

Serial No. 02
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. Petn. No. 40 of 2023

Date of Decision: 20.09.2023

M/s Sesami Chemicals (P) Ltd. Vs. Shri. Rajesh Kabra & 2 Ors.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. K.C. Gautam, Adv.

For the Respondent(s) : None

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

JUDGMENT (ORAL)

1. Heard Mr. K.C. Gautam, learned counsel for the petitioner who has submitted that the petitioner is a company incorporated under the Companies Act, 1956 and is represented by its Director, Shri. Gilbert Diengdoh.

2. The learned counsel has further submitted that this application preferred under Section 482 Cr.P.C is made with a prayer to set aside and quash the order dated 15.06.2022 passed by the court of the learned

Judicial Magistrate First Class, Shri. D.K. Mihsill in CR Case No. 87(S) of 2012.

3. It is also submitted that upon institution of this petition before this Court, the petitioner was directed to take steps for issue of notice upon the respondents which was accordingly done so. However, in spite of the same having been received, the respondents have failed to appear before this Court. Accordingly, it is prayed that this matter may proceed ex parte against the respondents herein.

4. Briefly citing the background facts leading to the filing of this petition, the learned counsel has submitted that the petitioner/company has business dealings with the respondents herein for which in the month of March, 2008 four consignments of ferro-silicon valued at ₹ 46,79,890/- (Rupees forty six lakh seventy nine thousand eight hundred ninety) only was supplied to the respondents who has paid an amount of ₹ 10,00,000/- (Rupees ten lakh) only with the balance of ₹ 36,79,890/- (Rupees thirty six lakh seventy nine thousand eighty hundred ninety) only yet to be paid.

5. On the respondents failing to make payment, the petitioner had lodged an FIR on 12.10.2011 registered as Umiam P.S. Case No. 43(10) of 2011 under Section 120(B)/418/420 IPC. The respondents responding to the same had worked out the amount to be paid to the petitioner which apart from the principle amount the accrued interest thereon comes to ₹ 34,54,599/- (Rupees thirty four lakh fifty four thousand five hundred ninety nine) only and therefore, together with the principal the total amount comes to ₹ 71,34,489/- (Rupees seventy one lakh thirty four thousand four hundred and eighty nine) only. The respondents have then

made a part payment of ₹ 40,00,000/- (Rupees forty lakh) only on 03.11.2011.

6. For the remaining balance of ₹ 31,34,489/- (Rupees thirty one lakh thirty four thousand four hundred eighty nine) only the respondents had issued an account payee cheque for the said amount from Account No. 25220500000011 drawn on the Bank of Baroda in favour of the petitioner. The cheque was signed by the respondent No. 2, Shri. Sanjay Kabra.

7. On receipt of the said cheque, the same was deposited by the petitioner on the company's account with the State Bank of India, Shillong Branch, however, the said cheque returned unpaid by the Bank of Baroda on the ground "*Payment Stopped by the Drawer*".

8. On the respondents after being made known of the fact that the said cheque has bounced, the respondents failing to respond to the same, the petitioner then instituted a Complaint Petition under Section 138 of the Negotiable Instruments Act, 1881 before the learned court of Judicial Magistrate First Class, Shillong which was registered as CR Case No. 87(S) of 2012.

9. During the pendency of said CR Case No. 87(S) of 2012, the respondents preferred two petitions before the Hon'ble Gauhati High Court (Shillong Bench) [as this Court then was], one being registered as Crl. Petn. (SH) No. 68 of 2011 which is a petition for quashing of the FIR dated 12.10.2011 registered as Umiam P.S. Case No. 43(10) of 2011. Another case being Crl. Petn. (SH) No. 40 of 2012 with a prayer for quashing of the proceedings in CR Case No. 87(S) of 2012.

10. This Court vide order dated 21.05.2013 had disposed of Crl. Petn. (SH) No. 68 of 2011 allowing the prayer made therein. Similarly, vide order dated 14.09.2012 the prayer made in Crl. Petn. (SH) No. 40 of 2012 was also allowed. Being aggrieved by such orders, the petitioner then approached the Hon'ble Supreme Court on appeal and vide order dated 26.09.2014 a common order was passed in Criminal Appeal No. 2139 of 2014 and Criminal Appeal No. 2140 of 2014 wherein the Hon'ble Supreme Court had set aside both the orders of the High Court aforementioned and has directed that the case before the trial court be proceeded in accordance with law.

