

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.03.2017

C O R A M

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Criminal Appeal No.126 of 2017

Sivaraj ... Appellant/Complainant

Vs

B.Devaraj ... Respondent/Accused

Prayer: Criminal Appeal filed under Section 378 of Cr.P.C., as against the order dated 01.08.2016 passed by the Learned Judicial Magistrate, Kotagiri in S.T.C.No.314 of 2010.

For Appellant : Mr.L.Mouli

For Respondent : No appearance

JUDGMENT

The Appellant/Complainant has preferred the instant Criminal Appeal before this Court as against the order of dismissal dated 01.08.2016 passed by the Learned Judicial Magistrate, Kotagiri in S.T.C.No.314 of 2010, whereby and whereunder, the Complaint was ultimately dismissed under Section 256 Cr.P.C.

2.At the outset, this Court points out that today, Crl.O.P.No.23512 of 2016 [seeking Grant of Special Leave to prefer an Appeal] was allowed by this Court for the reasons assigned therein.

3.The Learned Counsel for the Appellant contends that the Respondent/Accused is absconding and only because of that reason, NBW, issued against him, was not executed. It is further represented that when that be the fact situation, the trial Court had wrongly observed in the impugned order that the Appellant/Complainant had not taken any steps to execute the Non Bailable Warrant.

4.The Learned Counsel for the Appellant submits that the trial Court, when dismissing the complaint under Section 256 Cr.P.C., should have directed the concerned Police to produce the Respondent/Accused before Court after executing the NBW. However, such a thing was not resorted to in the present case.

5.The prime contention advanced on behalf of the Appellant is that the Respondent/Accused soon after receipt of summons had appeared before the trial Court and when the case was posted for cross examination of P.W.1 neither the Respondent/Accused nor his

counsel represented before the trial Court and therefore, NBW was issued.

6.The Learned Counsel for the Appellant submits that in fact, the Appellant/Complainant for the past three years was taking necessary steps to execute NBW. However, the Respondent/Accused is evading the clutches of the Police.

7.It is to be noted that in an Appeal against the order of acquittal, the High Court has all the requisite powers to reconsider the entire issue, reappraise the evidence and come to its own conclusion and findings, in place of the findings recorded by the trial Court. If the findings of the trial Court are perverse, arbitrary and capricious, then also, the High Court can interfere. Even if there is any misreading of evidence or if the material fact or point of law was not taken into account by the trial Court, at the time of passing the impugned order, then also, the High Court can interfere with the impugned order.

8.It cannot be ignored that the absence of a Complainant on the date of hearing cannot be a reason for acquitting the Respondent/Accused in a routine or casual manner. Nowhere the Criminal

Procedure Code contemplates that for the absence of a Complainant on a particular date of hearing in a given case, the Complaint should be dismissed or an Accused be discharged.

9.It is to be remembered that in respect of a case under Section 138 of the Negotiable Instruments Act, 1881 for the absence of a Complainant either for one or two occasions, the complaint ought not to be dismissed, to prevent an aberration of Justice. If an order of acquittal is passed by the trial Court owing to the non appearance of the Complainant on the given date of hearing or there was no representation on his behalf even through Learned Counsel, the trial Court cannot brushed aside that the order of acquittal so passed is a final one and it may even bar a fresh trial as per Section 300 Cr.P.C.

10.Indeed, the Jurisdiction of an Appellate Court is coextensive with that of trial Court in the matter of assessment, appraisal and reappreciation of evidence and to consider the centre of controversial issues. Further, an Appeal from acquittal is allowed only in exceptional circumstance. Also that, the High Court has necessary powers to upset the Order/Judgment of acquittal only when it finds substantial/compelling reasons. Moreover, if the trial Court had given untenable

reasons and its approach to the case is not legal and manifestly erroneous one, then also, an Appellate Court can step in.

11. It is to be pointed out that if a date is determined for appearance of Accused, then, the acquittal of Accused for non appearance of the Complainant is a manifest error of Justice, because of the reason, the same is not proper as per decision ***Banabai V. Shivasharanappa, (2003) 3 Crimes 287.*** After all, a Court of Law is to see whether the presence of a Complainant on a given date of hearing is very much essential for the purpose of prosecuting the case. Besides that, in the decision ***Ratanlal Gulabchand Gupta V. Sahara Sev Gruh Udyog Bhandar and others, 2001 CRI. L.J. 3733 at special pages 3735 & 3736(Guj.)***, it is, among other things observed as under:

