Lt.Col.N.D.Joy vs Dr.Josephkunju on 22 March, 2006

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.K.MOHANAN

FRIDAY, THE 19TH DAY OF OCTOBER 2012/27TH ASWINA 1934

CRL.A.No. 1214 of 2001 (B)

[AGAINST THE JUDGMENT DTD.16.6.2001 IN CC.391/1997 of JUDICIAL FIRST CLASS MAGISTRATE COURT, CHALAKUDY]

APPELLANT(S)/COMPLAINANT:

Lt.Col.N.D.Joy,
S/o.Late N.P.Devassy,
residing at 26/2867, Sajanas,
Thevara, Cochin-13

BY ADV.SRI.P.A.CHANDRAN
SMT.RANI JOY

RESPONDENTS(S)/ACCUSED AND STATE:

1. Dr.Josephkunju,
C/o.F3-70,
Priyadarsini Nagar,
Paravattany, Thrissur.

2. Jena Joseph,
W/o.Joseph Kunju, -do-

3. Joraj Joseph, S/o.Josephkunju,
-do- -do-

4. Dil Raj Joseph, S/o.Josephkunju,
-do- -do-

5. State of Kerala, represented by the
Public Prosecutor,High Court of Kerala,

Ernakulam.

R1-R4 BY ADV. SRI.V.JOHN SEBASTIAN RALPH
R1-R4 BY ADV. SRI.K.J.JOSEPH (ERNAKULAM)
R1-R4 BY ADV. SMT.PREETHY KARUNAKARAN
R5 BY PUBLIC PROSECUTOR SMT.S.HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-10-2012, THE COURT ON 19.10.2012 DELIVERED THE FOLLOWING:

APPENDIX

Appellant's Exhibits:

Annexure-AA : True copy of the judgment dated 22.3.2006 in O.P.No.7681/02 by this Court.

Annexure-BB: True copy of the order dated 9.4.2003 in I.A.No.2579/02 in O.S.No.3560/01 in the First Additional Munsiff Court, Thrissur.

-true copy-

P.S.TO JUDGE.

V.K.MOHANAN, J.

Crl.A.No. 1214 of 2001

Dated this the 19th day of October, 2012

J U D G M E N T

The appellant, who is an Advocate practising in this Court, is the complainant in C.C.No.391 of 1997 of the court of the Judicial First Class Magistrate, Chalakudy and in this appeal, he challenges the judgment dated 16.6.2001 in C.C.No.391 of 1997 of the above trial court as he is aggrieved by the finding in the above judgment and the order of acquittal recorded under Section 248(1) of the Cr.P.C. in favour of the accused four in numbers, who faced prosecution for the offences punishable under Section 341,294(b), 426,442, 380 read with Section 34 of I.P.C. at the instance of the appellant/complainant.

2. The case of the complainant is that his house bearing No.F3-70, Kerala State Housing Board, Priyadarshini Nagar, Paravattani, Trichur District, except the office room called 'Study' which was in his possession, from where the complainant operates the :-2-:

> office of 'Defence Builders' and legal profession, rented out to the first accused on 15.8.1993, who was then working as Doctor in Government Service. Thus, the specific case of the complainant is that on 13.6.1995 at about 16.45 hours, when the complainant and his wife attempted to enter the office room of the building, accused Nos.1 to 4 obstructed their entry to the office and restrained them from entering into the office wrongfully and similarly, the accused (s) obstructed to pluck the coconuts in the compound, for which the complainant is entitled to. It is also the case of the complainant that the accused(s) used filthy language towards the complainant questioning the paternity of his father, called him 'bastard'. It is also stated by the complainant that the first accused also threatened the complainant with his belt, twisting his muscle causing apprehension of assault and severe injury and the accused(s) caused wrongful loss and wrongfully restrained the complainant by way of obstructing to enter into the office and plucking coconuts from his property. It is the :-3-:
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> further allegation that the accused (s) threw away the office board of the complainant and his wife, which fetches value about `1000/-, which was erected at the office main gate without their knowledge and consent, belittling the position of the complainant before the door to door neighbours of the building F3-70 and caused wrongful loss to the complainant. It is also averred that the accused(s) action is tainted with mischief and malafide intention and to intentionally insult the complainant. Hence, according to the complainant, on 13.6.1995, the accused(s) committed the offences punishable under Sections 504,506,341,120B,441 and 34 of the Indian Penal Code. It is the further allegation that the accused No.1 committed the offences with the aiding and the abetting of accused Nos.2 to 4. According to the complainant, the accused No.1 committed the offences in collusion and common intention with the other accused(s) and thus, immediately after the incident on 13.6.1995, the complainant filed a petition before the Executive Magistrate, Ayyanthole and the :-4-:
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> concerned Circle Inspector of Police for immediate action.

3. The further allegation in the complaint is that on 24.6.1995, at about 15.30 hrs, the complainant has detected that the accused(s) had trespassed into the office room of the complainant and according to the complainant, Advocate Smt.K.Deepa, Advocate Smt. Rajeswary and Advocate Smt.Rani Joy of the Trichur Bar Association were present on 24.6.1995. It is also alleged in paragraph 5 of the complaint that the accused(s) had put a cot with a bed and a sun-mica chair in the office of the complainant and used the office room of the complainant. It is also averred that the complainant also detected that the accused(s), without the knowledge and consent, had taken away certain office-hold articles, for which the accused are not entitled to, which are mentioned in paragraph 5 of the complaint of which a copy of the list is attached to the complaint, causing

wrongful loss to the complainant and total loss calculated as `38,239/-. Thus, according to the complainant, the accused have no right to trespass into the office :-5-:

> room of the complainant and to put their cot with bed and the sun- mica chair and to use the office room of the complainant and derive wrongful gain and thus, according to the complainant, accused Nos.1 to 4 have committed the offence of trespass and theft in the building with mala fide intention. Thus, according to the complainant, the accused(s) have committed the offences of theft in the building, criminal intimidation, criminal trespass, intentional insult, wrongful restrain, mischief, conspiracy, aiding/abetment of offence read with common intention and they are punishable under Sections 380,448,427,341,504,506,120B and 34 of I.P.C. According to the complainant, on 24.6.1995, he had filed a written complaint before the Superintendent of Police, Ayyanthole, Thrissur and the Police Authorities have not taken any action against the cognizable and non- bailable offiences committed by the accused. Thus, the complaint concluded in its 13th paragraph as follows:-
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> "13. For these and other reasons to be urged at the time of sworn statement, it is humbly :-6-:
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> prayed that this Hon'ble Court may be pleased to take action against the accused(s) in accordance with the law. The complainant prays to issue a warrant of arrest against the accused(s) for which a separate petition is also filed which may kindly be allowed."

4. In fact, the complaint was filed before the Third Additional Judicial First Class Magistrate Court, Trichur wherein C.C.No.137 of 1995 was instituted on taking cognizance, in pursuance of the sworn statement of the complainant recorded on 8.8.1995, for the offences punishable under Sections 341,447,426,506(i),380,294(b) read with Section 34 of I.P.C.

5. When the accused appeared in pursuance of the summons issued, a copy of the complaint is given to them and thereafter, the prosecution examined PW1 and thereafter, on hearing both sides, the learned Magistrate has found that a prima facie case is made out against the accused. Accordingly, a formal charge was framed against the accused for the offences punishable under Sections 341,294(b), 426,442,380 read with 34 of I.P.C. When the above said charge read :-7-:

> over and explained to the accused, they denied the same and pleaded not guilty. Though the trial started in the said court, subsequently, the case was made over to the present trial court viz., the Judicial First Class Magistrate Court, Chalakudy wherein the case is proceeded, after giving a new calendar case number as C.C.No.391 of 1997. As per the request of the accused, PW1 was cross-examined and further Pws.2 to 5 are also examined. Exts.P1 to P27 are also marked from the side of the prosecution and Mos.1 to 6 are identified and marked as material objects. When the prosecution evidence is over, the accused were questioned under Section 313 of the Cr.P.C. during which, they denied the allegation raised against them as well as the

incriminating circumstances and evidence, which are brought during the prosecution evidence and when the same put to them. They denied the entire allegation and stated that they are innocent in the matter. First accused has filed a written statement stating that the house in question was taken on rent as per lease agreement from the :-8-:

complainant on 15.8.1993 which was renewed on 15.7.1994 and on the expiry of renewed agreement and after 3,4 months, exorbitant rent was demanded and created nuisance. According to him, being a Government Doctor, he was not capable to take a house on rent with exorbitant and unlawful rent and he wanted to vacate the building and the said facts were informed to the complainant in person as well as in writing. According to the first accused, he was trapped, without returning the rent advance on the date of vacating the premises. According to the first accused, thereafter, present false complaint is filed as a strategy to forcefully evict him and his family and thus, for the last five years, the accused were being intimidated at the instance of the complainant and he denied all the allegation in the complaint and evidence as false, incorrect and baseless. Both sides have filed written argument notes. The trial court, on the basis of the allegations contained in the complaint and in the light of the defence version and on the basis of the evidence and materials on record, particularly :-9-:

considering the rival arguments advanced, formulated six points for its consideration. The learned Magistrate has found that the evidence of PW1 that the accused has committed theft of the property is only an inference made by him from the fact that the properties were not seen in the room on 25.6.1995 (exact date 24.6.1995) and except this inference, there is no evidence to show that the accused committed theft of the articles. It is also found that the recovery effected by PW4 is not with respect to the stolen property, but the same is with respect to the items found in the office room, which admittedly belongs to the accused. Hence, according to the learned Magistrate, there is no theft as alleged by the prosecution. The learned Magistrate has also found that the evidence of PW3 would show only that the accused has attempted to open the door of the room and he had seen light in the room. Thus, according to the learned Magistrate, there is no evidence to show that the accused has removed those articles from the possession of PW1.

