

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 15.03.2019
CORAM:
THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA
Crl.A.No.29 of 2009

V.Veeragaghavan

... Appellant/complainant

/Vs/

N.Vijayakumar

... Respondent/accused

PRAYER: Criminal Appeal filed under section 378 of the Criminal Procedure Code, to allow this Criminal Appeal and set aside the order dated 02.07.2007 dismissing the complaint in C.C.No.331 of 2003 on the file of the learned Judicial Magistrate No.I, Tiruppur, and restore the same to file for being proceeded on merits with the trial and disposal of the same in accordance with law in a time bound manner.

For Appellant : Mr.J.Franklin

For Respondent : Mr.R.Babu, Legal Aid Counsel
for Mr.M.Muthusamy

* * * * *

J U D G M E N T

This criminal appeal has been filed by the appellant/complainant against the order dated 02.07.2007 in C.C.No.331 of 2003 dismissing the complaint filed under Section 138 of the Negotiable Instrument Act for non appearance of the complainant.

2. The learned counsel for the appellant/complainant would submit that the appellant/complainant had filed the complaint against the respondent/accused for offence under Section 138 of the Negotiable Instrument Act. He would submit that on 02.07.2007, the appellant was absent and there was no representation for him. Non Bailable Warrant was pending against the accused and the Trial Judge recording the absence of the appellant and recording that the process fee was not paid to obtain warrant dismissed the complaint under Section 256 (1) of Cr.P.C. He would further submit that the learned Magistrate was not justified in acquitting the accused under Section 256 (1) of Cr.P.C., on the absence of the complainant. He would submit that

discretion to acquit the accused or proceed with the trial must be exercised judicially and fairly.

3. The learned counsel for the appellant/complainant would submit that for exercising powers under Section 256 (1) of Cr.P.C two constraints are imposed on the Court. First is that, if the Court thinks that in a situation it is proper to adjourn the hearing, then the Magistrate shall not acquit the accused. 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. Further, when the Court notices that the complainant is absent on a particular day, the Court should also 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 date was quite unnecessary, then resorting to the step of axing down the complaint may not be proper exercise of power envisaged in the Section. He would further submit that the discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice.

4. He would further submit that the reading of the order would show that the learned Magistrate has not exercised his discretion judicially and fairly and that no observation has been made by the learned Magistrate whether the presence of the appellant/complainant was very much essential for the progress of the case and that whether the appellant/complainant had wilfully and deliberately avoided coming to the Court and moreover the accused was also absent and Non Bailable Warrant was pending against him.

5. He would rely on the judgement of the Hon'ble Apex Court in Associated Cement Co.Ltd Vs. Keshvanand reported in 1998 (1) SCC 687.

6. He would also submit that it is not the case were the accused had appeared and that despite the presence of the accused, the appellant/complainant was absent and would submit that on the date Non Bailable Warrant of arrest was pending against the accused from the year 2005. In such circumstances, the learned Trial Judge ought not to have dismissed the complaint. He would further submit that there is no observation with regard to reasonable time having been given to the appellant/complainant for taking process and that he had deliberately failed to pay the process fee.

7.The learned counsel appearing on behalf of the respondent/accused would submit that the learned Trial Judge finding that there was no representation for the complainant for several hearing and finding that no process was taken had rightly dismissed the complaint.

8.The order of the learned Trial Judge is extracted hereunder for reference:-

ORDER

"Complainant absent. No representation for the complainant. NBW pending from 29.08.2005. Steps not taken to execute the warrant. The complainant has not appeared before the Court on 07.12.2005 and notice was issued to him. Thereafter the complainant appeared before the Court and again the complainant has remained absent. Process fee also not paid to obtain the warrant. Considering these facts, the Court holds that the failure of the complainant to appear before this Court is material.

As such the Court holds that the absence of the complainant cannot be condoned.

In the result this Court is dismissed u/S 256 (1) of Cr.P.C."

9.In the case of Associated Cement Co.Ltd Vs.Keshvanand reported in 1998 (1) SCC 687 the Hon'ble Apex Court has held as follows:-

"16.What was the purpose of including a provision like Section 247 in the old code (or section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The Section, therefore, affords a protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, court has a duty to acquit the accused in invitum.