11. In this backdrop, the matter was pursued by the petitioner before the trial court as far as CR Case No. 87(S) of 2012 is concerned and steps were taken for issue of notice upon the respondents therein.

12. The learned counsel for the petitioner has again submitted that the petitioner was surprised to know that the court of the learned Judicial Magistrate First Class, Shillong vide order dated 15.06.2022 had dismissed the complaint filed by the complainant/petitioner on the ground that the learned counsel appearing for the complainant had failed to appear before the said court on the date fixed for the matter. The order was apparently passed under Section 256 Cr.P.C which had effectively not only dismissed the claim of the complainant but has also in the process, acquitted the accused persons who are the respondents in this case.

13. Being highly aggrieved and dissatisfied with the said order dated 15.06.2022, the petitioner/company has now approached this Court by way of this instant petition seeking relief in the form of quashing of the said

impugned order.

14. The first limb of argument advanced by the learned counsel for the petitioner is that the petitioner/company has always been diligent in pursuing the case inasmuch as it has gone to the extent of approaching the Apex Court when the application filed before this Court was allowed by the relevant orders which in effect, has affected the cause of the petitioner. In fact, pursuant to the order of the Apex Court dated 26.09.2014 the petitioner had diligently followed the proceedings in the said CR Case No. 87(S) of 2012.

15. However, unbeknownst to the petitioner the learned counsel entrusted to pursue the matter had failed to do so leading to the passing of the impugned order. It is reiterated that for the fault of the counsel the parties should not suffer. In support of this contention, the case of ***Secretary, Department of Horticulture, Chandigarh & Anr. v. Raghu Raj: (2008) 13 SCC 395*** at paras 25 and 27 was cited in this regard.

16. The second limb for argument advanced by the learned counsel for the petitioner is that the learned trial court had erred in law and facts in recording its finding in the impugned order by resorting to the provision of Section 256 Cr.P.C while dismissing the case of the complainant/petitioner.

17. The learned counsel has submitted that the stage of the case at the relevant point of time is for issue of summons to the accused persons/respondents which could not be affected in view of the fact that the correct address of the accused persons was not known. Even then, the learned trial court had caused issuance of bailable warrant of arrest against

the respondents but yet again, the same has returned unserved for want of a proper address.

18. Maintaining that the case is only at the stage of appearance of the accused persons/respondents the matter not having been heard in its entirety, the learned trial court could not have dismissed the complaint petition under Section 256 Cr.P.C.

19. In support of his contention, the case of *M/s Viswak Garments v. M/s Woodstock Merchandising Private Ltd. & Anr. in Criminal Original Petition No. 6905 of 2022* wherein the Hon'ble High Court of Madras vide order dated 06.06.2022 at paras 8 and 9 of the same had dealt with the import and impact of the provision of Section 256 Cr.P.C and has come to the conclusion that the court may resort to this provision only when the accused has entered appearance and on his/her appearance the complainant is absent, then necessary orders for dismissal of the complaint may be made.

20. The object of the provision of Section 256 Cr.P.C is to discourage frivolous and unnecessary complaint or litigation, however, in the case of the petitioner herein the same would not apply since as has been submitted, the petitioner/company has been diligently pursuing the matter right through except for the fact that the fault of the counsel the petitioner was made to suffer on the Complaint Petition being dismissed.

21. It is, therefore, prayed that this petition may be allowed and the impugned order dated 15.06.2022 be set aside and quashed with a direction to the trial court to continue with the proceedings.

22. This Court having heard the learned counsel for the petitioner, facts and circumstances of the case having been recounted herein above, the same need not be repeated.

23. Before proceeding further, on the basis of the record and the submission of the learned counsel for the petitioner, since the respondents in spite of having received the notice issued upon them have failed to appear before this Court, therefore, this matter shall proceed ex parte against the respondents herein.

