

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :04.01.2017

C O R A M

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Criminal Appeal No.13 of 2017

Sree Gokulam Chit
and Finance Company Pvt Limited,
represented by its Branch Manager,
M.Sasi Kumar, No.205,
Sattar Sait Buildings,
Commercial Road, Ootacamund. Appellant/Complainant

Vs

R.Balachandran Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 Cr.P.C., against
the order dated 30.08.2016 passed in C.C.No.53/2011 on the file
of the Judicial Magistrate, Udhagamandalam.

For Appellant : Mr.C.Yesuraj

For Respondent : Mr.S.Sithiraianandam

JUDGMENT

The Appellant/Complainant has focused the instant Criminal Appeal before this Court as against the order dated 30.08.2016 in C.C.No.53/2011 passed by the Learned Judicial Magistrate, Udhagamandalam.

2.The Learned Judicial Magistrate, Udhagamandalam, while passing the order in C.C.No.53/2011 on 30.08.2016, had observed the following:

"Complainant absent. No representation. Bailable warrant pending. As the Complainant did not appear before this Court and take steps to proceed the case this Court issued notice to the complainant to appear today in D.No.1518/2016 on 26.07.2016 and that notice has been served and AD card received. The notice has been sent to the address mentioned in the complainant. This case is of the year 2011. Therefore, this Court

constrained to dismiss this complaint under Section 256 of the Cr.P.C. for non-appearance of the complainant. Accordingly, this complaint is dismissed and the accused is acquitted."

3. Assailing the Legality, Validity and correctness of the Order of dismissal passed by the trial Court in C.C.No.53/2011 on 30.08.2016, the Appellant has filed the present Appeal by taking a plea that the Respondent/Accused had successfully evaded service of notice from the trial Court and much time was taken in serving the notice upon him.

4. The Learned Counsel for the Appellant urges before this Court that the trial Court had committed an error in dismissing the complaint because of the absence of the Appellant/Complainant on 30.08.2016 and in fact, the resultant order of acquitting the Respondent/Accused is per se not correct in the eye of Law.

5. The Learned Counsel for the Appellant takes a prime stand that a 'Bailable Warrant' was issued by the trial Court against the Respondent/Accused and on the date of impugned order being passed by the trial Court to dismiss the complaint only because of the non-appearance of Complainant on the date of hearing on 30.08.2016 in C.C.No.53/2011.

6. Per contra, it is the submission of the Learned Counsel for the Respondent/Accused that the presence of the Appellant/Complainant was not dispensed with by the trial Court in C.C.No.53/2011 and therefore, it is incumbent on the part of the Appellant/Complainant to appear for the hearing and in the instant case, the Complainant was remained absent and added further, there was no representation on behalf of the Appellant/Complainant and ultimately, the trial Court opined that the case in C.C.No.53/2011 was of the year 2011 and dismissed the complaint under Section 256 Cr.P.C., which ended in acquittal of the Respondent/Accused.

7. In effect, the plea taken on behalf of the Respondent/Accused is that the impugned order of the trial Court in dismissing the complaint for non appearance of the Complainant, besides there being no representation on 30.08.2016 does not suffer from any infirmity even in the eye of Law.

8. This Court has heard the Learned Counsel for the Appellant/ Complainant and the Learned Counsel for the Respondent/Accused and noticed their contentions.

9.It is to be noted that the Appellant/Chit and Finance Private Limited Company is registered under the Companies Act, 1956. Therefore, it is a juristic person in the eye of Law. The version of the Appellant/Complainant is that the Respondent/Accused was a subscriber of a Chit in respect of Group and Ticket No.J3G/0200/ JMM/21 with the Appellant Company for a chit value of Rs.3,00,000/- and the monthly subscription payable was Rs.12,000/- and that the chit got terminated on 18.06.2009 and a sum of Rs.2,25,000/- on 31.03.2008 was received by the Respondent/Accused. As a matter of fact, a sum of Rs.1,36,287/- was due from the Respondent/Accused to the Appellant Company.

