

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 07.11.2016
Pronounced on : 29.08.2018

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Criminal Appeal No.772 of 2011

M/s. National Handloom Development

Corporation rep by its
Deputy Manager Laxmipathy,
Plot No.6, TNUDP Colony,
Gandhi Mahanagar,
Peelamedu Post,
Coimbatore District ...Appellant/Complainant

Versus

D. Jayapal
Proprietor,
D.J. Merecerising,
202, Siruvani Main Road,
Perur Post, Coimbatore. ...Respondent/Accused

Criminal Appeal filed under Section 378(4) of Criminal Procedure Code, to set aside the order of acquittal dated 01.02.2010 made in C.C.No.402 of 2006 on the file of the Judicial Magistrate No.II, Coimbatore by allowing this Criminal Appeal.

For Appellant : Mr.N.Manokaran
For respondent : No Appearance

J U D G M E N T

This Criminal Appeal has been preferred against the order dated 01.02.2010, passed by the learned Judicial Magistrate No.II, Coimbatore, in C.C.No.402 of 2006.

2.The brief facts of the case are as follows:

The appellant M/s.National Handloom Development Corporation is registered under the Companies Act 1956 represented by its Deputy Manager. The appellant Corporation is doing business of selling dyes and chemicals required for clothing materials. The respondent had purchased the dyes and chemicals from the appellant Corporation and thereby issued a post-dated cheque for an amount of Rs.1,24,462/- bearing cheque No.052153 dated 30.03.2005 drawn at Bank of India, Porur Branch and instructed the respondent to present the cheque on 31.05.2005. When the respondent presented the cheque for clearance at Indian Overseas Bank, Ramnagar Branch, Coimbatore on 31.05.2005, the cheque was returned with an

endorsement "Funds insufficient" through a memo dated 31.05.2005. Hence, the appellant sent a notice to the respondent on 17.06.2005 informing him about the dishonour of the cheque calling upon the respondent to pay the cheque amount within fifteen days from the date of receipt of the notice. Even after receiving the said notice on 20.09.2005, the respondent neither made any payment nor sent any reply. Therefore, the appellant preferred a complaint before the Judicial Magistrate, Coimbatore in C.C.No.402 of 2006 under Section 138 Negotiable Instruments Act. The case was taken up on file and notice was sent to the respondent and the respondent appeared before the Judicial Magistrate through a counsel.

3.Before the trial Court, prosecution examined Thiru.Lakshmipathi, Deputy Manager as P.W.1 and marked Exs.P1 to P5, the authentication letter given by the Managing Director of the appellant company was marked as Ex.P.1, Cheque dated 30.03.2005 bearing No.052153 issued by the respondent in favour of the appellant was marked as Ex.P.2, a memo intimating the dis-honour of the cheque by the bank was marked as Ex.P.3, the advocate notice issued on behalf of the appellant to the respondent was marked as Ex.P.4 and the acknowledgment card signed by the respondent was marked as Ex.P.5.

4.When the above incriminating materials were put before the respondent/accused under section 313 Cr.P.C, he denied the same and did not examine any witnesses or marked any documents. Therefore, the evidence of defence side was closed and the matter was posted for judgment on 20.01.2010. In the meantime, the respondent filed an application to reopen the case and to examine the defence side evidence. The matter was adjourned to 27.01.2010 and on that day, neither the appellant nor his counsel appeared before the Trial Court. Hence, the case was dismissed for default and the respondent was acquitted. Aggrieved against the order passed by the Judicial Magistrate-II, Coimbatore, the appellant is before this Court with this Criminal Appeal.

5.Heard Mr.N.Manokaran, learned counsel for the appellant and perused the materials placed before this court. None appeared on behalf of the respondent.

6.The learned counsel for the appellant would submit that when the appellant's side evidence was completed, the matter was posted for defence side evidence. Since, the respondent did not produce any evidence, the defence side evidence was also closed and the matter was posted for judgment on 20.01.2010. When the matter was posted for judgment on 20.01.2010, the respondent filed an application to re-open the evidence and that was not intimated to the appellant. When enquired about the same, the Registry intimated that the bundle was misplaced and therefore, they have not posted the

matter for some time and all of a sudden posted the matter on 27.01.2010. Since the appellant does not know about the re-open petition, he did not appear before the Trial Court and therefore, the learned Magistrate dismissed the case for default and acquitted the respondent.