:-10-:

6. The learned Magistrate has further found that the complainant has miserably failed to prove the allegation that the accused restrained PW1 and PW2 since there is no cogent and satisfactory evidence in this regard. The learned Magistrate has observed that there was longstanding rivalry between the accused and PW1 and hence, PW1 cannot be believed and thus, the prosecution has not proved that the accused were having common intention. The learned Magistrate has pointed out the dirt of evidence and failure of the prosecution in adducing evidence to attract the above offences.

7. With respect to the allegation of trespass, the learned Magistrate has found that to prove the above offence, the prosecution mainly depends upon PW3, but PW3 did not see the accused opening the door of the office or entering into the room or remaining in the room. So, according to the learned Magistrate, the claim of PW3 that he saw light in the night, is not sufficient to hold that the accused has trespassed into the room. After having considered the evidence of the :-11-:

> prosecution witnesses with respect to the allegation under Section 294
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> (b) of I.P.C., the learned Magistrate has found that though PW1 said that the accused uttered obscene words when PW1 went to his house, there is nothing to show that the word uttered in or near a public place. Thus, according to the learned Magistrate, there is no evidence to show that the said transaction had taken place near a public place and hence, no offence under Section 294(b) has made out. Regarding the allegation with respect to the mischief, the learned Magistrate has found that the evidence of PW2 shows that she had reported that she went to the house premises and she had seen that the name board had been removed. In the absence of any other evidence, the Magistrate has found that there is no evidence to show that the accused has removed the name board of the complainant, especially when PW1 did not see the accused destroying the name board. So, according to the trial court, no offence is made out under Section 427. It is on the basis of the above finding, the learned Magistrate has held that the :-12-:
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> accused are not guilty of the offences under Sections 341,447,427,380,294(b) read with Section 34 of I.P.C. and accordingly, they are acquitted under Section 248(1) of the Cr.P.C. It is the above finding and order of acquittal challenged in this appeal.

8. I have heard Smt.Rani Joy, learned counsel for the appellant. The appellant/complainant, who is a lawyer practising in this Court is also present and he had assisted his counsel, who is none other than his wife also and this Court, as and when required during the hearing of the case. I have also heard Advocate Sri.John.S.Ralph, learned counsel appearing for the contesting respondents.

9. Learned counsel for the appellant mainly sticking on the grounds taken in the appeal memorandum, submitted that as per Exts.P3 and P4 documents, the accused are the tenants of the complainant, except the office room and as per Ext.P7, the accused were directed to vacate the house which provoked the accused and consequently, on 13.6.1995, when PW.1 and his wife went to the :-13-:

> house to enter into the office room, using filthy languages and showing muscles restrained them from entering into the office and the further evidence shows that by putting table behind the office room door, restrained the complainant and his wife and made it impossible to enter into the room. After taking me through the evidence, which are specifically referred to in paragraph 7 of the appeal memorandum, it is also the contention of the learned counsel,that there is ample evidence to prove the offences of trespass and theft, but the learned Magistrate, ignoring those vital

evidence came into a wrong finding that the prosecution has miserably failed to prove the offence of criminal trespass and theft.

10. In the appeal memorandum, ground Nos.A to Q and ground Nos.Q1 to Q10 are raised. According to the learned counsel, the learned Magistrate has not appreciated the evidence in its correct perspective nor applied law correctly and there was non-application of mind. It is also urged that the appellant is not allowed to get deposed :-14-:

> the evidence of occurrence witnesses and the above arbitrary approach amounts to shutting of the evidence. It is also urged that the court below did not allow to mark the material and vital documents which are very relevant and crucial to the case, which also amounts to shutting of the evidence. Another contention taken is that the court below intentionally delayed the application for certified copy of the order, rejecting the petition to re-open the evidence of the complainant and to summon an occurrence witness, till 2.7.2001, though the said petition was dismissed on 6.6.2001. It is specifically stated in ground
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> (f) that without hearing the evidence of the occurrence witness, who is sought to be examined, the court below adopted an arbitrary and empty formality of hearing and hurriedly passed the judgment on 16.6.2001, which according to the counsel, is highly arbitrary, incorrect and against law. It is also the contention of the learned counsel that the court below did not give adequate weightage to the evidence of the eye witness Pw.3, who had seen the illegal operation :-15-:
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> for opening of the complainant's office room by using a rod and tilting the tower bolt of the back door for trespassing into the room and theft of the office items, which were in legal possession of the complainant. In ground (H), it is quoted as follows:-
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> "(H) The court below failed to appreciate the evidence of the independent court officer, the Advocate Commissioner PW2, who clearly reported before the civil court and the criminal court that the accused trespassed into the office room of the complainant. The court below failed to note that the accused/respondents were even evicted in accordance with law which is a clear proof that the respondents, trespassed into the office room of the complainant.

The court below failed to appreciate the criminal intention of the respondents in opening the door of the complainant's office in the unnatural manner with an iron rod and the quantum of loss of Rs.38,239/- from the office room."

According to the counsel, there are factual errors in the judgment of the trial court and the learned Magistrate in the impugned judgment has repeatedly used, referring to the arguments of the defence counsel, as 'the contention raised by the learned defence counsel carries considerable force'. Another contention taken by the counsel is that :-16-:

the judgment was written not by the trial Magistrate and the learned Judgment magistrate has not appreciated the evidence of the witnesses properly, especially that of PW2 and PW3, the eye witnesses and the learned Magistrate, who wrote the judgment, could not appreciate as to how the two office chairs belonging to the complainant came upto the first floor from the office room and vice versa, of the building. According to the learned counsel, the movement of the two chairs is possible only by carrying manually and it is only by a third force and the accused was free to do it because the drawing room was found open to the office room and the same was in his illegal possession. In support of the above submission, the learned counsel pointed out that the learned Magistrate could not weigh and value as to how the complainant's office chairs came to the first floor and vice versa of the building where the accused were staying, and that too when PW2/the Advocate Commissioner has stated innocently that on 24.6.1995, that the door between the office and drawing room was in an open :-17-:

condition due to criminal trespass. It is also the contention that the learned Magistrate failed to note that the search was carried out as per the order of the Magistrate only on 28.8.1995, on which date two chairs were seized, i.e., after two months of local inspection of PW2 on 24.6.1995 and the Commissioner has not taken the office room into custody and therefore, the accused were free to enter into the office room frequently and to carry the office chairs into upstairs and vice versa. According to the counsel, the failure of the learned Magistrate in applying his mind into Ext.P5 resulted in miscarriage of justice. According to the learned counsel, due to empty formality of appreciation of evidence on record, the learned Magistrate could not appreciate the fact that only the accused handled the chairs from the office room to upstairs and vice versa. It is also stated in ground No.6 as follows:-

"Q6) The learned Magistrate could not appreciate that the act of opening the back door was with an iron rod at a distance of about 8 feet and a tower bolt of the back door is not made of plastic to get :-18-:

damaged quickly and easily."

Similarly, in ground No.9, it is stated as follows:-

"Q9) The house was rented out by PW1 in good faith and if the theft was taken place by others the occupant/accused could have informed the owner (PW1) or the police or others, but the accused failed his basic duty, obvious the accused committed the offence."

Thus, the contention of the counsel for the appellant is that the incident had taken place on 13.6.1995 by which the complainant and his wife were restrained and obstructed from entering into the office room by physical obstruction and by uttering obscene words as part of the common intention of the accused and the same are proved through the evidence of PW1, but the learned

Magistrate acquitted the accused of the offences punishable under Sections 504,506,341,441 and 34 of I.P.C. It is the further contention of the counsel for the appellant that the offence of house trespass and theft are also proved through the evidence of Pws.1 to 4 and the connected documents. Thus, according to the counsel, the following circumstances, viz., the :-19-:

> presence of the accused at the time of inspection of PW2 - the Advocate Commissioner in the office room, the fact proved through PW2 that the opening of the door of the office room from the front side made impossible by putting table like articles and the further fact that when PW2 had gone through the drawing room of the building, the door opening to the office room was found opened, the household articles belonging to the accused found placed inside the office room and the accused have filed claim petition before the trial court for the release of such household articles which were released to them, the civil court's orders like Ext.P10 order of eviction, Ext.P11 order in O.S.No.771/1995, Ext.P17 order in RCP.No.52 of 1995 and the facts proved through PW2 that two armless chairs were found by her on the upstairs of the residential building and the fact that the same two chairs were seized by PW4 subsequently from the office room and the evidence of PW3 that he had seen the attempt made by the accused to open the door, which is separating the office room and the drawing :-20-:
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> room of the building, by introducing iron bar through the outer window and by tilting the bolt by using such an iron bar and the fact deposed by PW3 that he had seen light in the office room during the night, are the circumstances, which are sufficient to prove the offence of trespass committed by the accused in the office room of the complainant. According to the counsel, the learned Magistrate miserably failed to consider the above vital facts,circumstances and evidence and wrongly found that the prosecution has not succeeded in establishing the above offence.

