

Biju Thomas Vs. Devaki Amma

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Court : Kerala

Decided On : Jan-11-2001

Reported in : 2001(1)ALT(Cri)201; 2001CriLJ790

Judge : Mr. R. Rajendra Babu, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138; [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 82, 83, 256(1), 257, 321 and 482

Appeal No. : CRMC No. 6791 to 2000

Appellant : Biju Thomas

Respondent : Devaki Amma

Advocate for Def. : V.K. Mohanan, Government Pleader

Advocate for Pet/Ap. : Praicy Jospeh, Adv.

Disposition : Petition allowed

Judgement :

ORDER

R. Rajendra Babu, J.

1. The first respondent herein filed a private complaint against the petitioner as S.T. 1489/99 before the Judl. 1st Class Magistrate's Court-II, Perinthalmanna

alleging the commission of offence under S. 138 of the Negotiable Instruments Act. The petitioner accepted the summons and entered appearance through counsel and filed an application for adjournment on 26.2.2000. The above application was allowed and the case was adjourned to 12.4.2000. On that day also the petitioner applied and the application was allowed and the case was adjourned to 24.5.2000 as the last chance. On 24.5.2000 also the accused applied, and the application was rejected and non-bailable warrants was issued against the petitioner and the case posted to 30.6.2000. On that day the accused was absent and there was no application, but the complainant filed Annexure 2 petition under S. 257 Cr.P.C. seeking permission to withdraw the complaint. Without passing an order on the above petition, it was posted for hearing to 7.7.2000 and non-bailable warrant was repeated against the petitioner. Thereafter the case stood posted on 14.7.2000, 30.7.2000, 19.8.2000, 30.12.2000 and on 1.1.2001. On all those occasions, the complainant was absent but non-bailable warrant was issued against the petitioner. On 30.7.2000 the non-bailable warrant was issued against the accused through the Circle Inspector of Police, Pandikkad. On 30.12.2000, the Court below ordered issue of the non-bailable warrant against the accused and steps under Ss. 82 and 83 Cr.P.C. through SP. Malappuram and case was posted to 1.1.2001. At this stage, the petitioner (accused in the case) had come up before this Court invoking S. 482 Cr.P.C. for an order directing the court below to drop the proceedings against him or to dismiss the case by accepting Annexure A2 withdrawal petition or to dismiss the complaint due to the persistent absence of the complainant and also to quash the coercive steps initiated against him.

2. The learned counsel for the petitioner submitted that the court below should have granted permission to withdraw the complaint on the petition under S. 257 filed by the complainant and acquitted the accused. It was further submitted that in the absence of the complainant, the court below ought not have proceeded with the case any further and should have acquitted the accused under S. 256(1) Cr.P.C., but instead of adopting such a course, the Court below had proceeded with the case for procuring the presence of the accused only for the purpose of seeing him in the dock and to remand him to the jail. It was further submitted that once the complainant had sought permission to withdraw the case making an

avertment in the petition that the matter had been settled between the parties and he was not interested in prosecuting the case, the court below should have granted permission as sufficient cause had been shown by the complainant seeking permission to withdraw his case. Even if such permission was not granted, in the absence of the complainant, the case could not be proceeded as the case was numbered and tried as S.T. (summary trial) and the accused should have been acquitted under S. 256(1) Cr.P.C. It was further submitted that the entire proceedings taken by the court below was an abuse of the process of the court and as such the entire proceedings are liable to be quashed.

'S. 257 Cr.P.C. reads as follows: 'Withdrawal of complaint- If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint against the accused, or if there be more than one accused, against all or any of them, the Magistrate may permit him to withdraw the same, and shall there upon acquit the accused against whom the complaint is so withdrawn.'

A reading of S. 257 would reveal that permission has to be granted when sufficient cause is shown. Annexure 2 is the copy of the petition filed by the complainant under S. 257 Cr.P.C. would clearly reveal that the complainant had received the entire amount covered by the cheque from the petitioner and he was not interested in prosecuting the matter and hence he sought permission for withdrawing the case. The offence alleged against the petitioner is one under S. 138 of the Negotiable Instruments Act and, in fact, it is only a deemed offence. The cause of action, would, arise only when a notice as contemplated by law had been issued within the stipulated time on the accused and on his failure to pay the amount within 15 days from the date of receipt of the notice. So when once the amount is paid within the statutory period, in fact, there was no offence at all. When once payment is not made within the stipulated time, then there is commission of a deemed offence under S. 138 of the Negotiable Instruments Act. Even subsequent to the filing of the case, if the complainant receives the amount and files a petition for withdrawal of the case, no reasons are there for refusing or denying permission to withdraw the case. It is not an offence against public or public tranquillity involving any public interest. The Apex Court as well as this Court had occasions

