

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.187 OF 2015

THE TJSB SAHAKARI BANK LTD.)...APPELLANT

V/s.

B. D. SAMPAT AND ORS.)...RESPONDENTS

Shri Bhupesh Samant, Advocate for the Appellant.

Shri P.D.Sampat with Shri Vilas Jadhav, Advocate for Respondent Nos.1, 2 and 3.

Shri V.B.KondeDeshmukh, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 8th FEBRUARY 2016.

ORAL JUDGMENT :

1 The appellant is the original complainant. He had filed a complaint alleging commission of an offence punishable under Section 138 of the Negotiable Instruments Act (N.I.Act hereinafter) against the respondent nos.1, 2 and 3 herein. The respondent no.3 is a private limited company and the respondent

nos.1 and 2 are the directors thereof. On 29th January 2013, the Judicial Magistrate First Class, Vashi, before whom the complaint was pending, passed an order of acquittal of the respondents. In the operative part of the order, the learned Magistrate referred to the provisions of Section 256 of the Code of Criminal Procedure (Code) and mentioned that the accused were being acquitted of the said offence under the said provision.

2 Being aggrieved by the said order of acquittal, the appellant – original complainant – has filed this appeal, after obtaining the special leave of this court.

3 At the time of granting leave, it was decided, by consent, that the appeal would be heard finally at the admission stage itself. Accordingly, the appeal is, today, heard finally.

4 For the sake of convenience and clarity, the appellant shall hereinafter be referred to as 'the complainant' and the respondent nos.1 to 3 as 'the accused.'

5 I have heard Shri Bhupesh Samant, the learned counsel for the appellant. I have heard Shri P.D.Sampat, the learned counsel for the respondent nos.1, 2 and 3. I have heard Shri V.B.KondeDeshmukh, the learned APP for the respondent – State.

6 It would be proper to reproduce the entire order passed by the learned Magistrate, which resulted in acquittal.

“ Order below Exh.1 in S.C.C.No.3002/1998

The complainant Bank's representative and advocate both are present today. However, evidence affidavit in lieu of examination on chief is not filed. Plea is recorded on 26/03/2012. The complainant has got sufficient opportunity to file the evidence. The matter cannot be proceeded further in absence of evidence of the complainant. Hence, I pass the following order.

: O R D E R :

1. Accused are acquitted from the offence under Section 138 of the Negotiable

Instrument Act vide section 256 of the
Code of Criminal Procedure.

2. Bail bonds of the accused if any stands
discharged.

sd/-

Date : 29/01/2013 (V.A.Godbole)
J.M.F.C., 3rd Court, Vashi”

7 It is clear that the complainant and the complainant's
advocate, both were present before the Magistrate on 29th January
2013. The Magistrate passed an order of acquittal because the
complainant had, according to him, inspite of having been given
sufficient opportunity to file the affidavit of evidence, had failed to
do so, and the matter, therefore, could not be proceeded with
further.

8 Section 256 of the Code speaks of acquittal of an
accused on the ground of absence of complainant. This was not a
case where the complainant was absent, and as such, there was no
question of invoking the provisions of Section 256 of the Code and
to record the acquittal of the accused thereunder.

9 The learned counsel for the accused persons submits that the Magistrate was entitled to pass an order of acquittal under Section 256 of the Code, as, though the complainant was present, he had not filed the affidavit of evidence. According to him, in the absence of the affidavit of evidence of the complainant, the Magistrate was right in acquitting the accused persons.

10 I have carefully considered the matter. I have gone through the compilation of documents tendered by the appellant, with particular reference to the roznama of the various dates.

11 It must be recorded at the outset that the acquittal of the accused could not have been ordered under the provisions of Section 256 of the Code. The language used in Section 256 is plain and makes it clear that it is only in the event of the *absence of the complainant*, that the provisions thereunder would come into play.

12 Since the learned counsel for the accused urged that the Magistrate was entitled to acquit the accused persons, as the complainant had not been adducing evidence, I have examined the matter from that point of view also. It is true that if the complainant persistently fails to adduce evidence, the Magistrate would be entitled to stop his wait for evidence at a given point, and switch over to the next stage of the trial, which would be of examination of the accused persons. In a case like this, where the evidence is not at all adduced, the learned Magistrate may dispense with the examination of the accused, and then, on the basis that the accusation / charge is not proved (as no evidence is led) acquit the accused. Such acquittal, however, cannot be construed as an acquittal under Section 256 of the Code, but is a 'regular acquittal' – so to say – on the consideration that there was no evidence to prove the accusation / charge against the accused. Such an acquittal would be one under the provisions of Section 255, and not under Section 256. Though Section 255 contemplates a finding to be arrived at upon consideration of the evidence 'as may be produced' in accordance with Section 254 of the Code, if the

prosecution or complainant does not adduce any evidence at all, the Magistrate may, as aforesaid, refuse to adjourn the matter to a further date for taking evidence, and switch over to the next stage of the trial; but the order of acquittal if passed by him in such circumstances, would not be one under Section 256 of the Code.