11. It is also contended by the learned counsel that the two armless chairs, belonging to the complainant, were initially found by PW2 on 24.6.1995 on the upstairs of the building, but PW4, on conducting the search, as per the order of the learned Magistrate, detected the same and seized from the office room, which fact itself is sufficient to constitute the ingredients 'offence of theft'. It is the further contention that two plastic buckets and plastic mug, which :-21-:

> belonged to the complainant, were seized by PW4 from the place near to the kitchen and toilet of the accused and the said fact also proves that the above material objects are stolen by the accused. Thus, according to the counsel, the theft of two chairs and two plastic buckets and mug is proved beyond reasonable doubt, but ignoring the above facts, evidence and circumstances, the learned Magistrate went wrong in holding that the prosecution has not succeeded in proving the offence of theft.

12. Besides the above, it is also contended that the learned Magistrate has miserably failed to apply his mind and to substantiate the above contention, the learned counsel invited my attention to the charge framed against the accused and paragraph 32 of the judgment and submitted that even

though there was no charge for the offence under Section 447, as evidenced from paragraph 5 as well as paragraph 32 of the judgment, erroneously acquitted the accused for the said offence. Another instance pointed out by the learned counsel :-22-:

> is that instead of two plastic buckets, the learned Magistrate marked MO6 as plastic bag.

13. It is also contended that after setting aside the judgment impugned in this appeal, the matter requires a remand for further trial giving opportunity to the complainant, to examine his wife, who was cited in the list of witnesses scheduled to the complaint and who was present when the incident had taken place on 13.6.1995, since the learned Magistrate dismissed Crl.M.P.No.7620 of 2001, rejecting the prayer for reopening the complainant's evidence and for examination of the said witnesses, by order dated 6.6.2001 and particularly, though a copy application was filed, the issuance of the same is delayed and the impugned judgment was pronounced on 16.6.2001 within ten days from the date of dismissal of the above petition. Therefore, the counsel submitted that the judgment impugned in this appeal is not legally and factually sustainable and because of the arbitrary and illegal approach of the learned Magistrate, in not allowing the petition :-23-:

> to reopen the evidence for examining the wife of the complainant, the matter has to be remanded back to the trial court and hence, according to the counsel, interference of this Court with the impugned judgment is absolutely necessary and the appeal has to be allowed. In support of the arguments advanced by the learned counsel for the appellant, she placed reliance upon the following decisions reported in Ammad Haji v. Kunhamboo [1959 KHC 87], Pammi v. Government of Madhya Pradesh [AIR 1998 SC 1185], K.G.Premshanker v. Inspector of Police [(2002)8 SCC 87], Iqbal Singh Marwah v. Meenakshi Marwah [(2005)4 SCC 370] and Kesavan Nair v. State of Kerala [2005(3) KLT 391] .

14. On the other hand, Mr.John.S.Ralph, learned counsel for the respondents strenuously submitted that the finding of the learned Magistrate as per the impugned judgment is based upon the evidence and materials on record, especially when the complainant has miserably failed to take appropriate pleadings in the complaint and :-24-:

> adducing evidence to substantiate such pleadings so as to attract the essential ingredients of the offences alleged against the accused. Therefore, the counsel submitted that absolutely, no interference is warranted with the findings of the court below and against the order of acquittal recorded in favour of the respondents/accused. Leaned counsel for the respondents as well, after inviting my attention to the evidence of Pw.1 who is allegedly restrained by the accused, submitted that the facts, regarding the exact place at which they are restrained and the exact date of such incident are not properly pleaded and proved. According to the learned counsel, a general averment and evidence are not sufficient to attract the offences of Section 294(b) and 341 of I.P.C. as well as Section 34 of I.P.C. It is the further contention of the counsel that regarding the allegation of trespass and theft,

there is no convincing evidence. According to the learned counsel, the particular facts and circumstances involved in the case, especially when the complainant is inimical to the accused, the :-25-:

evidence on record are not up to the standard required. According to the learned counsel, regarding the alleged trespass and theft, the complainant has no specific and definite case especially regarding the time and date on which the above offences are committed and who committed the said offences and how the accused are responsible for such alleged offences. According to the learned counsel for the respondents, right from 15.7.1994, the accused were being in possession of the building in question and the appellant is claimed to have issued Ext.P7 notice to vacate the premises on 25.2.1995. The alleged trespass and theft, according to the complainant, were detected only on 24.6.1995 and that too at the time of alleged local inspection conducted by PW2. Thus, the alleged incident, if the same is true, has taken place on any date prior to 24.6.1995. According to the learned counsel, simply because of the reason that the accused are the tenants of PW1, no responsibility of such serious offence can be shouldered on the accused, especially when the landlord-tenant relationship has :-26-:

tainted and worsened when Ext.P7 eviction notice was issued. According to the learned counsel, the subject matter of the civil proceedings are entirely different, the civil court orders or decree or judgment has no bearing or binding over the criminal court. Therefore, according to the learned counsel, it was incumbent upon the complainant to prove strictly and positively with clinching evidence that the accused has committed the offence of trespass and theft, but there is no such evidence in this regard and it is in the absence of such legal evidence, the learned Magistrate has rightly held that the complainant has failed to establish the above offence against the accused. Thus, according to the learned counsel, the findings of the court below are proper and legal and there is no perversity in those findings and hence, no interference is warranted against the order of acquittal recorded by the learned Magistrate in favour of the respondents/accused and therefore, the above appeal is only to be dismissed. In support of the above contentions, the learned counsel for :-27-:

the respondents placed reliance upon the following decisions reported in Smt.Kanwal Sood v. Nawal Kishore [AIR 1983 SC 159], K.G.Varghese v. Annamma Mariamma [1967 KLT 497], Kunjan Ammini v. State of Kerala [1967 KLT 621], Pappu v. Damodaran [1967 KLT 918], Smt.Mathri and others v. The State of Punjab [AIR 1964 SC 986], Rash Behari v. Fagu Shaw [AIR 1970 SC 20], Chandi Kumar Das Karmarkar v. Abanidhar Roy [AIR 1965 SC 585], Kesavan Nair v. State of Kerala [2005(3) KLT 391], Chacko George v. State of Kerala [1968 KLT 219], M.C.Ali v. State of Kerala [(2010)2 SCC (Cri) 885], Dhanisha v. Rakhi.N.Raj [2012(2) KHC 111] and P.V.Chandran v. L.V.Krishnamoorthy [1988(2) KLT 775].

15. I have carefully considered the arguments advanced by the learned counsel for the appellant as well as the respondents and I have also perused the judgment of the trial court and scrutinised the evidence and materials on record. I have gone through the authorities :-28-:

cited.

16. In the light of the rival contentions advanced by the counsel for the appellant and contesting respondents and in the light of the evidence and materials on record, the question that arises for consideration is whether the trial court is justified in its finding and acquitting the accused with respect to the offences alleged against them and whether the appellant has succeeded in his challenge against the judgment in question and establishing any compelling or substantial reason to interfere with the order of acquittal recorded in favour of the accused.

17. Before going into the details and merits of the rival contentions, according to me, it is beneficial to refer to certain facts which are beyond dispute. During the time of the alleged incident and at the time of filing the complaint, as evident from the cause title of the complaint, the complainant was residing in Ernakulam whereas the building in question is situated in the housing colony of the Kerala :-29-:

> State Housing Board viz., Priyadarshini Nagar at Trichur within the territorial jurisdiction of the Judicial First Class Magistrate Court-III, Trichur. The building No.F3-70, which is owned by the complainant, except the office room called 'Study', is rented out on 15.8.1993 to the first accused, who, at that time, was working as Doctor in the Health Department of the State of Kerala. Though tenancy was up to 15.7.1994, the same was extended up to 15.6.1995 as evident from Exts.P3 and P4. It is also the admitted case of the complainant that by issuing Ext.P7 dated 25.2.1995, he demanded the first accused to vacate the house, which is rented out to him and also warned the first respondent that no further time would be granted and time is the essence of the agreement. Though the alleged incident had taken place on 13.6.1995, the present private complaint was filed before the trial court only on 8.8.1995. Though the complainant has claimed that he had approached the jurisdictional Police, no evidence is produced to that effect and it is also beyond dispute that the complainant has :-30-:
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> filed a petition before the Executive Magistrate, Trichur.