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."

10. While analysing the impugned Judgement in view of the above decision, nothing has been stated in the order whether the personal attendance of the complainant was essential on that day for progress of the case and also that the situation did not justify the case being adjourned to another date due to any other reason. Further, no observation has been made that absence of the appellant/complainant was wilful and deliberate on that day. Admittedly, the respondent/accused was absent and Non Bailable Warrant was pending against him. There is also no observation in the order with regard to the time granted to the appellant/complainant for paying process fee and the failure of the appellant/complainant to pay the process fee.

11. Taking into consideration the facts of the case, the submissions made by the learned counsel on both sides and also the Judgements referred above, this Court is of the opinion, that the trial Judge had not judicially exercised his discretion to pass an order of acquittal under Section 256 (1) of Cr.P.C., and thereby, the order passed by the learned Magistrate, dated 02.07.2007 in C.C.No.331 of 2003 is set aside and the Criminal Appeal is allowed. The Trial Court shall take the complaint on file as it was on the date of dismissal and issue fresh summons to the complainant as well as the accused and dispose the case

in accordance with law within a period of four months from the 1st date of hearing.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

ssi

To

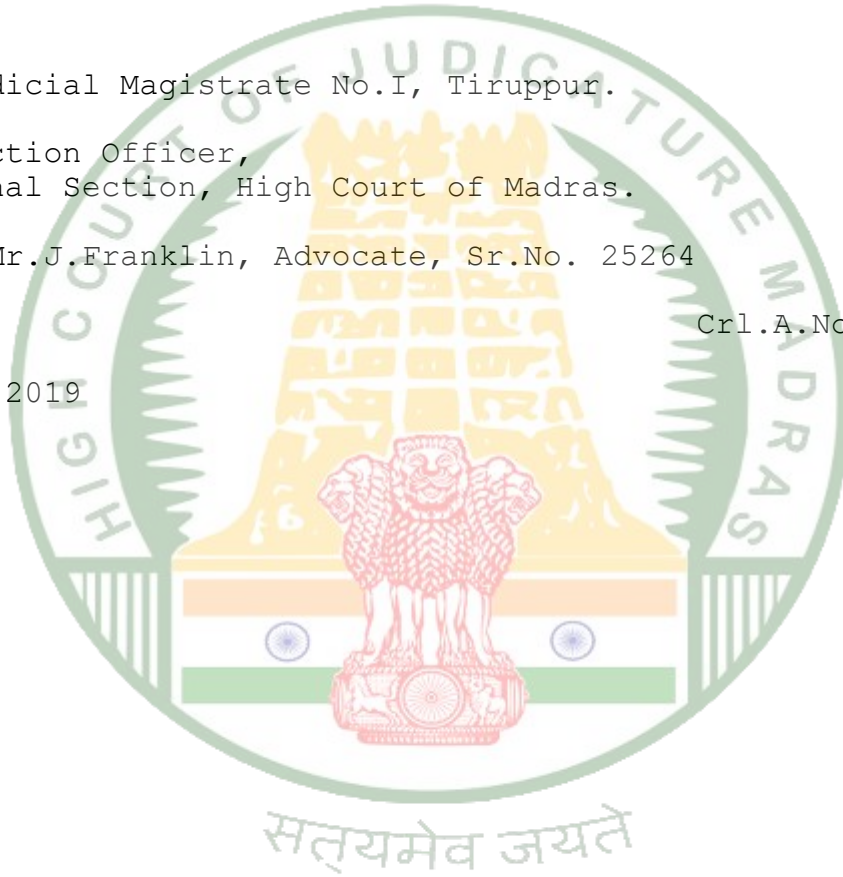
1. The Judicial Magistrate No.I, Tiruppur.

2. The Section Officer,
Criminal Section, High Court of Madras.

+1 cc to Mr.J.Franklin, Advocate, Sr.No. 25264

Crl.A.No.29 of 2009

SR(CO)
CSL/02.05.2019



WEB COPY