Crl.A. No.16 of 2011

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

THURSDAY, THE 5TH DAY OF OCTOBER 2023 / 13TH ASWINA, 1945

CRL.A NO. 16 OF 2011

AGAINST THE ORDER/JUDGMENT CC 1960/2007 OF JUDICIAL MAGISTRATE OF FIRST CLASS -I,THRISSUR

Crl.L.P. 1075/2010 OF HIGH COURT OF KERALA

APPELLANT/S:

JAMES.A.C.
[redacted]

BY ADV SRI.K.B.GANGESH

RESPONDENT/S:

1 K.A.SAKTHIDHARAN
[redacted]

2 THE STATE OF KERALA REP.BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,ERNAKULAM, KOCHI-31.

OTHER PRESENT:

SMT. SEETHA.S, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 05.10.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'C.R'

C. S. DIAS, J.

Crl.A. No.16 of 2011

Dated this the 5th day of October, 2023

JUDGMENT

Can an accused be perfunctorily acquitted under Section 256 (1) of the Code of Criminal Procedure is the point that arises for consideration in the appeal?

2. The appellant had filed C.C No.1960/2007 before the Court of the Judicial Magistrate of First Class – I, Thrissur, alleging the first respondent to have committed the offence under Sec.138 of the Negotiable Instruments Act (in short, 'N.I Act'). The learned Magistrate acquitted the accused under Sec.256 (1) of the Code of Criminal Procedure ('Cr.P.C', in short) on the ground that the appellant was regularly absent.

3. Heard; Sri. K.B Gangesh, the learned counsel for the appellant and Smt.Seetha.S, the learned Public Prosecutor.

4. The learned counsel for the appellant argued that the learned Magistrate had committed a grave illegality in acquitting the accused without affording the appellant an opportunity to

explain the reason for his absence. Although the complaint was posted for trial and the appellant was present in court on 17.10.2008, 24.11.2008 and 8.1.2009, the learned Magistrate referred the parties to the Adalat. As the dispute was not settled, the complaint was referred back to Court and was posted on 14.8.2009. By inadvertence, the appellant's counsel had noted the posting date as 14.9.2009. Consequently, there was no representation for the appellant on 14.08.2009, and the impugned order was passed. The learned Magistrate hastily passed the impugned order without appreciating the fact that the appellant was diligently prosecuting the complaint. Hence, the impugned order may be set aside.

5. The learned Magistrate passed the impugned order in the below-mentioned lines:

> "3. The complaint was taken on file and proceeded further. The complainant is absent. No application. Accused is present. Complainant is regularly absent. Even though specific direction has given for the appearance of the complainant, he has not turned up. The case is of the year 2007. The accused is regularly coming before the court. Since the complainant is not interested in conducting the case and he is regularly absent, the complaint is dismissed under Sec.256(1) Cr.P.C."

6. It is apposite to extract Section 256 of the Code Of Criminal Procedure, which reads as follows:

> (1) If the 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 opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.
>
> (2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

7. In **Govindan Nambiar v. Chidambareswara** [1961 KLT 797], this Court speaking through Anna Chandy J (as she then was), while interpreting Sec. 247 of the Code of 1898 (Old Code), an analogous provision to Sec.256 of the Cr.P.C., held thus:

> "7. Section 247 is evidently intended to prevent dilatory tactics on the part of complainants and consequent harassment to accused persons. **Like any other, the power under this section also has**

to be used judicially and judiciously and not in a manner that makes the remedy worse than the disease. It is not proper to throw out a case in a hasty or thoughtless manner when the complainant has proved his bona fides and shown himself vigilant in prosecuting the accused".

8. Again, this Court, through the same learned Judge who authored Govindan Nambiar (supra) in **Kunhumon v. Kotha and others** [1962 KLT 781], held as under:

> "8. I must say in this connection that instances are not rare where Magistrates have exhibited a tendency to clutch at the jurisdiction vested in them under Section 247 Cr. P.C. as a shortcut to obtain quick and easy disposals. The temptation offered by the Section is so much that in one case that was brought to my notice an order of acquittal under Section 247 was passed in the very face of the complainant at 11.15 a.m. on the ground that he was not present earlier when the case was first called. **Magistrates will do well to bear in mind that 'despatch is a good thing but to do justice is better".**
>
> (emphasis supplied)

9. In **Bijoy v. State of Kerala** [2016 (2) KLT 427], this Court, while dealing with Sec.256 (1) Cr. P.C observed thus:

> "9. The Magistrate in complaint cases should not dismiss the complaint and acquit the accused by calling the case immediately. Where the case is fixed for appearance of both parties the complainant and accused is represented by lawyers, rejection of the application of the complaint's lawyer without recording the

reason is illegal. In such situation, Court should record the reason for his absence and set the law in motion and direct the complainant to appear before Court in person on a particular date for the enquiry. If after giving such opportunity the complainant remains absent and not obey the directions issued by the Court, dismissal of the complaint under such circumstances is proper. If there is sufficient reason for his absence an order passed against him in his absence will vitally affect him and the consequence will be serious. If the Magistrate subsequently discovers that there had been good reason for the absence of the complainant, the Magistrate has no power to correct that mischief. In order to avoid this embarassing situation it is not proper to throw out the case in a hurry manner, when the complainant states his bona fides. Considering the facts and circumstances of the case, it is necessary to give a chance to the complainant to prove his case in the Trial Court."

10. It is far too well settled that the power of the Magistrate under Sec.256 Cr.P.C to acquit an accused should be exercised judicially, based on a definite conclusion that the complainant no longer desires to prosecute the complaint. The power is not to be indiscriminately exercised whimsically and mechanically for the statistical purposes of removing a docket from its rack as it undermines the cause of justice. Instead, the judicious course would be to direct the complaint to appear for the hearing, if it is imperative, and decide whether the drastic step of acquittal is to be passed in case he fails to appear.

11. The timeline of the dates and events narrated in the memorandum of revision petition reveals that even though the complaint was scheduled for trial, it was referred to the Adalat and was later returned to the Court as the dispute was not settled. Nonetheless, on the same date the complaint was posted, the order of acquittal was passed.

12. Undisputedly, on 14.8.2009, neither was the complaint posted for trial nor an order directing the appellant to be present. Therefore, the learned Magistrate ought to have adjourned the complaint to a later date and directed the appellant to be positively present for trial. Without adopting the above reasonable course and providing the appellant with a fair opportunity, the learned Magistrate has acquitted the first respondent, which is both unreasonable and irregular. The impulsive decision of the learned Magistrate has led to a miscarriage of justice warranting the setting aside of the order of acquittal, which I hereby do.

Consequentially, the revision petition is ordered as follows:

(i) The impugned order is set aside;

(ii) C.C No.1960/2007 is restored to file;

(iii) The learned Magistrate is directed to dispose of the complaint in accordance with law;

(iv) The appellant and the first respondent are directed to appear before the learned Magistrate on 6.11.2003.

(v) As the complaint is of the year 2007, the learned Magistrate shall make an endeavour to dispose of the complaint as expeditiously as possible.

sd/-

C.S.DIAS, JUDGE

sks/5.10.2023