



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)
PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No. 40/2011

M/s. Gupta Hardware Private Ltd.
(represented through –
Shri Manab Lahkar, its Marketing Manager,
through a registered Power of Attorney Deed)
at Dr. R.P. Road, Ganeshguri Chariali,
Dispur, Guwahati-6, PO & PS-Dispur,
District-Kamrup(Metro), Assam.

.....Appellant.

-Versus-

1. M/s. R.B. Engineering and Company,
Represented by its Proprietor,
Shri Ripun Bhuyan,
"Maya Apartment", Ganesh Mandir Path,
New Guwahati-781020, PS-Noonmati,
District-Kamrup(M), Assam.
2. The State of Assam.

.....Respondents.

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

For the Appellant	:	Mr. C.S. Ray, Ms. P. Gupta.	Advocates.
For the Respondents	:	Mr. S.P. Roy, Mr. K.K. Parasar, Addl. P.P.	Advocates.

Date of Hearing : 19.09.2023

Date of Judgment : 25.09.2023

JUDGMENT AND ORDER

Heard Ms. P. Gupta, learned counsel appearing on behalf of Mr. C.S. Ray, learned counsel for the appellant, Mr. S.P. Roy, learned counsel for the respondent No.1 and Mr. K.K. Parasar, learned Additional Public Prosecutor, Assam, appearing for the State respondent No.2.

2. In this appeal, under Section 374(4) of the Code of Criminal Procedure, 1973, the appellant has put to challenge the order, dated 27.07.2010, passed by the learned Judicial Magistrate First Class, Kamrup(M), Guwahati, in complaint case, being C.R. No.1882^C/2007. It is to be noted here that vide impugned order, dated 27.07.2010, the learned Court below has dismissed the complaint for default and acquitted the accused/respondent No.1.

3. The background facts, leading to filing of the present criminal appeal, are briefly stated as under:-

"The appellant, namely, M/s. Gupta Hardware Private Ltd., represented by Manab Lahkar, its Marketing Manager, through a registered Power of Attorney Deed, has instituted a complaint case, being C.R. No.1882^C/2007, under Section 138 of the N.I. Act before the learned Judicial Magistrate First Class, Kamrup(M). In the aforesaid complaint, the learned Court below

has taken cognizance of the offence under Section 138 of the N.I. Act and issued process to the accused/respondent No.1 and pursuant to the said process, the respondent No.1 entered appearance before the learned Court below on 17.10.2007 and then the learned Court below has explained the particulars of offence under Section 138 of the N.I. Act to the respondent No.1, to which the respondent No.1 pleaded not guilty and claimed to be tried. Thereafter, the learned Court below has fixed the case on 15.12.2007 for evidence. Thereafter, on different dates the case was adjourned, sometimes for necessary order, sometimes for appearance of the accused and sometimes for evidence. Thereafter, vide order dated 11.05.2010, the case was fixed for necessary order on 27.07.2010, as on that day the learned Presiding Officer of the Court below was on leave and both the parties were present on that day and on such count the case was fixed on 27.07.2010, for necessary order. Thereafter, on 27.07.2010, the appellant remained absent with step, vide Petition No.2501 and the accused was also absent with step and was represented for that day. But, the Petition No.2501 filed by the appellant was not pressed by its counsel for which the learned Court below observed that many dates were given to the complainant's side, but, the complainant has failed to adduce any evidence till date and he was also absent with a petition showing a common reason of ailment without there being any medical paper and therefore, the learned Court below had rejected the petition and dismissed the complaint by exercising the power under Section 256 Cr.P.C. and acquitted the accused. On the same day, the learned counsel for the appellant had filed another petition, being Petition No.4185, to restore the case to

the file, but the learned Court below has dismissed the same, as there is no provision in the Cr.P.C. empowering the Magistrate to do so after the complaint is dismissed.”

Being aggrieved the appellant is before this Court.

4. Ms. Gupta, learned counsel for the appellant, has raised following issues for consideration of this Court:

- (i) That, the learned Court below had fixed 27.07.2010, for necessary order, vide order dated 11.05.2010.
- (ii) That, on 27.07.2010, the appellant could not appear before the Court, but his counsel filed one petition, being Petition No.2501 and thereafter, informing the Bench Assistant, the learned counsel left for the CBI Court to attend some other matters.
- (iii) That, after returning from the CBI Court, the learned counsel came to know about dismissal of the complaint and filed another petition, being Petition No.4185, for restoration of the complaint, but, the learned Court below had dismissed the same for want of provision in Cr.P.C.
- (iv) That, the learned Court below has exercised the jurisdiction arbitrarily in as much as the date 27.07.2010, was fixed for necessary order, not for appearance of the accused or for hearing of the matter.
- (v) That, the learned Court below can exercise the power when the matter was fixed for appearance of the accused and for hearing of the matter.

