

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.01.2017

CORAM

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

Crl.A.No. 762 of 2016

M.Vinoth

... Appellant / Complainant

Vs.

R.Mohan

... Respondent / Accused

PRAYER: Criminal Appeal is filed under Section 378 of the Code of Criminal Procedure, to Admit this appeal and call for the records from the trial court namely, the Fast Track Judicial Magistrate No.2, Erode, duly quash and set aside the Judgment of the lower court by convicting the Respondent / Accused in S.T.C. No.91 of 2015 on the file of Fast Track Judicial Magistrate No.2, Erode.

For Appellant : Mr.A.Thiyagarajan
For Respondent : No Appearance

J U D G M E N T

Heard the Learned Counsel for the Appellant / Complainant.

2. The Appellant / Complainant has preferred the instant Criminal Appeal before this Court as against the Order dated 21.01.2016 in S.T.C. No.91 of 2015 passed by the Learned Judicial Magistrate (FTC) No.2, Erode.

3. The Learned Judicial Magistrate (FTC) No.2, Erode while passing the Impugned Order on 21.01.2016 in STC No.91 of 2015 at Paragraph No.2 had observed that "this case was pending from 03.08.2015 for cross examination of P.W.1. In the present case, the Complainant since had not appeared regularly before the Court, for his personal appearance, he was directed to appear on numerous occasions but the Complainant had not appeared before the Court. Therefore, P.W.1 was not able to be cross examined, on behalf of the Accused. On the side of the Accused, it was informed that their side was ready to cross examine P.W.1 even on 08.01.2016 when an order was passed directing the Complainant to appear before this Court, the Complainant had not appeared on his behalf a direction under Sections 256 and 309 Cr.P.C., were filed and accepted. Again, the Complainant was directed to

appear on 21.01.2016 before Court, but he had not appeared for cross examination. Today till at 5.15 P.M., on the side of Accused, they waited for cross examining P.W.1, but the Complainant had not appeared before Court in person on his behalf, again a Petition under Section 256 of Cr.P.C., was filed but the same was dismissed by the Court because of the reason that similar Petitions like the present one were filed already on his behalf. Furthermore, since the complainant is not appearing regularly / continuously before the Court, there is no progress in the conduct of case. Therefore, the Court came to the conclusion that no useful purpose would be served in keeping the case pending. Hence, in the absence of the complainant the present case was dismissed under Section 256 of Cr.P.C., and the Accused was ordered to be acquitted under Section 256 of Cr.P.C., no costs."

4. Assailing the legality and validity of the Impugned Order dated 21.01.2016 in STC No. 91 of 2015 passed the trial court, the Appellant (Complainant) as an aggrieved person, has preferred the instant Criminal Appeal before this Court.

5. Today, when the Criminal Appeal is taken up for hearing even though the Respondent was served on 16.12.2016 on his behalf there is no appearance either in person or through Learned Counsel, as such, this Court proceeds further to dispose of the Appeal on merits.

6. The Learned Counsel for the Appellant contends that the Appellant / Complainant was examined as P.W.1. However, was not cross examined on the side of the Respondent / Accused. Moreover, the Respondent / Accused was examined under Section 313(1)(b) of Criminal Procedure Code on 12.06.2015. Therefore, it is the stand of the Appellant that the trial court had not borne in mind the aforesaid vital facts in a real and proper perspective.

7. The Learned Counsel for the Appellant urges before this Court that the Appellant / Complainant was not able to appear because of his inability on 21.01.2016 and for his absence, a Petition was filed, but the trial court had dismissed the Petition erroneously, which is against Law.

8. The Learned Counsel for the Appellant projects an argument that the trial court instead of passing the impugned order of dismissing the complaint in STC No.91 of 2015 dated 21.01.2016 should have imposed a reasonable cost on the Appellant, for his absence on 21.01.2016 unfortunately, the trial court had not resorted to such a procedure, which is resulted in serious miscarriage of justice.

9. While winding up, it is the submission of the Learned Counsel for the Appellant that to substantiate his case, the Appellant / Complainant may be provided with a chance and by so doing no prejudice would be caused to the other side.

