

HIGH COURT OF CHHATTISGARH, BILASPUR**Acquittal Appeal No.127 of 2014**

Ganesh Shankar Diwan S/o Late Gariba Ram, Age-60 years, R/o. Pachpedi Naka, Laxmi Nagar, Jhanda Chauk, P.S. Tikarapara, Raipur, C.G.) Pin 492001

----Appellant

Versus

Ajay Sahu S/o Kamal Ram Sahu, Age-30 years, Pr. Resi./Gram Chhoti Kareli, P.S. Nagar Road, Raipur, C.G. Permanent R/o. New Laxmi Nagar, Dawda Colony, P.S. Tikarapara, Raipur, C.G. Pin 492001

---- Respondent

For Appellant	:	Mr.Rajkumar Gupta, Advocate
For Respondent	:	Mr.Amit Kumar Sahu, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

03/02/2017

1. Invoking the jurisdiction of this Court under Section 378(4) of the CrPC, the appellant/complainant has filed this acquittal appeal against the order dated 28.2.2014 passed by the 4th Additional Sessions Judge, Raipur, in unregistered criminal revision (Ganesh Shankar Diwan Vs. Ajay Sahu), by which the revision filed by the appellant has been dismissed.
2. The appellant/complainant filed a complaint before the jurisdictional Judicial Magistrate First Class, Raipur under Section 138 of the Negotiable Instruments Act, 1881. That complaint was registered and cognizance was taken, summons were issued to the respondent/accused and thereafter the

complainant regularly appeared before the trial Court and adduced his evidence and case was fixed for accused statement, but on 26.12.2013 he could not appear either personally or through his counsel, therefore, the complaint was dismissed and the accused was acquitted. The appellant preferred revision before the 4th Additional Sessions Judge, Raipur. That was also dismissed. Against which, this acquittal appeal under Section 378(4) of the CrPC has been filed.

3. Mr.Rajkumar Gupta, learned counsel appearing for the appellant would submit that the appellant/complainant regularly appeared before the trial Court right from 24.6.2011 except on 26.12.2013 the date on which the complaint was dismissed either personally or through his counsel and on 26.12.2013 he was unwell, therefore, he could not appear before the trial Court and the complaint was dismissed and on 26.12.2013 his presence was not necessary as case was fixed for accused statement. Therefore, the order impugned be set aside and the matter be remanded back to the trial Court for hearing and disposal in accordance with law.
4. On the other hand, Mr.Amit Kumar Sahu, learned counsel appearing for the respondent, would support the impugned order.
5. I have heard learned counsel appearing for the parties and perused the order impugned with utmost circumspection.
6. In order to have proper comprehension of the attack made to the order dismissing the complaint, it would be

profitable to notice Section 256(1) of the Code, which provides as under:--

Section 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 herein before 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."

7. From the careful and close perusal of Section 256 of the Code, it appears that in a summons case, instituted on a complaint, if the complainant is absent on the date of hearing, the Magistrate has to follow either of the three courses, namely:

- (1) Acquit the accused;
- (2) To adjourn the case; and
- (3) To dispense with the attendance of the complainant and to proceed with the case.

8. In a decision reported in **Associated Cement Co. Ltd. vs. Keshvanand**¹, the Supreme Court has held that

¹ (1998) 1 SCC 687

Section 256 of Code, imposes two constraints on the Court for exercising the power for dismissing the complaint and provides as under:--

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."

9. Subsequently, Their Lordships of the Supreme Court in the matter of **S. Anand Vs. Vasumathi Chandrasekar**² referred the decision of **Associated Cement Co. Ltd.** (supra) and held as under:-

"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

2 (2008) 4 SCC 67

provision could have been resorted to in the facts of the case as the witnesses on behalf of complainant have already been examined.

13. The date was fixed for examining the defence witnesses. 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.

15. Presence of the complainant or her lawyer would have been necessary, as indicated hereinbefore, only for the purpose of cross-examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter.

10. In a decision reported in **Memon Mohmedrafik Rasulbhai vs. Desai Rameshkumar Virsanghbhai and another**³, the High Court of Gujarat has held that in a complaint filed under Section 200 of the Code for offence punishable under Section 138 of the Negotiable Instruments Act, 1881, if the complainant was present before the Court on all days except earlier on the date of order, dismissal of the complaint and the acquittal of the accused persons on the ground of absent of complainant is not justified.

11. Thus, before proceeding to dismiss the complaint, in absence of complainant in exercise of jurisdiction under 256 of Code

³ 2010 Cri.L.J. 2543

of Criminal Procedure it must be considered by the Court whether the presence of the complainant is really necessary and the Court should act judicially and not capriciously as the duty has been cast on the Court to consider whether the personal attendance of the complainant is or is not necessary. The discretion vested in the Court should be exercised carefully and not hastily. An order of acquittal under Section 256 of the Code would bar a fresh trial and therefore, such an order is of immense significance. The order must show that the wide discretion vested in the Court had properly been exercised in accordance with law.

12. The fact remains that the complaint was filed on 24.6.2011 and the same had been dismissed on 26.12.2013 on account of absence of appellant/complainant. It appears that the appellant has appeared before the said Court right from 24.6.2011 and on 26.12.2013 when he was absent the complaint was dismissed. According to learned counsel for the appellant, there is uncontroverted evidence that the appellant regularly appeared before the trial Court from 24.6.2011 either personally or through his counsel and on 26.12.2013 the case was fixed for statement of the accused as evidence of the complainant has already been completed and no reason has been assigned by the trial Court as to why the case was not adjourned for some other date. Since the presence of the appellant/complainant was not necessary on the said date, the trial Court was required to proceed further into the matter instead of dismissing the complaint in default.

13. Accordingly, the acquittal appeal is allowed and the impugned order is set aside. Complaint Case No.697/2011 (Ganesh Shankar Diwan Vs. Ajay Sahu) is restored to its original number in the file of the Judicial Magistrate First Class, Raipur for hearing and disposal in accordance with law on its own merits. Parties are directed to appear before the said court on **27.2.2017**. The said Court is directed to complete the proceedings of complaint case within a period three months from the date of appearance of the parties.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-