

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

CRL.A.No. 2131 of 2004 (Y)

AGAINST THE ORDER IN CrI.L.P. 626/2004 of HIGH COURT OF KERALA,
DATED 07-10-2004

&

AGAINST THE ORDER IN ST 50/2004 of J.M.F.C.(MARADU CASES),
KOZHIKODE, DATED 13-07-2004.

APPELLANT(S)/COMPLAINANT:

SAMBADYA CHITS P.LTD.,
KALOOR ROAD, KOZHIKODE, REPRESENTED BY
K.M.RAMESH, MANAGING DIRECTOR, S/O. K.SREEDHARAN,
AGED 43 YEARS, IRINGALLUR AMSOM DESOM,
P.O.GURUVAYOORAPPAN COLLEGE, KOZHIKODE.

BY ADV. SRI.R.SUDHISH

RESPONDENT(S)/ACCUSED & STATE:

1. K.SURESH, S/O.RAVUNNI NAIR,
AGED 28 YEARS, ARANGATH HOUSE, KACHERIKUNNU,
VALAYANAD AMSOM DESOM, P.O.POKKUNNU, KOZHIKODE.
2. STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

R1 BY ADVS. SRI.V.V.SURENDRAN,
SRI.P.A.HARISH

R2 BY PUBLIC PROSECUTOR SRI.JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

Crl. Appeal No.2131 of 2004

Dated this the 2nd day of November, 2015

JUDGMENT

Complainant in S.T.No.50/2004, on the file of the Judicial First Class Magistrate Court (Marad Cases), Kozhikode, is the appellant herein. The case was taken on file on the basis of a private complaint filed by the complainant/ through its representative 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, accused in discharge of his liability issued a cheque, which when presented was dishonoured for the reasons 'funds insufficient' and in spite of notice issued the 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. The accused did not appear before the court below in spite of service of summons on him and the case

was posted to 19.06.2004 and due to bus strike, the complainant could not appear and the case was adjourned to 03.07.2004. On that day, there was no sitting and the case was adjourned to 13.07.2004. There was road block due to march to the D.I.G's Office by a political party and he and his counsel could not reach the court when the case was called. So it could not be said that there was willful neglect on the part of the complainant in not prosecuting the case as observed by the court below. Since the complainant did not appear on that day, court below by the impugned judgment acquitted the accused under Section 256(1) of the Code of Criminal Procedure. Aggrieved by the same, the present appeal has been preferred by the appellant/complainant before the court below along with Leave Petition as Crl.L.P. No.626/2004 and the application was allowed and the leave was granted and then the appeal was admitted.

4. Heard the counsel for the appellant, respondent and Sri. Jibu P. Thomas, Public Prosecutor appearing for the State.

5. The counsel for the appellant submitted that, due to road block caused on account of a march conducted by the political party to the office of the D.I.G. Police, neither himself nor his counsel could attend the court. Further it was not posted for evidence on that day as the accused had not entered appearance in spite of service of notice. So court below ought to have granted opportunity to the appellant to conduct the case instead of acquitting the accused for non-prosecution of the complaint by the complainant. He prayed for an opportunity.

6. On the other hand, the counsel for the respondent submitted that there is no illegality committed by the court below in passing the impugned order. Heard the Public Prosecutor as well.

7. It is an admitted fact that the case was taken on file on the basis of a private complaint filed by the complainant through its representative against the first respondent alleging offence under Section 138 of the Negotiable Instruments Act. It is also in away admitted that the complainant was not present on 19.06.2004 and also on 13.07.2004. There was no representation on behalf of the complainant on those two occasions and it was on that basis that the court below had passed the impugned order.

8. It is seen from the proceedings paper that the complaint was taken on file on 27.02.2004 and posted to 28.02.2004 and on that day, the complainant was present and summons to the accused was ordered by registered post and posted the case to 30.02.2004. On 30.02.2004 the complainant was present and summons was served on accused, but accused was absent and non-bailable warrant was issued to the accused and posted the case to

28.04.2004. On that day there was no sitting, the case was adjourned to 29.05.2004. On 29.05.2004, the complainant was present and non-bailable warrant was ordered to the accused again and the case was posted to 19.06.2004. On that day complainant was absent and there was no representation and it was posted awaiting return of non-bailable warrant and memo was issued to Station House Officer and the case was posted to 03.07.2004. On 03.07.2004 there was no sitting as magistrate was on training and it was adjourned by notification to 13.07.2004. On that day the learned magistrate passed the following impugned order.

“Complainant absent. On 19.06.2004 also complainant absent. No representation. It appears, the complainant has no interest in the matter. Hence, dismissed in default. He is acquitted under Section 256 Cr.P.C”.

9. It may be mentioned here that except on 19.06.2004 and 13.07.2004, on other dates, the complainant

was present and he was diligently prosecuting the case. In this case though summons was served on the accused, he did not appear. So non-bailable warrant was ordered and it was posted to 19.06.2004 from 29.05.2004 for return of non-bailable warrant. It is seen that on 19.06.2004, it was noted that there was no representation for the complainant and non-bailable warrant was not returned and memo was issued to the Station House Officer calling upon to submit an explanation for not returning the warrant and it was for that purpose posted to 03.07.2004. But on that day there was no sitting and the case was adjourned by notification to 13.07.2004 and it was on that day the impugned order was passed by the court below.

10. 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 hereinbefore 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.

11. It may mentioned here that it was not posted for the evidence of the complainant on 13.07.2004 or on 19.06.2004. There is no case that the complainant had not taken any steps to issue non-bailable warrant to the accused. It is seen from the proceedings paper dated 19.06.2004 that the non-bailable warrant issued was not returned and so court below had issued memo to the concerned Station House Officer in this regard and it was thereafter adjourned to 03.07.2004. But on that day there was no sitting and the case was adjourned to 13.07.2004 by notification. So it cannot be said that the presence of the

complainant was necessary for prosecuting the case either on 19.06.2004 or on 13.07.2004 and it was not clear from the order as to whether there was any negligence on the part of the complainant in not taking steps to issue non-bailable warrant to the accused as well. In fact it was posted to 13.07.2004 for securing the presence of the accused and even if the complainant was present, the case could not have been proceeded with by the court below on that date. So under the circumstances, it cannot be said that the complainant was not interested in prosecuting the case as observed by the court below and in such cases court below ought to have given an opportunity to the complainant to prosecute the complaint instead of dismissing the complaint for default and acquitting the accused invoking the power under Section 256 of the Code of Criminal Procedure. So under the circumstances, this court feels that an opportunity has to be given to the

complainant to prosecute the complaint, for which purpose 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 in accordance with law.

So the appellant succeeds and the appeal is allowed. The order of acquittal passed by the court below against the accused / first respondent under Section 256 of the Code of Criminal Procedure is hereby set aside and the matter is remitted to the court below for fresh disposal in accordance with law. The lower court is directed to take the complaint on file and give an opportunity to the complainant to proceed with the case. The parties are directed to appear before the court below on 22.12.2015. If the accused did not appear, court below is directed to give an opportunity to the complainant to take steps to procure the presence of the accused and after procuring the presence of the accused and giving opportunity to the complainant to adduce

evidence, court below is directed to dispose of the case in accordance with law, as expeditiously as possible at any rate within three months from the date of procuring the presence of the accused by the court below, as the case is of the year 2004.

Office is directed to communicate this judgment to the court below at the earliest.

Sd/-

K. Ramakrishnan, Judge

//True Copy//

P.A. to Judge

ss