10. It is to be pointed out that the ingredients of Section 256 of Cr.P.C., confers a wide discretion to the Learned Judicial Magistrate to dismiss the complaint (because of the absence of complainant's appearance) and to acquit the Accused or to postpone the hearing. But the said power is to be exercised in a reasonable manner and that too with meticulous care, caution and circumspection.

11. The real test in regard to the absence of the complainant on the date of hearing is one of good faith and for a bonafide reason(s). Just because the complainant in a given case had remained absent before the trial court, it is not necessary that an Accused would be acquitted. Ordinarily owing to the absence of the complainant on one or two occasions, the complaint, especially filed under Section 138 of Negotiable Instruments Act ought not to be dismissed in the interest of justice.

12. It is to be remembered that there is an obligation on the part of Complainant to be present on a 'Specified Hearing Date', even when the Respondent / Accused had not appeared. Undoubtedly, the Learned Judicial Magistrate is not under any Rule / Law to wait till the closure of the working day for the proceedings under Section 256 of Cr.P.C., in the considered opinion of this Court.

13. It cannot be brushed aside that the order of dismissing the complaint passed by the trial court is a final order and therefore a new / fresh complaint is barred, therefore, the Learned Judicial Magistrate is to apply his judicial thinking mind and exercise his discretion while passing order under Section 256 of Cr.P.C., It cannot be gainsaid that when the presence of complainant is not necessary on a given date of hearing, then, the trial court shall not pass an order of dismissing the complaint either as a matter of routine or as a matter of course, in the considered opinion of this Court. Apart from that, a short cut method of disposing the case not on merits is not a palatable one.

14. No where the Criminal Procedure Code enjoins that because of the absence of the complainant a case is to be dismissed and an Accused would be acquitted. In short, the absence of complainant on the date of hearing cannot be a ground of acquitting an Accused in a ritualistic fashion.

15. In a given case, where the main legal proceedings can proceed further, even if the complainant was absent, the absence of the complainant must be viewed with discretion. To put it precisely, an 'Order of Acquittal' ought not to be passed in an arbitrary and capricious manner.

16. In this connection, this Court pertinently points out that because of the absence of the Complainant, an 'Order of Acquittal' may not to be passed because of the reason that subsequently trial of an accused for the same offence is barred.

17. As far as the present case is concerned, this Court on going through the Impugned Order dated 21.01.2016 in S.T.C. No.91 of 2015 passed by the trial court finds that the Appellant / Complainant had not appeared on 21.01.2016 (for the purpose of cross examination) and till 5.15 p.m., on the side of the Respondent / Accused, they were ready to cross examine him, inspite of the same, the Appellant / Complainant had not appeared but a Petition was filed to condone his absence on 21.01.2016 and the same was dismissed.

18. At this stage, on behalf of the Appellant / Complainant, it is represented before this Court that the Appellant / Complainant had met with an accident on 15.01.2016 at Chinnarpalayam (Near Pallipalayam at Erode) and because of that there was a muscle catch on his right hand and therefore, he took treatment and presently he is taking rest. That apart, in connection with the 'Motor Vehicle Accident Case', a case in Crime No.11 of 2016 was registered at Pallipalayam Police Station. Therefore, the Appellant / Complainant was not in a position to appear before the trial court on 21.01.2016 when the impugned order came to be passed.

19. On a careful consideration of the contentions advanced on behalf of the Appellant, this Court taking note of the entire facts and circumstances of the present case in a conspectus fashion bearing in mind yet another fact that the Appellant / Complainant (P.W.1) had not appeared on numerous occasions before the trial court (for the purpose of cross examination) and also considering vital facts that the Appellant / Complainant had reportedly met with an accident on 15.01.2016 and therefore, he was not able to appear on 21.01.2016 and because of the accident, he suffered a muscle catch on his right hand, for which he is taking treatment comes to a consequent conclusion that the Impugned Order of dismissal of complaint in STC No.91 of 2015 dated 21.01.2016 is not based on a realistic, practical, pragmatic approach and also not a prudent course of action, which necessitates interference in the considered opinion of this Court sitting in Appellate Jurisdiction. Viewed

in that perspective, this Court in furtherance of substantial cause of justice interferes with the Impugned Order dated 21.01.2016 and sets aside the same. Resultantly, the Criminal Appeal succeeds.

