

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 15TH DAY OF JULY 2015/24TH ASHADHA, 1937

CRL.A.No. 534 of 2015 () IN CrI.L.P..94/2015

(AGAINST THE ORDER/JUDGMENT IN CC 288/2013 of J.M.F.C. - IV, ERNAKULAM
DATED 02-04-2014)

APPELLANT(S)/COMPLAINANT:

MERCY CHACKO, AGED 64 YEARS,
W/O.P.C.CHACKO, PAINUTHA HOUSE, K.P.VALLON ROAD,
KADAVANTHRA, ERNAKULAM

BY ADVS.SRI.JACOB CHACKO
SRI.MATHEWS JOSEPH

RESPONDENT(S)/STATE & ACCUSED:

1. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM 682 031

2. DORRIS ANTO CHRISOSTOM,
DOOR NO.XVII/1310, BLESSINGS, MUNDAMVELI PO, PIN682 507,

R1 BY ADV. SRI.M.SHAJU PURUSHOTHAMAN
R1 BY ADV. SRI.K.S.RAJESH
R BY PUBLIC PROSECUTOR SMT.P.MAYA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Crl. Appeal No.534 of 2015

Dated this the 15th day of July, 2015

JUDGMENT

The defacto complainant in C.C.No.288/2013 challenges the order of the learned Judicial First Class Magistrate, Ernakulam, by which her complaint under Section 138 of the Negotiable Instruments Act was dealt with, holding the accused not guiltily and acquitted under Section 255(1) of Cr.P.C.

2. The defacto complainant laid a complaint before the learned Magistrate alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act. It was alleged that the accused and the defacto complainant had entered into an agreement for sale. Towards discharge of the liability arising therefrom, the accused allegedly executed a cheque for a sum of Rs.38 Lakhs. The cheque was presented for collection, but was returned dishonoured. After completion of the statutory formalities, the complaint was laid before the court. After few postings, the matter came up before the learned Magistrate on 2/4/2014. The learned Magistrate held that, in

spite of several adjournments, the complainant did not adduce any evidence and consequently the complaint was closed. Thereafter, the court proceeded to hold that the complainant failed to establish that the accused has committed any offence and acquitted under section 255(1) Cr.P.C. This is assailed in this appeal.

3. When the matter was taken up today, there was no representation for the appellant. The learned counsel for the respondent was present. Heard and perused the records.

4. The proceedings before the court below show that on 2/4/2014 the accused was absent, but was represented. The complainant did not adduce any evidence. Thereafter, the court below passed the impugned judgment. However, perusal of the records show that, when the case originally stood posted to 31/12/2013, non bailable warrant was issued to the accused and was posted to 17/3/2014. It appears from the proceedings that the case was advanced on 10/1/2014 at the instance of the accused, who was granted bail. However, instead of adjourning the case to the original date of posting i.e. 17/03/2014, the learned Magistrate adjourned the case to 3/2/2014. Thereafter, there were few postings and ultimately resulting in the

impugned judgment. It appears that during the interregnum, the complainant was neither present nor represented. There are reasons to believe that at least till 17/3/2014 there was no likelihood of the complainant being aware of the posting, in the light of the intervening posting without notice to complainant, which could not be justified.

5. However, had the complainant being deligent, she would have been aware of the posting, at least on 17/3/2014, as justifiably and effectively contended by Mr.Shaju Purushothaman, the learned counsel for the accused. Learned counsel further contended had the complainant been deligent and prompt, atleast on 17/3/2014, it would have been brought to the notice of the learned counsel for the complainant that the case was not called on that date and a consequent enquiry would have revealed about the posting of the case on 3/2/2014. Thereafter the case was posted on 25/3/2014, then to 29/3/2014, 3/2/2014 and ultimately resulting in the impugned judgment on 2/4/2014. There seems to be a gap of almost one month in between. Giving maximum benefit to the complainant and her counsel, still, there appears some element of negligence and laches.

6. The learned counsel for the accused relying on **Chellappan v. State of Kerala** (2013(1) KHC SN 14 (DB)) contended that the law laid down there squarely applies to the facts of this case. I am not inclined to accept that contention. In the above cited decision, the learned single Judge had held that in a case where accused is acquitted due to negligence and callous indifference from the part of the complainant, no relief can be granted to the complainant. In the case at hand, it is true that the complainant never appeared in person before the court below during the previous posting. However, she was being represented through counsel. Evidently, her personal presence is essentially required only on the date when the evidence is to be tendered. Even going to that extent, it seems that there are some laches on the part of the complainant. Since it does not rise to the extent of callous indifference, I am inclined to give one more opportunity to the complainant to contest the entire proceedings on merits, taking into consideration the fact, that the huge amount is claimed to be involved and the further fact that at least there was some mistake from the part of the learned Magistrate in adjourning the case to a different date than to one which was originally notified. Considering the above facts, I am

inclined to allow this appeal on the following terms:

i). The appeal will stand allowed, the impugned judgment will stand set aside and the complaint restored to file on the complainant paying a sum of Rs.3000/- (Rupees Three Thousand only) to the learned counsel for the respondent appearing before this court, within a period of 15 days from today.

ii) Both sides shall appear before the court below on 11/8/2015. The memo/receipt evidencing the payment of costs, as directed above, shall be produced before the learned Magistrate, whereupon the court shall take back the complaint to file and after giving a reasonable opportunity to both sides to adduce evidence, proceed in accordance with law. In the event of non-compliance of the condition of payment of cost, the impugned judgment will stand revived without any further order.

The appeal is allowed as above.

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.

