

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.04.2017

CORAM

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

Crl.A.No. 221 of 2016

S.Sankaran ... Appellant / Complainant

Vs.

Reshma ... Respondent / Accused

PRAYER: Criminal Appeal is filed under Section 378 (4) of the Code of Criminal Procedure to set aside the Order of Acquittal in S.T.C.No.199 of 2015 dated 12.01.2016 passed by the Learned Judicial Magistrate No.II (Fast Track Court), Erode.

For Appellant : Mr.K.Ramanamoorthy

For Respondent : Mr.C.S.Saravanan

J U D G M E N T

The Appellant / Complainant has preferred the instant Criminal Appeal before this Court as against the 'Order' / 'Judgment of Acquittal' dated 12.01.2016 in S.T.C. No.199 of 2015 passed by the Learned Judicial Magistrate No.II (FTC), Erode.

2. It comes to be known that the trial Court while passing the Impugned Order / 'Judgment of Acquittal' dated 12.01.2016 at Paragraph No.2 had observed that 'The present case is pending from 03.12.2015, for cross examination of P.W.1. In the present case on 08.01.2016, since the complainant had not appeared before the Court, an Order was passed directing the complainant to appear before Court, but, the complainant had not appeared before Court. Therefore, on the side of Accused, P.W.1 was not cross examined. On behalf of the Accused, it was informed that they were ready to cross examine P.W.1. Today till about 5.30 P.M., on behalf of the Respondent / Accused they waited for cross examination of P.W.1, yet, the complainant had not appeared before Court. On behalf of the complainant, there was no representation. In the instant case, no progress was made because of the continuous absence of the complainant before Court. Therefore, no useful purpose would be served in keeping

the case pending, in the considered opinion of this Court. As such, for the default of the complainant, the case in S.T.C. No.199 of 2015 is ordered to be dismissed. Further, the accused in the instant case is ordered to be acquitted under Section 256 of Cr.P.C.,'.

3. Questioning the 'Order of Dismissal' / 'Judgment of Acquittal' dated 12.01.2016 in S.T.C.No.199 of 2015 passed by the Learned Judicial Magistrate No.II (FTC), Erode, the Appellant / Complainant has filed the present Criminal Appeal before this Court contending that the trial Court had not borne in mind that in the main case, no oral and documentary evidence was adduced on either side.

4. The Learned Counsel for the Appellant contends that the trial Court issued final notice to the complainant to appear on 08.01.2016 and posted the case immediately on 12.01.2016 for complainant's cross examination. However, the trial Court had dismissed the case because of the fact that the Appellant had failed to appear on 12.01.2016.

5. The Learned Counsel for the Appellant takes a prime stand that the Appellant / Complainant was absent because of typhoid fever and further, he was advised by his Doctor to take bed rest. That apart, he came to Chennai during the floods to visit his relative and at that point of time, the case was posted on 03.12.2015. However, he was unable to appear before the Court and after returning to his native town, he suffered with a 'Viral Typhoid Fever'.

6. The Learned Counsel for the Appellant projects an argument that the cheque sum in S.T.C.No.199 of 2015 on the file of the trial Court is Rs.2,35,000/- and without considering the same, the trial Court had dismissed the main case at the initial stage.

7. The Learned Counsel for the Appellant / Complainant strenuously takes a plea that the trial Court had not provided a breathing time to the Appellant to put forth his contentions and in fact the trial Court should have provided an opportunity to the complainant for being cross examined by the Respondent / Accused's side as P.W.1.

8. Per contra, it is the submission of the Learned Counsel for the Respondent / Accused that before the trial Court, the main case in S.T.C.No.199 of 2015 was pending ever since 03.12.2015, of course, for the purpose of cross examination and in reality, the trial Court had directed the Appellant / Complainant to appear in person because of the reason that he had failed to appear on 08.01.2016. In fact, the Appellant /

Complainant had not appeared before the trial Court and as such, the Respondent / Accused's side was not in a position to cross examine the complainant (P.W.1).

9. The Learned Counsel for the Respondent brings it to the notice of this Court that prior to the 'Order of Dismissal' of complaint on 12.01.2016, the trial Court had waited till evening 5.30 p.m., for cross examination of P.W.1, on the side of the Respondent / Accused, even then, the Complainant had not appeared before the trial Court on 12.01.2016 and added further, there was no representation on his behalf.

