

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :15.12.2016

C O R A M

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Criminal Appeal No.825 of 2016

Sakthivel

... Appellant/Complainant

Vs

Subramaniyan

... Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 Cr.P.C., against the order of acquittal dated 4.4.2016 passed in S.T.C.No.6/2007, on the file of the Judicial Magistrate No.II, Chidambaram.

For Appellant : Mr.S.Sounthar

For Respondent : M/s.Jayasree Baskar

JUDGMENT

The Appellant/Complainant has preferred the instant Criminal Appeal as against the Order of Acquittal passed in S.T.C.No.6/2007 dated 04.04.2016 by the Learned Judicial Magistrate No.II, Chidambaram.

2.The Learned Judicial Magistrate No.II, Chidambaram, while passing the impugned order on 04.04.2016 in S.T.C.No.6/2007, at paragraph 2 had observed the following:

"2.The Complainant called absent and no representation for third time at 4.25 PM., Accused absent. Petition filed and allowed. For the past Ten Years the case had been pending for the complainant's evidence only on 12.12.2015, the complainant's side evidence was closed, so this Court thinks that the complainant has no interest to conduct the case and did not co-operate to the court for the past ten years. The complainant is not appeared and also the counsel of complainant, hence this case is dismissed U/s.256 of CrPC. The accused is acquitted."

3.Assailing the Validity and Legality of the Order of Acquittal dated 04.04.2016, in S.T.C.No.6/2007 passed by the trial Court, the Appellant/Complainant has preferred the present Criminal Appeal primarily by taking a plea that the complaint was taken on file during the year 2007. Further, he was examined as P.W.1 on 16.07.2007 and thereafter, nearly 8 years was taken for cross examining him and ultimately, he was cross examined on 04.06.2015. Therefore, it is represented on behalf of the Appellant/Complainant that the trial Court had taken an erroneous view and arriving at a conclusion that the Appellant/Complainant was not interested in prosecuting the case.

4.The Learned Counsel for the Appellant/Complainant side evidence was closed on 12.02.2016 [not on 12.12.2015 as inadvertently mentioned in the impugned order]. Apart from that, the Respondent/Accused was questioned by the trial Court on 22.03.2016 [under Section 313 Cr.P.C.]. Thereafter, the main case in S.T.C.No.6/2007 was adjourned to 28.03.2016 for letting in of evidence on the side of the Respondent/Accused and that the Appellant was present on 28.03.2016, but the Respondent was absent and that the matter was adjourned to 04.04.2016.

5.At this juncture, the Learned Counsel for the Appellant/Complainant seeks in aid of the decision of the Hon'ble Supreme Court in S.Anand V. Vasumathi Chandrasekar, (2008) 4 Supreme Court Cases 67, at special page 69, whereby and whereunder, at paragraphs 12 & 13, it was observed as follows:

"12.Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined.

13.The date was fixed for examining the defence witnesses. The appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence."

6.The Learned Counsel for the Appellant/Complainant takes an emphatic plea that the trial Court had not borne in mind that whether on the date of examination of Respondent/Accused side witness/ witnesses, the presence of the Appellant/Complainant was very much essential and necessary.

7. Repelling the contention of the Learned Counsel for the Appellant/Complainant, the Learned Counsel for the Respondent/Accused submits that the Appellant/Complainant before the trial Court had not evinced interest to conduct the case in S.T.C.No.6/2007 in a diligent fashion and also that, the trial Court had observed in the impugned order that the Appellant/Complainant had not cooperate to the Court for the past Ten years and also even on the date of the impugned order viz., on 04.04.2016 in S.T.C.No.6/2007, the Appellant / Complainant was not present and also his Learned Counsel was not present. Finally, the trial Court had dismissed the complaint under Section 256 Cr.P.C. thereby acquitting the Respondent/Accused, which does not suffer from any material irregularity or patent illegalities in the eye of Law.

8. At the outset, it is to be pointed out that a reading of Section 256 Cr.P.C. clearly points out that if the concerned Court thinks fit to adjourn the hearing of the case, then, the Respondent/Accused cannot be acquitted. If the presence of the Appellant/Complainant was not necessary on the date of hearing, then, the trial Court, in Law, is entitled to dispense with the personal attendance of the Complainant and in this regard, it can exercise its judicial discretion with care, caution and with utmost circumspection. However, if the fact situation does not justify the case being adjourned to another date, the trial Court is at liberty to dismiss the complaint and acquit the Accused. If the presence of the Complainant on that particular day was an unnecessary one, then, taking recourse to the act of dismissing the complaint by exercising power under Section 256 Cr.P.C., in the considered opinion of this Court, is not a valid, proper and palatable one.

