

HIGH COURT OF CHHATTISGARH, BILASPUR**Acquittal Appeal No.114 of 2016**

Ashok Kumar Sharma S/o Manohar Lal Sharma, aged about 47 years R/o Sanichari Bazar, Durg, Tahsil and District Durg (CG).

----Appellant

Versus

1. Uttam Kumar Deshmukh S/o Babu Lal Deshmukh, aged about 32 years R/o Beechpara, House No. 264 nearby Bus Stand, Village and Post Nikum, PS Anda, District Durg (CG).

2. State of Chhattisgarh through District Magistrate, Durg (CG).

----Respondents

For Appellant
For Respondent No.1

Shri CK Kesharwani, Advocate.
Shir MK Bhaduri, Advocate.

SB: Hon'ble Shri Justice P.Sam Koshy

Order On Board

23/12/2016

1. This acquittal appeal has been preferred against the order dated 26.07.2014 passed by the Chief Judicial Magistrate, Durg, in Complainant Case No.886/2011 dismissing the complaint case filed under Section 138 of Negotiable Instrument Act,1882 (for short, NI Act) for want of prosecution which was affirmed by order dated 16.06.2016 passed by the Revisional Court in Criminal Revision No.0000253/2014.
2. The facts of the case is that, a cheque amounting to Rs.2,00,000/- was issued by the respondent in favour of the appellant on 01.04.2010. On presentation of the cheque, the same got dishonored. A legal notice was issued. When no response was received from the

respondent, a complainant case under Section 138 of NI Act was filed which was registered as complaint case No.886 of 2011 before the JMFC, Durg. Thereafter the matter was fixed on more than couple of occasions, but on account of non appearance of the complainant, the JMFC, Durg, rejected the complainant case on 26.07.2014 for want of prosecution and as a consequence, the respondent stood acquitted from the charge under Section 138 NI Act.

3. Against the said order of JMFC dated 26.07.2014 dismissing the complainant case for want of prosecution, the appellant preferred a criminal revision before the Additional Sessions Judge, Durg, which was registered as Criminal Revision No.0000253/2014. The revisional court vide order dated 16.06.2016 dismissed the revision holding that the same as not maintainable as the remedy available to appellant was only to file leave to appeal and an appeal under Sections 378 and 378(4) CrPC before the High Court. Hence this Acquittal Appeal.
4. Learned counsel appearing for the appellant submits that the appellant has filed the complaint case against cheque which got dishonored. By virtue of rejection of complaint case under Section 138 NI Act for want of prosecution, the appellant would be rendered remediless and would have no remedy for getting the money back from the respondent which he owes to the appellant.
5. The instant acquittal appeal has been filed seeking for restoration of complainant case No.886/2011 and for setting aside the order dated 26.07.2014 so that he would be able to contest the matter on merits.

6. Counsel for the respondent however vehemently opposing the appeal submits that the appellant had been granted repeated opportunities but he did not enter appearance before the court and therefore the court below was left with no other option but to dismiss the complaint case for want of prosecution. Therefore, no illegality has been committed by the court below in rejecting the complaint case for want of prosecution.
7. Having heard the counsel appearing for the parties and having perused the records what is clearly reflected is the fact that the appellant after filing of complaint case remained absent for more than couple of occasions and as such on 26.07.2014 the complaint case got dismissed for want of prosecution. However, by virtue of dismissal of complainant case, the appellant becomes remediless for getting the money back which the respondent owes to the appellant. Thus, only on account of default on the part of complainant, the accused should not get an advantage of the said order passed by the court below. Therefore, this court feels that the appellant may be granted one opportunity to appear before the JMFC and pursue his complaint case on merits.
8. The Supreme Court in the case of Associated Cement Co. Ltd. v. Keshvanand reported in (1998) 1 SCC 687 in paragraph 18 has held as under:

“18. Reading the Section in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the Section. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is when the Magistrate considers

that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice.”

9. The Supreme Court again in the case of Mohd. Azeem v. A. Venkatesh and Another reported in (2002) 7 SCC 726 has very categorically held that in a proceeding under Section 138 of the Negotiable Instruments Act, the one singular default in appearance on the part of the complainant, the dismissal of the complaint case is not proper, legal and justified.
10. Taking into consideration the law laid down by the Supreme Court in the above referred two judgments, this Court is of the opinion that ends of justice would meet if the order dated 26.07.2014 dismissing the complaint case for want of prosecution as also order dated 16.06.2016 affirming the order dated 26.07.2014 is set aside and the matter is remitted back to the trial Court for further proceeding with the case from the stage it stood on 26.07.2014. It is accordingly ordered. Complaint case No.886/2011 pending before the court of JMFC, Durg is restored to its original number.
11. Since parties to dispute are represented through their lawyer, it is directed that both the parties shall remain present before the trial

Court on 24.01.2017 and the trial Court in turn shall proceed further with the case and decide the same as expeditiously as possible.

Sd/-
(P.Sam Koshy)
Judge

inder