IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.06.2016

CORAM:

THE HON'BLE MR.JUSTICE R.SUBBIAH

Crl.A.No.212 of 2016

Mr.S.Surendran ... Appellant/Complainant

Vs.,

Azhagi Shu ... Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, against the judgement and order passed by the learned The Metropolitan Magistrate, Fast Track Court at Magisterial Level-2 Egmore at Allikulam Commercial Complex, Chennai-3 in CC No.1979/2013 dated 29.9.2015.

For Petitioner : Mr.M.Rajavelu

For Respondent : No appearance

ORDER

This appeal has been filed by the appellant as against the order dated 29.09.2015 in C.C.No.1979 of 2013 passed by the learned Fast Track Court-2, Egmore, in and by which the complaint preferred by the appellant herein was dismissed for non-appearance of the complainant on 29.09.2015, thereby acquitting the accused/respondent herein.

2.The appellant herein has filed a complaint against the respondent in C.C.No.1979 of 2013 for the alleged offence punishable under Section 138 of Negotiable Instruments Act. Since the complainant/appellant herein was absent on the hearing date ie., 29.09.2015, the said complaint was dismissed by the Court below and consequently, the respondent herein/accused was acquitted. Aggrieved over the same, the present appeal has been filed by the appellant.

3.The learned counsel for the appellant submitted that before the Court below, the appellant/complainant and his

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counsel have appeared on several hearing dates; however, on 29.09.2015, the appellant herein/complainant could not appear before the Court below, since he was suffering from liver disease. In fact, the appellant herein was taking treatment for his disease for the past several months. He was regular in attending the Court on the hearing days; but, he was absent only on 29.09.2015 due to his illness; that his counsel was also held-up in another Court, as such his counsel could also not make the representation before the Court below on the said date. Thus, the learned counsel for the appellant sought setting aside the impugned order.

4.Though notice was served on the respondent herein and the matter is listed today by printing the name of the respondent, the respondent has not chosen to appear before this Court.

5.Heard the learned counsel for the appellant and perused the materials available on record.

6.It is contended by the learned counsel for the appellant that the trial Court has not followed the principles laid down by the Apex Court in the decision reported in Associated Cement Company Limited v. Keshvanand AIR 1998 SC 596 : (1998) 1 SCC 687 and has failed to see that the complainant and his counsel were appearing promptly on several hearing dates, whereas the accused was not present, which necessitated the adjourning of the case. Further, when the complainant was absent on the hearing date, the Court below ought to have given notice to him before passing the order dismissing the complaint and acquitting the accused. In support of his contention, learned counsel for the appellant relied upon the judgment dated 10.10.2007 rendered in Criminal Appeal Nos. 909 and 910 of 2007. In the said order, the learned Judge of this court has observed as follows in Paragraph 14, 15 and 16_

> "14.In identical circumstances, this Court in Judgment dated 20.9.2007 sub Crl. A. Nos. 858 to 864 of 2007 has held that the proper course to be adopted by the learned Judicial Magistrate is that when the complainant was not present before the Court, it is incumbent upon the Presiding Officer to issue notice to the complainant and without issuance of such notice, adopting the procedure of dismissing the complaint under Wection 256 (1) Cr.P.C. is not at all appreciable.

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15.Even though the power is conferred upon the Judicial Magistrate under Section 255 (1) Cr.P.C. to acquit the accused, in the absence of the complainant, the said power could not be stated to be absolute but subject to certain limitation. Even though the section does not specifically mention about the issuance of notice to the complainant before acquitting the accused, in order to afford opportunity to the complainant for his appearance, the court shall issue notice to him.

16.The above said decision would throw much light on the subject. The observations, findings and principles formulated in the above said decisions should be scrupulously followed by the judicial officers who are dealing with the complaint, particularly, while the matter is coming up before them, whether the complainant is present or not. The legal duty is cast upon them to record the reasons in the order manifestly as to the appearance of complainant on the previous hearings. The order should also contain the reason for the presence of the complainant for a particular hearing and whether it is a necessary one. If the presence of the complainant is not necessary in a particular hearing, they have to follow the procedure laid down as per the legal principles set out in the above said decisions. The Presiding Officer shall apply reins to his mental attitude in acting in a hurried manner, in disposing the case, while the complainant was not present before him when the matter was taken up. By his experience and by the conduct of the complainant during the previous hearing, he can very well ascertain the intention of the complainant whether he wanted to ignore the proceedings. Whatever maybe, if once the complainant was absent before him, he has to issue notice to him for his appearance. There should be every attempt on the part of the Presiding Officer to render real justice. No doubt the litigants expect the early disposal of the matter and it may not be fair on the part of the Courts to show the disposal in violation of the settled legal propositions and procedure. The administration of criminal justice system will suffer if sufficient opportunities were not afforded to the parties.

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7.If the facts of the case on hand are considered in the light of the above said observations of the learned Judge, it is clear that the failure on the part of the Court below in issuing notice to the complainant before dismissing the complainant has resulted in miscarriage of justice. I am of the opinion that before passing the impugned order dismissing the complaint, sufficient opportunity ought to have been given to the appellant herein. Hence, the impugned order is liable to be set aside.

Accordingly, the criminal appeal is allowed and the impugned order is set aside. The Court below is directed to restore the complaint on file and proceed with the matter in accordance with law.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To,

1.The Metropolitan Magistrate,
The Fast Track Court at Magisterial Level-2 Egmore
at Allikulam Commercial Complex, Chennai-3.

+1cc to Mr.M.Rajavelu, Advocate sR.30322

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