

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.03.2016

CORAM

THE HON'BLE DR.JUSTICE P.DEVADASS

CrI.A.No.676 of 2015

M/s.Jupiter and Company
rep.by its Proprietor
Mr.K.Seshadri
New No.18/2, Old No.17/2
3rd Level, Yusuf Street
Chepauk, Chennai 600 005. ... Appellant/complainant

Versus

M/s.CSM Enterprises
rep.by its Partner
Mr.Chockalingam Kailasam
Chokalingam Bhavan
No.3033/B, 5th cross Street
Ram Nagar South
Madipakkam
Chennai 600 091. ... Respondent/Accused

Criminal Appeal filed under Section 378 of Cr.P.C to set aside the order dated 25.05.2015 passed by the learned Metropolitan Magistrate [Fast Track Court at Magisterial Level-2], Egmore, Chennai-8 in C.C.No.1790 of 2013.

For Appellant : Mr.M.Lakshmipathi

For Respondent : M/s.N.Kavitha
for Mr.S.Natanasabapathy

JUDGMENT

Aggrieved by the dismissal of his complaint under Section 256(1) Cr.P.C., the complainant has preferred this Criminal Appeal.

2. The appellant/complainant instituted this private complaint case for an offence under Section 138 of the N.I.Act.

The learned Metropolitan Magistrate [Fast Track Court at Magisterial Level-2], Egmore, Chennai-8 took cognizance in C.C.No.1790 of 2013. Issued summons under Section 204 Cr.P.C to the accused/respondent. He appeared before the Court. Received the copies.

3. On 25.05.2015, the learned Magistrate passed the following impugned order:

"Complainant absent today; No representation for complainant; this case is posted for cross examination of PW1; inspite of sufficient opportunities given to the complainant, he continuously absent for several hearings. This complaint petition is pending without any progress, since from 10.04.2013. Hence, this Court is of the view that the complainant is not interested in prosecuting the case properly. Accordingly, this complaint is dismissed u/s.256 (1) Cr.P.C as the complainant failed to appear for cross examination."

4. This is being challenged by the complainant before this Court.

5. According to the learned counsel for the appellant, the view of the trial court that the complainant/PW1 was continuously absent, is incorrect. Further, there is factual error in the impugned order. On 25.05.2015, the case was not posted for cross examination of PW1. In fact on earlier occasion NBW was issued against the accused. The case is posted for the appearance of the accused.

6. The learned counsel for the appellant further submitted that no doubt, on the said date, the appellant/complainant was absent, but looking at the back history of this case, the learned Magistrate could have given an opportunity to the complainant. In these circumstances, the impugned order of the learned Magistrate is unsustainable in law.

7. On the other hand, the learned counsel for the respondent/accused contends that it is an hopeless case. There is no consistency in the appearance of the complainant before the trial court. Fed up with his recalcitrant attitude, the trial court took action under Section 256(1) Cr.P.C and his complaint was dismissed.

8. I have anxiously considered the rival submissions; perused the impugned order and also the materials on record.

9. The power has been conferred on the Court to dismiss a complaint under Section 256 Cr.P.C when the complainant was absent. It is opposite here to notice, Section 256(1) Cr.P.C., which runs 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 hereinbefore 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.

[emphasis supplied by us]

10. Section 256(1) Cr.P.C empowers the Court to dismiss the complaint in the event of the death of the complainant or the absence of the complainant. Proviso to Section 256(1) Cr.P.C, will act as an exception to it. This proviso will come into play under three circumstances, namely,

- (i) when the complainant is represented by a prosecuting official or
- (ii) an officer conducts the prosecution or
- (iii) the discretion of the Magistrate.

11. When the learned Magistrate deems fit, an opportunity can be given to the complainant either by adjourning the case to a future date or even ordering notice to the complainant.

12. If we read the docket entry in this case, it is seen that the accused as well as the complainant chose to absent and have filed petitions to condone their absence. On one particular hearing, the accused had absconded. NBW was issued. He has surrendered and the NBW was recalled. When this case came up on 20.04.2015, the learned Magistrate ordered as under:

"Complainant present. Accused absent. 317 Cr.P.C. petition filed and allowed. Appearance of accused on the next hearing date call on 25.05.2015."

