

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS**

**FRIDAY, THE 9TH DAY OF JANUARY 2015/19TH POUSHA, 1936**

**CRL.A.No. 217 of 2011 ( )**  
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**AGAINST THE ORDER/JUDGMENT IN CrI.L.P. 48/2011 of HIGH COURT OF KERALA  
DATED 17-01-2011**

**AGAINST THE ORDER/JUDGMENT IN ST 8/2009 of J.M.F.C. - III, KOLLAM  
DATED 30-10-2010**

**APPELLANT(S)/COMPLAINANT:**  
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**K.SATHYANANADAN,  
SUARNALAYAM, ASRAMOM, KOLLAM.**

**BY ADVS.SRI.V.V.RAJA  
SRI.M.T.SURESHKUMAR**

**RESPONDENT(S)/ACCUSED & STATE:**  
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- 1. R.PRABHAKARAN,  
M/S.PREJEESH GLASS EMPORIUM, KUNDARA KOLLAM.**
- 2. STATE OF KERALA REPRESENTED BY  
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA  
ERNAKULAM.**

**R1 BY ADV. DR.K.P.SATHEESAN  
R1 BY ADV. SRI.K.K.GOPINATHAN NAIR  
R1 BY ADV. SRI.M.R.JAYAPRASAD  
R1 BY ADV. SRI.P.MOHANDAS (ERNAKULAM)  
R1 BY ADV. SRI.MATHEW SUNNY  
R1 BY ADV. SRI.ANOOP.V.NAIR  
R2 BY PUBLIC PROSECUTOR SRI.R.GITHESH**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-01-2015, THE  
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ALEXANDER THOMAS, J.

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Crl.Appeal No. 217 of 2011

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Dated this the 9<sup>th</sup> day of January, 2015

J U D G M E N T

This is an appeal filed under Sec.378(4) of the Code of Criminal Procedure to challenge the order dated 13.10.2010 of the Judicial First Class Magistrate's Court No.III, Kollam, in S.T.No.8/2009, whereby the complaint has been dismissed due to the absence of the complainant on that day and the accused has been thus acquitted under Sec.256(1) of the Code of Criminal Procedure. The summary trial case arose out of a private complaint instituted by the appellant herein (complainant) alleging that the 1<sup>st</sup> respondent herein (accused) has committed the offence punishable under Sec.138 of the Negotiable Instruments Act for the alleged dishonour of the cheque in question for an amount of Rs.1.5 lakhs. The impugned order dated 30.10.2010 rendered by the court below in S.T.No.8/2009 reads as follows:

“Complainant absent. No representation. PW1 also absent. Accused present. Last time there was specific direction that the complainant and PW1 should be present today for adducing evidence. In spite of that they are absent and there is not even a representation for them. Hence the accused is acquitted u/s.256(1) Cr.P.C..”

2. The appeal was admitted on 14.2.2011 and Dr.K.P.Satheesan, learned Senior Counsel instructed by Sri.Manu Thambi, learned counsel for appearing for the 1<sup>st</sup> respondent has entered appearance on behalf of the 1<sup>st</sup> respondent. The learned Public Prosecutor has taken notice for the 2<sup>nd</sup> respondent State of Kerala.

3. Heard Sri.Raja Vijayaraghavan, learned counsel appearing for the appellant and Dr.K.P.Satheesan, learned Senior Counsel instructed by Sri.Manu Thambi, learned counsel appearing for the 1<sup>st</sup> respondent and the learned Public Prosecutor appearing for the 2<sup>nd</sup> respondent State of Kerala.

4. It is averred in para 4 of the appeal memorandum as follows:

“4. Since the accused did not care to appear inspite of receipt of summons non bailable warrant was ordered. Later, the accused appeared and he was enlarged on bail. The accusation was read over to the accused and the case was posted for evidence to 14.7.2008. Thereafter, the case was posted in the adalath and since the matter could not be settled it was again posted for evidence. Later, the case was made over to the J.F.M.C.III, Kollam and the parties were directed to appear on 16.1.2009. Later, the case was adjourned for various reasons and finally the case was posted to 18.8.2010 for evidence and the complainant was present. Since the accused kept away from the court non bailable warrant was again issued and steps were initiated against the sureties. The case was then posted to 7.10.2010 on which day both the complainant and the accused applied for time. The case was posted to 25.10.2010 and before the said day affidavit in chief along with original documents were produced in court. The Power of Attorney holder of the original complainant was one Sri.Rajeesh Kumar, who called up the counsel

and informed that he was laid up with viral and requested that the matter be posted on the next week. The case was posted on 30.10.2010 and on the said day the Power Holder informed he original complainant that he was in fact laid down with chickenpox and hence will not be able to appear before Court. Though the counsel for the petitioner informed the said fact before court by filing an application, the court below did not accept the same and have mechanically acquitted the accused under S.256(1) of the Cr.P.C. The order passed by the Learned Magistrate is palpably erroneous, arbitrary and against all tenets of law and has resulted in gross miscarriage of justice.”

It is thus clearly pleaded by the appellant that the complainant was laid up with chickenpox and has filed application before the court below for excusing his absence on the day in question. These factual averments in para 4 of the appeal memorandum, more particularly about the aforementioned aspects, have not been rebutted by the 1<sup>st</sup> respondent. There are no circumstances to disbelieve the factual version averred by the complainant on these aspects. Therefore, this Court is of the considered opinion that the court below ought to have rendered a decision on the merits of the case instead of shutting out the case of the complainant at the threshold itself on account of his mere non-appearance on the abovesaid day in question, for which he has shown adequate cause for his absence. In this view of the matter, the impugned order is set aside and the Summary Trial case, S.T.No.8/2009 stands restored to the file of the Judicial First Class Magistrate's Court-III,

Kollam. The complainant and the 1<sup>st</sup> respondent shall appear in person before the court below on 6.2.2015 at 11 a.m. It is ordered in the interest of justice that the court below will decide the case on merits with reasonable opportunity to both sides and in accordance with law. Having regard to the fact that the Summary Trial Case arose as early as in the year 2009, it is further ordered in the interest of justice that the court below will endeavour to ensure that the case is finally disposed of well before the end of September, 2015.

With these observations and directions, this Criminal Appeal stands allowed.

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Sd/-  
ALEXANDER THOMAS, JUDGE

///True copy///

P.S. to Judge