18. As I indicated earlier, the defence taken by the first respondent/accused is that on the expiry of the renewed period of rent, after 3-4 months, the complainant demanded exorbitant rent and created nuisance and according to him, being a Government Doctor, he was not in a position to give the exorbitant rent demanded by the complainant, especially when the said demand was unlawful and he decided to vacate the building and the said fact was informed to the complainant in person as well as in writing and he was trapped without returning the rental advance, which was with the complainant on the date of vacating the premises and thus, the present false complaint was filed, thereafter, as a strategy to forcefully evict himself and his family and the accused are being

intimidated by the complainant.

19. According to me, the case at hand has to be examined in the backdrops of the above mentioned undisputed facts and the :-31-:

> defence advanced by the accused.

20. On examination of the allegations contained in the complaint and the evidence and materials on record and as per the arguments advanced, it can be seen that the allegation against the accused are of three separate and distinct instances. The first instance projected in the complaint is with respect to the alleged incident, that had taken place on 13.6.1995. Whereas the second instance is connected with the allegation of trespass and theft, which according to the complainant, known to him on 24.6.1995. Regarding the alleged trespass and theft, and the exact date of commission of such offences, the complainant has no specific pleading or clear cut evidence. The third instance is regarding the destruction of Board of the complainant and his wife.

21. Now, let us examine the evidence and materials on record to find out whether the complainant has succeeded in establishing the incident allegedly taken place on 13.6.1995 and the offence alleged :-32-:

> against the accused under Sections 341,442,294(b) read with Section 34 of I.P.C. To prove the above incident, there is no evidence other than the deposition of the complainant as PW1. In the present case, the deposition of PW1 is recorded in English language and when the examination of PW1 started on 20.1.1996, he had stated, after referring about the rental arrangement, that on 25.2.1995, he had sent a registered letter to the first accused to vacate the home as stated earlier and the said letter was acknowledged by him and in the said letter, it is also stated that no further time would be given. The further deposition in chief examination is quoted herein for convenience:-
>
> "..... 16.6.95, in the evening 4.45 along with my wife went to that house. At that time, A1 and A2 is collusion with A3 and A4 (sons) used indecent words bastard why did you come here and obstructed us. We were very much insulted and injured and defamed. A1 removed his belt and twisted his muscles and assaulted us in collusion with A3 and A4. Thus very much apprehended and felt fear. The room study is exclusively under my possession for my engineering works....."

When the complainant was examined in chief on 27.9.1996 about the :-33-:

> above incident, he had stated that after the incident on 13.6.1995, he made a police complaint with the Executive Magistrate, Ayyanthole. But, no such copy of the complaint is produced in the trial court. Improving his version in the chief examination on 20.1.1996, he had deposed on 19.6.1999 as follows:-

> "..... Accused No.1 removed his belt, fisted his hands and assaulted me and my wife with the help of accused Nos.3 and 4. ....."

He had further stated that accused No.2 assaulted him and his wife along with the other accused. He had deposed that accused No.2 is a lady and accused No.1 called him filthy words as hush and why did he come there? It had also been stated that accused Nos.1,3 and 4 prevented him from entering his office room called study room. He had also stated that accused Nos.1 to 4 have no right to prevent him from entering into his office room, which was not rented out. He continued to depose that on 13.6.1995, he reported the matter to Police and when there was no proper action, he filed a suit as :-34-:

> O.S.No.771/95 for a mandatory injunction against the accused. So these are the evidence of PW1 with respect to the alleged incident on 13.6.1995. It is relevant to note that the above version of PW1 is not corroborated from any independent source. When PW1 was examined in chief on 20.1.1996, the overt act of the accused is not stated. In this juncture, it is relevant to note that on 20.1.1996, the chief examination was not completed and hence, it continued on 24.1.1996 and on 21.5.1996. It was only on 19.6.1999, he had made certain improvements when compared with the deposition dated 20.1.1996.

But, the above deposition of PW1 cannot be stated as in terms of the averment in the complaint since no such averments are taken with respect to the overt act of each of the accused. The only overt act stated in the complaint against the first accused is as follows:-

> ".....The accused No.1 also threatened the complainant with his belt and twisting his muscle causing apprehension of assault and severe injury....."

No overt act is pleaded against the other accused. There is no case in :-35-:

> the complaint that A2, who is a lady, assaulted PW1 and his wife along with other accused, but during the chief examination of the complainant on 19.6.1999, improving from his statement from 20.1.1996, it was stated that the accused No.2 has also assaulted him and his wife along with the other accused. On 20.1.1996, the version of PW1 was that on 16.6.95, A1 and A2 in collusion with A3 and A4 (sons) used indecent words 'bastard why did you come here and obstructed us'. No overt act is alleged in the complaint specifically against any accused, except a common allegation. But, when he was examined, after three years, varying from his deposition on 20.1.1996, he made this improved version, which is not tallying or in support with the averment in the complaint. The mode of the alleged restraint etc. has not been stated clearly.

22. It is also relevant to note that the alleged incident had taken place at 4.45 evening in a housing colony of the Kerala State Housing Board. If that be so, there is every possibility for witnessing :-36-:

the incident by the neighbours if actually such an incident has taken place. But, no such independent witness is examined. Though PW1 has claimed that he had made a police complaint, no positive evidence is available to that effect. What stated by PW1 is that he had filed a complaint before the Executive Magistrate at Ayyanthole with copy to the Police. When a criminal offence is committed, the complainant being an Advocate is expected to set the investigating machinery in motion by approaching the concerned Police Station or Police authorities. Hence, that part of the case of the complainant is not believable and therefore, there is no material to hold that the incident, as alleged by the complainant, had taken place on 13.6.1995. Therefore, according to me, the deposition of PW1 to prove the incident, that is allegedly taken place on 13.6.1995 is not sufficient, especially in the backdrop of the civil dispute pending between PW1 and the accused and because of the rivalry among them and especially when the evidence of PW1 is not corroborated by any independent :-37-:

evidence.

23. According to PW1, his wife was present when the said incident had taken place. But, though she is cited as a witness, she is not examined. No explanation is forthcoming from PW1/the complainant for not examining his wife, who is allegedly an occurrence witness for the alleged incident on 13.6.1995. The appellant/complainant has no case that he had requested the Magistrate by filing a prompt petition at appropriate time and stage to summon the said witness or he had produced the said witness by himself for examination and the Magistrate refused the same. So, the complainant has suppressed the best evidence from the scrutiny of the court by non-examination of material witness, who is none other than his wife. Now, the case of the appellant is that the learned Magistrate has not allowed his petition dated 6.6.2001 and the same is a ground for remand of the matter. I am unable to sustain the above contention. The complainant had filed Crl.M.P.No.7620 of 2001 and the same :-38-:

was dismissed on 6.6.2001 itself. The judgment was pronounced on 16.6.2001. It is relevant to note that though the complaint was present on 8.8.1995 and cognizance was taken on 8.8.1995, the case was pending for the last six years in the trial court. In this juncture, it is also relevant to note that without any delay, the examination of Pws.2 to 4 were completed. But, in the case of PW1, to complete his examination, four years were taken since his chief examination, though started on 20.1.1996, was completed only on 17.2.2000. As no timely action was taken by PW1 to examine his wife, who is claimed to be the occurrence witness and the application under Section 311 was filed only at the fag end of the trial, especially when the case was taken for judgment, the trial court dismissed the said petition, which according to me, is fully justified and correct and no remand can be ordered on such ground.

24. As rightly found by the learned Magistrate, there is no clear evidence as to where exactly the accused restrained PW1 and his :-39-:

wife. According to me, the learned Magistrate is correct in his finding that there is no consistent evidence regarding the wrongful restraint since initially the complainant has stated that all the four accused wrongfully restrained him but at the time of evidence, his version was that A1 and A2 alone restrained him. As I indicated earlier, regarding the allegation under Section 341 of I.P.C., the complainant's evidence is totally insufficient and unacceptable since he has miserably failed to give deposition with respect to the overt act of each of the accused in the commission of the offence under Section 340 and also failed to prove that the accused had shared the common intention.

25. Now the question comes up for consideration is whether the complainant has succeeded in proving the offence under Section 294(b) of I.P.C. against the accused. In the present case, according to PW1, the word uttered by the accused is 'bastard', which will not come under the purview of obscenity as contemplated by Section 294(b), especially in the light of the decisions cited supra. From the evidence :-40-:

of PW1 as per his deposition in chief on 20.1.1996, it is not clear as to who uttered the word and the said offence is not proved with the help of the independent evidence. A Division Bench of this Court, in the decision reported in Dhanisha's case (2012(2) KHC 111), has held as follows:-

"17. The Courts have taken a consistent view interpreting obscene / obscenity to mean that the matter charged as 'obscene' should tend to deprave and corrupt those whose minds are open to immoral influence arousing lustful desire or must tend to sexually impure thoughts. It may be argued that precedent is authority only for what it actually decides and not for what may remotely or logically follow from it. What is binding is the ratio decidendi of the judgement. According to the respondents P. T. Chacko's case and Chacko George's case cited supra, were rendered by a Single Judge and hence the learned Single Judge, when passed the reference Order has expressed the inability to accept the views expressed in P. T. Chacko and Chacko George, cited supra."