10. The Learned Counsel for the Respondent / Accused proceeds to state before this Court that since there was no progress in the instant case in S.T.C.No.199 of 2015, the trial Court opined that no useful purpose would be served in keeping the case pending and ultimately dismissed the complaint in S.T.C. No.199 of 2015 on 12.01.2016 for default of the Appellant / Complainant to appear before the Court, thereby resulting in an Acquittal Order being passed under Section 256 of Cr.P.C.,

11. At the outset, this Court significantly points out that Section 256 of Cr.P.C., applies where the complainant had not appeared in a summons case. In this connection, this Court aptly points out that if the trial Court considers that the personal attendance of the complainant is not necessary on that date, it has the power to dispense with his attendance and proceed with the case. However, if the trial court opines that it is proper to postpone the hearing to a different date, then, an accused shall not be acquitted undoubtedly, the Learned Judicial Magistrate has the power to dispense with the attendance of a complainant and to proceed with the case.

12. It is to be noted that the Learned Judicial Magistrate / trial Court is to see that just because of the absence of the complainant on a particular date, whether his personal attendance is very much required on that day for the progress of the subject matter in issue. In this connection, the trial Court has also to visualise whether the absence of complainant on a particular day would not justify the case being postponed to another date for any reason, it deems fit and proper if the trial Court / Learned Judicial Magistrate is of the earnest view that the case does not require to be adjourned to another date, then, it is at liberty to pass an order of dismissing the complaint and to acquit an Accused. However, if the presence of the complainant on a given day was unnecessary, then, adopting to such a course of dismissing the complaint may not be a wise exercise of discretion as per Section 256 of Cr.P.C., in the considered opinion of this Court.

13. Ordinarily, the absence of complainant on the date of hearing cannot be a valid reason for acquitting an accused in a regular manner. Merely because the complainant had not appeared on a given date of hearing, it is not necessary in all cases the accused ought to be acquitted. No where, the Criminal Procedure Code specifies 'Dismissal of the Complaint' or 'Discharge of an Accused' when the complainant had remained absent on a given date of hearing, that discretion either to dismiss the case or to adjourn the main case is to be exercised by the concerned trial Court in a fair and judicious manner. In regard to the cases relating to Section 138 of Negotiable Instruments Act, an order of 'Dismissing the Complaint' passed by the concerned Judicial Magistrate will have an adverse impact on the complainant.

14. As far as the present case is concerned, before the trial Court on either side, no one had appeared on 12.01.2016, But a petition under Section 317 of Cr.P.C., was filed on behalf of the Respondent / Accused and the same was allowed. It transpires that the Appellant / Complainant for his cross examination as P.W.1 had not turned up till 5.30 P.M., in the evening on 12.01.2016. Notwithstanding the fact that on behalf of the Respondent / Accused they were ready to cross examine him. Moreover, there was no representation on behalf of the Appellant / Complainant on 12.01.2016. Inasmuch as main case was pending for cross examination of P.W.1 (Appellant / Complainant) and even though the trial Court had directed the Appellant / Complainant to appear, yet, he had not appeared, but remained absent. Therefore, the trial Court was perforced to 'Dismiss the Complaint' under Section 256 of Cr.P.C., and ultimately Acquitted the Respondent / Accused.

15. A cursory perusal of the contents of notes paper (confidential one) of the trial Court on S.T.C. No.199 of 2015 dated 12.01.2016 latently and patently points out that on both sides there was no representation and in fact a Petition seeking to condone the absence of the Accused (Respondent) was filed under Section 317 of Cr.P.C., and the same was allowed. In reality, on 08.01.2016, on both sides, there was no representation and Petitions were filed under Sections 256 and 317 of Cr.P.C., and allowed. For continuation of cross examination of P.W.1 (the Appellant / Complainant), the trial Court had directed the Appellant / Complainant to appear in person on 12.01.2016. Inspite of such a direction being issued to the Appellant / Complainant to appear on 12.01.2016, for the purpose of cross examination (to be made by the Respondent / Accused) yet, the Appellant / Complainant had not chosen to appear, because of absence of P.W.1 on 12.01.2016 there was no possibility for making any progress in the main case.

Therefore, this Court is of the considered view that because of the absence of the Appellant / Complainant (P.W.1) the trial Court should not have resorted to the method of axing down the complaint. However, such a thing was not adopted by the trial Court. However, it had exercised its discretion in an inappropriate manner which had resulted in 'Dismissal of the Complaint' and had caused serious miscarriage of justice to the Appellant / Complainant, in the considered opinion of this Court.

