

IN THE HIGH COURT OF KERALA AT ERNAKULAM

**PRESENT:
THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS**

WEDNESDAY, THE 7TH DAY OF JANUARY 2015/17TH POUSHA, 1936

CRL.A.No. 1209 of 2011 ()

AGAINST THE ORDER/JUDGMENT IN CC 100/2008 of C.J.M., ALAPPUZHA DATED 03-10-2008

APPELLANT(S)//COMPLAINANT:

**GURUDAYAL M.P, S/O.PALANIAPPAN,
PROPRIETOR, M/S.GURU JEWELLERS, MULLAKKAL
ALAPPUZHA.**

BY ADV. SRI.R.AZAD BABU

RESPONDENT(S)/ACCUSED:

**1. ANIL JOSEPH,
VALAYIL, THUMPOLY.P.O, ALAPPUZHA.**

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

R2 BY PUBLIC PROSECUTOR SRI.M.K.ABOOBACKER

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-01-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ALEXANDER THOMAS, J.

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Crl.Appeal No. 1209 of 2011

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Dated this the 7th 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 impugn the order dated 3.10.2008 of the Chief Judicial Magistrate, Alappuzha, in Calendar Case, C.C.No.100/2008, whereby the complaint has been dismissed due to the absence of the complainant and the accused has been acquitted under Sec. 256(1) of the Code of Criminal Procedure. The Calendar Case, C.C.No. 100/2008 arose out of a private criminal complaint filed by the complainant herein alleging that the 1st respondent herein (accused) had committed the offence punishable under Sec. 138 of the Negotiable Instruments Act for the alleged dishonour of the cheque in question. The impugned order dated 3.10.2008 of the court below in C.C.No. 100/2008 reads as follows:

“Complainant absent. Applies. Accused absent. No representation. Accused absent. His pleader absent. Complainant's counsel Sri.T.G.Sanalkumar absent. Case is posted for the evidence of the complainant and no further time was ordered. But complainant and his pleader are absent. Reasons stated in the application are not supported by evidence. Hence application is rejected. Accused is acquitted u/s. 256(1) Cr.P.C. Set at liberty.”

2. This appeal has been admitted on 10.8.2011 and notice was ordered to the 1st respondent and the learned Public Prosecutor has taken notice for R-2 State of Kerala. Service of notice on R-1 has been duly completed, but the 1st respondent has not entered appearance in this appeal.

3. Heard Sri.R.Azad Babu, learned counsel for the appellant and the learned Public Prosecutor appearing for the 2nd respondent-State of Kerala.

4. It is pleaded in Ground C of the appeal memorandum that the learned Magistrate should have found that the absence of the complainant and his advocate was not wilful or deliberate and that there were compelling reasons for their absence. That In fact the Advocate for the complainant was engaged in another court and was unable to be present when the case was called and that though he made arrangements for submitting about the application for time and in fact, the learned Magistrate had considered the application and rejected the same without giving any reasons. It is further averred in Ground D of the appeal memorandum that the learned Magistrate should have found that the accused and his counsel were absent on the day in question and even if the complainant and his

advocate were present, evidence could not have been taken in the absence of the accused and the learned Magistrate should have ordered necessary process against the accused to secure his presence before the court, rather than dismissing the complaint for the absence of the complainant.

5. It is seen from the perusal of the impugned order that the counsel for the appellant was absent on that date, but the application for excusing the absence of the accused was submitted before the court below. There are no circumstances to disbelieve this version of the complainant's counsel that he was engaged in another court on that day and therefore he could not appear before the court below on the day in question. Moreover, it is seen from a perusal of the impugned order that neither the accused nor his counsel was present before the court below on that day. Therefore, in the absence of the accused, no evidence could have been taken on that day and the court below should have taken steps to secure the presence of the accused and should have taken steps to facilitate rendering of a decision on merits of the matter. Having regard to all the circumstances, this Court is inclined to set aside the impugned order. Accordingly, the impugned order is set aside. The Calendar

Case, C.C.No. 100/2008 shall stand restored to the file of the court below concerned. The court below will decide the case on merits after reasonable opportunity to both sides and in accordance with law. Having regard to the fact that the Calendar Case arose as early as in the year, 2008, the court below will take all reasonable measures to ensure that the case is finally disposed of well before the end of August, 2015.

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

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Sd/-
ALEXANDER THOMAS, JUDGE

///True copy///

P.S. to Judge