In the very same decision, this Court has held as follows:-

"24. To attract an offence under S.294(b), the words uttered must be obscene and it must be to the annoyance of others and it must have been uttered in or near any public place. The concept of 'obscenity' would differ from country to country, state to state and even from region to region depending on the standards of morals and contemporary :-41-:

society. The words treated as obscene in Malabar area may not be obscene in other parts of Kerala; similarly the words used in other parts of Kerala may not be obscene in Malabar Area. Therefore, the learned Public Prosecutor submits that there are even regional variations in the meaning of such words. The learned Public Prosecutor

would further submit that the tone and tenor of the words and the way it is expressed also may have relevance depending upon the context and circumstances."

Similarly, in Chacko George's case [1968 KLT 219], according to this Court, the test of obscenity 'is whether the tendency of the matter charged as obscenity, is to deprave and corrupt those whose minds are open to such immoral influences'. The words uttered must be capable of arousing sexually impure thoughts in the minds of the hearers. The words uttered in the present case are not such as would tend to arouse sexually impure thoughts or deprave and corrupt the mind of the complainant who is himself a doctor.

26. In the light of the facts and circumstances involved in the case and in the light of the above decision, the appellant/complainant has miserably failed to establish the essential ingredients of Section 294(b) and therefore, the trial court is fully justified and correct in its :-42-:

decision acquitting the accused for the offence under Section 294(b) of I.P.C.

27. The resultant conclusion is that the complainant has miserably failed to establish the essential ingredients of Sections 341,294(b) and Section 34 of I.P.C.

28. In this juncture, it is apposite to consider the allegation against the the accused that they have committed the offence of mischief punishable under Section 427 of I.P.C. In this regard, the allegation in the complaint is that the accused (s) threw away the office board of the complainant and wife, valued about `1000/- which was erected at the office main gate, without the knowledge and consent belittling the position of the complainant before the door to door neighbors of the building F3-70 and causing wrongful loss to the complainant and the action of the accused(s) is tainted with mischief and mala fide intention, to intentionally insult the complainant. Admittedly, none of the witnesses, including the complainant, had :-43-:

witnessed the above alleged act of the accused. The complainant in the trial court as well as in this Court tried to canvass for the conviction of the accused for the said offences on the basis of the evidence of PW2. The learned Magistrate, as per his impugned judgment, considered the above allegation and evidence in paragraphs

29 and 30. The trial court has found that the contention of the complainant in this count is not sustainable as there is no evidence to show that the accused removed the name board of the complainant. After considering the evidence of PW2, the learned Magistrate has found that the same does not reveal that the accused destroyed the name board. I have gone through the deposition of PW2 in which connected with the above allegation, her only evidence is as follows:-

```
"      Board

   .            Main   Road -     Board

-      .                    Compound-   15

                    Board  .  Board
```

Board . Board-

:-44-:

Register- .."

It goes without saying that in the absence of any positive evidence to show that the accused has destroyed the board and the date and time of such incident, no offence under Section 427 of I.P.C. would be attracted against the accused. The other defect, which I pointed out earlier, is with respect to the incident taken place on 13.6.1995 and the failure on the part of the complainant to promptly report the matter to the Police, long rivalry among PW1 and the accused and other circumstances connected therewith are also applicable while considering the allegation of the complainant against the accused connected with the offence under Section 427 of I.P.C. Therefore, the complainant has also miserably failed to prove the allegation under Section 427 of I.P.C. against the accused. Hence, the findings of the court below for the above reason are not liable to be interfered with against the accused.

29. The third part of the allegation raised by the complainant :-45-:

> against the accused is with respect to the offence of trespass and theft. As I indicated earlier, the argument of counsel for the appellant is that in the light of the evidence of Pws.1,2 and 3 and in the light of the other attending circumstances which are already referred to, the complainant has proved that the accused have committed the offence of trespass and theft, but the learned Magistrate, ignoring the above evidence and circumstances, went wrong in acquitting the accused for the said offences.

30. Now let us examine the evidence and materials on record connected with the above allegations. It is relevant to note that the complainant has no specific case as on which date or period the alleged trespass was committed and the theft occurred. According to PW1, he came to know about the said incident only on 24.6.1995 when the office room was got opened with the assistance of PW2, the Advocate Commissioner. In this juncture, it is relevant to note that as I indicated earlier, Ext.P7 eviction notice dated 25.2.1995 was served :-46-:

> on the accused. The alleged offences under Section 341, 294(b) etc., according to the complainant, have taken place on 13.6.1995. But, no complaint is filed before the appropriate police authorities on 13.6.1995 and there is no evidence to that effect. It is, thereafter, within the gap of four days, the complainant preferred O.S.No.771 of 1995 before the court below and the inspection of the Commissioner had taken place on 24.6.1995. The case of the defence is that the present private complaint is filed with an oblique motive to evict the accused from the building premises owned by the complainant. Thus, the complainant has no case that the accused was not in occupation of the room on any date prior to 24.6.1995 and hence, it appears that,

according to the complainant, the accused illegally occupied the room either during the month of May,1995 or on 13.6.1995 or 24.6.1995. It is in the above back drop, the case of the complainant has to be examined. No where in the complaint or in the evidence of PW1, he had stated that on any particular date, prior to 13.6.1995, he had gone :-47-:

to the office room and nothing found against his interest or occupation of the office room by the accused. Admittedly, the accused, being the tenants of PW1 in the possession of the building in question, though the office room is not legally rented out to the accused, were residing in the said building. At the very same time, it is relevant to note that PW1 is settled at Ernakulam even at the time of the complaint and at least right from the date of rental agreement. PW1/the complainant has heavily relied upon the evidence of PW3., to prove the trespass. According to PW3, on a date during the month of May,1995, he had seen the accused attempting to open the door, which has an opening to the office room from the drawing room of the accused, by introducing an iron bar and tilting the bolt of that door. In the evidence of PW3, he has also stated that during that night, he had seen light in the office room of the said building. Suffice to say, PW3 has never deposed before the court that he had seen the accused opening the door and entering into the room and seen them remained therein.

:-48-:

The above evidence is not sufficient to hold that the accused had trespassed into the office room of the complainant. Thus, absolutely there is no eye witness to the incident of trespass. It is also relevant to note that even according to PW3. he is not aware of the exact date of the incident which he witnessed. In this juncture, it is also relevant to note that the alleged date of the trespass of the incident which he witnessed was during the month of May 1995, that is after Ext.P7 eviction notice dated 25.2.1995. The complainant has no case as I indicated earlier that before issuing Ext.P7, he had visited the office room or found any circumstance which indicate that the accused occupied the room.

31. Now let us examine whether the circumstances brought out through the evidence of witnesses and material and documents are sufficient to hold that the accused has committed the offence of trespass. As I indicated earlier, according to PW1, he came to know about the trespass when he entered in the office room with the :-49-:

assistance of PW2, the Advocate Commissioner on 24.6.1995. In the deposition of PW1 or PW2, they have no case that the accused put their household articles with any particular intention of committing any particular offence or to cause any intimidation, insult or annoyance to PW1, the owner of the building. In order to attract the offence of criminal trespass and other offences enumerated towards the last of chapter XVII of Indian Penal Code, the prosecution has to prove the intention

of the wrongdoer to commit an offence as enumerated in the I.P.C. and also to show that the accused has committed the same with the intention to intimidate, insult or annoy the complainant. But, in the deposition of PW1 or any other witnesses, there is no whisper to that effect. According to me, having regard to the particular facts and circumstances involved in the case and especially when considering the rental agreement between PW1 and the first accused and considering the long rivalry among them, particularly the allegation of trespass is raised after issuing Ext.P7 :-50-:

eviction notice, it was incumbent upon the complainant to take requisite pleading in the complaint and to adduce evidence in terms of such pleading that the trespass in the present case was committed with the requisite intention to attract any of the above offences, so as to commit any offence or to intimidate, insult or annoy the complainant.

32. Now let us go through some authorities on this point. In the decision reported in Smt.Kanwal Sood's case [AIR 1983 SC 159], after considering the scope of Sections 441 and 448, the Apex Court has held that the intention on the part of the accused to commit an offence is an essential ingredient and mere occupation, even if illegal, cannot amount to criminal trespass. On an examination of the facts and circumstances involved in the present case, in the light of the above decision of the Apex Court, it can be seen that a bare perusal of the complaint filed by the appellant made crystal clear that there is absolutely no allegation about the intention of the accused to commit any offence or to intimidate, insult or annoy any person in possession.

