

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MRS. JUSTICE MARY JOSEPH

THURSDAY, THE 11TH DAY OF JUNE 2015/21ST JYAISHTA, 1937

CRL.A.No. 2101 of 2011 ()

AGAINST THE ORDER/JUDGMENT IN CrI.L.P. 1032/2011 of HIGH COURT OF KERALA

AGAINST THE ORDER/JUDGMENT IN ST 330/2010 of J.M.F.C.-X, TRIVANDRUM

APPELLANT(S) :

K.KARUNAKARAN, AGED 55 YEARS, PROPRIETOR,
M/S.REENA WOOD INDUSTRIES, PULLANNIMUKKU, NELLIVILA P.O.,
THIRUVANANTHAPURAM, REPRESENTED BY POWER OF ATTORNEY HOLDER
MR.SADASIVAN, S/O.GOVINDAN, AGED 60 YEARS, RESIDING AT ANJU BHAVAN,
PERINGAMMALA,, KALLIYOOR P.O.,
THIRUVANANTHAPURAM.

BY ADV. SRI.S.RAJEEV

RESPONDENT(S) :

1. K.R.BALU, AGED ABOUT 35 YEARS,
RESIDING AT DWARAKA, T.C.NO.72/2780,
PUTHENPALAM, VALLAKKADAVU,
THIRUVANANTHAPURAM.

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

R1 BY ADV. SRI.P.V.ANIL
R2 BY PUBLIC PROSECUTOR SMT.T.Y.LALIZA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'C.R'

Mary Joseph, J.

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Crl.A.No.2101 of 2011
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Dated this the 11th day of June, 2015.

JUDGMENT

1. Appellant is the complainant in S.T.No.330 of 2010 on the file of the Judicial First Class Magistrate-X, Thiruvananthapuram. The parties to this appeal for convenience will hereinafter be referred to in accordance with their respective status in the complaint. The complaint was filed against the first respondent alleging commission of the offence under Section 138 of the Negotiable Instruments Act, 1881, (for short, the “Act”) before the Judicial First Class Magistrate-III, Thiruvananthapuram and it was taken on file by the said Magistrate as S.T.No.549 of 2008. The allegation was that two cheques issued by the first respondent to the

complainant towards discharge of the monetary liability of Rs.2,01,890/- were not honoured on presentation before the bank for encashment due to insufficiency of funds in the account, maintained with the bank. Demand was made through lawyer notice, but, due to want of response by reply notice or payment, the complaint in question was filed. It is the case of the complainant that, the complaint, which was filed before the Judicial First Class Magistrate-III, Thiruvananthapuram, though taken on file as S.T.No.549 of 2008, was later on transferred on administrative reasons to the Court of the Judicial First Class Magistrate-X, Thiruvananthapuram, without the factum of transfer being informed to the complainant or his counsel. It is also the grievance of the complainant that, after the transfer, the case was scheduled for appearance of the complainant, to 9.2.2011, a much later date. Since the factum of transfer was not

within his knowledge, he could not appear before the latter court on three successive posting dates. On the third posting date when the case was posted for recording the evidence of the complainant for want of his presence before the court to let in evidence, the learned Magistrate was pleased to acquit the accused consequently.

2. Heard Sri.S.Rajeev, learned counsel for the complainant.

Sri.S.Anil. who laid vakalath for the accused did not turn up. According to Sri.S.Rajeev, the act of the learned Magistrate, posting the case to a much later date, without the factum of the transfer of the case informed to the complainant or his counsel and dismissal of the complaint on the third occasion for his non-appearance, caused much prejudice to the complainant. It is further submitted that, the non-consideration of the complaint on merits has also resulted in prejudice to him. According to him,

the learned JFCM-X, Thiruvananthapuram ought to have taken measures to inform the complainant or his counsel about the posting of the case after the transfer. According to him, the JFCM-X, Thiruvananthapuram ought to have adverted to the fact that the complainant was vigilantly prosecuting the complaint in question for the preceding two years prior to the transfer without fail.

3. It is the grievance of the complainant that, his case which was originally on the file of JFCM-III, Thiruvananthapuram was transferred therefrom to JFCM-X, Thiruvananthapuram; without the factum of transfer made known to him and therefore, he was prevented from attending the latter court and his absence for three successive posting dates before the latter court culminated in the passing of the impugned order to his disadvantage. According to Sri.S.Rajeev, the complainant was vigilant in

prosecuting the case prior to the transfer of the same to JFCM-X, Thiruvananthapuram and that is discernible from the proceedings therein. Sri.S.Rajeev, the learned counsel for the complainant has addressed this Court stating that had the learned Magistrate now in seizin of the case adverted to the proceedings prior to the transfer of the same to his file, the order under challenge would not have been passed.