7.The learned counsel for the appellant submitted that the presence of the appellant either on 20.01.2010 or 27.01.2010 is not necessary, because the case was posted on 20.01.2010 for judgment. Since the respondent filed an application to re-open the case and also for examining the defendant's side witness, the case was adjourned to 27.01.2010. So, either on 20.01.2010 or 27.01.2010, the presence of the appellant is not necessary. The learned Judicial Magistrate No.II, Coimbatore, failed to consider the presence of the appellant on the above said dates. Therefore, the Magistrate ought to have pronounced the judgment on merits or allowed to re-open the application by giving an opportunity to the respondent to examine the defence side witnesses. Even otherwise, at the worst they should have sent a notice to the appellant before dismissing the complaint. But, the learned Judicial Magistrate-II, Coimbatore failed to follow the provisions of law and also settled propositions of law laid down by the Hon'ble Apex Court. Therefore, the order passed by the learned Judicial Magistrate-II, Coimbatore warrants interference and prays to set aside the order dated 01.02.2010 and allow this appeal.

8.In support of his contention, the learned counsel for the appellant relied upon a judgment of the Hon'ble Supreme Court in the case of Associated Cement Co. Ltd., Vs. Keshvanand reported in 1998 (1) SCC 687 and based on the judgment, before dismissing the complaint, the learned Judicial Magistrate No.II, Coimbatore ought to have issued a notice to the appellant. But, in the present case, the Trial Court has not sent any notice to the appellant. Therefore, the order passed by the learned Judicial Magistrate is liable to be set aside and the appeal is to be allowed.

9.I have carefully considered the submissions made by the learned counsel for the appellant and perused the materials available on record.

10.The case of the appellant is that, the respondent has purchased dyes and chemicals for his business purposes from the appellant Corporation and had issued a cheque dated 30.03.2005 bearing No.052153 for Rs.1,24,462/-. When the appellant presented the cheque for collection, it was returned as "insufficient funds". The appellant sent a notice to the respondent through an advocate informing about the dishonour of cheque and directed to pay the amount. Despite receipt of notice, the respondent neither paid the amount nor replied to the notice. Hence, the appellant preferred a complaint before the Judicial Magistrate-II, Coimbatore, under Section 138 of

the Negotiable Instruments Act. The case was taken on file in C.C.No.402 of 2006 and summons were issued to the respondent. The prosecution examined one witness and marked five documents and the evidence of the appellant was closed. The respondent neither produced any witnesses nor marked any documents. Hence, the case was posted for judgment on 20.01.2010. Therefore, the respondent filed an application to re-open the case and also to examine the defence side evidence. After receiving the application, the matter was adjourned to 27.01.2010. On that day, the appellant did not present before the Court. Hence, the case was dismissed for default.

11.The main contention of the appellant is that after closing the defence side evidence, the matter was not posted for sometime. When enquired in the Registry, it was informed that the bundle was misplaced and hence it could not be posted. But, it was suddenly posted on 27.01.2010 and dismissed for default on the ground that the appellant was absent on that day and acquitted the respondent under Section 256 of Cr.P.C.

12.Admittedly, on behalf of the appellant, the Deputy Manager appeared before the Magistrate and marked necessary documents and the appellant's side evidence was closed on 18.08.2007 and posted for defence side evidence. Since, no witness was examined or documents marked on behalf of the respondents, defence side evidence was also closed and adjourned to 20.01.2010 for judgment. Section 256 Cr.P.C deals with the procedure to be followed when the appellant was absent during the hearing dates, which reads as follows:

13.Section 256 of the Code reads as under:

"256.Non-appearance or death of complainant-

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, not withstanding anything herein before contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2)The provisions of sub-section(1)shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."

14. In this regard, it is relevant to refer to the decision of the Honourable Apex Court in the case of Associated Cement Co. Ltd. Vs. Keshvanand reported in 1998 (1) Supreme Court Cases 687. The relevant portion of the order is extracted hereunder:

"17. Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the section. The first is, if the court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. The second is when the Magistrate considers that personal attendance of the complainant is not necessary on that day, the Magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But, if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice."

15. Further, in the case of S. Anand Vs. Vasumathi Chandrasekar reported in 2008 (4) Supreme Court cases 67, the Apex Court has held as follows:

"12. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined."

13. The date was fixed for examining the defence witnesses. The appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence."