:-51-:

So also, in the evidence of PW1, there is no whisper to that effect that the accused had occupied the office room with an intention to commit any offence or to intimidate, insult or annoy PW1 or any other person. In the decision of the Apex Court reported in Smt.Mathri's case [AIR 1964 SC 986], it was held as follows:-

"13. .... the proposition that every person intends the natural consequences of his act, on which the learned counsel relies, if often a convenient and helpful rule to ascertain the intention of persons when doing a particular act. It is wrong however to accept this proposition as a binding rule which must prevail on all occasions and in all circumstances. The ultimate question for decision being whether an act was done with a particular intention all the circumstances including the natural consequence of the action have to be taken into consideration. It is legitimate to think also that when S.441 speaks of entering on property "with intent to commit an offence, or to intimidate, insult or annoy" any person in possession of the property it speaks of the main intention in the action and not any subsidiary intention that may also be present....." (underline supplied) In the above decision, the Apex Court has further held as follows:-

:-52-:

> "18. .... In order to establish that the entry on the property was with the intent to annoy, intimidate or insult, it is necessary for the Court to be satisfied that causing such annoyance, intimidation or insult was the aim of the entry; that it is not sufficient for that purpose to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult, and that this likely consequence was known to the persons entering; that in deciding whether the aim of the entry was the causing of such annoyance intimidation or insult, the Court has to consider all the relevant circumstances including the presence of knowledge that its natural consequences would be such annoyance, intimidation or insult and including also the probability of something else than the causing of such intimidation, insult or annoyance, being the dominant intention which prompted the entry."

(underline supplied) In the decision reported in K.G.Varghese' case [1967 KLT 497], it was held that entry upon land, made under a bonafide claim of right, however ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant. It was also held that in order to establish that the entry on the property was with the intent to annoy, intimidate :-53-:

> or insult, it is necessary for the Court to be satisfied that causing such annoyance, intimidation or insult was the aim of the entry. It was further held that it is not sufficient for that purpose to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult, and that this likely consequence was known to the persons entering. It was also held that in deciding whether the aim of the entry was the causing of such annoyance, intimidation or insult, the court has to consider all the relevant circumstances including the presence of knowledge that its natural consequences would be such annoyance, intimidation or insult and including also the probability of something else than the causing of such intimidation, insult or annoyance being the dominant intention which promoted the entry and so the question to be asked and answered is whether the accused entered into possession of the property with the dominant intention to intimidate, insult or annoy. In the very same decision, it was also held that it is legitimate to think also that when S.441 speaks of entering on :-54-:

> property `with intent to commit an offence or to intimidate, insult, or annoy any person in possession of the property' it speaks of the main intention in the action and not any subsidiary intention that may also be present. Similarly, in the decision reported in Kunjan Ammini's case [1967 KLT 621], this Court has also held that even if the entry is unlawful and might sustain a civil action for damages it cannot be treated as criminal and even if the accused had knowledge that her action would cause insult or annoyance to the inmates of the house, such knowledge is not sufficient to constitute an offence of criminal trespass, in the absence of evidence to

show that the intention of the accused was to intimidate, insult or annoy the complainant. At worst her action might constitute a civil trespass, actionable in a civil court.

33. Learned counsel for the appellant to support his argument placed reliance upon the decision of this Court reported in Ammad Haji's case [1959 KHC 87]. According to me, the above decision is not applicable in the present case, since the dictum laid down in the :-55-:

above case is that though delivery records are not conclusive in themselves, criminal courts ought to attach due weight to them in deciding whether possession has passed under them. The facts and circumstances involved in the said case is entirely different from the facts involved in the case on hand. In the said case, the learned Magistrate did not consider Exts.P10 and P11 which had two delivery records connected with the execution of two decree. It was under the above circumstances in the said decision, the court remanded the matter to the trial court to take fresh decision after considering those documents. Another decision relied on by the learned counsel for the appellant is that of the decision rendered by the Apex Court in Pammi's case [AIR 1998 SC 1185], to canvass a proposition that the admission made by the accused in the civil case is relevant and admissible during the trial of the criminal case based upon which the trespass of the accused can be found. In the above case, in paragraph 17, it was held that the deposition of a person in another criminal case :-56-:

cannot be relied without examining such person during the trial of the criminal case and to disbelieve the testimony eye witness. The above decision according to me, is not at all relevant and applicable in the present case under Section 41 of the Indian Evidence Act. Another decision cited and relied on by the learned counsel for the appellant is reported in K.G.Premshakar's case [(2002)8 SCC 87]. In the above decision, the Apex Court has held that the decision of the civil court will be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be a conclusive except as provided in Section 41 and it is further held that if the judgment,order or decree of the civil court is relevant as provided under Sections 40 and 42, then Court has to decided as to what extent it is binding with regard to the matters decided therein. Therefore, according to the Apex Court, in each case, it has to be ascertained whether the judgment, decree or order is relevant and if so, what would be its effect. Relying on the decision of the Apex Court reported in Iqbal :-57-:

Singh Marwah's case [(2005)4 SCC 370], learned counsel for the appellant submitted that the findings and the order of civil court are relevant in the present trial court, but the learned Magistrate, without considering the civil court order, acquitted the accused. According to me, in all cases, the criminal court is not bound by the judgment or order or decree passed by the civil court, unless the same are relevant as provided under Sections 40 to 43 and satisfied the conditions mentioned therein and the civil court judgments are not conclusive except as provided in Section 41. In the

present case, it can be seen that the complainant herein had preferred two civil cases before the civil court one for injunction and another for eviction. The subject matter of these proceedings is entirely different from the present case. In (2005)4 SCC 370, the Apex Court has held as follows:-

"32. Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while :-58-:

in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein....."

(underline supplied)

34. On examination of the facts and circumstances involved in the case, Keeping the dictum laid down in the above authorities in mind, it can be seen that the complainant has miserably failed to prove that the accused has committed the criminal trespass. One of the facts brought by the appellant/complainant through the evidence of PW3 is that the accused has tried to open the door inside the office room. As I indicated earlier, PW1 has no case regarding the exact date of trespass and according to him, he came to know about it only when the office room got opened on 24.6.1995 in the presence of PW2/the Advocate Commissioner. PW3 is examined as an independent witness. Having regard to the facts and circumstances involved in the case, the :-59-:

question that remains is how far PW3 can be relied. PW3, in his evidence during the cross-examination, has deposed that he had not seen the accused opened the door. He had also deposed that on any date near to the date of the occurrence, he had not seen the complainant and he had seen the complainant after five to six months. He had also stated that in between that period, he had not seen the complainant at any point of time. In this juncture, it is relevant to note that PW3 claimed that he had seen the above act of the accused during the month of May. It is also deposed by him that the complainant has come to the spot only after five to six months. So, according to him, the complainant was not present on 13.6.1995 as claimed by the complainant. It is also relevant to note that though he had seen the complainant after five to six months, he did not inform the above incident to the complainant. He had also stated that he is not remembering regarding the incident, and the complainant asked him as to how it was opened but he replied, he was not remembering the :-60-:

exact date on which the above attempt was made. PW3 says that according to him, it was not necessary for him to inform the incident to the complainant and he had further stated that about the incident, he had talked to his wife alone and never

disclosed to anybody. But, it is relevant to note that when the complaint was filed, PW3 was cited as a witness. There is no explanation from the part of the complainant as to how he came to know at the time of filing the complaint that PW3 had witnessed the incident. So, the evidence of PW3 cannot be believed especially when he failed to inform the complainant about the said incident if the same is true after 5 to 6 months. If the above evidence of PW3 is excluded, it cannot be said that the accused has committed the offence of trespass.

35. As I indicated earlier, one of the circumstances relied upon by the complainant to prove the offence of trespass is the detection of house hold articles belonging to the accused from the office room. According to me, in the absence of any evidence from the part of the :-61-:

