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HIGH COURT OF CHHATTISGARH, BILASPUR

Acquittal Appeal No.187 of 2015

Rajkumar Jain S/o Late Shri Komal Chand Jain Aged About 53 Years R/o Behind R.D.A. Complex; Sharda Chowk, Tahsil; Raipur, Civil and Revenue Distt. Raipur Chhattisgarh.

... Appellant

Versus

Shri Ashish Joshi S/o Shri D.M. Joshi Aged About 35 Years R/o Khamhardih, Shankar Nagar, Kachana Road, Tahsil; Raipur, Civil and Revenue Distt. Raipur Chhattisgarh.

... Respondent

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... Respondent

For Appellant	:	Shri Amiykant Tiwari, Advocate.
For respondent	:	Shri Devershi Thakur, Advocate.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

30.08.2016.

1. Since common facts and issues are involved in these three acquittal appeals, they are being disposed of by this common order.
2. These appeals have been preferred against the order dated 16.06.2015 whereby the criminal complaint case Nos. 439/11, 220/11 and 440/11 respectively preferred by the petitioner against the respondent under Section 138 of Negotiable Instrument Act, 1882, got dismissed on account of non representation on the part of petitioner-complainant.
3. Learned counsel appearing for the appellant submits that it is a case where initially the complaint was lodged on 20.04.2010 and since then the appellant is continuously pursuing with the matter and that his evidence has already been recorded and he is also examined. After the case was registered, Process Fee was also deposited by the complainant for the presence of witnesses to be examined on his behalf and the matter was fixed on 09.04.2015 for appearance of the witnesses. However, on account of non appearance of witnesses on 09.04.2015, the matter was adjourned for 09.06.2015 for the same purpose awaiting the presence of witnesses, but due to mistake, counsel for the appellant-complainant recorded the next date of hearing as 19.06.2015 in place of 09.06.2015. Therefore, when the matter was called on on 09.06.2015, neither the complainant nor his counsel could remain present and as such the case was again

adjourned for 16.06.2015 on which date also neither complainant nor his counsel were present as they were under bonafide belief that the next date of hearing is 19.06.2015. Therefore, the court below vide impugned order dated 16.06.2015 dismissed the case for want of prosecution.

4. Counsel for the appellant submits that present are the cases where the appellant has been prosecuting the case for almost five years, and therefore, only on account of default on the part of his counsel, the complainant should not be put to loss as he would be remedy less for redressal of his grievance which he was pursuing for these five years and therefore, the order dated 16.06.2015 be set aside and the matter be remitted back to the court below for adjudication on merit.
5. Counsel for the respondent however opposes the appeals on the ground that these appeals are not supported with any affidavit of the counsel who was representing the complainant before the trial court, and therefore, it should not be accepted only on the basis of submissions made by their counsel before this court, and prayed for rejection of the appeals.
6. Having heard the counsel appearing for the parties and having perused the records what is clearly reflected is that, the appellant-complainant has been pursuing the complaint since 20.04.2010 till 09.04.2015 i.e. almost for five years. Only on account of non appearance of the appellant and his counsel on 09.06.2015 as well as on 16.06.2015 because of the bonafide impression of the next date of hearing being 19.06.2016, the complaint cases got dismissed for want

of prosecution. Thus, only on account of technical default on the part of complainant, the accused should not get an advantage of the said order passed by the court below.

7. 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.”

8. 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.
9. 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 16.06.2015 dismissing the complaints for want of prosecution are set aside and the matters are remitted back to the trial Court for further proceedings with the cases from the stage it stood on 16.06.2015. It is accordingly ordered.

10. It is directed that both the parties shall remain present before the trial Court on 27.09.2016 and the trial Court in turn shall proceed further with the case and decide the same as expeditiously as possible.
11. Registry is directed to ensure that the records be sent back to the concerned court below well before 27.09.2016.

Sd/-
(P. Sam Koshy)
JUDGE