. But the amount was not paid by the accused

thereby he had committed the said offence, hence the complaint.

3. After preliminary enquiry, the case was taken on file by the learned Magistrate as ST 93/03. The accused entered appearance. Only when the case was posted for evidence on 14.05.2004, the complainant was not present and the court below acquitted the accused under Section 256(1) of the Code of Criminal Procedure (for short 'the Code'). Aggrieved by the same, the present appeal has been preferred by the complainant with leave petition as Crl.LP 443/04. The same was allowed, leave granted and appeal admitted the file.

4. During the pendency of the appeal, the appellant died and his wife filed an application to implead her as additional appellant as Crl.M.A 6320/15 and the same was allowed and the wife was permitted to prosecute the appeal. Though notice was served on the respondent, he remained absent.

5. Heard the counsel for the petitioner Sri P Vijayakumar, counsel appearing for the appellant and Smt. Seena Ramakrishnan, Public Prosecutor appearing for the

State.

6. The counsel for the appellant submitted that since the complainant had to take his daughter to the doctor to Thiruvananthapuram Medical College as she was a cancer patient, he could not attend the case. Though intimation was given to the counsel and he made oral representation before he filed the application to condone the absence, the case was called later and in his absence, the case was disposed of. He prayed for a opportunity as there was no willful negligence on the part of the complainant in not prosecuting the case.

7. It is an admitted fact that the original complainant filed the complaint under Section 138 of the Act against the accused on the basis of a cheque given by him in discharge of a liability for the amount due from him to the complainant. The complaint was filed in the year 2003. The presence of the accused could be procured after issuance of non-bailable warrant only on 29.08.2003. On that day the accused surrendered and he was released on bail and particulars offence were read over and he

pleaded guilty. Thereafter the case was adjourned to 15.09.03, 18.10.03,18.11.03,29.12.03,3.02.04 and all those dates the complainant was absent and his absence was condoned on application. On 03.02.2004, the complainant was absent and his absence was condoned. The accused was also absent and he was represented by counsel and the case was posted for evidence to 02.04.2004. On that day also both the complainant and accused were absent and their absence was condoned on application and it was posted to 14.05.2004 for evidence. On that day, the accused as well as the complainant were absent. But the absence of the accused was condoned on application and since there was no representation for the complainant as seen from the order, the learned Magistrate acquitted the accused under Section 256 (1) of the Code.

8. It is true that under Section 256 of the Code, the Magistrate has got power to acquit the accused under that Section if the court is satisfied that the complainant is not interested in prosecuting the case. It is not always necessary that the court to exercise that discretion of

acquitting the accused under Section 256 of the Code instead the court can even grant an adjournment to the complainant to conduct the case. Further it is seen from the proceedings paper that except on 14.05.2004, throughout when the complainant was absent, he was represented by the counsel and necessary applications have been filed for condonation of his absence and that was allowed by the court also. So under the circumstances, it cannot be said that the complainant was not diligent in prosecuting the case which warrants the exercise of power under Section 256 of the code to acquit the accused. Further the counsel for the appellant submitted that since the daughter of the original complainant was suffering from cancer, he had to take her to hospital for consultation and that was reason why he could not appear. Though the counsel for the appellant submitted that he was represented by counsel and oral submission was made, but that was not seen find a place in the impugned order. However, now the complainant is also no more. Considering the circumstances, this Court feels that the

court below ought to have exercised the discretion in favour of appellant and should have adjourned the case giving an opportunity to the complainant to meet case on merit instead of acquitting the accused especially when the accused was also absent on that day. So considering the circumstances, this Court feels that an opportunity has to be given to the appellant to conduct the case, for which purpose the order of acquittal passed by the court below has to be set aside and the matter has to be remitted to the court below for fresh disposal in accordance with law.

So the appeal is allowed. The 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 Chief Judicial Magistrate, Pathanamthitta is directed to take the case on file and after procuring the presence of the accused, dispose of the case as expeditiously as possible at any rate within a period of three months from the date of procuring the presence of the accused. The parties are directed to appear before the court below on 22.01.2016.

Office is directed to communicate this judgment to the court below and transmit the records to the court below at the earliest so as to reach that court before the date mentioned above.

**Sd/-K.RAMAKRISHNAN,
Judge**

True Copy

P.A to Judge

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