complainant to show that the accused has committed the trespass with the criminal intention or to intimidate or to insult or to annoy the complainant, the mere presence of the household articles of the accused, especially when the accused are the tenants of the complainant based upon the rental agreement, cannot be taken as a circumstance to hold that the accused committed the offence of trespass, particularly when the presence of the accused in the office room prior to the alleged period of occupation cannot be ruled out as they are the tenants of other part of the building. It is also relevant to note that the Advocate Commissioner/PW2 has also stated during the cross-examination that "Room- Study room-

```
      .                          Drawing room -
study room        -   Door- tower bolt-
bolt-             changes      ."
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36. So on examination of the facts and circumstances involved in the case and the available evidence and materials on record, especially in the light of the dictum laid down in the above authorities, :-62-:

according to me, the complainant has miserably failed to establish that the accused has committed the offence of criminal trespass and therefore, the finding of the court below is absolutely correct and no interference is warranted.

37. On the strength of the decision of the Honourable Supreme Court reported in Seth Ramdayal Jat v. Laxmi Prasad [(2009)11 SCC 545] and K.G.Premshanker v. Inspector of Police [(2002)8 SCC 87] and in the light of the judgment and decree in O.S.No.771 of 1995 of the Sub Court, Trichur, the contention of the counsel for the appellant is that those decrees and judgments and Ext.P10 order for eviction are binding on the criminal court in the above private complaint, but the learned Magistrate ignored the above civil court proceedings. According to me, the above contention of the learned counsel is not legally and factually sustainable. In the light of the above authorities and in view of the provisions contained in Sections 41,42 and 43 of the Indian Evidence Act, 1872, the above mentioned :-63-:

civil proceedings are not relevant and inadmissible in evidence. In the present case, it can be seen that O.S.No.771 of 1995 was preferred for mandatory injunction filed against the respondents/accused to vacate the room 'Study' and the second prayer in the said suit is for decree restraining the defendants, who are the accused herein, from causing obstruction to the plaintiff/the complainant herein and his agents, plucking the coconuts and taking other usufructs from the compound. Ext.P10 order is issued in the above suit for eviction of the defendants therein, who are the accused herein from the office room. The judgment and decree in O.S.No.771 of 1995 covered by a different subject matter and the same has also not been produced before the trial court. Thus, it is crystal clear that those civil court proceedings are not relevant and material in view of Sections 41,42 and 43 of the Indian Evidence Act and the same are inadmissible in evidence. In view of the decision reported in (2002)8 SCC 87, the criminal case has to be terminated in accordance with its logical conclusion as per the :-64-:

evidence and materials on record and in order to convict the accused, the court should satisfy that the allegations and accusation against the accused are proved beyond reasonable doubt. But, in case of civil action, the degree of proof required only on preponderance of probabilities. Therefore, the civil court proceedings and orders, which are not relevant and inadmissible in the criminal case, cannot be inducted for the purpose of convicting the accused and thereby to circumvent the traditional responsibility of the prosecution to prove its case beyond reasonable doubt. In short, in the present case, the complainant has miserably failed to prove that the accused have physically trespassed into the office room and even if it is shown that they have found occupied the office room, the complainant has not succeeded in establishing that such trespass is with the requisite intention to commit any offence or to intimidate or insult or annoy the complainant.

38. Another offence alleged against the accused is that they :-65-:

have committed theft of two steel chairs and plastic bucket and mug. The trial court, by an elaborate discussion, has found that there is no evidence to show that the accused have committed theft of such article. The contention of the appellant against the above finding is that PW3 has found the attempt of the accused to open the door inside the office which has an opening from the drawing room of the house rented out to the accused and PW3 has also seen light in the office room on that particular day. The other ground is to the effect that Mos.1 to 5, which were seized by PW4 from the said office room among which there were two chairs and the same were not found when PW2/the Advocate Commissioner inspected the office room on 24.6.1995, but she had detected the same on the upstairs of the building on the said date and therefore, according to the complainant, the movement of those two chairs from his office room to the upstairs of the building and vice versa shows that the accused has committed theft of those chairs. It is the further contention of the counsel that :-66-:

PW4 has also detected two plastic buckets and mug near from the toilet and kitchen used by the accused and therefore, the respondents/accused have committed the said offence. With respect to the above issue, I have no hesitation to endorse the findings of the learned Magistrate. Absolutely, there is no evidence to prove beyond reasonable doubt, that the accused has committed the offence of theft with respect to the two chairs and the plastic buckets and mug. The first circumstance pointed out by counsel for the appellant is that when PW2 inspected the office room, the chairs were not seen therein, but it was detected at the upstairs. The complainant has no case that in the application for appointment of Advocate Commissioner, the Commissioner was directed to inspect the upstairs of the building which was given on rent to the accused. If the Commissioner's evidence is true, she had gone to the upstairs at the request of the plaintiff, who is the complainant. What persuaded the plaintiff/complainant to request the Advocate Commissioner to inspect :-67-:

the upstairs is still in blank since the subject matter of the suit was for mandatory injunction, to vacate the study room. If the plaintiff/complainant has got any previous information regarding the placing of the chairs at the upstairs, it is quite natural to make such a request before the Commissioner. But, he has no such case that he had located or he had information about the chairs in the upstairs. So that part of the evidence of the Commissioner cannot be swallowed without a pinch of salt. In the light of the evidence of PW4, it can be seen that the above chairs were found in the office room and according to me, there is nothing peculiar since those chairs are belonging to the complainant and the same are expected to see in the office room as the said room was in the possession of the complainant. Thus, it can be seen that the chairs which are detected in the office room are not recovered from the physical possession of the accused. There is no statement or admission from the part of the accused that the chairs were in their possession and recovered from their physical :-68-:

possession. Similarly, the two plastic buckets and mug seized by PW4 are not from the physical possession of the accused. It is pertinent to note that when Mos.1 to 6 were produced, PW4 or the officer, who produced the material objects, has specifically stated in the property list that the same are not stolen properties. I have repeatedly gone through the deposition of PW1 to see that whether PW1 has identified those buckets and mugs as of his own. There is no whisper in the deposition of PW1 to the effect that he had identified the plastic buckets and mugs as of his own and belonging to him. Plastic buckets and mugs are generally available in the open market which are likely to use in the bathroom or kitchen, as the case may be and in the absence of any positive evidence to show that the same are belonging to the complainant, it cannot be ruled out that the same are not belonged to the accused. Therefore, the mere seizure of these articles from the side of the kitchen or bathroom used by the accused, are not sufficient to hold that the same are belonged to the complainant and :-69-:

recovered from the physical possession of the accused or the same are stolen articles so as to fix penal liability upon the accused for the offence punishable under Section 379 of I.P.C.

39. It is relevant to note that as I indicated earlier, there is no substantial or direct evidence to show that the accused has committed the offence of theft with respect to the chairs. Even if the movements of the chairs as alleged by the complainant are admitted as true and correct for the argument sake, the only inference is that can be drawn in that the same was removed from the office room to the upstairs of the building and thereafter, placed the same in the office room, still then there is no clinching evidence to show that the same is done by the accused. Now the question therefore, to be considered is whether the said facts are sufficient to attract the ingredients of Section 379 of I.P.C. In AIR 1965 SC 585, the Supreme Court in the above decision has held as follows:-

"4. The offence of theft consists in the dishonest taking of any moveable property out of :-70-:

the possession of another without his consent.

Dishonest intention exists when the person so taking the property intends to cause wrongful gain to himself or wrongful loss to the other. This intention is known as animus furandi and without it the offence of theft is not complete. ...." A learned Judge of this Court in the decision reported in Kesavan Nair's case [2005(3) KLT 391] has held as follows:-

"6. A close reading of Ss. 378, 24 and 23 IPC extracted above would show that proof of removal of a movable property by the accused alone will not be sufficient to establish "theft".

Prosecution has to further prove that the accused had intended to take the movable property "dishonestly" as defined under S.24 read with S.23 IPC. To prove that the accused intended to take the property "dishonestly", prosecution has also to establish that the accused intended to cause wrongful gain or wrongful loss of the movable property as stated in S.23 of IPC. Thus, to prove the offence of "theft", prosecution has to establish that the accused moved the articles with the requisite intention contemplated by S.378 IPC read with Ss. 23 and 24 of IPC.

7. The main ingredients of offence of "theft"

which are to be proved under S.378 of IPC are therefore (1) that the offender had the intention to "take" a movable property out of possession of another without the consent of the latter; (2) that the offender had also intended to cause wrongful :-71-:

gain by unlawful means, of such property to which the person gaining is not entitled to or wrongful loss by unlawful means, of such property to which the person who is losing it is entitled to and (3) that with such intentions and in order to such "taking", the offender had moved such movable property.

8. Thus, it is clear that the offence of "theft" takes in both a physical act of 'moving' and also a specified intention. But, what exactly is the nature of the intention which is required to be proved to make out the offence of "theft"? Theft postulates two "intentions". Firstly, an intention of the accused to 'take' any movable property out of possession of another person without the consent of the other person. Secondly, an intention to cause wrongful gain by unlawful means, of such property to which the person gaining is not entitled to or to cause wrongful loss by unlawful means of such property to which the person losing is entitled to. Only if both such intentions of the accused are proved, an offence of "theft" as defined in S.378 IPC will be established.

Therefore, a mere removal of a movable property by a person from possession of another without the consent of the latter with the sole intention to evict him from a building will not be sufficient to make out an offence under S.380 of IPC."

