

NAFR

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**ACQUITTAL APPEAL NO. 80 OF 2016**

Vansh Narayan Tiwari S/o Late Kailash Tiwari, aged about 49 years, occupation- Advocacy and Agriculture, presently R/o Choprapara Ambikapur, District Surguja (C.G.)

**... Appellant**

**Versus**

Shri Sitaram @ Sitoram S/o Shri Bhukhlaram, caste- Gond, aged about 58 years, occupation- Agriculturist, R/o Village Dhaupur, P.S. & Post-Dhaupur, District Surguja (C.G.)

**... Respondent**

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| For Appellant  | : | Mr. Rakesh Pandey, Advocate.   |
| For Respondent | : | Mr. Nishikant Sinha, Advocate. |

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**Hon'ble Shri Justice P. Sam Koshy**

**Order on Board**

**26/08/2016**

1. Challenge in the present appeal is to the order of dated 20.7.2015 passed by Judicial Magistrate First Class, Ambikapur, District Surguja in Criminal Case No. 886 of 2012 whereby the said Court has dismissed the criminal complaint filed by the Appellant-Complainant under the provisions of Section 138 of the Negotiable Instruments Act, 1881 (for brevity, 'the N.I. Act') for want of prosecution.

2. According to the learned Counsel for the Appellant-Complainant, he had filed a complaint against the Respondent-Accused for the commission of offence punishable under Section 138 of the N.I. Act stating all the details of the facts of the case and prayed therein that the Respondent-Accused be punished in accordance with law. On 5.11.2012 the case was registered as Criminal Case No. 886 of 2012 and the Judicial Magistrate First Class, Ambikapur ordered for issuance of notice to the Respondent-Accused fixing the date for appearance of the accused on 22.12.2012.

However, the accused did not appear before the Court on 22.12.2012 and therefore the Court below again directed for issuance of notice against the accused by fixing the case for his appearance on 20.2.2013. The accused again did not put his appearance before the Court below on 20.2.2013 and therefore a bailable warrant of arrest was ordered to be issued against him and the case was further fixed on 26.3.2013 for his appearance. On 26.3.2013, the accused appeared before the Court below and furnished his bail bonds.

**3.** Thereafter, when the matter came up for hearing on 15.6.2013 the Presiding Judge was on leave and the matter was then fixed for framing of charges for the first time on 7.6.2013 and thereafter the matter was fixed on various dates for framing of charges i.e., 26.8.2013, 23.9.2013, 25.11.2013, 10.12.2013, 6.1.2014, 14.3.2014, 19.5.2014 and 31.7.2014. Thereafter, the case was transferred to another Court and listed on 12.8.2014 and on that date the said Court further fixed the matter on 13.10.2014 for framing of charges and thereafter the case was fixed on 3.1.2015 and 23.5.2015 for the said purpose.

**4.** According to the Appellant-Complainant, thereafter on 10.6.2015, 19.6.2015, 6.7.2015 and 20.7.2015 he could not enter his appearance before the Court as the case was again transferred to another Court and the said Court ultimately on 20.7.2015 finding the Complainant and his Counsel absent dismissed the complaint in exercise of powers conferred under Section 256 of CrPC and acquitted the Respondent-Accused for the said offence, leading to the filing of the present acquittal appeal.

**5.** Learned Counsel for the Appellant-Complainant submits that the Complainant was regularly appearing before the Trial Court either personally or through his counsel right from the date of institution of the complaint i.e., 5.11.2012. That on 20.7.2015 he could not appear as he

had no knowledge about the transfer of his case to another Court and therefore the order passed by the Trial Court dismissing the complaint in his absence without recording any reason and thereby acquitting the Respondent-Accused is unsustainable in law and as such the impugned order deserves to be set-aside and the matter be remanded back to the Trial Court for proceeding in accordance with law.

6. Learned Counsel for the Respondent-Accused opposing the appeal submits that the Trial Court is absolutely justified in dismissing the complaint as the complainant deliberately did not appear on 10.6.2015, 19.6.2015, 6.7.2015 and finally on 20.7.2015 and therefore there is no illegality in dismissing the complaint in exercise of jurisdiction conferred under Section 256 of CrPC.

7. In order to have proper comprehension of the attack made to the order dismissing the complaint, it would be profitable to notice Section 256(1) of CrPC, which provides as under:-

**“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 herein before 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.”

8. From the careful and close perusal of Section 256 of CrPC, it appears that in a summons case, instituted on a complaint, if the complainant is absent on the date of hearing, the Magistrate has to follow either of the three courses, namely:

- 1) Acquit the accused;
- 2) To adjourn the case, and'
- 3) To dispense with the attendance of the complainant and to proceed with the case.

9. In the matter of **Associated Cement Co. Ltd. Vs. Keshvanand, 1998 (1) SCC 687**, the Supreme Court has held that Section 256 of CrPC, imposes two constraints on the Court for exercising the power for dismissing the complaint and provides as under:-

“17. Reading the Section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. The 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. The 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.”

10. In **2010 Cri.L.J. 2543 (Memon Mohmedrafik Rasulbhai Vs. Desai Rameshkumar Virsanghbhai and another)**, the High Court of Gujarat has held that in a complaint filed under Section 200 of the Code for offence punishable under Section 138 of the Negotiable Instruments Act, 1881, if the complainant was present before the Court on all days except earlier on the date of order, dismissal of the complaint and the acquittal of the accused persons on the ground of absent of complainant is not justified.

11. Thus, before proceeding to dismiss the complaint, in absence of the Complainant in exercise of jurisdiction under 256 of CrPC it must be considered by the Court whether the presence of the Complainant is really

necessary and the Court should act judicially and not capriciously as the duty has been cast on the Court to consider whether the personal attendance of the Complainant is or is not necessary. The discretion vested in the Court should be exercised carefully and not hastily. An order of acquittal under Section 256 of CrPC would bar a fresh trial and therefore such an order is of immense significance. The order must show that the wide discretion vested in the Court has properly been exercised in accordance with law.

**12.** Having noticed the statutory provision in this regard and principles laid down by the Supreme Court relating to dismissal of complaint in absence of the Complainant, reverting back to the facts of the present case, it appears that the Complainant was regularly appearing before the Trial Court either personally or through his counsel right from the date of institution of the complaint i.e., 5.11.2012 except the dates i.e., 10.6.2015, 19.6.2015, 6.7.2015 and lastly on 20.7.2015 on which date the complaint was dismissed. The Trial Court did not record any reason whether presence of the Complainant was absolutely necessary for the progress of the case and whether there was no reason to adjourn the case for any other date considering the fact that he had appear on all the dates earlier except the said four dates including 20.7.2015, on which the impugned order has been passed, either personally or through his Counsel throughout. In the considered opinion of this Court, the Trial Court has failed to meet the legal and essential requirements of recording reasons for dismissing complaint, under Section 256 of CrPC. The reason assigned by the Appellant-Complainant for his absence on 20.7.2015 is held to be sufficient reason for his absence. Accordingly, his absence is condoned.

**13.** Thus, for the foregoing reasons, the acquittal appeal is allowed. Consequently, the impugned order being unsustainable is hereby set-aside and the Criminal Case No. 886 of 2012 is restored to its original file of the Judicial Magistrate First Class, Ambikapur, District Surguja for hearing and disposal in accordance with law on merits. No costs.

Sd/-  
**(P. Sam Koshy)**  
Judge

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