

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 24TH DAY OF NOVEMBER 2015/3RD AGRAHAYANA, 1937

CRL.A.No. 1585 of 2011 ()

AGAINST THE ORDER IN Cr1.L.P. 279/2010 of HIGH COURT OF KERALA DATED
12.03.2010

AGAINST THE JUDGMENT IN ST 1711/2009 of JUDICIAL FIRST CLASS
MAGISTRATE-II (MOBILE), KOTTAYAM DATED 02.11.2009

APPELLANT/COMPLAINANT:

R.JAYALAL, PROPRIETOR,
JAYA PLY & VENEERS, KOTTAYAM.

BY ADV. SRI.MATHEW PHILIP EDAPPALLIL

RESPONDENTS/ACCUSED:

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

2. MRS.SAJIDA MAZOOD, ARTEK,
AUTOMOBILE ROAD, PALARIVATTOM, ERNAKULAM - 682025.

R2 BY ADV. SRI.ANCHAL C.VIJAYAN
BY PUBLIC PROSECUTOR: SMT.M.G.LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 24-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.1585 of 2011

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Dated this the 24th day of November, 2015

JUDGMENT

The appellant, on the strength of a dishonoured cheque for a sum of Rs.95,000/-, laid a complaint against the second respondent herein invoking Section 138 of the Negotiable Instruments Act. The case was pending for quite sometime and ultimately came up for evidence on 02.11.2009. On that day, neither the appellant nor the counsel was present. Hence, court below by the impugned order dismissed the complaint and acquitted the accused invoking Section 256(1) of Cr.P.C. This is challenged in this appeal.

2. Respondents appeared and both sides were heard.

3. Annexure to the leave application is a copy of the diary extract of court below. It indicates that the complaint was filed sometime in October 2006. The matter was pending for a long period awaiting the appearance of the accused. Sections 82 and 83 Cr.P.C. steps were also taken. Ultimately, accused appeared on 16.10.2009, the case was advanced and bail was granted to him. Thereafter, the case stood posted to the original date of appearance on 24.10.2009 with a direction to file a proof affidavit. On

24.10.2009, the proof affidavit was not filed and the case was posted to 2.11.2009 as last chance. On that day, impugned order was passed.

4. Learned counsel for the appellant contended that though the accused appeared on 16.10.2009, the appellant was not aware of that appearance. On that day, even though the complainant was absent, there was a direction to file proof affidavit. Even though there is some substance in the contention of the learned counsel for the appellant in this regard, it is evident that there was a further posting on 2.11.2009. Even though the order to file the proof affidavit was passed on 16.10.2009, that also in the absence of the complainant, court below granted one more opportunity to the appellant.

5. According to the learned counsel for the appellant, on 02.11.2009, though the appellant wanted to appear in Court in person, he felt giddiness and had to get medical aid. Learned counsel contended that he is suffering from heart ailment and to substantiate it, a certificate issued from the Amritha Institute of Medical Sciences and Research Centre is also appended.

6. Though, there is no direct evidence to show that the complainant had availed any medical treatment on 2.11.2009 and

there is no justifiable reason for the counsel also to be absent on that day, it appears that a lenient view is liable to be taken. This is all the more so, since the complainant has been effectively prosecuting the matter from 23.11.2006 till 24.10.2009. Having regard to these facts, I feel that the court below on 2.11.2009 could have taken a more pragmatic approach and granted one more reasonable opportunity. Having regard to the above facts, I feel that the impugned order is not legally sustainable and is liable to be set aside.

In the result, the appeal is allowed. The impugned order is set aside and the matter is remanded to the court below for fresh consideration after granting the appellant a reasonable opportunity to contest the proceeding. Both sides shall appear before the court below on 02.01.2016.

Sd/-

SUNIL THOMAS
Judge

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True Copy /

P.A to Judge