20. In fine, the Criminal Appeal is allowed. The Impugned Order dated 21.01.2016 passed by the Learned Judicial Magistrate (FTC) No.2, Erode in STC No.91 of 2015 is hereby set aside by this Court for the reasons assigned in this Appeal. The Learned Judicial Magistrate (FTC) No.2, Erode is directed to restore the STC No.91 of 2015 to file within a period of ten days from the date of receipt of copy of this Judgment. Thereafter, the Appellant / Complainant is directed to present himself for cross examination (since he was examined in chief as P.W.1) and it is abundantly made clear that on his behalf no lame duck excuse shall be offered hence forth and in this regard the trial court is directed to dispose of the main case within a period of three months.

21. The respective parties are directed to lend their assistance and unstinted cooperation to the trial court in regard to the completion of proceedings in a comprehensive fashion. Soon after disposal of the main case in S.T.C No.91 of 2015 on its file, the trial court is directed to send a compliance report to this Court without fail.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

ssd

To

1. The Fast Track Judicial Magistrate No.2,
Erode

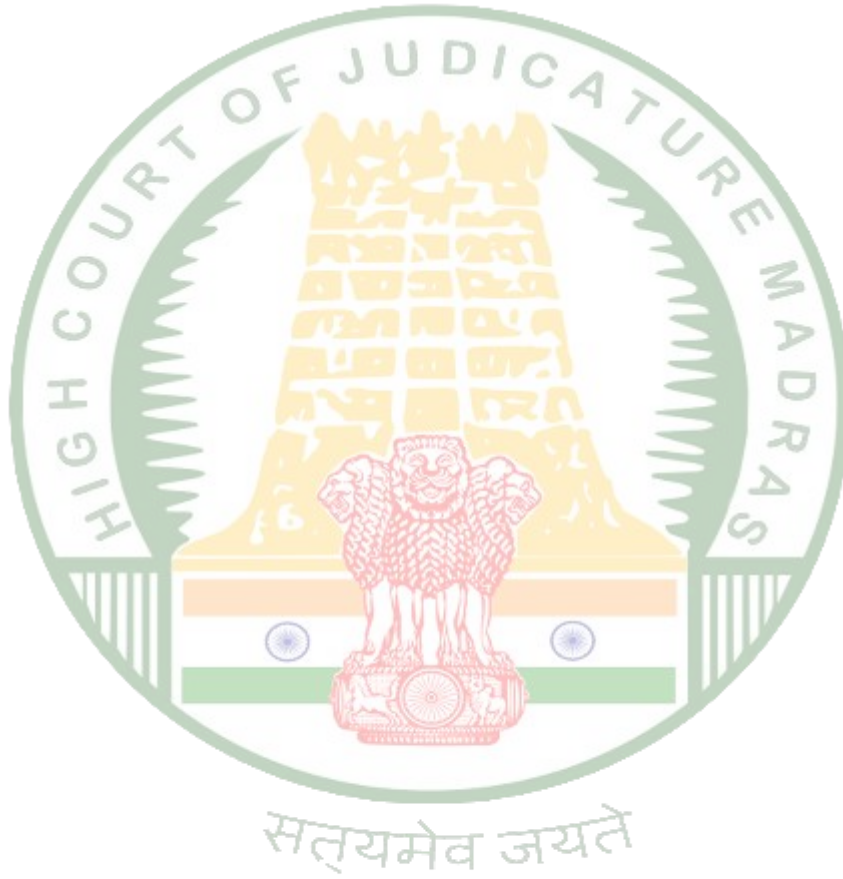
2. The Registrar Judicial,
High Court, Madras.
(for favour of information and
consequent necessary follow-up
action)

3. The Record Keeper,
High Court, Madras

+1cc to Mr.A. Thiagarajan, Advocate, S.R.No.2837

cp(CO)
md(01/02/2017)

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