In the present case, on examination of the evidence and materials, it can be seen that the so-called chairs of the complainant were seized from the office room and not from the physical possession of the :-72-:

accused. Plastic buckets and mug, even though, seized respectively near from the kitchen and bathroom of the accused, the same are not proved as belonged to the complainant, beyond reasonable doubt and there is also no substantial evidence to show that the accused has committed the offence of theft with respect to those articles. PW4, the Police Officer, who seized those articles, has no claim that those things are stolen properties. In the light of rivalry among the complainant and the accused and in the absence of any independent, reliable and satisfactory evidence to connect the accused with the said incidents, no penal liability can be fixed against them. Hence, the essential ingredient of Section 379 is not established. Therefore, the finding of the court below is absolutely correct and legal and no interference is warranted.

40. Another contention raised by the learned counsel for the appellant is that the impugned judgment contained 17 mistakes and the learned Magistrate has repeatedly mentioned in the judgment :-73-:

about the argument of the counsel for the defence in favour of the defence as well as against the complainant stating that "the learned defence counsel contended that all those arguments are without any force, learned counsel for the accused contended that these grounds are not sustainable, this contention raised by the learned defence counsel carries considerable force, the learned defence counsel contended that this contention is without any force etc. and the appellant has also filed Crl.M.A.No.8200

of 2006 under Section 362/482 of Cr.P.C. praying that this Court be pleased to grant a direction to correct the errors 17 in number in the judgment dated 16.6.2001 in C.C.No.391 of 1997 and set aside the judgment dated 16.6.2001 by the Judicial First Class Magistrate, Chalakkudy which is not maintainable. Another contention raised by the learned counsel is that though no plastic bag is seized by the Police, MO6 in the schedule to the judgment, is shown as plastic bag instead of plastic buckets(2) and plastic mug. So, according to the learned counsel, the :-74-:

Magistrate has not applied his mind. In order to substantiate the contention of non-application of mind of the Magistrate, the learned counsel has stated that though there was no charge against the accused for the offence under Section 447, the charge is for 442, in paragraph 32 of the judgment, while acquitting the accused, the learned Magistrate has stated that the accused are not found guilty of all the offences including Section 447, for which there was no charge.

Hence, according to the learned counsel,those instances and approach show the non-application of mind by the Magistrate. As I indicated earlier, another ground taken is that the learned Magistrate denied opportunity to the complainant to adduce evidence and to substantiate the above ground. It is argued that Crl.M.P.No.7620 of 2001 filed before the court below for reopening the evidence of the complainant and to examine the wife of the complainant, who was present during the occasion of the alleged incident taken place on 13.6.1995, was dismissed and the issuance of certified copy of order is deliberately :-75-:

delayed by the learned Magistrate. Therefore, according to the learned counsel, on the above grounds, the appeal is liable to be allowed and the matter requires reconsideration by the trial court for which the case has to be remanded back.

41. Through the foregone discussions and the appreciation of evidence and materials, and on scrutiny of the impugned judgment, I have already arrived at a conclusion that the findings of the court below as per the impugned judgment are correct, legal and proper and such conclusions are arrived after considering the arguments advanced by the learned counsel for the appellant including 17 mistakes pointed out by him on the basis of Crl.M.A.No.8200 of 2006. Therefore, I am not proposed to repeat the same. I have already dismissed Crl.M.A.No.8200 of 2006 since the same are not maintainable especially when the subject matter of the appeal and the challenge is against the impugned judgment. With respect to the ground taken regarding the denial of opportunity to adduce evidence and with :-76-:

respect to dismissal of Crl.M.P.No.7620 of 2001, I have already dealt with the said point through the foregone discussion and I have already found that the learned Magistrate is absolutely correct and legal in dismissing the above petition. Therefore, the same need not be considered again.

42. With respect to the alleged seizure of the plastic buckets and mug, I have already found that item No.4, the two plastic buckets are seized by PW4 from the veranda near to the kitchen occupied by the accused and item No.5 plastic mug was seized by PW4 from the side of the toilet, which is also occupied by the accused as per the rent agreement and I have specifically found that the same are not recovered from the physical possession of the accused and the same are not identified as belonged to the complainant. Even the complainant has no case that the accused has committed the theft of plastic bag. At the most, MO6 in the appendix to the judgment is shown as plastic bag may be due to some oversight and the same will :-77-:

in no way affect the case of the complainant, especially in the light of the earlier finding with respect to the offence of theft. Hence, according to me, though MO6 is shown as plastic bag, the same has no bearing in the findings of the court below or this court.

43. It is true, in paragraph 32 of the judgment of the trial court, among other offences, the accused are not found guilty for the offence under Section 447 of Crl.P.C., though in the charge, the respective offence is shown as 442. According to me, this also has no bearing in the light of the facts and circumstances involved in the case. As I have already found the complainant has miserably failed to adduce any evidence so as to show that the accused has committed the offence of trespass under any of the sections enumerated in the chapter XVII of I.P.C. In the charge, the section incorporated is 442, which, as per I.P.C. define the offence 'house-trespass'. The punishment provision is under Section 448 for the offence under Section 442. Section 448 contemplates punishment up to one year or with fine which may :-78-:

extend to one thousand rupees, or with both. Section 441 defines criminal trespass and its punishment clause is under Section 447 of I.P.C. where the punishment prescribed is maximum 3 months imprisonment, with fine or which may extend to five hundred rupees or with both. Therefore, the accused has faced the charge including the offence under Section 442, for which offence, on conviction, the accused are liable to be punished with higher sentence when compared with the offence under Section 441. Therefore. according to me, the complainant in no way, prejudiced simply because the section of offence under which the accused is found not guilty is shown as 447 instead of Section 442. In this juncture, it is also relevant to note that as discernible from paragraph 3 of the trial court judgment, cognizance was taken initially for the offence under Section 447, but when the charge was framed the section is shown as 442. In this juncture, it is also relevant to note that the complaint was filed alleging offences under Sections 448,427,341,506(I), 120B and 34.

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When the cognizance was taken, the same were only for the offences under Section 341,447,426,506(I),380,294(b) read with Section 34 of I.P.C., but at the time of framing charge, the same were only for the offences punishable under Sections 341,294(b),426,442,380,34. But the complainant did not raise any objection or take appropriate remedial legal proceedings either at the time of taking cognizance for the said offences or at the time of framing charge, against exclusion of the offences those mentioned in the complaint. The outcome of the above discussion shows that the complainant was not having any grievance in not taking cognizance for all the offences mentioned in his complaint and also no grievance against the charge framed excluding certain offences, though such offences are raised by him and the defect now raised by the complainant with respect to the acquittal portion, according to me, will not affect the complainant, because as per the foregone discussion,the complainant has miserably failed to prove the trespass. Therefore the contentions raised by the :-80-:

appellant in this regard are also not sustainable.

44. From the above discussion and materials and evidence referred to above, it can be seen that the findings of the court below or the judgment impugned in this appeal are not perverse or illegal and the findings of the court below are approved by this Court as correct and legal since such findings are supported by the evidence and materials. The Honourable Apex Court time and again held that the jurisdiction of the appellate court, sitting in appeal against an order of acquittal, is limited and can be interfered only when it is shown that the judgment of the trial court or its finding are perverse. Even if two views are possible, that is also not a ground to substitute the view of the appellate court instead of the view adopted by the trial court and to convict the acquitted accused.

45. In a recent decision of the Apex Court reported in State of Rajasthan v. Darshan Singh @ Darshan Lal (2012(4) Supreme 72), the Hon'ble Apex Court has held as follows:-

:-81-:

"In exceptional cases where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence."

Thus, on examination of the facts and circumstances involved in the present case, in the light of the above dictum laid down by the Apex Court in the decision cited supra, it can be seen that the petitioner has miserably failed to show that the judgment sought to be impugned is a perverse one. No substantial reasons are made out to

interfere with the order of acquittal recorded in favour of the accused and to disturb the double presumption of innocence bolstered as per the judgment in question.

Therefore, I find no ground to allow the appeal, especially when the appellant miserably failed to substantiate his challenge against the findings and order of acquittal recorded by the trial court.

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In the result, this Criminal Appeal is dismissed as devoid of any merit.

V.K.MOHANAN, Judge MBS/ :-83-:

As the above petition is not maintainable under Section 362 of Cr.P.C. as well as Section 482 of Cr.P.C., especially when the correctness, legality and propriety of the judgment of the trial court is under scrutiny in the above appeal, this Criminal M.A. is dismissed.

In view of Sections 41 to 43, Annexures A3,A4,A5 and A6 are in no way relevant or admissible in this appeal, especially in the light of the decisions of the Honourable Apex Court reported in Seth Ramdayal Jat v. Laxmi Prasad [(2009) 11 SCC 545] and Iqbal Singh Marwah and another v. Meenakshi Marwah and another [(2005) 4 SCC 370]. Hence, the above petition is dismissed.

As the correctness, legality and propriety of the judgment under challenge is being examined in the appeal on the basis :-84-:

of the available evidence and materials, which forms part of the record of the trial court, the present petition to receive and accept document Nos. Annexures A1 and A2 requires no consideration. Accordingly, the same is dismissed.

This is an application filed under Section 482 of Cr.P.C. with a prayer to receive and accept the judgment in O.S.No.771 of 1995 marked as Annexure A7 for facilitating adjudication of the above appeal. In the light of the decisions reported in Seth Ramdayal Jat v. Laxmi Prasad [(2009) 11 SCC 545] and Iqbal Singh Marwah and another v. Meenakshi Marwah and another [(2005) 4 SCC 370] and especially the subject matter of O.S.No.771 of 1995 is entirely different from the subject matter of the complaint and the same is in no way relevant and admissible in view :-85-:

of Sections 40 to 43 of the Indian Evidence Act, the above petition stands dismissed.

V.K.MOHANAN, Judge MBS/ :-86-:

V.K.MOHANAN, J.

CRL.A.No. 434 OF 2003 JUDGMENT Dated:11.11.2011 :-87-: