

THE HON'BLE SRI JUSTICE T.SUNIL
CHOWDARY
CRIMINAL PETITION No.10591 of 2009

ORDER:

This criminal petition is filed under Section 482 Cr.P.C. to set aside the orders dated 10.09.2009 in Crl.R.P.No.27 of 2008 on the file of the Metropolitan Sessions Judge, Vijayawada, wherein whereby the order dated 30.03.2009 in C.C.No.42 of 2008 on the file of the IV Additional Chief Metropolitan Magistrate Court, Vijayawada was confirmed.

The notice sent to the second respondent returned unserved on various grounds. Ultimately, this Court permitted the petitioner to serve notice on the respondent by way of paper publication publishing in Andhra Jyothi Telugu Daily Newspaper, Visakhapatnam Edition intimating the date of listing of the matter as 20.04.2016. In spite of paper publication, none appeared on behalf of the respondent. This Court can safely presume that the notice was served on the respondent. Hence, this Court is inclined to dispose of the matter on merits in the absence of the second respondent.

The contention of the learned counsel for the petitioner is two fold:

1. The trial Court dismissed the complaint on the ground that the complainant has not paid the batta which is factually incorrect, and
2. The trial Court is not justified in dismissing the complaint on 30.03.2009 even though the presence of the complainant-petitioner is not required on that day.

The facts leading to filing of the present petition are briefly as follows:

The petitioner filed a complaint against the respondent for the offences punishable under Sections 138 and 142 of Negotiable Instruments Act on the file of the Court of IV Additional Chief Metropolitan Magistrate, Vijayawada. For one reason or other, the respondent did not appear before the trial Court. Hence, the trial Court dismissed the petition on the ground that batta was not paid to the respondent.

Feeling aggrieved by the orders of the trial Court, the petitioner preferred Criminal Revision Petition No.27 of 2009 on the file of the Metropolitan Sessions Judge, Vijayawada and the same was dismissed on 10.09.2009. Hence, the present petition.

I have carefully perused the orders dated 30.03.2009 in C.C.No.42 of 2008. For better appreciation of the contention of the learned counsel for the petitioner, it is not out of place to extract hereunder the order:

“Complainant called absent. No representation for the complainant till 2.00 p.m. Batta not paid. Despite directions, complainant did not appear before this Court. Hence the complaint is dismissed under Section 204(4) Cr.P.C.”

The revisional Court also dismissed the petition on two grounds:

1. The complainant did not appear before the trial Court on 30.03.2009, and
2. Complainant failed to pay the batta to the respondent.

If the orders of the Courts below are taken into

consideration, the matter was dismissed for non-payment of
batta by the complainant. It is an admitted fact that the
complainant was not present on 30.03.2009 before the trial
Court. The trial Court permitted the petitioner to serve
notice on the respondent by way of substituted service. It
is not out of place to extract the paper publication dated
02.01.2008.

"In the Court of the III Additional Chief
Metropolitan Magistrate At Vijayawada
C.C.No.358/2006

Between:

Thammareddy Ashok Kumar ...Complainant

And

Sabbineni Bharathi, W/o.Subba Rao, Business,
R/o.Flat No.T-2, Kalpatharu Apartments,
Doctors Colony, Peda Waltair, Visakhapatnam

_____ ...Accused

Proclamation issued to you under Section 82
Cr.P.C.

Whereas complaint has been made before
this Court that you have committed an offence of
dishonoring the cheque issued by you,
punishable under Section 138 of the Negotiable
Instruments (Amended) Act, 1988, and it has
been returned to a warrant of arrest thereupon
issued that you cannot be found and whereas it
has been shown to the satisfaction of this Court
that you have absconded or have been
concealing yourself to avoid the service of the
said warrant.

Proclamation is hereby made that you are
required to appear before this Court to answer
the said complaint on the 4th February 2008 at
10.30 a.m.

(By order)

IIIrd Additional Chief Metropolitan Magistrate,
Vijayawada

01.01.2008"

A perusal of the same reveals that as directed by the
trial Court, the petitioner gave publication in Janata daily
newspaper intimating the date of listing of the matter to
the respondent as 04.02.2008. It seems that the

respondent did not appear before the trial Court in spite of paper publication. Once the publication is given, the question of payment of batta does not arise. The trial Court under the misconception dismissed the complaint as if the petitioner has not paid the batta. The revisional Court also endorsed the finding of the trial Court that the petitioner has not paid the batta. The finding of the Courts below that the petitioner has not paid the batta is factually incorrect in view of the paper publication dated 01.01.2008.

It is not an admitted fact that the complainant was absent on 30.03.2009. It appears the matter is not posted for trial. In such circumstances, whether the absence of the complainant by itself is a valid ground to dismiss the complaint for default. At this juncture, learned counsel for the petitioner has drawn my attention to the following decisions:

1 . **ASSOCIATED CEMENT CO.LTD.** v.

KESHVANAND^[1] wherein it was held at Paras 16 and 17 as follows:

16. What was the purpose of including a provision like Section 247 in the old Code (or Section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The section, therefore, affords protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, the court has a duty to acquit the accused in invitum.
17. Reading the section in its entirety would reveal

that two constraints are imposed on the court for exercising the power under the section. The first is, if the court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. The second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice.

In **“MOHD.AZEEM v. A.VENKATESH AND ANOTHER**^[2] wherein it was held at paras 3 and 4 as follows:

3. From the contents of the impugned order of the High Court, we have noticed that there was one singular default in appearance on the part of the complainant. The learned Judge of the High Court observes that even on earlier dates in the course of trial, the complainant failed to examine the witnesses. But that could not be a ground to dismiss his complaint for his appearance (*sic* absence) on one single day. The cause shown by the complainant of his absence

that he had wrongly noted the date, has not been disbelieved. It should have been held to be a valid ground for restoration of the complaint.

4. In our opinion, the learned Magistrate and the High Court have adopted a very strict and unjust attitude resulting in failure of justice. In our opinion, the learned Magistrate committed an error in acquitting the accused only for absence of the complainant on one day and refusing to restore the complaint when sufficient cause for the absence was shown by the complainant.

As per the principle enunciated in the cases cited supra, if the presence of the complainant is not required on the date of adjournment, dismissal of the complaint is not justifiable. As observed earlier, the presence of the complainant is not necessary on 30.03.2009. While disposing of the petitions of this nature, the approach of the Court shall be pragmatic and not pedantic. The Court has to take into consideration the problems being faced by the complainant on each and every date of adjournment, even if their presence is not so required. Even if one adjournment is granted, no prejudice will be caused to the accused. As observed earlier, the finding of the courts below that the petitioner has not paid batta is factually incorrect.

Having regard to the facts and circumstances of the case and also the principles enunciated in the cases cited supra, I am of the considered view that it is a fit case to quash the orders dated 30.03.2009 in C.C.No.42 of 2008 to secure the ends of justice.

In the result, the criminal petition is allowed setting aside the order dated 10.09.2009 in CrI.R.P.No.27 of 2008

on the file of the Metropolitan Sessions Judge, Vijayawada, whereby the order dated 30.03.2009 in C.C.No.42 of 2008 on the file of the IV Additional Chief Metropolitan Magistrate Court, Vijayawada was confirmed. Consequently, miscellaneous petitions pending if any in this revision shall stand closed. Consequently, C.C.No.42 of 2008 is restored to its file. The trial Court is hereby directed to dispose of the matter in accordance with law.

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T.SUNIL CHOWDARY, J

April 29, 2016.
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[\[1\]](#) (1998) 1 Supreme Court Cases 687

[\[2\]](#) (2002) 7 Supreme Court Cases 726