

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

FRIDAY, THE 16TH DAY OF OCTOBER 2015/24TH ASWINA, 1937

CRL.A.No. 1391 of 2011 ()

AGAINST THE ORDER/JUDGMENT IN CC 2328/2009 of JUDICIAL FIRST CLASS
MAGISTRATE - VI, ERNAKULAM DATED 09.05.2011

APPELLANT(S)/COMPLAINANT:

M/S.HOLY FAITH FINANCIAL SERVICES,
34/2353, MAMANGALAM, COCHIN-682 025
REP.BY ITS, PROPRIETOR, SANY FRANCIS
AGED 47, R/AT HOUSE NO., 48/2005-C
RMV ROAD, ELAMAKKARA, ERNAKULAM-682026
PRESENTLY M/S.HOLY FAITH FINANCE PVT.LTD.
3-E, 3rd FLOOR, VATTOLI TOWERS, S R M ROAD
ERNAKULAM COCHIN 682 018

BY ADV. SRI.PEEYUS A.KOTTAM

RESPONDENTS/STATE AND ACCUSED:

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

2. M/S. BCG ESTATES BUILDERS & HOTELS PVT.
LTD., REPRESENTED BY ITS MANAGING DIRECTOR, 1ST FLOOR
HOTEL HARBOR VIEW RESIDENCY, M.G.ROAD, ERNAKULAM
KOCHI-682 015.

3. REKHA,
DIRECTOR, M/S. BCG ESTATES BUILDERS & HOTELS PVT.
LTD., 1ST FLOOR, HOTEL HARBOR VIEW RESIDENCY
M.G.ROAD, KOCHI-682 015.

R2 & R3 BY ADV. SRI.JOHNSON ABRAHAM

R2 & R3 BY ADV. SRI.NELSON ABRAHAM

BY PUBLIC PROSECUTOR: SMT M G LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.1391 of 2011

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Dated this the 16th day of October, 2015

JUDGMENT

Appellant was the complainant before the court below who lodged a complaint invoking Section 138 of the Negotiable Instruments Act alleging that a cheque issued by the accused towards the discharge of a legally recoverable debt was dishonoured on ground of insufficiency of funds. After the appearance of the accused, the case was thereafter posted for evidence. It appears that there were several postings and ultimately, the case was posted to 09.05.2011. On that day, the accused was absent but he was represented. The complainant was also absent but he was represented. On the ground that the case was posted for evidence as the last chance, the accused was acquitted invoking Section 256(1) of the Cr.P.C. This is under challenge in this appeal.

2. Heard both sides and examined the records.

3. It is an admitted fact that the accused was absent on the date when the case was posted for evidence. It was posted as last chance for the evidence of the complainant, which is evident from the impugned order. According to the appellant, as revealed in the

appeal memorandum, the date was wrongly noted by the advocate clerk inadvertently as 10.05.2010, instead of 09.05.2011.

4. Learned counsel for the respondent vehemently contended that the appeal itself is not maintainable, since the original complaint was filed claiming it to be a partnership firm and now, it is claimed to be a private limited concern and the appeal is filed by yet another institution. The appeal memorandum shows that the appellant is one M/s. Holy Faith Financial Services, represented by its proprietor, which is the complainant before the court below and it is stated that it is presently, M/s. Holy Faith Finance Pvt. Ltd. In the appeal memorandum itself, it is clearly stated that it is presently known as M/s. Holy Faith Finance Pvt. Ltd. The appellant remains to be M/s. Holy Faith Financial Services. Hence, I am not inclined to accept the contention of the learned counsel for the respondent that the complainant is not the appellant herein. The question about the status of the entity, the jural relationship and whether they are entitled to continue to proceed with the proceedings are matters of evidence, not to be adjudicated at this point of time.

5. Regarding the reason stated in the appeal memorandum that the posting date was wrongly taken as 10.05.2010 instead of

09.05.2011, even though strong objections were raised by the learned counsel for the respondent that an anterior date with a difference of one year was claimed to be taken down, it appears to be a case of typographical mistake as explained by the learned counsel for the appellant, instead of 10.05.2011, since the certified copy of the impugned order shows that the copy application was made on 12.05.2011 and it was issued on 30.05.2011.

6. It is on record that the complaint is of the year 2009. It was dismissed in May 2011. Evidently, from 2009 to 2011, the matter was pending before the court below. On the date of dismissal, though the complainant was absent, he was represented. In the above circumstances, it cannot be said that the complainant was completely negligent or lethargic in prosecuting the matter. Having regard to the above facts, I feel that though the court below was perfectly justified legally in acquitting the accused on that day due to the absence of the complainant, it would be more appropriate to give one more opportunity to the complainant to prosecute his case on merits. In the light of the above, I feel that the impugned order is liable to be set aside and the matter remanded to the court below, to enable the complainant to prosecute the matter as a last chance. It is made clear that on the date of proposed appearance to

be mentioned hereinafter, the complainant shall be present, offer himself for evidence and in case he remains absent, the court below can pass appropriate orders in accordance with law.

In the result, the appeal is allowed. The impugned order is set aside and the matter is remanded to the court below to have a fresh consideration. Both sides shall appear before the court below on 09.12.2015. It is made clear that any objection regarding legal status of the complainant firm can be raised by the accused before the court below.

Sd/-
SUNIL THOMAS
Judge

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P.A to Judge