

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

MONDAY, THE 9TH DAY OF AUGUST 2021 / 18TH SRAVANA, 1943

CRL.A NO. 2417 OF 2007

**AGAINST THE ORDER DATED 09.02.2007 IN ST 387/2004 OF
JUDICIAL MAGISTRATE OF FIRST CLASS, KATTAPPANA, IDUKKI
APPELLANT:COMPLAINANT IN ST NO.387/2004**

KRISHNANKUTTY, S/O. MADHAVAN,
VILAYIL HOUSE, KOCHARA KARA, KARUNAPURAM
VILLAGE, IDUKKI DISTRICT.
BY ADV SRI.PAULY MATHEW MURICKEN

RESPONDENTS:ACCUSED IN ST 387 OF 2004 & STATE

- 1 RAMANI, W/O. DAMU,
LECTURER, ASNABI MES COLLEGE, PADINJARE
VEMBALLOOR P.O., THRISSUR DISTRICT.
- 2 STATE OF KERALA REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
KOCHI.
BY ADVS.
TOM JOSE
PUBLIC PROSECUTOR MAYA M.N

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
30.07.2021, THE COURT ON 09.08.2021 DELIVERED THE
FOLLOWING:

A.BADHARUDEEN, J.

Crl.Appeal No.2417 of 2007

Dated this the 9th day of August, 2021

J U D G M E N T

The order in S.T.No.387 of 2004 on the file of the Judicial First Class Magistrate Court, Kattappana dated 09.02.2007 is under challenge in this appeal at the instance of the original complainant before the Magistrate Court. The respondents herein are the accused before the court below as well as the State of Kerala represented by the Public Prosecutor.

2. The parties in this appeal will be referred herein as complainant and accused for convenience.

3. Facts: The complainant herein launched prosecution alleging commission of offence under Section 138 of the Negotiable Instruments Act by the accused on the allegation that the cheque for Rs.2 lakh issued by the accused on 10.08.2003 for repayment of a legal enforceable debt was dishonoured for

want of funds. Though the complainant issued demand notice, the accused did not pay the amount. Accordingly, the court below took cognizance of the offence and secured the presence of the accused.

4. While so, as per order dated 09.02.2007, the learned Magistrate dismissed the complaint. The short order is as extracted below:

Matter not settled. Complainant is absent. Accused absent. Complainant absent, applied. Application is rejected. Therefore complaint is dismissed for default.

5. Aggrieved by the said dismissal, the complainant filed this appeal with leave application. Leave already granted.

6. Heard the learned counsel for the complainant as well as the accused and the learned Public Prosecutor.

7. It is submitted by the learned counsel for the complainant that the absence of the complainant on 09.02.2007 before the court below was not willful. It is submitted further that since the complainant was suffering from dysentery and vomiting, he could not attend the court and in that regard an

application along with medical certificate was filed before the magistrate court. But the learned Magistrate dismissed the excuse petition and consequently the complaint also was dismissed. The learned counsel for the complainant sought to set aside the order and remand back the matter before the trial court facilitating trial of the matter on merits.

8. The learned counsel for the accused opposed the said contention. But the learned counsel failed to justify the contention in a case where the complaint was dismissed for non appearance of the complainant.

9. Now the question arises for consideration is whether the order is liable to be set aside facilitating opportunity to the complainant herein to prosecute the matter on merits.

10. Before answering the question, the legal issue involved in this matter required to be addressed. To be explicit, two queries required to be addressed, viz.

1. Whether an appeal would lie against the order under challenge?

2. Is the order impugned is a revisable order?

11. In this context it is pertinent to decide the remedies available to a complainant when a complaint got dismissed. Dismissal of a complaint is dealt under Section 204(4) of Cr.P.C. Section 204(4) of Cr.P.C is extracted below:

*“204: Issue of process:-- (1) xxxxxx xxxx xxxx
xxxx xxxx
(4) When by any law for the time being in force
any process-fees or other fees are payable, no process
shall be issued until the fees are paid and, if such fees are
not paid within a reasonable time, the Magistrate may
dismiss the complaint.
xxxx xxxx xxxx”*

Going by Section 204(4) of Cr.P.C, the Magistrate may dismiss the complaint if process fees or other fees failed to be paid by the complainant.

12. It is true that dismissal of a complaint is dealt under Section 203 of Cr.P.C as well, after completion of enquiry provided under Section 200 of Cr.P.C in a complaint case. Apart from Section 203 and 204(4) of Cr.P.C, dismissal of a complaint for non appearance or death of a complainant is not provided anywhere in the Code. However, the course of action

available to a Magistrate in the event of non appearance or death of a complainant has been stipulated in Section 256 of Cr.P.C.

For clarity, the said provision is extracted as under:

“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.”