16. In this case also, after completing the appellant side evidence, evidence under section 313 Cr.P.C., was completed. After completion of 313 Cr.PC proceedings, the

matter was posted for defence side evidence. Since no witness was examined, the defence side evidence was also closed and reserved for judgment. At that stage, the presence of the appellant is not necessary, as per the provisio to Section 256 Cr.P.C the Hon'ble Apex Court also in the decision cited supra clearly held that the presence of the complainant is not necessary. Due to the non-appearance of the appellant on that day, the Judicial Magistrate should not have dismissed the complaint on the ground of non-appearance of the appellant especially under Section 256 Cr.P.C.

17. In the present case on hand, it is stated that the matter was reserved for judgment on 20.01.2010 and subsequently it was adjourned to 27.01.2010 for reopening the case. Either on 20.01.2010 or 27.01.2010, the presence of the appellant is not necessary. Even assuming that the presence of the appellant is necessary, the trial Court ought to have issued a notice to the appellant before dismissing the complaint. But, after completion of evidence of the appellant, the learned Magistrate should not have dismissed the complaint for default under Section 256 Cr.P.C. In my considered opinion, the trial Court should have issued a notice to the appellant before dismissing the complaint or atleast passed the judgment on merits. Therefore, the dismissal of the complaint by the Judicial Magistrate-II, Coimbatore on 02.01.2010 for non-appearance of the appellant is not legally sustainable. Therefore, the order of the trial Court warrants serious interference and is liable to be set aside.

18. In view of the discussions held above, the judgment dated 02.01.2010 passed by the learned Judicial Magistrate-II, Coimbatore is set aside. Since, the learned Judicial Magistrate has not dismissed the complaint on merits and acquitted the respondent/accused. Hence, the matter is remitted back to the learned Judicial Magistrate-II, Coimbatore and the learned Judicial Magistrate is directed to dispose of the complaint on merits and in accordance with law after giving due opportunity to both the parties.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

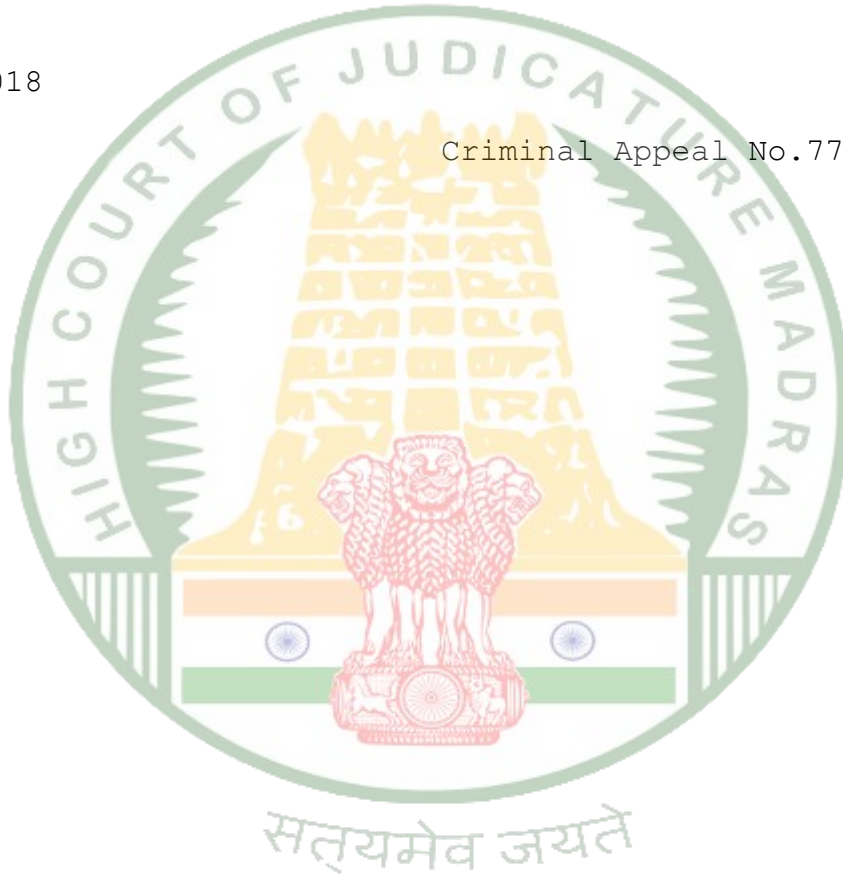
1. The Judicial Magistrate No.II,
Coimbatore.

2. The Public Prosecutor,
High Court, Madras.

+lcc to Mr.N.Manokaran, Advocate SR.NO.59481

VGII(CO)
sm:19.9.2018

Criminal Appeal No.772 of 2011



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