

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.03.2017

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

CRL.O.P.No.4972 of 2011

G.Zackir Hussain

.. Petitioner

Vs

Dr.Veeranan

... Respondent

PRAYER: Petition under Section 482 of the Code of Criminal Procedure against the order dated 16.9.2010 in C.R.P.No.45 of 2010 on the file of the Additional District cum Sessions Judge, Fast Track Court No.III, Coimbatore, confirming the order dated 21.8.2009 passed in S.T.C.No.290 of 2008 on the file of the Judicial Magistrate No.VII, Coimbatore.

For Petitioner : Mr.S.D.S.Philip
For Respondent : Mr.M.Vijayakumaran

ORDER

This petition has been filed by the petitioner under Section 482 Cr.P.C. seeking to set aside the order dated 16.9.2010 passed by the Additional District and Sessions Judge, Fast Track Court No.III, Coimbatore, confirming the order dated 21.8.2009 in S.T.C.No.290 of 2008 on the file of the Judicial Magistrate No.VII, Coimbatore and to restore the complaint in S.T.C.No.290 of 2008.

2. The petitioner herein is the complainant, who lodged a private complaint before the Judicial Magistrate No.VII, Coimbatore for the offence under Section 138 of Negotiable Instruments Act and the same was taken on file as S.T.C.No.290 of 2008. When S.T.C.No.290 of 2008 was posted for hearing on 21.8.2009, the complainant was not present, resultantly, the respondent/accused was acquitted under Section 256 Cr.P.C. Challenging the order passed in S.T.C.No.290 of 2008, the petitioner had filed C.R.P.No.45 of 2010 before the file of the Additional District and Sessions Judge, Fast Track Court No.III, Coimbatore seeking to set aside the said order. By an order

dated 16.9.2010, the Additional District Judge dismissed the Revision. Aggrieved by the same, the petitioner had filed the present Criminal Original Petition.

3. I heard Mr.S.D.S.Philip, learned counsel for the petitioner and Mr.M.Vijayakumaran, learned counsel for the respondent and also perused the materials available on record.

4. Challenging the orders impugned in this petition, the learned counsel for the petitioner submitted that the order of the trial Court as well as the revisional Court are contrary to law and passed without considering the facts and circumstances of the case. The revisional Court erred in considering the absence of the petitioner on earlier occasions where petitions to condone his absence were filed and allowed by the trial Court. He would submit that the revisional Court ought to have imposed suitable condition on the petitioner to prosecute his complaint within a time frame and impose cost on the petitioner for restoring the complaint.

5. The learned counsel would further submitted that since the petitioner was employed at Madurai, he could not able to appear before the trial Court due to his official duty on earlier occasions and due to his illness on 21.8.2009. The learned counsel then submitted that the petitioner has got good case on merits. The reasoning given by the trial Court as well as the revisional Court was erroneous and both the Courts have failed to appreciate the facts put forth before them. Hence, he prayed for setting aside the order of the Courts below.

6. Reiterating the orders of Courts below, the learned counsel for the respondent contended that both the Courts have rightly held that the petitioner did not take steps to let in evidence and failed to appear before the trial Court. From the date of filing of the complaint, the petitioner had failed to appear before the trial Court. Because of frequent absence of the petitioner, the trial Court sent a notice to him for his appearance on 21.8.2009. Since the petitioner had failed to appear on 21.8.2009, the trial Court has rightly dismissed the complaint.

7. The learned counsel for the respondent further submitted that when a case is dismissed due to the absence of the complainant and an order of acquittal of the accused passed, only an appeal would lie and the revision is not maintainable. He would submit that due to non-appearance, the trial Court has rightly dismissed the complaint, which was also rightly affirmed by the revisional Court and there is no need to interfere with the orders of the Courts below.

8. The petitioner is a complainant in S.T.C.No.290 of 2008 filed under Section 138 of Negotiable Instruments Act against the respondent due to the dishonour of the cheque to the value of Rs.2.60 lakhs issued by the respondent. According to the petitioner, when S.T.C.No.290 of 2008 was listed on 21.8.2009, due to ill-health, he was not able to appear before the trial Court and because of his non-appearance, the complaint was dismissed and the respondent was acquitted.