13 Even if one would accept that the mentioning of Section 256 of the Code, as made by the Magistrate in the order of acquittal is not fatal, one would necessarily be required to consider whether the Magistrate was right in closing the prosecution case and acquitting the accused. At best, the impugned order can be construed as an order refusing to grant adjournment to the prosecution to lead further evidence, and then, acquitting the accused on the ground that there is no evidence against the accused.

14 In this regard, it may be observed that the accused themselves were not present before the court on the given date. Ordinarily, no evidence can be recorded in the absence of the

accused persons. It is only because the N.I.Act makes a special provision permitting evidence in lieu of examination-in-chief to be given by an affidavit, it was, perhaps, possible for the complainant to have filed an affidavit of evidence, even in the absence of the accused. That, however, would not have been very appropriate. Even if the oral examination-in-chief is dispensed with, it would be necessary for the complainant to tender a copy of the affidavit of evidence to the accused, whereafter, cross-examination is expected to commence immediately. Though I do not express any final opinion on this, viz., 'whether the affidavit of evidence of the complainant could have been filed without requiring or securing the presence of the accused', (or without dispensing therewith) what needs to be observed is, that, in the instant case, it was not proper on the part of the Magistrate to have suddenly closed the case of the complainant and acquitted the accused. It is because, I find that the case was pending before the Magistrate since the year 1998. I am told that the presence of the accused persons before the court could be procured by the complainant after several years. It appears that on a number of occasions, non-

bailable warrants were issued against the accused persons so as to compel their appearance. The learned counsel for the complainant submits that even the bail bonds executed by the accused persons had been forfeited because of the default in appearance committed by them.

15 The learned counsel for the accused persons submits that the delay in the trial was caused also due to the complainant who was not diligently prosecuting the proceedings. Even if it is accepted, just for the sake of arguments, that both the parties were responsible for delaying the trial, still, I do not think the order passed by the Magistrate, just or proper. It may be observed that it took several years for the complainant to procure the presence of the accused persons before the court. Even thereafter, the accused persons did not remain present before the court and again the process to compel their appearance before the court was required to be undertaken. On some dates, the matter appeared before the Magistrate for settlement, as is seen from the roznama. It may incidentally be observed that even before this court, the

matter had been appearing 'for settlement.' A number of adjournments were taken by the parties on the ground that the matter is being settled and on 7th October 2015 it was stated before the court that the matter had already been amicably settled. In spite of that, further adjournments on the ground that the talks of settlement were going on, were taken. Infact, the emphasis on the on the necessity or desirability of an adjournment being granted on the ground 'that the matter was being settled' was more from the learned counsel for the accused, than the learned counsel for the complainant.

16 The learned counsel for the accused has relied upon following two judgments delivered by two different Learned Single Judges of this court in the following cases :

- i) Shriram City Union Finance Limited vs. Sudam Govind Satpute (Criminal Appeal No.57 of 2010, decided on 8th December 2010)
- ii) Deputy Commissioner of Income Tax, Special Range 2 vs. State of Maharashtra and Ors. (Criminal Application Nos.1164 to 1179 of 2012, decided on 13th September 2012)

I do not think that any of these judgments helps the learned counsel for the accused in establishing that 'an order of acquittal under Section 256 of the Code can be passed even when the complainant is present' – a proposition not directly canvassed by the learned counsel for the accused. In Criminal Appeal No.57 of 2010 the order of acquittal was not passed under the provisions of Section 256 of the Code. Further, it appears from the said order itself that three previous opportunities were given to the complainant therein by the learned Magistrate to adduce evidence, and he was forewarned; but the complainant, inspite of such warnings and opportunities, had failed to adduce evidence. In Criminal Application Nos.1164 to 1179 of 2012 also, the complainant was absent on the given date, and therefore, the Magistrate passed an order under Section 256 of the Code.

17 After carefully considering the matter from all angles, it appears to me that even if the flaw in the order in placing reliance on the provisions of Section 256 of the Code is accepted – for the sake of arguments – as not fatal, and even if the order of

acquittal is treated as one having been passed under Section 255 of the Code, still the same cannot be justified or held as proper. In the circumstances of the case, the Magistrate ought to have warned the complainant previously that in the event of his failure to file an affidavit of evidence on the next date, no further opportunity to produce the evidence would be given and the case would be proceeded with further, without his evidence (which would obviously result in acquittal, there being no evidence). When the trial was pending for about 13 years, and when the accused and the complainant both had not been diligent in going ahead with the matter, – at times taking adjournments 'for settlement' – abruptly closing the case of the complainant and passing an order of acquittal of the accused persons, was not correct.

18 In my opinion, the impugned order is not proper. It, therefore, needs to be interfered with, in the interest of justice.

19 The appeal is allowed.

 The impugned order is set aside.

20 The matter is remanded back to the learned Magistrate with a direction to proceed further with the trial in accordance with law.

21 The learned Magistrate shall proceed with the trial expeditiously and endeavour to complete it within a period of four months from the receipt of this order.

(ABHAY M. THIPSAY, J.)