9. It is needless for this Court to make a relevant mention that the discretion to dismiss the complaint must be exercised by a Court of Law in a Fair, judicious, dispassionate and circumspect manner.

10. It is true that the presence or absence of an Advocate may be taken into consideration by the trial Court at the time of determining whether to adjourn the case or not. An absence of Complainant on the given date of hearing may not be a ground for acquitting the Respondent/Accused in a routine, casual and cavalier manner. The acid test would be one of good faith and to dismiss the complaint because of the absence of a Complainant on a given day cannot be passed for the purpose of statistics, in the considered opinion of this Court.

11. It cannot be lost sight of that the Criminal Procedure Code does not envisage for dismissal of complaint or discharge of an Accused when the Complainant had remained absent on the given date of hearing. It is not essential/necessary in every

case that because of the non- appearance of the Complainant, the Complainant's case is to be thrown over board. Ordinarily, it is incumbent on the part of a Complainant to be present on the given date of hearing, even though an Accused had not appeared before the concerned Court. When date was fixed for appearance of an Accused and not for hearing, the acquittal of Accused for non-appearance of the Complainant is a grievous error. After all, the concerned Court is to see as to whether the presence of the Complainant on the given date of hearing was essential for the purpose of prosecuting the case. Even when an Advocate for the Complainant was not present (absented himself) on the date of hearing, the dismissal of complaint for non-prosecution may not be a proper one.

12.It is to be remembered that when a Complainant in a given case had remained absent on the date of hearing some options are available to the concerned Court, like; (i) To acquit an Accused; or (ii) To adjourn the case to the next date of hearing; or (iii) To dispense with the attendance of the Complainant and proceed with the case. In any event, it is the subjective discretion of the concerned Court to resort to a particular course, but the rider is that it must be exercised in a free Fair and unbiased manner.

13.Moreover, if the Appellant/Complainant was represented by a Pleader as per Section 2(q) Cr.P.C., then, his personal appearance would not be considered as an indispensable one. A Court of Law should exercise its wide discretion in a given case whether the Appellant/Complainant had remained absent on the date of hearing.

14.Besides the above, as far as the present case is concerned, there is no dispute as to the fact that the Appellant/Complainant had remained absent and it was recorded by the Learned Judicial Magistrate, Chidambaram for the third time, the Appellant/ Complainant had remained absent at 4.25 p.m. Further, the Respondent/Accused was absent. In fact, to condone the absence of the Respondent/Accused obviously a petition under Section 317 Cr.P.C. was filed and allowed.

15.It is true that the case in S.T.C.No.6/2007 on the file of the trial Court was pending for the past ten years and in fact, the evidence on the side of the Appellant/Complainant was closed on 12.02.2016. In this regard, this Court extracts the Noting of the Notes Paper of the trial Court in S.T.C.No.6/2007 on 12.02.2016 which runs as under:

"Complainant present. Accused absent. PFA LW2 examined in chief as PW3 and Ex.P10 marked and cross examined fully. Counsel stated that no further evidence, hence comp's side evidence closed for 313(1)(b) of the Cr.P.C. by 23.02.2016."

16. Thereafter, it appears for the hearing on 23.02.2016 the Appellant/Complainant was present. However, the Respondent/Accused was absent. A Petition for condoning the absence of the Respondent/Accused was filed and at request of the learned counsel for questioning under Section 313(1)(b), the matter was posted to 02.03.2016. However, on 02.03.2016, the Appellant/Complainant was present and that the questioning under Section 313(1)(b) Cr.P.C. was made ready. But the Respondent/Accused was absent and on his behalf, a petition was filed and the same was allowed. As a result thereof, the matter was adjourned for questioning to 14.03.2016. On 14.03.2016, the Complainant was present, but the Accused remained absent. A petition under Section 317 Cr.P.C. was filed together with Medical Certificate and the same was allowed. The matter was adjourned to 21.03.2016 stating that the questioning was ready for 313(1)(b) Cr.P.C.

