

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 31ST JULY 2006 / 9TH SRAVANA 1928

CRL.A.No. 1423 of 2006

AGAINST THE JUDGEMENT/ORDER IN CRLP.287/2006

Dated 13/07/2006

**CC.1126/1999 of JUDL.MAGISTRATE OF FIRST CLASS-I,
ERNAKULAM**
.....

APPELLANT/COMPLAINANT:

**M/S. KERALA STATE INDUSTRIAL DEVELOPMENT
CORPORATION LTD., (KSIDC),
CHOICE TOWERS, MANORAMA JUNCTION,
COCHIN-682 016, REP. BY ITS MANAGER (LEGAL),
SMT.V.R.USA.**

BY ADV. SRI. A.K. SRINIVASAN

RESPONDENTS/ACCUSED AND STATE:

- 1. KANDCO POLYMERS PVT. LTD.,
POST BOX NO.25, INDUSTRIAL DEVELOPMENT PLOT,
ANANDAPURAM, KUMBLA, KASARAGOD DISTRICT,
REP. BY ITS MANAGING DIRECTOR,
MR.C.H.ASHRAF.**
- 2. MR.C.H.ASHRAF,
MANAGING DIRECTOR, KANDCO POLYMERS PVT. LTD.,
POST BOX NO.25, INDUSTRIAL DEVELOPMENT PLOT,
ANANDAPURAM, KUMBLA,
KASARAGOD DISTRICT.**
- 3. STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR,
HONOURABLE HIGH COURT OF KERALA.**

BY PUBLIC PROSECUTOR SMT.P.A. RAZIYA.

**THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION
ON 31/07/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

K. HEMA, J.

Crl. Appeal No. 1423 OF 2006

Dated this the 31st day of July, 2006.

J U D G M E N T

The appeal is filed by the complainant who filed the complaint against the respondents 1 & 2 alleging offence under Section 138 of the Negotiable Instruments Act, ('Act' for short). The complainant is Kerala State Industrial Development Corporation represented by Assistant Manager. This complaint was filed as early as in 1998 and the case was pending till 2006, for about eight long years. But the accused was absconding and hence the case could not be proceeded with. The complainant was examined as early as on 05.06.2001 and documentary evidence was also produced.

2. Thereafter the accused was absent and court cancelled the bail, initiated steps under Sections 82 & 83 of Code of Criminal Procedure. The court also addressed the Chief Judicial Magistrate to include the case in the long pending register, since the accused could not be procured despite of the coercive steps taken by the court. From 31.05.2004 onwards, the court was posting the case for getting sanction from Chief Judicial Magistrate. For about two years the case was reposted awaiting report and sanction from the Chief Judicial Magistrate. But on 20.02.2006, the complainant was absent and

hence the accused was acquitted under Section 256 of the Code of Criminal Procedure. The said order is under challenge in this appeal.

3. The appellant has produced the certified copy of the proceeding sheet in this appeal. A perusal of the proceeding and the order under challenge would show that the impugned order is per se illegal and not consistent with the provisions contained in Section 256 of the Code of Criminal Procedure. Since the accused was absconding for a long time, on the peculiar facts and circumstances of this case, it is unnecessary to give notice to the accused. The court below has acquitted the accused on the ground that the complainant was not present either in person or by pleader. It is true that in cases where the complainant is absent either in person or where there is no representation by the pleader, the accused can be acquitted under Section 256 of the Code of Criminal Procedure. But before acquitting the accused, the court has to apply its mind to the facts of the case. Court has to be satisfied that all the relevant factors stated in Section 256 of the Code of Criminal Procedure are satisfied and that it is a fit case where the accused has to be acquitted. Section 256 reads as follows:

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 subsection (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

4. It is clear from the reading of Section 256(1) of the Code of Criminal Procedure that the court can acquit the accused only if the court does not think it proper to adjourn the hearing of the case to some other day. This is revealed from subsection (1) of Section 256 itself. This is an indication that the court before acquitting the accused under Section 256(1) has to be satisfied that there is no proper reason to adjourn the case to some other day. This satisfaction can be attained by the court in a prudent manner. The court has to apply its mind to the various facts and circumstances of the case and then decide whether it is proper or not to grant an adjournment on the date

on which the accused is acquitted. If the court indulges in this exercise which is required under the last clause in subsection (1) of Section 256, there can be no doubt that in this particular case the court would not and could not have acquitted the accused. The court would have certainly come to a conclusion that this is a case where it is fit and proper to grant adjournment.

5. A perusal of the order sheet will show that the case was being posted for a period of more than two years only for getting sanction from Chief Judicial Magistrate. The presence of the complainant is not at all necessary when the court awaits sanction from Chief Judicial Magistrate court. The case was being reposted to several days awaiting sanction. It can be seen from the proceeding sheet that more than 2 ½ years, the complainant was absent. Despite the fact that the accused could not procure and no order was passed by the Chief Judicial Magistrate granting sanction, the complainant was throughout present for prosecuting the case. In spite of this, it is quite unfortunate that the accused was acquitted on 20.02.2006 on the ground that the complainant was absent.

6. This was a case where the presence of the complainant was not at all necessary for the further progress of the case. Though the court did not obtain sanction from the Chief Judicial Magistrate Court,

no steps are seen taken within the span of 2 ½ years to ascertain why sanction is not issued. Instead, the court has shown an over anxiety to acquit the accused on the day when the complainant happened to be absent. This attitude is contrary to the scope of the provision contained in Section 256 of the Code of Criminal Procedure.

7. It is seen from Section 256 (1) of Code of Criminal Procedure as well as from its proviso that the Magistrate can proceed with the case, dispensing with the attendance of the complainant. Proviso is very clear on this aspect. It shows that the Magistrate may dispense with the attendance of the complainant and proceed with the case under three contingencies. (i) when the complainant is represented by a pleader (ii) the complainant is represented by the officer conducting the prosecution (iii) the Magistrate is of opinion that the personal attendance of the complainant is not necessary. There is no doubt that there is a situation where the case falls under the third category. The Magistrate as on the facts and circumstances of the case should have formed an opinion that the personal attendance was absolutely unnecessary.

Therefore, the Magistrate should have dispensed with the attendance of the complainant and proceeded with the case. The accused can be acquitted under Section 256(1) of the Code of Criminal

Procedure only if the court finds that there is no proper reason to adjourn the hearing of the case and also that the personal attendance is unnecessary. Taking all these facts and circumstances, I find that the order under challenge is absolutely illegal. It is set aside. The trial court is directed to take CC No. 1126/1999 on file and dispose of the same in accordance with law.

Admitted, heard and allowed.

K. HEMA, JUDGE

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