to consider the petitions filed under S. 321 Cr.P.C. by the Public Prosecutor or the Assistant Public Prosecutor seeking permission to withdraw from the prosecution. Even in grave offences also permission for withdrawing from the prosecution has to be granted for the proper administration of justice. No reason are there for the court below to adjourn the application for permission to withdraw from the prosecution and to post the same for hearing. Even when it was posted for hearing, as the complainant was absent, the court below should have either dismissed the application or allowed the same. Instead of that the court below was hunting after the accused issuing non-bailable warrant and even taking steps under Ss. 82 and 83 Cr.P.C. One fail to understand why the court below has adopted such a procedure when the accused should have been acquitted under S. 256(1) Cr.P.C. in the absence of the complainant. Nobody was interested in the prosecution of the case and the complainant had already filed an application to withdraw the case. In the above circumstances, the only option available for the Court was to acquit the accused either by granting sanction to withdraw from the prosecution or to acquit the accused under S. 256(1) Cr.P.C.

3. The learned counsel for the petitioner placed reliance on a decision of this Court in *Mathew v. State of Kerala* (1986 KLT 128). That was a case where the police filed a charge sheet against the accused alleging the commission of an offence under S. 420 IPC, as the cheque issued by the petitioner was dishonoured. The accused in the above case was abroad and the case was registered in the Long Pending Register. When coercive steps had been initiated, the matter had been settled between the parties and the accused filed petitions for exemption from the personal appearance for permission to appear through the Pleader, for advancing the posting of the case, for recalling the arrest warrant, for permission to compound the offence and also a joint petition along with the defacto complainant compounding the offence. The trial court rejected all the above petitions and aggrieved by the above orders, the accused had come up before this Court. There it was held:

'The insistence on the appearance or parties before court need be only if it becomes absolutely necessary for some purpose. Courts are entitled to compel the appearance of the accused. But such insistence should not be for the mere

pleasure of the accused being seen in the dock. Sometimes his presence may be absolutely essential, say for instance, for questioning him or for himself being identified by witnesses. Insistence on his appearance in such cases may be alright. To insist on his appearance on a day when his appearance has nothing to do with the progress of the case will only result in unnecessary harassment, especially when he has some inconvenience and his counsel is prepared to represent him. In this case that is what actually happened. The petitioner who is the accused before the Magistrate is already in Switzerland. Even if he wanted he was not in a position to come over to India and appear before the Magistrate because on the requisition of the Magistrate himself his passport was impounded by the concerned authorities. The Magistrate ought to have realised the fact that under such circumstances appearance of the accused before him was rather an impossibility. One could only enjoy sadistic pleasure by insisting on an unnecessary impossibility and penalising a person for not complying with such a condition'.

The facts of the present case are worse than the facts of the earlier case. The case in hand is a private complaint alleging the commission of offence under S. 138. The matter had been settled between the parties and the complainant filed Annexure 2 petition for seeking permission to withdraw the complaint and thereafter on all subsequent posting dates the complainant was absent and was not prosecuting the matter. The court below, without passing an order on the petition filed under S. 257 Cr.P.C., proceeded with the case, hunting after the petitioner. Even if the accused is arrested and produced, I do not think that the case can be proceeded as the complainant had already abandoned the case and the only purpose was to see the accused in the dock and to remand him to the jail and the same can only to enjoy a saddistic pleasure and for penalising him for not complying with the direction to appear before court. In the nature and circumstances, the procedure adopted by the court below was an abuse of the process which cannot be justified by any means. It was a sheer waste of time of the court, including the time of this court as the petitioner had been compelled to approach this court when steps under Ss. 82 and 83 had been initiated against him. The time of the police force also had been wasted for no purpose and only for enjoying a saddistic pleasure as mentioned in the decision cited (supra). Hence

this petition has only to be allowed and the court below has to be directed to pass an order on the petition filed by the complainant permission to withdraw the complaint and pass appropriate orders in accordance with law in the absence of the complainant. The coercive steps initiated against the petitioner is an abuse of the process of the court and the entire coercive steps are liable to be set aside.

In the result this petition is allowed. The Court below shall pass an order on the petition filed by the 1st respondent seeking permission to withdraw the complaint forthwith and shall pass an order in accordance with law as the complainant had abandoned the case. The coercive steps initiated against the petitioner, i.e., the issue of non-bailable arrest warrant and steps under Ss. 82 and 83 Cr.P.C. shall stand quashed.

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