4. The records of the case have been summoned. The impugned order is perused. The relevant portion of the said order reads:-

“The case has been filed in the year 2008 and is transferred to this court for trial. From 9.2.2011 onwards the case is posted for evidence of the complainant. Accused alone appears and the complainant and counsel absent, no representation. The case has been posted for evidence of the complainant as last chance on 26.4.2011. On that day also complainant was absent. The accused is present. Since the case of the year 2008 and complainant is absent regularly, accused is acquitted under Section 256 (1) Cr.P.C.”

5. It is made clear from the order that the complaint was of the year 2008 and it was transferred by the court which took cognizance over it to another court and the case was posted to 9.2.2011 for adducing evidence by the complainant. It is also revealed from the order that neither on 9.2.2011 nor on the subsequent dates to which the case was posted for evidence to be let in by the complainant, he was absent. The accused was present on all those days and due to want of presence of the complainant, on 26.4.2011, the date which was scheduled as the last date for the purpose, the learned Magistrate was compelled to pass the order of acquittal of the accused under Section 256(1) of Cr.P.C. The long pendency of the complaint since 2008 was also cited by the learned Magistrate as a reason for passing the order.
6. According to Sri.S.Rajeev, the learned counsel, it is not an outright dismissal of the complaint that is contemplated under

Section 256(1) Cr.P.C. According to him, a discretion is conferred on the learned Magistrate under Section 256(1) Cr.P.C. and that is meant to be exercised reasonably and not mechanically or arbitrarily. In the nature of the argument put forth by the learned counsel, a re-production of Section 256(1) Cr.P.C. is necessitated. Section 256(1) reads:

“Non-appearance or death of complainant-(1) If a summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day.

Provided that where the complainant is represented by a Pleader or by the Officer

conducting the prosecution or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.”

7. A perusal of the section cited *supra* would make it clear that the authority to acquit the accused could be exercised by the Magistrate in seizin of the complaint only in the twin occasions and that too after the issuance of summons to the accused, i.e.

(1) on the date appointed for the appearance of the accused or

(2) on any day subsequent thereto to which hearing may be adjourned.

8. The Section contemplates that if summons has been issued in a complaint and the complainant fails to appear when the case is called on the day scheduled for his appearance or on any

adjourned date of hearing, it is open for the Magistrate to proceed in either of the three ways as follows:

The Magistrate may;

- (1) acquit the accused or
- (2) adjourn the case or
- (3) proceed to hear the case under the proviso if the complainant is represented by a Pleader or by an officer conducting the prosecution or if the personal attendance of the complainant was dispensed with when applied with reasons.

9. Whether the personal attendance of the complainant is necessary or not is a matter of discretion within the realm of the learned Magistrate and the discretion should only be exercised judicially. The discretion should not have been exercised with the sole aim in mind of achievement of disposal rate. The power under

Section 256(1) is not meant by the Code to be exercised by the Magistrate to get rid of a case on its file by short cut methods. Before exercising the discretion, the Magistrate has a duty to see whether in the particular instance before him the personal attendance of the complainant before him or her is unavoidable to step down further in the process of adjudication. If the learned Magistrate finds that the proceedings would be meaningless on account of the absence of the complainant and in the event of want of any reasonable explanation being submitted for his absence or when the explanation offered for the absence appears to him to be unsatisfactory, he will be justified in the exercise of power under Section 256(1) Cr.P.C. Whenever the power is exercised, and an order of acquittal is passed, that should be a reasoned one.

10.What the Magistrate has to do in a situation of the nature on

hand is to see whether the absence of the complainant on the date of posting would affect the progress of the case or not. If the absence of the complainant on a particular day would not, in the opinion of the Magistrate, materially affects the progress of the case, then there is every justification for the Magistrate under Section 256(1) Cr.P.C. to adjourn the hearing to a future date.

11. Normally, in prosecutions under Section 138 of the Negotiable Instruments Act, the complainant will have a stake in the matter. Therefore, it is improper for the Magistrate concerned to dismiss the complaint on the sole reason that the complainant has not turned up. The order of dismissal would, no doubt, operate as a final order. In the circumstances, there is every chance for the complainant to be affected prejudicially and therefore, the learned Magistrate must have exercised the judicial discretion in its true spirit and only after proper application of mind. Or, in

other words, in the event of absence of the complainant the complaint should not be dismissed immediately, lest, the court should either adjourn the case or may proceed to hear the case under the proviso to Section 256(1) Cr.P.C. in case the complainant is represented by his counsel or by an officer conducting the prosecution or if the personal attendance of the complainant is not warranted by the situation on hand. The Magistrate may grant exemption on its own or on an application being made by the counsel representing the complainant.