17. That apart, on 21.03.2016 the Appellant/Complainant was present. But the Accused was absent, on his behalf, a petition was filed under Section 309 Cr.P.C. and the same was allowed. The case was adjourned to 22.03.2016 for questioning. On 22.03.2016 both parties were present and that the Respondent/Accused was questioned under Section 313(1)(b) Cr.P.C. After denial, on behalf of the Respondent/Accused, a written statement was submitted that he has evidenced on his side and therefore, the matter stood adjourned to 28.03.2016 for examination of D.Ws. On 28.03.2016, the Appellant/Complainant was present. However, the Accused (Respondent) was absent and on his behalf, a petition was filed and the same was allowed. However, the matter was adjourned to 04.04.2016 for examination of D.Ws. On 04.04.2016, only when the Appellant/Complainant was called absent and when there was no representation for third time at 4.25 P.M., the trial Court obviously was left with no option but to dismiss the complaint. But one significant factor is that on 04.40.2016, the Respondent/Accused had remained absent and on his behalf a petition to condone his absence was filed and the same was allowed. Only because of the Appellant/Complainant's non-appearance on 04.04.2016 and that of his counsel, the trial Court had ultimately dismissed the complaint under Section 256 Cr.P.C. and acquitted the Respondent/Accused.

18.From the aforesaid Notings [as culled out from the Notes Paper of the trial Court in S.T.C.No.6/2007], this Court is of the firm, candid view that both the Appellant/Complainant as well as the Respondent/Accused are not quite diligent enough to take part in the proceedings of the pending case so as to terminate the proceedings initiated by the Appellant/Complainant against the Respondent/ Accused. Like a 'Musical Chair' both the Appellant/Complainant as well as the Respondent/Accused take a merry turn as a matter of routine in remaining absent for a particular given date of hearing. It appears that at one point of time, even though the questioning under Section 313(1)(b) Cr.P.C., the Respondent/Accused had remained absent and therefore, the trial Court was very much inconvenienced and handicapped in not proceeding any further so as to bring to a logical end/clear conclusion of the case in S.T.C.No.6/2007 and that too in a complete and comprehensive fashion.

19.Be that as it may, in view of the fact that this Court opines that in the present case, the trial Court should have disposed of the case on merits of the matter. Furthermore, when on 04.04.2016, the Respondent/Accused remained absent, the trial Court should have exercised its judicial thinking mind in not passing an Order of Acquittal for the simple reason that the Appellant/Complainant had remained absent, even though for the third time at 4.25 P.M. Furthermore, there was also no appearance through Lawyer on his side.

20.It is to be borne in mind that a Court of Law is to deliver a substantial Justice to the parties to secure the ends of Justice. A shortcut approach adopted by the trial Court resulting in dismissal of the complaint really would cause disaster effect on the complaint filed by the Appellant/Complainant.

21.Inasmuch as the trial Court was not correct in dismissing the complaint on 04.04.2016 when the Appellant/Complainant was remained absent and there was no representation on his behalf for the third time at 4.25 P.M. because of the simple reason on that day, the Respondent/Accused was absent, this Court, to provide an opportunity to the Appellant/Complainant to project his version of the case before the trial Court on merits, to prevent an aberration of Justice and to promote substantial cause of Justice, interferes with the impugned order dated 04.04.2016 in S.T.C.No.6/2007 and sets aside the same. Resultantly, the Criminal Appeal succeeds.

22.In the result, the Criminal Appeal is allowed. The Order passed by the trial Court in S.T.C.No.6/2007 dated 04.04.2016 is set aside by this Court for the reasons assigned by this Court in this Appeal. The trial Court is further directed to restore

the main case in S.T.C.No.6/2007 to its file within one week from the date of receipt of copy of this Judgment. After taking the S.T.C. Case on file, the trial Court is directed to dispose of the same within a period of two months thereafter and to report compliance to this Court. Also that, the respective parties are directed to appear before the trial Court till the completion of the case and it is abundantly quite clear that the trial Court shall not grant unnecessary adjournments to the parties concerned.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

Sgl

To

1.The Judicial Magistrate -II,
Chidambaram.

2.The Registrar (Judicial)
High Court, Madras.

[For favour of necessary
information and follow up action]

3.The Section Officer,
Record Section,
High Court, Madras.

4.The Public Prosecutor
HIGH COURT MADRAS

5. -do- Thro The Chief Judicial
Magistrate Cuddalore

+1 cc to Mr.S.Sounthar Advocate sr 73515

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