5. Under the aforesaid circumstances, Ms. Gupta submits that the impugned order passed by the learned Court below has failed to withstand the legal scrutiny and therefore, it is contended to set aside

the same and to remand the matter to the learned Court below. Ms. Gupta also referred following case laws in support of her submission:-

- (i) Mohd. Azeem vs. A. Venkatesh & Ano.** reported in **(2002) 7 SCC 726;**
- (ii) M/s Shalimar Paints vs. M/S Muralidharan Hardware Mart** reported in **2007(2) MWN (Cr.) 109 DDC**
- (iii) Punjab State Warehousing Corporation, Foridakot vs. Shreedurga Ji Traders & Ors;** reported in **(2011) 14 SCC 615**
- (iv) N. Krishna Mohan vs. S.K. Karunakaran,** reported in **2011(3) MWN(Cr.) (DCC) 11**

6. Whereas, Mr. S.P. Roy, learned counsel for the respondent No.1, has vehemently opposed the appeal on the ground that the impugned order suffers from no infirmity or illegality requiring any interference of this Court. Referring to different orders passed by the learned Court below in the proceeding, Mr. Roy submits that on several occasions, the appellant had failed to produce any witness before the learned Court below and that on such count the learned Court below has exercised its power under Section 256 Cr.P.C. and dismissed the complaint. Mr. Roy further submits that though the learned counsel for the appellant had filed a petition before the learned Court below, the same was not pressed and therefore, the learned Court below has exercised the jurisdiction under Section 256 Cr.P.C. Further, Mr. Roy submits that the appellant has not enclosed the complaint petition with the Memo of Appeal and that the complaint suffers from inherent defects as there is no resolution of the Board of Directors of the Company/Firm, authorizing the appellant to file a complaint before the

learned Court below. Under the aforesaid facts and circumstances, Mr. Roy contended to dismiss this appeal.

7. Mr. Roy has also referred following case laws in support of his submission:

- (i) State of M.P. Vs. Ramesh & Another**, reported in **(2011)4 SCC 786.**
- (ii) State Bank of Travancore Vs. Kingston Computers (I) P. Ltd.** reported in **(2011)11 SCC 524.**
- (iii) M/S Kothari Enterprises, Mumbai vs. M/S Dharendra Agro Food Industries LTD. Ahmedabad**, reported in **(2020) 1 CriCC 255.**

8. Having heard the submission of learned Advocates of both sides, I have carefully gone through the Memo of Appeal and the documents placed on record and also perused the impugned order dated 27.07.2010, which is read as under:-

"27.7.2010 Complainant is absent with step vide petition No.2501. But none has appeared to move the same when the case was taken up. Accused is also absent with steps and duly represented for today.

Perused the C/R. It appears that many dates were given to complainant side but he failed to adduce any evidence till date and today also, he is absent with a petition showing a common reason of ailment without any medical paper. The petition is hence, rejected and the complaint is dismissed U/s. 256 Cr.P.C. and accused is acquitted. The case is accordingly disposed of.

Later

27.7.2010 Seen petition No.4185 filed by the learned Advocate for the complainant and heard Id. Counsel. The prayer is made to restore this case to file.

There is no provision in the Cr.P.C. which authorizes a Magistrate to do so after the complaint is dismissed. Hence the petition stands rejected.

Sd/- JMFC(K)"

9. In this context, I would also like to reproduce the order dated 11.05.2010, which is read as under:-

"11.5.2010 J.M. is on C/L. Both the parties are present.
Fixed 27.7.2010 for N/o.

Sd/- JMFC(K)"

10. A careful perusal of the aforementioned orders, specially order dated 11.05.2010, reveals that 27.07.2010 was appointed for necessary order, not for appearance of the accused or hearing of the matter. In this context, I deem it appropriate to reproduce Section 256 of the Code of Criminal Procedure, which is read as under:-

"S.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."

11. A careful perusal of the aforesaid provision reveals that the power under Section 256 Cr.P.C. to dismiss a complaint can be

exercised by the Magistrate when the date was appointed for appearance of the accused or any date, subsequent thereto, to which the hearing may be adjourned. A careful perusal of the orders, dated 11.05.2010 and 27.07.2010 reveal that 27.07.2010 was appointed for passing necessary order as on 11.05.2010, the learned Presiding Officer of the Court below availed leave and on that day both the parties were present.