10.It comes to be known that in consideration for a sum of Rs.1,36,287/-, being the outstanding amount, the Respondent/Accused had issued a Cheque dated 20.11.2010 bearing No.005597 drawn on Central Bank of India, Kattabettu Branch for the said sum to and in favour of the Appellant Company and when the cheque was presented on 26.11.2010 for collection with the Appellant's Banker viz., State Bank of Travancore, Udhagamandalam Branch, the same got dishonoured for the reason 'Funds Insufficient' through memo dated 03.12.2010 [issued by the Central Bank of Kattabettu Branch] and the same was received by the Appellant on 03.12.2010.

11.The clear cut case of the Appellant/Company is that the Respondent/Appellant had issued the cheque without sufficient funds in an account with a view to cheat the Appellant/Company and therefore, a complaint was filed under Section 138 of the N.I. Act, 1881 and the same was taken on file in C.C.No.53/2011 on the file of the Learned Judicial Magistrate, Udhagamandalam.

12.The Learned Counsel for the Appellant puts forward a plea that the Appellant Company issued a legal notice on 18.12.2010 through its counsel and in fact, the Respondent had received a notice on 27.12.2010. Since the Respondent/Accused issued a cheque without sufficient funds in the account, the Complaint in C.C.No.53/2011 was filed before the trial Court.

13.It is to be borne in mind that if a Complainant is represented by a Pleader/Counsel [as per Section 2(q) Cr.P.C.], his personal appearance cannot be recorded as an indispensable one. The absence on a particular day of a trial Court is whether it is one of bona fide reason to be taken note of by the trial Court. Nowhere in the Criminal Procedure Code, it is made

mention of that when a Complainant remained absent on appointed hearing date of the case, the complaint was to be dismissed or the Respondent/Accused was to be either Acquitted or Discharged. Ordinarily, a complaint under Section 138 of the Negotiable Instruments Act, 1881 is not to be dismissed in our processual Criminal Justice Delivery System. After all, if a Complainant remained absent on a particular date of hearing and if there was no representation on his side either in person or through Learned Counsel, at best, it would unerringly point out that the Complainant's lackadaisical or laissez attitude in prosecuting the matter any further. Moreover, his lack of interest would be evident in not prosecuting the case filed by him in a diligent manner.

14.It cannot be gainsaid that the presence of Complainant on a given date of hearing is an obligatory one even if the Accused had not appeared. A Court of Law at time when the Complainant was not present in a given case is to consider whether the presence of Complainant on the said hearing date was very much essential for the purpose of prosecuting the case.

15.In the instant case, this Court, on going through the impugned order passed by the trial Court in C.C.No.53/2011, is of the earnest view that the trial Court had clearly observed that 'Bailable Warrant was pending'. When a Bailable Warrant is pending against the Respondent/Accused, then, this Court is of the considered opinion that the trial Court was not correct in dismissing the complaint in C.C.No.53/2011 because of the absence of Complainant and also there being no representation on his side on the hearing date.

16.Resorting to a dismissal of complaint owing to non-appearance of the Complainant on a given date of hearing before the trial Court may not be a prudent course of action. In this regard, the trial Court is required to exercise its judicial discretion with utmost care, caution and judicial circumspection. It cannot be disputed that a Complainant owes a duty to appear before the trial Court on dates of hearing, but for his non appearance on a given date of hearing an order of acquittal cannot be passed either as a matter of routine or other matter of course, as opined by this Court. If the personal attendance of the Complainant is not required on a given date of hearing, then, the trial Court can exercise its thinking judicial discretion in dispensing with the attendance of the Complainant and to proceed further, of course, in accordance with Law.

