



2024/KER/28372

CrI. Appeal No. 2382/2007 : 1 :

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE JOHNSON JOHN
FRIDAY, THE 12TH DAY OF APRIL 2024 / 23RD CHAITHRA, 1946
CRL.A NO. 2382 OF 2007

ORDER DATED 12.05.1999 IN ST NO.1282 OF 1998 OF JUDICIAL MAGISTRATE OF
FIRST CLASS -II,NEDUMANGAD

APPELLANT/COMPLAINANT:

SREEKUMAR, KARIMPALA VEEDU,
ANAD P.O., NEDUMANGAD,, THIRUVANANTHAPURAM.
BY ADVS.
SRI.T.A.UNNIKRISHNAN
SRI.K.SATHEESH KUMAR

RESPONDENTS/ACCUSED & STATE:

- 1 S.K.VALSALAN, SREENILAYAM,
KULAPPADA P.O., NEDUMANGAD.
- 2 STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,, ERNAKULAM.
BY ADVS.

SRI. SANAL. P. RAJ, PUBLIC PROSECUTOR
R1 BY SRI. C.A. CHACKO

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11.04.2024, THE COURT ON
12.04.2024 DELIVERED THE FOLLOWING:

**'C.R'****JOHNSON JOHN, J.**-----
Crl. Appeal No. 2382 of 2007
-----Dated this the 12th day of April, 2024.**JUDGMENT**

The appellant is the complainant in S.T. No. 1282 of 1998 of Judicial First Class Magistrate Court-II, Nedumangad and he is challenging the order dated 12.05.1999, whereby the accused was acquitted of the offence under Section 138 of the Negotiable Instruments Act, 1881 ('NI Act' for short) under Section 256 Cr.P.C. on the ground that the complainant was not present either in person or by Pleader.

2. Heard Sri. T.A. Unnikrishnan, the learned counsel for the appellant, Sri. C.A. Chacko, the learned counsel for the first respondent and Sri. Sanal P. Raj, the learned Public Prosecutor.

3. 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. It is pointed out that on 17.04.1999, the complainant was present and the accused was absent and hence, the case was posted to 30.04.1999 for return of the acknowledgment card regarding the service



of summons to the accused and on 30.04.1999, the case was adjourned by notification to 12.05.1999 and on 12.05.1999, the impugned order was passed acquitting the accused under Section 256 Cr.P.C for the reason that the complainant was absent and there was no representation for the complainant.

4. It is pointed out that on 12.05.1999, the case was posted for the appearance of the accused and the presence of the complainant was not necessary on that day and that the complainant was present on all other previous postings. It is further pointed out that on 30.04.1999, there was no sitting and the case was adjourned by notification to 12.05.1999; but, it was wrongly noted as 13.05.1999 and that the appellant/complainant was prosecuting the case with utmost diligence and all earnestness and the learned Magistrate passed the impugned order of acquittal in a mechanical manner by using a printed form without any application of mind.

5. The impugned order of the learned Magistrate in the printed form reads thus:

“The case was called on for hearing today to which it had been posted/adjourned.

The complainant not being present either in person or by pleader the accused is acquitted under section 256, Criminal Procedure Code.”



6. The learned Magistrate passed the impugned order by exercising the power under Section 256 Cr.P.C and for convenience, Section 256 Cr.P.C is extracted below:

“256. Non-appearance or death of complainant.—

(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 **Bijoy v State of Kerala** (2016 (2) KLT 427), this Court, while dealing with Section 256(1) Cr.P.C, held 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 embarrassing 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.”

8. It is well settled that the Magistrate can invoke the power under Section 256 Cr.P.C only after arriving at a definite conclusion that the complainant no longer desires to prosecute the complaint and the said power is to be exercised judicially and that the same cannot be indiscriminately exercised whimsically and mechanically for the statistical purposes of disposal.

9. In this case, the complainant was present on 17.04.1999 and the case was posted for service of summons to the accused to 30.04.1999 and on 30.04.1999, the case was adjourned by notification to 12.05.1999. It is pertinent to note that on the date of the impugned order, the case was not posted for the appearance of the complainant



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and there was also no direction to the complainant to be positively present on 12.05.1999. Therefore, it is clear that the learned Magistrate has acquitted the accused without giving a fair opportunity to the complainant to prosecute the complaint and therefore, the order of the Magistrate is unreasonable and irregular and the same has caused miscarriage of justice warranting interference by this Court.

In the result, this appeal is allowed as follows:

1. The impugned order is set aside.
2. S.T. No. 1282 of 1998 is restored to file.
3. The learned Magistrate is directed to dispose of the complaint in accordance with law.
4. The appellant and the 1st respondent are directed to appear before the learned Magistrate on 20.05.2024.
5. As the complaint is of the year 1998, the learned Magistrate shall make an endeavour to dispose of the case as expeditiously as possible.

sd/-
JOHNSON JOHN,
JUDGE.

Rv