

(2012) 11 KL CK 0104
In the High Court Of Kerala
Case No : Criminal A. No. 285 of 2010

Kalesh

APPELLANT

Vs

Sudarsanan @ Thampy and State of Kerala

RESPONDENT

Date of Decision : 20-11-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 256(1)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2012) 11 KL CK 0104

Hon'ble Judges : V.K. Mohanan, J

Bench : Single Bench

Advocate : K.P. Ramachandran, Sri. Padmalayan. P.P., Sri. Sebastian Joseph Kurisummoottil and Smt. Bindhu Paulose, for the Appellant; K.S. Manu (Punukkonnoor) and Smt. Laliza T.Y., Public Prosecutor, for the Respondent

Judgement

Justice V.K. Mohanan

1. The complainant in a prosecution for the offence punishable u/s 138 of the Negotiable Instruments Act, 1881 (for short "the N.I.Act") is the appellant since he is aggrieved by the judgment dated 31.12.2009 in S.T. No. 1127 of 2007 of the court of Chief Judicial Magistrate-Kollam, by which the learned Magistrate acquitted the accused u/s 256(1) of the Cr.P.C. I have carefully considered the submissions made by the counsel for the appellant and the respondent and I have perused the judgment impugned in this appeal.

2. Counsel for the appellant vehemently submitted that the complainant was prosecuting the matter diligently and he was present on all posting dates except on 31.12.2009. It is the further case of the appellant that after taking cognizance upon the complaint preferred by the appellant, though proceedings were issued, the accused failed to appear and therefore on 26.3.2009, non bailable warrant was issued against the accused and on 9.11.2009, according to the complainant/appellant, the court directed him to take fresh steps to issue warrant in the correct address of the accused and according to the complainant/ appellant, he

has taken steps on the same day and the case was posted on 31.01.2010. It is the further case of the appellant that, subsequently on 11.11.2009, the accused moved an application for advancement of hearing of the case and for bail, and thus the accused was released on bail on 12.11.2009 and his petition to recall the warrant was allowed. According to the appellant, from 12.11.2009 onwards, the case was posted to 31.12.2009, on which date the impugned order was passed. Thus according to the learned counsel for the appellant, the case was posted on 31.12.2009 behind the back of the appellant/complainant, though there was a specific posting on 31.01.2010 as per the proceedings of the learned Magistrate on 9.11.2009. Therefore, the counsel submitted that one more opportunity may be given to the complainant to prosecute the matter, especially when the cheque in question covers an amount of Rs. 3 lakhs.

3. On the other hand, the counsel for the respondent vehemently submitted that when the case was taken on 31.12.2009, neither the complainant nor his counsel were present and it was in the above circumstances, the learned Magistrate issued the impugned order, which according to the learned counsel, is correct and legal and no interference is warranted. I have carefully considered the submissions made by the counsel for the appellant and the respondent. Though the counsel for the appellant submitted several facts justifying the absence of the complainant on 31.12.2009, no evidence or material is produced to substantiate the above claim and contention. As the impugned judgment is cryptic in nature, I am not in a position to ascertain whether the learned Magistrate was of the opinion that the complainant was regularly absent or that the complainant was not interested in prosecuting the matter. However, it is relevant to note that though the court has taken cognizance for the offence punishable u/s 138 of the NI Act based upon the complaint preferred by the complainant connected with the dishonour of cheque for an amount of Rs. 3,00,000/-, there is no decision on merit. From the impugned order it appears that, the accused was present on the date of the impugned order but the complainant/appellant was absent and no explanation was offered, though he was represented. No material or evidence produced would show that the case was adjourned from 9.11.2009 and posted on 31.01.2010 but preponed and posted on 31.12.2009. Under the above circumstances, according to me, it is only just and proper to grant one more opportunity to the complainant to prosecute the matter on merit but subject to terms, as there was lapse on the part of the complainant/appellant in appearing before the court below on the date of the impugned order.

In the result, this appeal is disposed of setting aside the order dated 31.12.2009 in S.T. No. 1127 of 2007 of the court of Chief Judicial Magistrate-Kollam, on condition that the appellant/complainant deposits a sum of Rs. 3,000/- (Rupees Three Thousand only) within one month from today, in the trial court. Accordingly, the appellant is directed to appear before the trial court on 20.12.2012, on which date the learned Magistrate is directed to restore the complaint on file and on his satisfaction that the appellant/complainant depositing the amount as directed above, the learned Magistrate is further

directed to proceed with the trial of the case in accordance with the procedure and law and dispose of the same on merit. It is made clear that if there is any failure on the part of the appellant either in appearing before the court on the date fixed for his appearance and depositing the above amount within the time stipulated above, this order will stand vacated and consequently this appeal will also stand dismissed. In case the appellant/complainant complies with the above direction, and on the appearance of the accused, out of Rs. 3,000/-, which would be deposited, a sum of Rs. 2,000/- shall be given to the accused and a sum of Rs. 1,000/- shall be remitted to the State Exchequer. As the case pertains to the year 2007, the learned Magistrate is directed to expedite the trial of the case as expeditiously as possible.

The Criminal Appeal is disposed of as above.