"Section 138 of the Negotiable Instruments Act has created a faith, confidence and satisfaction in the banking system of the peoples. In the case of dishonour of cheque if the drawer thereof on the receipt of the notice from the drawee not paid the amount of the cheque within a stipulated period, his this act constitutes an offence punishable under Section 138 of the Negotiable Instruments Act. The complainant in the criminal complaint under Section 138 of the Negotiable Instruments Act filed by him needs to prove the offence but to

prove thereof, much quantum of evidence both oral or documentary is not required. Even the complaints filed under Section 138 of the Negotiable Instruments Act have their own long life that is different matter. In our this adversary system in the country there is nothing wrong of dependent of a litigant who have chosen to engage an Advocate in the matter on him. In the case of this nature, on every date is fixed or the proceedings are taken up, the complainant's presence is not necessary and more so where he has engaged an Advocate. It is unfortunate that the Advocate was not sufficiently vigilant in conducting the matter. But for this act of the Advocate why the poor complainant should suffer. On 24.10.1996, the petitioner was present in the Court and 24.12.1996 was the next date fixed therein. On that date the matter was not on the Board. The best course available in these facts to the petitioner was to contact his Advocate and I do not find any perversity in the approach of the litigant to act in accordance with the advice of the Counsel. I fail to see why the case of the petitioner has not been accepted by both the Courts below. A complainant, on his absent, may face consequences of the dismissal of the complaint as well as discharge of the accused. How absence of the complainant in the criminal case is beneficial to him. The absence of the complainant in the matter results in dismissal of his complaint, he has to take all the precautions and in this case petitioner did and he engaged an advocate. On 24.12.1996 the next date was not fixed in case could not be known

by the petitioner and I do not find any abnormality in the approach of the petitioner to rely upon the advice of his Advocate. The Advocate has told him to inform him the next date fixed in the matter. It is a different matter that the Advocate has not informed the petitioner the next date fixed in the matter. Though Advocate is supposed to take all the care in the matter of his client, but for his action, omission or lapse ultimately the poor litigant has to pay heavily. It is not the case of the respondents that the complainant petitioner has not engaged an advocate in the case. He had engaged the advocate to avoid any adverse order in the complaint for his absence and to defend his case. It is unfortunate that the advocate did not remain present and for this act he has paid heavily. By keeping himself absent in the proceedings the complainant is not benefited. The trial Court as well as the Revisional Court has not considered this aspect of the matter. They proceeded with totally a technical approach despite the fact that in series of decisions this Court this their approach is not appreciated. Even for the time being it is accepted that the complainant was not present, how far it is justified on the part of the trial Court to dismiss the complaint where he engaged an advocate to represent him. It is the case where trial Court has punished the petitioner for the inaction or omission of the advocate. The learned Court below should not have given any premium to the accused for his benefit on the ground of the absence of the advocate. In the facts of this case the orders passed by both the Courts below cannot be allowed

to stand. A time comes where the trial Court as well as the Sessions Court are to look into the matter with justice oriented approach. It is to be stated that this is not a matter pertaining to poor or down-trodden peoples, but it relates to the peoples of business class who has, though issued cheques but avoided to make payments by honouring the cheques presented for encashment."

Further, in the aforesaid decision at page 3737, it is laid down as follows:

"... The Courts below should have made all endeavour to see that as far as possible the matters are decided on merits. It is also expected of the Courts below to read the law laid down by this Court and to decide the matters accordingly. Here in this case both the Courts have not considered the matter in the light of the decisions given by this Court interpreting and giving out the guidelines for them how to deal with the matters when the complainant is not present in the proceeding. The orders of the Courts below are not legally sustainable."

13. In view of the foregoing detailed discussions and considering the attendant facts and circumstances of the present case in a conspectus fashion, this Court comes to a resultant conclusion that the impugned order dated 01.08.2016 in dismissing the complaint for non

appearance of Complainant when the NBW was pending against the Respondent/Accused for more than three years etc., is not a fair, valid and justifiable one, in the eye of Law. Viewed in that perspective, this Court interferes with the impugned order dated 01.08.2016 in S.T.C.No.314 of 2014 passed by the Learned Judicial Magistrate, Kotagiri and sets aside the same. Consequently, the Criminal Appeal succeeds.

14.In fine, the Criminal Appeal is allowed. Resultantly, the order passed by the trial Court in S.T.C.No.314 of 2010 dated 01.08.2016 is set aside by this Court for the reasons assigned in this Appeal. The trial Court is directed to restore the Complaint in S.T.C.No.314 of 2010 on its file within a period of two weeks from the date of receipt of copy of this Judgment. After restoring the main case in S.T.C.No.314 of 2010 to its file, the trial Court shall make a necessary endeavour to take necessary steps in securing the presence of the Respondent/Accused and after securing the presence of the Respondent/Accused, the trial Court is directed to proceed with the main case in the manner known to Law and in accordance with Law and in any event to dispose of the same within a period of six months thereafter and to report

compliance to this Court. Liberty is granted to the Appellant/Complainant to take fresh steps before the trial Court in regard to the execution of NBW and in this regard, the trial Court shall permit him in the interest of Justice. If necessary 'Batta' is required to be paid, then, the Appellant/Complainant shall pay the same diligently with got speed without procrastinating the matter any further.

Index : Yes / No

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(2/2)

Internet : Yes / No
Sgl

To

1.The Judicial Magistrate,
Kotagiri.

2.The Registrar (Judicial)
High Court, Madras.

[For favour of information
and follow up action]

3.The Second Officer,
Record Section,
High Court, Madras.

M.VENUGOPAL,J.

sgl

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