12. In the case on hand, as revealed from the impugned order, there was a transfer of the case from the original court that took cognizance of the complaint to a different court. Whether the factum of transfer of the case was notified properly with the new posting date on conspicuous parts of the court centre for the counsel representing the respective parties to the complaint is not

known to this court. Nevertheless, it is pleaded by the counsel representing the complainant in the revision petition and also drawn attention of this Court while hearing that the factum of transfer of the complaint from JFCM-III to JFCM-X, Thiruvananthapuram was not made known to him. The impugned order makes it clear that the posting on 9.2.2011 and on subsequent dates was for adducing evidence of the complainant and on all those posting dates the accused was personally present. The complaint being posted on 9.2.2011 and on further dates for the complainant to adduce evidence, the presence of the complainant was material and inevitable for the progress of the case further. Moreover, a contra inference is also not possible in the matter, in a circumstance, when the accused made his appearance in person on all posting dates before the court to which the case was transferred that the factum of

transfer and the date to which it was posted in the latter court was not notified. In such a situation, I could not find merit in the submission of Sri.S.Rajeev, the learned counsel appearing for the complainant/revision petitioner that the factum of transfer of the case from JFCM-III to JFCM-X, Thiruvananthapuram and the posting date before the latter Court were not informed to him.

13.It is pertinent to see that the prosecution in question was launched in the year 2008 and there is absolutely no reference in the impugned order by the learned Magistrate that the complaint was dismissed for default on any prior occasion during its pendency till the passing of the impugned order in the year 2011. Therefore, it could be gathered that the complainant was prosecuting the case vigilantly and properly for the last three years. It has also come to light from the impugned order that the case was posted for evidence for the first time on 9.2.2011. The

attending circumstances stated supra makes this Court to conclude that the complainant in the case on hand was vigilant in prosecuting the case prior to the transfer of the case from JFCM-III to JFCM-X and for some reason, which he adhered to as the lack of information about the transfer and the posting date, he could not make his presence available on three consecutive dates of posting after the transfer. The learned Magistrate has considered only the long pendency of the case from 2008 and the absence of the complainant for three consecutive posting dates before him for adducing evidence as the reason for acquitting the accused. The learned Magistrate ought to have looked into the previous proceedings of the case available in the proceedings paper to arrive at a conclusion as to whether the non-attendance of the complainant before him was wilful or not. The learned Magistrate ought to have considered whether the absence of the

complainant was only after the transfer of the case to JFCM-X, Thiruvananthapuram or else he was frequent in absenting himself before JFCM-III, Thiruvananthapuram. Normally, the complainant will not wilfully evade from attending the court and let himself to face the dire consequences as the one on hand. A counsel also would not in normal circumstances keeps himself away from prosecuting the case wilfully. Therefore, it is stated that the learned Magistrate must have adverted to the previous proceedings of the case prior to arriving at a decision as the one on hand determining the destiny of the complaint or the complainant. Only after application of mind on the nature and the character of the complainant from the perspective of a litigant that the learned Magistrate could have arrived at the conclusion that he is contumacious in prosecuting the matter and then only he could have exercised the discretion conferred on

him under Section 256(1) Cr.P.C. to acquit the accused. Had he applied the mind, the impugned order of acquittal would not have been passed by him. In this connection, the dictum in **Chettinad Cement Corporation Ltd. v. Proprietor, Rugmini Steels** (2014 (2) KHC 537) cited by the learned counsel for reliance is worthy of quoting and is reproduced hereunder.

" 28. As has been observed in the various decisions on the point, the learned Magistrates are to be reminded of the fact that while exercising the discretion they should not forget that their very existence is for dispensation of justice but within the frame work of the statutes governing particular cases. A complainant usually approaches the court with a case because the accused committed wrong to him. Though there may be cases where the complaints are filed only to cause harassment to the accused, that can only be stated as an exception.