17.As far as the present case is concerned, the fact of the matter is that on the date viz., 30.08.2016 when the impugned

order in C.C.No.53/2011 was passed by the trial Court in dismissing the complaint because of non appearance of the Complainant and there being no representation, at that point of time, the Respondent/Accused was not present. In reality, a Bailable Warrant was pending as seen from the impugned order. Therefore, this Court comes to a resultant conclusion without any haziness that even if the Appellant/Complainant was not present in the instant case either in person or through his authorised representation/counsel, the said absence should have been viewed with discretion. But the same was not done in the present case which resulted in an acquittal order being passed in favour of the Respondent/Accused. In reality, the dismissal of complaint by a Court of Law at early session on a given date of hearing is an illogical one.

18.Besides the above, when the Complainant had not made his presence on the hearing date, a Court of Law has wide discretion to postpone the case to another date. An Order under Section 256 Cr.P.C., being a final one, precluding a new complaint to be filed, must be passed only after application of judicial mind exercising sound discretion as envisaged in Law.

19.It is to be pertinently pointed out by this Court that an Order of Acquittal will be a bar under Section 300 Cr.P.C. to try the Accused in respect of the same offence. Further, it is to be noted that a new complaint is not barred in terms of Section 300 Cr.P.C. if an Accused is acquitted when the case was not adjourned on account of a Complainant's demise. Section 300 Cr.P.C. is based on the principle 'Nemo Debet Bis Vexari'. The plea of 'Autre Fois Convict' (in English Law) or the principle of 'Double Jeopardy' (in American Jurisprudence) is encompassed within Article 20(2) of the Constitution of India. Moreover, the plea of 'Autre Fois Acquit' is of no application, if an Accused was not liable and legally to be convicted at the first trial because of lack of jurisdiction of the Court concerned.

20.In this connection, it may not be out of place for this Court to make a significant mention that if a Complainant is not present on a particular date of hearing, the Judicial Magistrate has some choices under his belt viz., (i) to acquit an Accused; (ii) to postpone the date of hearing to another specified date; (iii) to dispense with the presence of the Complainant and to proceed with the case.

21.In the instant case on hand, on 30.08.2016 when the impugned order was passed in C.C.No.53/2011, one cannot brush aside a very prime fact that the Appellant/Complainant was absent, besides there being no representation and also that the warrant was pending against the Respondent/Accused. In the present case, the trial Court had assigned reasons to the effect that since the Appellant/ Complainant had not appeared before it

and took steps to proceed with the case, a notice was issued by the Court to the Appellant/ Complainant to appear on 30.08.2016 in D.No.1518/2016 on 26.07.2016 and that the notice was served on that date and that apart, the case being of the year 2011, even then, this Court is of the considered view that when both the Appellant/Complainant and the Respondent/Accused were not present on 30.08.2016, the trial Court should not have resorted to the act of dismissing the complaint. Suffice it for this Court to point out that since the impugned order suffers from manifest error in Law, this Court interferes with the said impugned order dated 30.08.2016 and sets aside the same, in furtherance of substantial cause of Justice. Consequently, the Appeal succeeds.

22.In fine, the Criminal Appeal is allowed. The Judgment dated 30.08.2016 in C.C.No.53/2011 is set aside for the reasons assigned in this Appeal. The trial Court is directed to restore C.C.No.53/2011 to 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 Company to appear before the trial Court on the hearing dates in future and shall not offer/ascribe any flimsy/lame duck excuse in future. Before parting with the case, this Court directs the trial Court to take necessary effective and efficacious steps to execute the pending Bailable Warrant against the Respondent/Accused in accordance with Law.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

Sgl
To

1. The Judicial Magistrate,
Udhagamandalam.
2. The Section Officer,
Record Section,
High Court, Madras.

+lcc to Mr. Yesuraj, Advocate, S.R.No.568
+lcc to Mr. Sithirai anandam, Advocate, S.R.No.598

GMJ (CO)
RS (27/01/2017)

Cr1.A.No.13 of 2017