24. The submission made by the learned counsel for the petitioner pointing to the fact that the petitioner/company has been diligently pursuing its case throughout but for the default on the part of its counsel at the relevant point of time, which fact was not known to the petitioner, this Court is in agreement with the submission made and in the peculiar facts and circumstances of this case, would hold that the complainant/petitioner cannot be held responsible for the action or inaction of the appointed counsel who has failed to appear before the court concerned without any specific instructions from the said complainant. In the case of ***Secretary, Department of Horticulture, Chandigarh***(supra) the relevant portion, that is, paras 25 and 27 of the same are found acceptable by this Court in as far as the applicability of the principle stated therein to the facts of this case are concerned. The said paras are reproduced herein as:

“25. In Rafiq v. Munshilal, [(1981) 2 SCC 788], the High Court disposed of the appeal preferred by the appellant in absence of his counsel. When the appellant came to know of the fact that his appeal had been disposed of in absence of the advocate, he filed an application for recall of the order dismissing the appeal and to permit him to participate in the hearing of the appeal. The

application was, however, rejected by the High Court, *inter alia*, on the ground that there was no satisfactory explanation why the advocate remained absent. The aggrieved appellant approached this Court. Allowing the appeal, setting aside the order passed by the High Court and remanding the matter for fresh disposal in accordance with law, this Court stated:

"3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for

ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law."

27. In Mangilal v. State of M.P. [(1994) 4 SCC 564] an appeal against conviction recorded by the trial court was dismissed by the High Court for non-appearance of counsel for the appellant due to "strike" by lawyers. This Court held that dismissal of appeal by the High Court was improper. The appeal was directed to be restored to file and be heard on merits. [see also Tahil Ram Issardas Sadarangani v. Ramchand Issardas Sadarangani [1993 Supp (3) SCC 256]."

25. The other aspect of the matter is the interpretation of the provision of Section 256 Cr.P.C. The said Section reads as follows:

"256. Non-appearance or death of complainant.-(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day: Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."

26. As referred to by the learned counsel for the petitioner, paras 8 and 9 of the case of *M/s Viswak Garments*(supra) has adequately interpreted

the said provision to which this Court respectfully agrees to. The said paras are reproduced herein below as:

“8. Section 256 Cr.P.C. is the only provision which deals with the dismissal of the complaint leading to the acquittal of the accused. As per the provision, it will be applicable only if the complaint is taken on file and summons is issued to the accused and on the date appointed for the appearance of the accused, on his/her appearance, if the complainant does not appear, the Magistrate shall acquit the accused unless, if, for some reason, he thinks proper to adjourn the hearing of the case to some other date.

9. The object of the provision is that the court should take serious note of the absence of the person who approached the court to set the law in motion, when the accused person makes himself present before the court for enquiry.”

27. In view of the fact that the accused persons/respondents are yet to enter appearance the proceedings in the said CR Case No. 87(S) of 2012 have not yet actually started and as such, the learned court of the Judicial Magistrate First Class, Shillong has misconstrued the import of Section 256 Cr.P.C and has dismissed the Complaint Petition without even ascertaining that the accused persons are in attendance before the court on the relevant date when the impugned order was passed. The summons therefore, having yet to be issued, in a sense that the summons are to be duly affected, to ensure that on the appointed date the appearance of the accused is made, therefore, the letter of the aforesaid provision is deemed to have not been complied with, the same could not have been resorted to by the learned court.

28. On an overall consideration of the facts and circumstances in this case, this Court is convinced that the petitioner has made out a case for interference and exercise of its inherent power under Section 482 Cr.P.C.

the impugned order dated 15.06.2022 passed in CR Case No. 87(S) of 2012 is hereby set aside and quashed.

29. The case before the trial court is restored to file and the trial court is directed to proceed with the proceedings on appearance of the petitioner, who shall appear before the said court on 05.10.2023.

30. Let copy of this order be issued upon the court concerned for due compliance.

31. Petition disposed of. No costs.

Judge

Meghalaya
20.09.2023
"Tiprilynti-PS"