9. Challenging the order of dismissal of the complaint and also acquittal of the respondent, the petitioner filed C.R.P.No.45 of 2010 before the Additional District and Sessions Judge, Fast Track Court No.III, Coimbatore, wherein the respondent had raised a plea that as against the order of dismissal of the complaint, only appeal would lie and revision is not maintainable. In its order, the revisional Court has not dealt with the maintainability of the revision, but, held that the petitioner is not entitled to any relief in the revision filed by him.

10. According to the petitioner, he was very regular in attending the Court and due to ill-health and unavoidable circumstances, he was not able to attend the Court on 21.8.2009, however, the petitioner informed his advocate to file a petition. Unfortunately, his advocate also not appeared before the Court and file a petition due to his pre-occupation in some other case. Therefore, the petitioner pleaded that the absence on 21.8.2009 is neither wilful, nor wanton.

11. No rebuttal evidence was produced by the respondent to show that the petitioner had wantonly failed to appear before the trial Court on 21.8.2009 and is not interested in prosecuting the case.

12. If the complainant is absent on a particular day and if the Court feels that presence of the complainant on that day was quite unnecessary, then dismissing the complaint is not a proper exercise of power as per Section 256 Cr.P.C.

13. On a perusal of the order of the trial Court, it is seen that no reasoning was given in dismissing the complaint. For proper appreciation, the order of the trial Court in S.T.C.No.290 of 2008 is extracted herein below:

"PROCEEDINGS OF THE JUDICIAL MAGISTRATE NO.VII,
COIMBATORE

(Section 256 of Code of Criminal Procedure)

Dated 21.09.09

In Calender Case No.STC.290/08

Complainant

G.Zakir Hussain

Accused Dr.Veeranam
Offence U/s 138 NI Act

STC No.290/08

Date of Offence 15.09.06

Date of Complaint 25.10.06

Date of hearing 19.08.08

The case was called for hearing To-day to which it had been posted/adjourned. The complainant not being present either in person or by pleader or being been reported dead the accused is acquitted under section 256 Criminal Procedure Code."

14. Dismissing the complaint without recording reason is unsustainable. Power of Magistrate under Section 256 Cr.P.C. cannot be exercised only on account of absence of complainant and the Magistrate has to exercise discretion after considering the conduct of the complainant. Admittedly, in the case hand, the Magistrate has not stated anything in his order. More over, the perusal of the order of the trial Court would reveal that it had not given any speaking order.

15. It is apposite to mention that in the case of dishonour of cheque, it is the complainant who is at stake for his money and the complaint should not be dismissed for non-prosecution and the Court ought to adopt course either to adjourn the case for hearing to some other day under the provision of Section 256 Cr.P.C. or to grant exemption to complainant on particular date for his non-appearance.

16. The petitioner who approached the Court for relief should not be denied and an opportunity to put forward his case on merits should be given without closing its doors. The respondent cannot take advantage of the procedural technicalities. Therefore, in the interest of justice and in order to give an opportunity to the petitioner to prove his case, the order of the trial Court dismissing the complaint, which was confirmed by the revisional Court, is liable to be set aside. However, in such a case the Court should also keep in mind the constant litigation expenses incurred or to be incurred by the opposite party and should compensate him accordingly.

17. In the result:

(a) the Criminal Original Petition is allowed by setting aside the order in C.R.P.No.45 of 2010 dated 16.09.2010 passed by the learned Additional District-cum-Sessions Judge, Fast Track Court No.III, Coimbatore, confirming the order in S.T.C.No.290 of 2008 dated 21.08.2009 on the file of the learned Judicial Magistrate No.VII, Coimbatore;

(b) the complaint in S.T.C.No.290 of 2008 is restored on its file for fresh consideration;

(c) the learned Judicial Magistrate No.VII, Coimbatore is directed to take up the S.T.C.No.290 of 2008 on day-to-day basis without giving any adjournments to either parties and to dispose the same within a period of three months from the date of receipt of a copy of this order. Both the parties are directed to give their fullest co-operation for early disposal. No costs.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

vs

To

1. The Additional District & Sessions Judge,
Fast Track Court No.III, Coimbatore.

2. The Judicial Magistrate No.VII,
Coimbatore.

+1cc to Mr.M.Vijayakumaran, Advocate, S.R.No.18152

+1cc to Mr.S.D.S.Philip, Advocate, S.R.No.18518

CRL.OP.No.4972 of 2011

GSP(26/11/2018)

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