

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 03.11.2016

C O R A M

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Criminal Appeal No.756 of 2016

D.Rajasampath Kumar
S/o.K.Duraisamy,
649, Dr.Charles Flat,
E.V.N. Road, Erode,
Rep. By Power of Attorney
P.K.Velusamy,
S/o.Kumarappa Gounder,
D.No.94/66, Palanigoundampalayam,
Pasur Via, Erode Taluk,
Erode. ... Appellant/Complainant

Vs

P.Vellairaj ... Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 (4) of Cr.P.C.,
as against the order of acquittal of the Respondent under
Section 138 of the N.I. Act, by the Fast Track Judicial
Magistrate No.2, Erode in S.T.C.No.89 of 2011 dated 02.04.2016.

For Appellant : Mr.T.Balaji

For Respondent : No appearance

JUDGMENT

The Appellant/Complainant has preferred the instant Criminal Appeal before this Court as against the Judgment dated 02.04.2016 in S.T.C.No.89 of 2011 passed by the Learned Judicial Magistrate, Fast Track Court No.II, Erode.

2.At the outset, this Court points out that today, the CrI.O.P.No.15468 of 2016 [seeking grant of Special Leave to prefer an Appeal] was allowed by this Court for the reasons assigned therein.

3. According to the Learned Counsel for the Appellant/Complainant, the trial Court on 02.04.2016 had dismissed the case for non-appearance of the Appellant/Complainant and consequently, acquitted the Respondent in terms of Section 256 Cr.P.C.

4. The Learned Counsel for the Appellant urges before this Court that the Appellant/Complainant was examined as P.W.1 before the trial Court and in fact, he was not cross examined on the side of the Respondent/Accused. Moreover, the Respondent/Accused had filed a Petition under Section 311 Cr.P.C. on 11.11.2011 and the same was allowed by the trial Court. But, without the cross examination of P.W.1, the evidence was closed and in fact, the trial Court had not decided the case on merits, but dismissed the case for non-appearance of the Appellant/Complainant on 28.03.2016 and this has resulted in serious miscarriage of Justice.

5. The Learned Counsel for the Appellant takes a plea that when P.W.1 (Appellant/Complainant) appeared before the Court on 19.01.2016, the Respondent/Accused had not cross examined him and at best, the trial Court could have imposed some reasonable costs on the Appellant/Complainant for his non-appearance on 28.03.2016. However, this has not been resorted to by the trial Court.

6. Lastly, the Learned Counsel for the Appellant/Complainant contends that the Appellant/Complainant has a valid defence to substantiate his case and unless the Appellant/Complainant is given a chance to substantiate his claim, he would be very much prejudiced and would incur heavy loss.

7. In the instant case, it transpires that admittedly, the Appellant/Complainant had not appeared before the trial Court from 02.02.2016. Furthermore, a direction was given by the trial Court requiring the Appellant/Complainant to appear, but, in spite of that the Appellant/Complainant had not appeared before the Court. The Petition filed under Section 309 Cr.P.C. was filed on behalf of the Appellant/Complainant on 15.03.2016 was allowed by the trial Court.

8. At this stage, it cannot be forgotten that the trial Court, in the impugned order, at paragraph 2, had pertinently mentioned that on the side of the Appellant/Complainant, there was no representation from 21.03.2016. Under such circumstances, the trial Court had directed the Appellant/Complainant to appear on 28.03.2016 (vide D.No.370/2016 dated 02.04.2016) and the final notice was issued in this regard and notwithstanding the same, the Appellant/Complainant had not appeared before the

trial Court. Even the two Petitions, filed on behalf of the Appellant/Complainant stating that he was not keeping well, came to be dismissed by the trial Court. Finally, the trial Court had categorically observed, in its impugned order, that there is no progress in the case because of the non-appearance of the Appellant/ Complainant in a proper manner.