13. So the case was adjourned to 25.05.2015 for the appearance of the accused. On that date the impugned order was passed by the learned Magistrate.

"Complainant called absent. No representation for complainant. Accused appeared. Accused present. Today this case is posted for cross examination of PW1. PW1 continuously absent, and not co-operating with this Court to complete the trial. Hence this complaint is dismissed u/s.256(i) Cr.P.C."

14. 25.05.2015 is fixed for the appearance of the accused. It was not fixed for cross examination of PW1. However, the facts stated in the impugned order of the trial court is contrary to the reality of the situation.

15. No doubt, on 25.05.2015, the complainant was absent. No doubt, no application for condoning his absence was filed, but looking at the course of events that have taken place in this case, the learned Magistrate could have exercised his discretion under the proviso to Section 256(1) Cr.P.C. In the circumstances, the impugned order is not in accordance with law.

16. In view of the foregoings, ordered as under:

(i) This Criminal appeal is allowed.

(ii) The judgment dated 25.05.2015 of the learned Magistrate, Fast Track Court at Magisterial level-2, Chennai is set aside.

(iii) The learned Magistrate, Fast Track Court at Magisterial level-2 Allikulam, will restore the complaint to its original C.C.No.1790 of 2013.

(iv) The appellant/complainant and the respondent/accused shall appear on 04.04.2016 at 10.30 am before the said Magistrate.

(v) Both side counsels shall inform their parties as to their appearance before the said Magistrate on the said date.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

vj2

To

1.The Metropolitan Magistrate
[Fast Track Court at Magisterial Level -2]
Allikulam
Chennai.

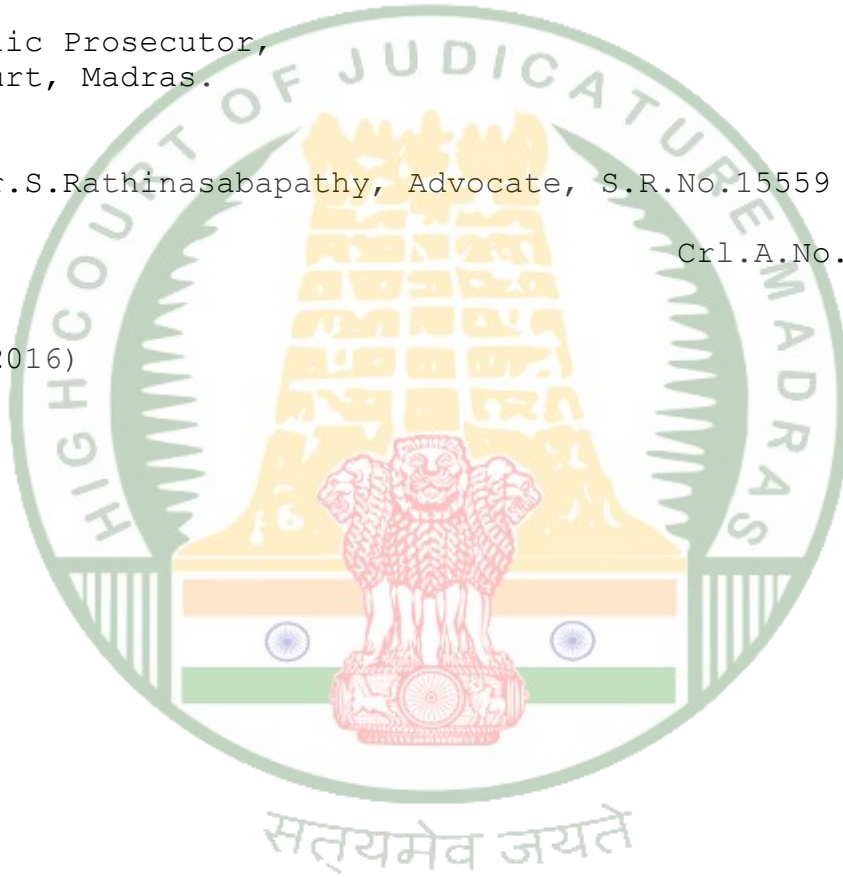
2.Do- Through The Chief Metropolitan Magistrate,
Egmore, Chennai.

3.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.S.Rathinasabapathy, Advocate, S.R.No.15559

CrI.A.No.676 of 2015

UG(CO)
CA(28/03/2016)



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