16. Apart from that, the absence of complainant on the given date of hearing cannot be a sufficient ground for Acquitting an Accused in a cavalier fashion. The significant test is one of good faith and a short cut method cannot be resorted to by the trial court in dismissing the complaint.

17. It is to be remembered that in the absence of the complainant especially under Section 138 of Negotiable Instruments Act, the complaint should not be dismissed to prevent an aberration of justice. It is true that both the Complainant and an Accused are to appear for each and every hearing before the trial Court unless his or her presence is dispensed with by the Court concerned. If the date is fixed for appearance of the complainant and for his cross examination to be made by the Respondent / Accused, then, for the non appearance of Complainant, acquitting the Respondent / Accused is a manifest error of justice. After all, the Court of Law is to see if the presence of complainant on the date when the complaint was filed was very much essential for the purpose of prosecuting the case. If a complainant had remained absent then, the Court is to look into the matter whether his absence is either due to good / sufficient cause / reason. If the complainant is represented by a Pleader as per Section 2(q) of Cr.P.C., his personal appearance would not be considered as indispensable, as per decision Ponnaganti Kotayyan (1903) 2 WEIR 309.

18. The trial Court is to bear in mind a vital fact viz., whether an 'Order of Acquittal' would operate as a bar under Section 300 of Cr.P.C., to the trial of an accused for the same offence and therefore, such an order of dismissal is of paramount consideration.

19. More importantly, the trial Court is to exercise its thinking judicial mind when the main case relates to an offence under Section 138 of Negotiable Instruments Act and especially when the Appellant / Complainant as P.W.1 had remained absent for the purpose of cross examination.

20. Be that as it may, on a careful consideration of the respective contentions and also considering the facts and circumstances of the present case, this Court is of the earnest view that in as much as on either side there was no representation, but in fact a Petition under Section 317 of Cr.P.C., was filed (on behalf of the Respondent / Accused), this Court is of the considered view that the 'Dismissal of the Complaint' for non-appearance of the Appellant as P.W.1 is not proper because of the fact that owing to the absence of the Appellant there could not have been any progress for continuation of his cross examination as P.W.1. Viewed in that perspective, this Court is of the resultant opinion that the trial Court had not exercised its power to adjourn the case to a different date for cross examination of P.W.1 in a judicious manner.

21. Therefore, this Court interferes with the Impugned Order in S.T.C. No.199 of 2015 and sets aside the same. Consequently, the Criminal Appeal succeeds. In fine, Criminal Appeal is allowed. The Order / Judgment of Acquittal dated 12.01.2016 in S.T.C. No.199 of 2015 is set aside for the reasons assigned in this Appeal. The trial Court is directed to restore the Complaint in S.T.C.No.199 of 2015 within 10 days from the date of receipt of a copy of this Judgment.

22. Before the trial Court, both the Appellant / Complainant and the Respondent / Accused are directed to appear in the main case and the trial Court in any event is directed to dispose of the main case within four months thereafter. The Appellant as P.W.1 shall make himself available for the purpose of cross examination and since the cheque is dated 11.05.2015 and the date of transaction being 10.04.2015 and nearly two years had elapsed, this Court deems it fit and proper to direct the respective parties to lend their assistance and unstinted cooperation to the trial Court in disposing of the main case. The trial Court soon after disposal of the main case shall send a report of compliance by addressing a communication to this Court without fail.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

ssd

To

- 1.The Learned Judicial Magistrate No.II
(Fast Track Court) Erode.
 - 2.Thro' The Chief Judicial Magistrate,
Erode.
 - 3.The Public Prosecutor,
High Court, Madras.
 - 4.The Registrar Judicial
High Court, Madras
(for favour of information and
necessary follow-up action)
 - 5.S.Sankaran,
S/O.Sukumaran,
D.No.63, Ramamoorthy Street,
Sodar, Erode-2.
 - 6.Reshma,
W/O.Mohamed Shanavas,
D.No.31/21, Majith Street,
Veerappan Chatram,
Erode-4.
 - 7.The Record Keeper,
Criminal Section,
High Court, Madras.
- +1cc to M/S.K.Ramanamoorthy, Advocate Sr.19571

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