

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

Criminal Appeal No. 542 OF 2009

Judgment:

Aggrieved with the order of dismissal of the complaint, filed under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the NI Act'), dated 09th July 2008, in Calendar Case No.146 of 2007 on the file of the I Additional Judicial Magistrate of First Class, Khammam, on the ground that the complainant was absent and there was no representation, though, the accused was present and that the complainant was not appearing for proceeding further in the case since long time, the instant appeal is preferred seeking to set aside the same on the grounds that the Court below has, somehow, overlooked the fact that the complainant was always ready to lead his evidence and his absence on that day was only on account of his being out of station for the reasons beyond his control and, therefore, unsustainable and to restore the complaint to its original file.

2. Heard Sri N.V. Anantha Krishna, learned counsel for the appellant, and Sri Kowturu Vinaya Kumar, learned counsel for the second respondent.

3. The facts, reflected from the affidavit of the appellant, are that the respondent was acquainted with him through his brother M. Venkata Ramana who was working as a Teacher and, out of such acquaintance, when the respondent approached the appellant on 01.04.2005, requesting for advancing amount, an amount of Rs.30,000/- was lent to meet the family necessities of the respondent and, in token of receipt of the said amount, a promissory note was executed by the respondent in favour of the appellant. Later, on demand for repayment, the respondent had issued a cheque bearing No.014030 on 12.09.2006 for Rs.30,000/- payable at Stambadri Co-operative Urban Bank Limited, Khammam, in favour of the appellant. When the said cheque was presented with Central Bank of India, Khammam, for collection it was returned unpaid for the reason "Funds Insufficient" with the memo dated 21.09.2006 of Central Bank of India, Khammam, along with the memo dated

17.09.2006 of Stambhadri Co-operative Urban Bank Limited, Khammam. The same was informed by the appellant to the respondent, on which the respondent requested him to present it again after 30 days. Accordingly, the said cheque was again presented for collection in the same bank, but again it was dishonoured through memo dated 15.11.2006, of Central Bank of India, Khammam, along with the memo of Stambhadri Co-operative Urban Bank Limited, Khammam.

4. The appellant's case is that he has issued a legal notice dated 22.11.2006 to the respondent calling upon to pay the said cheque amount, which was served on 24.11.2006, but the respondent did not choose to repay the due amount, hence, the complaint, which was numbered as Calendar Case No.146 of 2007 on the file of the I Additional Judicial Magistrate of First Class, at Khammam.

5. As seen from the material on record, on 09.07.2008, the order under challenge was passed, which reads thus:

“Complainant is absent. No representation. Accused is present. Since a long time the complainant is not appearing for proceeding further in this case.

Hence, it is deemed that the complainant has no interest in prosecuting the matter. Accordingly, the complaint is dismissed for default.”

6. Thus, the ground on which the complaint was dismissed happened to be that the complainant was absent since a long time and not appearing for proceeding further in the case.

7. Whether that ground in dismissing the complaint is sustainable or not is the question involved in the instant appeal.

8. The proceedings sheet in the said Calendar Case reflects that the summons were ordered on 14.03.2007, 16.05.2007, 08.08.2007 and 26.12.2007. On all these days

the complainant was present before the Court. On 27.02.2008 the complainant as well as the accused were present. On 26.03.2008 the complainant was present, though the accused was not present, his absence was condoned on petition. On 09.04.2008 the complainant was present and NBW was issued against the accused, however, it was recalled later. On 23.04.2008 the complainant was present and accused was examined under Section 251 Cr.P.C., who pleaded not guilty for the offence under Section 138 of the NI Act. On 15.05.2008 the complainant was present and so also the accused. On 11.06.2008, 18.06.2008 and 25.06.2008 the absence of the complainant was dispensed with. On 09.07.2008 the complainant was absent on which day the order under challenge was made by the Court below. Thus, it is abundantly clear that the complainant was continuously present right from the date of taking cognizance of the complaint, except on three occasions as mentioned above, but the absence was condoned by the Court below. The reason assigned by the appellant in the grounds of appeal is that, since he was out of station, he could not attend the Court on 09.07.2008 but he was returning to India within a week.

9. Learned counsel for the appellant submits that the absence of the complainant on 09.07.2008 was on account of his being outside the country and, though, a request was made by the advocate for the learned counsel for the complainant before the Court below that the complainant was returning within a week and adjournment was sought, somehow, the Court below did not agree with it and did not even endorse the same on the docket and, therefore, sought to set aside the order under challenge.

10. The observation of the Court below that, the complainant has been absent since a long time and the complainant was not appearing for proceeding further in the case, appears to be very vague without mentioning the details as reflected from the proceedings sheet which were narrated hereinabove. Therefore, no wilful default can be attributed nor any *mala fides* to the complainant for his absence on the day on which the said order was passed dismissing the complaint for default.

11. In the present context, it would be profitable to refer to the decision of the Hon'ble Supreme Court in **Mohd. Azeem v. A. Venkatesh and another**. While

dealing with dismissal order passed by the learned Magistrate under Section 138 of the N.I. Act and the appeal preferred under Section 378 (4) of Cr.P.C., the Apex Court while observing that the Magistrate has committed an error in acquitting the accused only for absence of the complainant on one day and refusing to restore the complaint when sufficient cause for the absence was shown by the complainant, held in paragraph No.4 thus:

“4. In our opinion, the learned Magistrate, and the High Court have adopted a very strict and unjust attitude resulting in failure of justice. In our opinion, the learned Magistrate committed a error in acquitting the accused only for absence of the complainant on one day and refusing to restore the complaint when sufficient cause for the absence was shown by the complainant.”

12. Certainly, the order challenged herein is liable to be set aside. Accordingly, the order is set aside directing the Court below to restore the Calendar Case to its original file and to continue the proceedings from the stage the complaint was dismissed for default.

13. The Registry is directed to despatch the record forthwith. Since the matter relates to the year 2007, it is desirable to direct the Court below to dispose of the matter within a period of six (6) months from the date of receipt of a copy of this order. Even both the sides are directed to co-operate with the Court for complying with the above direction.

14. The Criminal Appeal is, accordingly, allowed.

15. As a sequel thereto, the miscellaneous petitions, if any, pending in this appeal shall stand closed.

A. SHANKAR NARAYANA, J

Date: 25.03.2015

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