13. Plain reading of the above provision would make it unequivocally clear that when the complainant did not appear, the Magistrate shall, acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other day.

14. It is settled law that appealable orders cannot be subject matter of revision. Section 401(4) of Cr.P.C is clear on this point. The said provision reads as under:

“401: High Court's powers of revision:-- (1) xxxx xxxx
xxxx xxxx

(4) *Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.*

xxxx xxxx xxxx”

15. Thus it is clear that dismissal of a complaint under Section 204(4) Cr.P.C is distinct and different from dismissal of a complaint for non appearance or death of a complainant. If a complaint is dismissed for non appearance or death of a complainant, the Magistrate would get statutory sanction to do so only under Section 256 of Cr.P.C. This provision mandates acquittal of the accused.

16. When considering the question as to whether dismissal of the complaint by the learned Magistrate as per the order extracted above would come under the purview of Section 256 Cr.P.C, it is relevant to refer a decision of the Honourable Supreme Court in [(2016) 13 SCC 243 : 2016 KHC 6254] ***V.K Bhat v. G.Ravi Kishore & Anr.*** In this decision the Honourable Apex Court considered an identical case wherein successive revisions were filed challenging the order of dismissal of a

complaint for default after the appearance of the accused. It has been held that the dismissal of a complaint for non appearance of the complainant amounts to acquittal as contemplated under Section 256 of Cr.P.C. The order under challenge in this appeal is similar to the matter discussed and decided by the Honourable Supreme Court.

17. Therefore, it has to be held that when a complaint is dismissed, instead of acquitting the accused as provided under Section 256 on the ground of non appearance of the complainant, the said order amounts to acquittal of the accused as provided under Section 256 of Cr.P.C.

18. Appeal in cases of acquittal is provided under Section 378 of Cr.P.C. Section 378(4) of Cr.P.C provides that if an order of acquittal is passed in any case instituted upon a complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court. Here the appeal was filed with leave

application and the same was allowed by this Court.

19. Coming to Section 204(4) of Cr.P.C, where dismissal of a complaint was provided for non payment of process fees or other fees payable, the said order is not an appealable order. Therefore, the remedy of the complainant is to file a revision before the Sessions Judge as provided under Section 399 of Cr.P.C or before the High Court as stipulated in Section 401 of Cr.P.C.

20. In this connection the decision of this Court reported in [2010 (4) KLT 535], ***Subhash B.Rao v. K.V.Varghese & anr.*** is relevant. In this decision, it has been held that *in cases in which summons is ordered but not issued for want of process fee, there will be no day appointed for 'appearance' of accused in Court, as referred to in S.256(1) of the Code. Hence, in cases in which process fee is not remitted, the accused shall not be acquitted, under S.256(1) of the Code, even if the complainant is absent.* In this decision, earlier decision reported in [2006 KHC 1712], ***Tom Thomas v. Abdul Lathief.E & anr.*** was referred, to

assert the point that dismissal of a complaint under Section 204(4) of Cr.P.C is not an appealable order as the said order could not be treated as an order of acquittal. In a subsequent decision of this Court in [2017(3) KHC 740], **Chelladurai v. Sureshkumar (Biju) & anr.** also this position was clarified.

21. Thus the law emerges from the above discussion is as under:

(i) If the dismissal of a complaint is for non appearance or death of the complainant, after appearance of the accused on service of summons or otherwise, the same amounts to acquittal of the accused under Section 256 of Cr.P.C and therefore the remedy of the complainant is to file an appeal as provided under Section 378(4) of Cr.P.C.

(ii) If a complaint is dismissed for non payment of process fees or other fees dealt under Section 204(4) Cr.P.C, the same is not an appealable order and therefore, the said order is revisable.

22. In view of the discussion as above, the order impugned would be read as an order of acquittal under Section

256 of Cr.P.C. Thus appeal would lie against the said order. As such this appeal is perfectly maintainable before this Court with leave.

23. Coming to the crux of this case, the learned Magistrate dismissed the excuse petition filed by the complainant along with medical certificate showing his treatment for dysentery and vomiting. In such a case, the Magistrate ought to have granted an adjournment instead of dismissing the complaint. Therefore, the order impugned is liable to be set aside, so as to provide an opportunity to the complainant to proceed with the matter on merits.

24. In view of the discussion, the order impugned is set aside. The matter is remitted back to the trial court for fresh disposal. Since both parties appeared before this Court, the parties are directed to appear before the trial court on 08.09.2021 at 11 a.m.

25. Considering the fact that this is a case of 2007, the learned Magistrate is directed to expedite the trial, at any rate,

within three months from 08.09.2021.

The Registry shall forward the copy of the judgment along with back records within 7 days.

Sd/-

(A.BADHARUDEEN, JUDGE)

rtr/