Magistrate cannot proceed on the premise that complaints are filed only to cause harassment to the accused. While maintaining the presumption of innocence of the accused, the court should not be harsh or hasty in disposing such complaints availing of the provision under S.256 (1) Cr.P.C. totally disregarding the injustice that may be caused to the complainant. The endeavour of the court should be to advance justice and not to deny it. It cannot be forgotten that there may be host of reasons for the absence of the complainant when the case is called. Either he might have been held up due to heavy traffic block or because the vehicle was held up at a level-cross (Railway gate). The fact that there used to be a huge crowd in the veranda and at the entrance door of the court which prevents the complainant from entering the court on time are not matters which the Magistrate can lose sight of. The court should be cautious of such situations as well The fact that the complainant was absent on

an earlier date also may not in all cases be a reason to invoke the provision under S.256 (1) Cr.P.C. If the case is posted for recording the evidence, the better course would be to pass over the matter and not to immediately invoke S.256 (1) Cr.P.C. solely for the reason that the complainant could not enter the court hall when the case is called. There may be variety of reasons for his inability to enter the court hall or to reach the court on time. There may also be cases where the counsel appearing for the complainant could not be present in court either because he was engaged in another court or because of other reasons. True that the counsel is expected to make arrangements to represent the matter in court. But for the fault or lapses on the part of the counsel, a genuine complaint cannot be thrown out. There is a propensity to see that the pendency is reduced by adopting such shortcut disposal resorting to S.256(1) Cr.P.C. It cannot be justified. But at the same time, the view that under

no circumstance, S.256 can be applied if the case is posted for evidence and that only if the case is posted for "hearing" and if only on that day the complainant is absent, the case can be disposed of under S.256 (1) Cr.P.C. is something which is not discernible from the provision. Therefore, the pragmatic view would be that though the Magistrates can invoke the provision under S.256 (1) Cr.P.C. to acquit the accused for the absence of the complainant on the day the case is posted for recording evidence or on the day when the actual presence of the complainant is essential for the due prosecution of the matter, a case cannot be simply disposed of under S.256(1) Cr.P.C. unless the court is satisfied that the absence of the complainant was deliberate and that his absence was only to protract the proceedings to cause harassment to the accused.

14.It is an axiom of criminal law that it is better that a hundred

guilty persons should escape than that an innocent person should suffer. Therefore, it resolves all reasonable doubts in favour of the accused. The golden rule of criminal jurisprudence is that an accused is presumed to be innocent till he is proved to be guilty; hence the law requires the accuser to prove all facts compatible with the guilt of the accused and incompatible with his innocence.

15. Therefore, in the criminal system that is existing, a complainant, who has launched a criminal prosecution against an accused has to take the burden to prove the latter's guilt starting from the presumption that he is innocent. In such a circumstance, if his complaint having stake is thrown down by the court without the opportunity to adduce the evidence being provided to him, no doubt, it is unfair and unjust and the action of the court below doing so is violative of the principles of natural justice. The aim

of the rules of natural justice is to secure justice or in other words, to prevent miscarriage of justice. It is pertinent to quote **Chandra Reddy, C.J.**, who had expressed in **C.Pinchiah v. Andhra University** (AIR 1961 AP 465).

16. “The expression “natural justice” conveys the notion that the result of the process should be just. There are two concepts underlying this doctrine, namely, the authority deciding the dispute should be impartial and party to be affected should be given full and fair opportunity of being heard.”
17. Therefore, the courts vested with the power to resolve conflicts are bound to observe rules of natural justice in the conduct of the enquiry and should not allow their decision to be impeached on the ground that the procedure followed was not in accordance with that.
18. In the case on hand, the learned Magistrate's failure to apply his

or her mind into the conduct of the complainant in prosecuting the case prior to the transfer of the case on to his file has resulted in the acquittal of the accused without a full fledged trial being held in the prosecution and thereby culminated in sheer miscarriage of justice. The approach of the court in a circumstance when the complainant is not present should be pragmatic. Court should venture into the attending circumstances discernible from the previous postings to see whether the absence was deliberate or not. If the court feels that, an element of deliberateness is present in the conduct of the complainant in absenting himself in the court, there is every justification in acting in accordance with the directives contained in Section 256(1) Cr.P.C. If it is found unintentional or non-deliberate, the trend of the court should be to adjourn the case and it is also desirable that the message be conveyed to the

counsel through a responsible agent of the court. If complainant resorts to abstinence even after the transpiration of the message, then the court can very well take recourse to the power under Section 256(1) Cr.P.C. and order for acquittal of the accused. This Court feels in the circumstances, in the interest of justice, that the complainant should be given an opportunity to contest the case.

In the result, the Criminal Appeal is allowed on the following terms:

- 1) The impugned order of acquittal of the accused is set aside.
- 2) JFCM-X, Thiruvananthapuram is directed to restore the complaint back to file.
- 3) Both parties to this appeal are directed to attend JFCM-X, Thiruvananthapuram on 6.7.2015 without failure.
- 4) The learned Judicial First Class Magistrate shall

post the case to a date convenient not much later, to both parties to the complaint before it for letting in their respective evidences and shall dispose of the case on merits, within three months from 6.7.2015.

Mary Joseph, Judge.

sl.