

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 1ST DAY OF OCTOBER 2015/9TH ASWINA, 1937

CRL.A.No. 1960 of 2004 ()

AGAINST THE ORDER IN CrI.L.P. 660/2004 of HIGH COURT OF KERALA
AGAINST THE JUDGMENT IN ST.NO.79/2004 OF CJM, MANJERI

APPELLANT/PETITIONER/COMPLAINANT:

SURESH BABU, S/O. ARUMUGHAN,
"PALLAVI" KARUVEMBRAM WEST P.O., MANJERI.

BY ADV. SRI.K.SHIBILI NAHA

RESPONDENTS/RESPONDENT/ACCUSED AND STATE:

1. C.T.HUSSAIN S/O. C.T.MUHAMMED MASTER,
KUNNATHADATHIL HOUSE, OTHUKKUNGAL P.O.,
MALAPPURAM.

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

BY P.P.SRI.JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1960 of 2004
.....

Dated this the 1st day of October, 2015.

JUDGMENT

The complainant in S.T.No.79/2004 on the file of the Chief Judicial Magistrate Court, Manjeri is the appellant herein. The case was taken on file on the basis of a private complaint filed by the appellant against the accused under section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act').

2. The case of the complainant in the complaint was that accused borrowed a sum of Rs.60,000/- on 24.2.2003 and in discharge of that liability, he had issued a cheque dated 20.2.2004 drawn on Canara Bank, Manjeri branch in favour of the complainant. The complainant presented the cheque for collection and the same was dishonoured for the reason funds insufficient evidenced by dishonour memo dated 23.2.2004. This was intimated to the complainant by his banker vide intimation letter dated 25.2.2004. The complainant issued notice dated 1.3.2004 on the same day and it was delivered

on the accused on 3.3.2004 and on 8.3.2004 respectively. The accused had not paid the amount. So he had committed the offence. Hence the complaint.

3. The Complaint was presented on 16.4.2004 on which date sworn statement of the complainant was taken and it was taken on file as ST.79/2004 under section 138 of the Act and summons was issued to the accused and posted to 18.6.2004. On 18.6.2004 the accused appeared through counsel and the complainant was represented and that was adjourned to 22.7.2004 for appearance of the accused. On 22.7.2004, there was no sitting and it was adjourned by notification to 20.8.2004. On 20.8.2004 the complainant was present, accused was absent and his absence was condoned on application and the case was posted to 17.9.2004. On 17.9.2004, the complainant was present, accused absent and an application was filed to condone his absence, but that was dismissed and non bailable warrant was issued against him and case was posted to 30.9.2004. On 30.9.2004, the complainant was absent and there was no representation and non bailable warrant was not returned. The learned Magistrate by the

impugned order acquitted the accused under section 256(1) of the Code. This is being challenged by the appellant by filing appeal along with leave petition as Crl.L.P.No.660/2004 and leave was granted and appeal was admitted to file. Notice on the first respondent was effected by affixture. In spite of that, he did not appear. The second respondent was represented by Public Prosecutor Sri. Jibu P. Thoams.

4. Heard counsel for the appellant Sri. Shibili Naha and the Public Prosecutor.

5. Counsel for the appellant submitted that there was no willful negligence on the part of the appellant in not prosecuting the case. In fact on that day, case was not posted for any specific purpose but it was only posted for return of non bailable warrant issued against the accused. So it cannot be said that the complainant was deliberately absent on the day on which the case was specifically posted for evidence or hearing. So under the circumstances, the court below was not justified in acquitting the accused invoking section 256(1) of the Code.

6. It is seen from the proceedings paper that except on 30.9.2004, on all other days, the complaint was present.

Further, accused had not appeared in the case but only represented though counsel and particulars of offence were not read over to him. So it was not ripe for trial as well which is seen from the order dated 30.9.2004. It reads as follows:

“Complainant absent consecutively. Today also complainant absent. No application. Counsel also absent. Non bailable warrant not returned. Accused acquitted under section 256(1) Cr.P.C.”

7. The observation made by the court below that complainant absent consecutively appears to be not correct in view of the earlier notings in the proceedings paper which shows that he was present on 20.8.2004 and 17.9.2004. On 18.6.2004 though the complainant was absent, he was represented by counsel.

8. Section 256 of the Code 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 if the complainant was absent or he is dead, the court has got power to acquit the accused under section 256(1) of the code. But before exercising the discretion, the court must satisfy that the complainant is not interested in prosecuting the case. The discretion vested on the magistrate under section 256 of the Code has to be exercised judiciously. It is not always necessary for want of complainant, the accused has to be acquitted invoking power under section 256 (1) of the Code. In appropriate cases, court can adjourn the case and give an opportunity to the complainant to proceed with the case. On going through the proceedings paper, it cannot be said that the complainant was

not diligent in prosecuting the case. He was either present in person or represented by counsel on all previous occasions. Further on 30.9.2004 the case was not posted for evidence or presence of the complainant as required for the purpose of proceeding with the case as well. It was posted for return of non bailable warrant issued and it was noted in the proceedings paper that non bailable warrant was not returned. So under the circumstances, the order passed by the court below acquitting the accused invoking power under section 256(1) of the Code in the circumstance of the case is unsustainable in law and 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 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. Order of acquittal passed by the court below invoking section 256 of the Code against the first respondent is hereby set side and the matter is remitted to the court below for fresh disposal in accordance with law. The court below is directed to take the complaint on file and

after procuring the presence of the accused and giving opportunity to the complainant and accused to adduce evidence, then dispose of the case afresh in accordance with law. The appellant is directed to appear before the court below on 30.11.2015.

Office is directed to send back the records to the court below along with a copy of this judgment.

Sd/-
K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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