12. Thus, as the case was not appointed for appearance of the accused or for hearing on 27.07.2010, the learned Court below ought not to have exercised the power under Section 256 Cr.P.C.

13. Further, it appears that though the appellant was absent on that day in the Court, his counsel filed a Petition No.2501 before the learned Court below. It is the categorical stand of the appellant that after filing of the petition, the learned counsel had left for the CBI Court to attend some matters there, after informing the Bench Asstt. of the learned court. Then without waiting for return of the counsel for the appellant and without hearing him, the learned Court below has exercised its jurisdiction under Section 256 Cr.P.C. after rejection of the Petition No.2501 and dismissed the complaint and acquitted the respondent No.1.

14. Indisputably, the case was filed under Section 138 of the N.I. Act. Indisputably also the case was appointed for passing necessary order on 27.07.2010, vide order dated 11.05.2010. While the case was fixed for passing necessary order, presence of the complainant was not essential for the progress of the case, as on that day a direction could have been issued to the parties, especially to the appellant, to produce the witnesses on the next date. The learned Court below ought to have examined this aspect as to whether the personal attendance of the

complainant was necessary or not. But, without examining that matter, the learned Court below has exercised the jurisdiction under Section 256 Cr.P.C.

15. Thus, the exercise of power under Section 256 Cr.P.C. by the learned Court below seems to be arbitrary and it defies all logic as on the date appointed the case was fixed for passing necessary order. Thus, the mandate of Section 256 Cr.P.C. appears to be violated here in this case and as such, the learned Court below has committed illegalities in dismissing the complaint.

16. I have carefully gone through the judgments referred by Mr. S.P. Roy, learned counsel for the respondent No.1 and I have find that the ratios laid down therein would not advance the case of the respondent No.1. In the case of **Ramesh & Another** (supra) and in **State Bank of Travancore** (supra) Hon'ble Supreme Court has dealt with two separate issues, which are not at all connected with the issues of the case in hand. Though the case of **M/S Kothari Enterprises (supra)** has some relevance, yet, it appears that the said case was fixed for hearing and the complainant remained absent on the date fixed and no application was filed on his behalf and under this circumstance the case came to be dismissed. But, the factual situation is quite different here in this case, as in the case in hand a petition was filed by the engaged counsel of the complainant.

17. On the other hand the ratios, so laid down in the cases referred by Ms. Gupta, the learned counsel for the appellant, has supported her argument. In the case of **Mohd. Azeem** (supra) the complainant remained absent for one day only and the trial court had dismissed the case for absence of the complainant for one single day and refused to restore the complaint when sufficient cause was shown, and the same

stands affirmed in the High Court, but, the Supreme Court had held that the both the courts adopted a very strict and unjust attitude resulting in failure of justice. In the case of **Shalimar Paints** (supra) Madras High Court held that it is incumbent upon the Magistrate to issue notice to the complainant and without issuance of such notice, adopting the procedure of dismissing the complaint under section 256(1) Cr.P.C. is not at all applicable. Similar view is expressed by Madras High Court in the case of **N. Krishna Mohan** (supra) also. However, the ratio in the other case i.e. **Punjab State Warehousing Corporation** (supra) would not advance her case as Hon'ble Supreme Court in the said case had dealt with the power of the High Court under section 482 Cr.P.C. and also the exemption of personal appearance of the complainant.

18. Thus, the impugned order, so passed by the learned court below, fails to withstand legal scrutiny because of the following reasons :-

- (i) The date, on which the case was dismissed, was appointed for necessary order not for appearance or for hearing as contemplated under section 256(1) Cr.P.C.;
- (ii) Though the complainant was absent on the date appointed, his counsel had filed one petition and the same was rejected without hearing the counsel;
- (iii) The learned court below has not issued notice to the complainant before dismissing the complaint as held by Madras High Court in **Shalimar Paints** (supra);

(iv) On previous date i.e. 11.05.2010, the complainant remained present, and that being so he remained absent only for a single i.e. 27.07.2010.

19. In the result, I find sufficient merit in this appeal. And accordingly, the same stands allowed. The impugned order dated 27.07.2010, passed by the learned Judicial Magistrate First Class, Kamrup (M) Guwahati stands set aside and quashed. The matter is remitted back to the learned court below, with a direction to proceed with the matter from the stage, where it was pending, at the time of dismissal, and to dispose of the same on merit, after hearing both the parties and affording them opportunities to adduce evidence. The above exercise has to be carried out within a period of six months from today. The Registry shall forthwith send down the record of the learned court below, with a copy of this judgment.

J U D G E

Comparing Assistant