9.As regards Section 311 Cr.P.C., it is to be relevantly pointed out by this Court that the power envisaged under Section 311 Cr.P.C. must be invoked by a Court of Law only to secure the ends of Justice. Of course, the said power ought to be exercised with utmost care and circumspection. In Criminal Jurisprudence, the Law of Evidence speaks of best evidence should be brought before the Court to prove the necessary fact(s) or points in issue. Even after respective sides have closed their evidence, always it is wide open to the trial Court/Learned Judicial Magistrate to summon any person as a witness if his evidence appears to be a just and essential one for arriving at a proper decision of the case in question. In short, a Court of Law can summon a witness under Section 311 Cr.P.C. at any stage of the trial. Also that, even when the case is posted for arguments and not for Judgment, when the trial of the case has not come to an end, even then, a witness can be summoned under Section 311 Cr.P.C.

10.It is to be borne in mind that in terms of the ingredients of Section 256 Cr.P.C., the Learned Judicial Magistrate has a discretion either to dismiss the complaint and to acquit the Accused or to adjourn the hearing on the non-appearance of Complainant in a given case. But, the said power, in the considered opinion of this Court, must be exercised by the trial Court in applying its thinking Judicial discretion, of course, with utmost care and caution. This power can be exercised by the concerned Court where the Complainant had failed to appear without any valid/just/fair cause. Indeed, the absence or presence of an Advocate may be taken into account by the Learned Judicial Magistrate in a reasonable fashion when he is to decide whether to defer the proceedings of the case or otherwise.

11.Apart from the above, one cannot ignore a prime fact that 'absence of Complainant' on the date of hearing cannot be a ground for acquitting the Accused in a routine, casual and cavalier fashion. The acid test for the Court concerned is one of 'Good Faith' and not to be employed for just disposal of the case.

12.To put it succinctly, nowhere in the Criminal Procedure Code, there is a provision for disposal of the complaint or

discharge of an Accused when the Complainant was absent on the day appointed for hearing, before the trial Court. Only because of non-appearance of Complainant, it is not essential/necessary in every case/all cases an Accused shall be acquitted.

13.As far as the present case is concerned, Section 311 Cr.P.C. Petition filed by the Respondent/Accused to cross examine P.W.1 is pending before the trial Court (second 311 Cr.P.C. Miscellaneous Petition). When that be the fact situation, this Court is of the considered view that the impugned order of dismissing the complaint/ case in S.T.C.No.89 of 2011 (filed by the Appellant/Complainant) by the trial Court is not a valid and legally tenable one. Therefore, this Court, by taking note of the fact that the Criminal Miscellaneous Petition filed by the Respondent/Accused under Section 311 Cr.P.C. is pending before the trial Court, at this juncture, even for non- appearance of the Complainant on the day appointed viz., on 28.03.2016, the impugned order of dismissing the complaint in S.T.C.No.89 of 2011 dated 02.04.2016 is not proper and would not stand a moment scrutiny in the eye of Law. As such, this Court, to promote substantial cause of Justice, interferes with the said order passed by the trial Court in S.T.C.No.89 of 2011 dated 02.04.2016 and sets aside the same. Consequently, the Criminal Appeal succeeds.

14.In fine, the Criminal Appeal is allowed. Resultantly, the order passed by the trial Court in S.T.C.No.89 of 2011 dated 02.04.2016 is set aside by this Court for the reasons assigned in this Appeal. The trial Court is directed to restore the complaint in S.T.C.No.89 of 2011 on its file within a period of one week from the date of receipt of copy of this Judgment and to proceed further in the manner known to Law and in accordance with Law. Before parting with the case, this Court directs the Appellant/Complainant to appear before the trial Court henceforth without any default or giving any lame duck excuse. Since the S.T.C.No.89 of 2011 is nearly five years old, the trial Court is directed to dispose of the same within a period of three months thereafter and to report compliance to this Court.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

Sgl

To

1. The Judicial Magistrate,
Fast Track Court No.II,
Erode.
2. Do- Through The Chief Judicial Magistrate,
Erode.
3. The Registrar (Judicial)
High Court, Madras.
[For favour of information
and follow up action]
4. The Superintendent,
Central Prison,
Coimbatore.
5. The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to Mr.A.Thiyagarajan, Advocate, S.R.No.62730

Crl.A.No.756 of 2016

EV(CO)
CA(16/11/2016)



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