

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE

CRIMINAL APPEAL NO.1359 OF 2002

Ketan Vinay Shah)
Mumbai Indian Inhabitant, Aged-32 years, carrying on)
business under Proprietary firm named KAUSTUBH)
CONSTRUCTION, having its office address at 10-A,)
Snanti Nagar, Near Milap Talkies, S.V.Road, Malad (W))
Mumbai-400 064)....Appellant
(Org.Complainant)

V/s.

1) The State of Maharashtra)

2) Rajan B.Mehta)
Prop. VINA CORPORATION, Shop No.2, Sheetal)
Palace, Kulupwadi, Borivli (East) Mumbai-400 066)...Respondents

None for appellant.
None for respondent no.2.
Ms.Pallavi Dabholkar APP for Respondent No.1-State.

CORAM : K.R.SHRIRAM,J
DATE : 3.12.2019

ORAL JUDGMENT:-

1. This appeal is filed under Section 378 (4) of the Code of Criminal Procedure 1973 impugning an order of acquittal passed on 12.6.2002 passed by the Additional Chief Metropolitan Magistrate, 24th Court, Borivali, Mumbai and the same reads as under :-

*“Case is called twice on 11.30 a.m. and 3.30 p.m.
Complainant absent. Advocate absent. Accused absent.
Advocate absent. For non-appearance of complainant
and for want of prosecution case is dismissed U/Sec.256
of Cr.P.C. Accused is acquitted.”*

2. With the assistance of learned APP Ms.Dabholkar I have perused the appeal papers. Admittedly in this case, process, i.e., summons, has been issued and even plea has been recorded.

3 Section 256 of the Code of Criminal Procedure, 1973 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, notwithstanding anything hereinbefore 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.

4 The ingredients of Section 256 (1) are (i) summons must have been issued on a complaint, (ii) the Magistrate should be of the opinion that for some reasons, it is proper to adjourn the hearing of the case to some other date, and (iii) the date on which the order

under Section 256(1) can be passed is the day appointed for appearance of the accused or any day subsequent thereto, to which the hearing of the case has been adjourned. Section 256(1) mandates the Magistrate to acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case. If an exceptional course is to be adopted, it must be spelt out. The discretion conferred upon the Magistrate, however, must be exercised with great care and caution. The conduct of the complainant for the said purpose is of immense significance. He cannot allow a case to remain pending for an indefinite period. There exists a distinction between a civil case and a criminal case. Speedy trial is a fundamental right of an accused. The orders passed by the competent Court of law as also the provisions of the Code of Criminal Procedure must be construed having regard to the constitutional scheme and the legal principles in mind.

5. On 12.6.2002 it was the first day of hearing after issuance of process against accused. The learned Magistrate dismissed the complaint for non prosecution under Section 256 of the Criminal Procedure Code and also acquitted accused. This was because complainant and Advocate both were absent. According to appellant he was sick and advocate appearing for him Mr.C.K.Chitalia was out of India. According to appellant, he attended the trial Court on

4.7.2002 to check the next date of hearing when he came to know that case was dismissed for non appearance of complainant and his Advocate on 12.6.2002. Appellant however, does not explain as to why he went on 4.7.2002 and why not earlier. He does not even produce any documents to show that he was in fact sick on 12.6.2002 and he could not go to Court before 4.7.2002. On 4.7.2002 appellant filed an application for restoration of the complaint which came to be dismissed by an order dated 6.9.2002 on the ground that there was no provision in law by which the Magistrate could have restored the application.

6. Section 256 of the Code of Criminal Procedure 1973 mandates that if complainant does not remain present on the appointed date after summons have been issued on complaint and unless attendance of complainant has been dispensed with, the Magistrate can acquit accused. If the Magistrate feels that order of acquittal should not be passed on that date, the Magistrate has to give reasons.

7. In this case the Magistrate has acquitted accused as provided under Section 256 of the Code of Criminal Procedure 1973 because he did not find any reason to adjourn the hearing of the case

to some other day. There was no application for exemption also filed on behalf of complainant. The Magistrate in terms of sub-section 1 of section 256 exercises wide jurisdiction. An order of acquittal is of immense significance. I am not finding fault for a moment, with the discretion exercised by the Magistrate but the case has been dismissed on the very first day of hearing after issuance of process against accused. The case was of course, called out twice at 11.30 a.m. and 3.30 p.m. at which time both, complainant and his advocate were absent. Even if I decide to interfere because the Magistrate could have given one more opportunity, still I am not inclined to interfere because it would serve no purpose. Even before this Court, appellant has been absent. On 1.8.2019 appellant was absent and the matter was stood over on 29.8.2019. On 3.9.2019 as appellant was absent, matter was stood over to 4.9.2019. On 4.9.2019 as none appeared for appellant the matter was kept back and called out second time. Again none appeared for appellant and hence matter was stood over to 3.10.2019. It appears the matter did not get listed on 3.10.2019 but on 14.10.2019 an order came to be passed which reads as under :-

*“None for the appellant.
Stand over to 18th November, 2019 under the caption
“Dismissal”*

8. Today again nobody is present for appellant. We must keep in mind that an offence punishable under Section 138 of Negotiable Instruments Act 1881 is compoundable. It is an offence not related to the society at large but only against a particular person i.e., complainant to whom certain sum is due under the cheque. This criminal appeal is not the one where appeal can be preferred as a matter of right or provided under the Code, but preferred under section 378(4) of the Criminal Procedure Code, 1973. The complainant-appellant is not the State, moreover, the order impugned is quasi-civil in nature. At the inception of the proceeding, the complainant-appellant approached this Court with an application to grant special leave to prefer this criminal appeal and only upon granting that this appeal came on the records of this court. Since, the complainant-appellant is not showing any interest in this proceeding and remaining absent for hearings, this Court has no option left but to revoke the leave granted to appellant. Leave granted stands revoked.

9. In view of the revocation of the leave, this appeal cannot survive. Hence dismissed.

(K.R.SHRIRAM,J)