

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.02.2019

CORAM

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Criminal Appeal No.798 of 2009

P.Murugasamy

... Appellant/Complainant

Vs.

D.Senthil Kumar

... Respondent/Accused

PRAYER: Criminal Appeal filed under Section 378(4) of Cr.P.C., to set aside the order passed in C.C.No.232 of 2008 on the file of the learned Judicial Magistrate No.III, Coimbatore, dated 15.09.2009.

For Appellant : Mr.S.Gunalan

For Respondent : Mr.B.Gopalakrishnan
Legal Aid Counsel

JUDGMENT

The appeal has been preferred against the order passed by the Judicial Magistrate No.III, Coimbatore, dated 15.09.2009 in C.C.No.232 of 2008, in dismissing the complaint and acquittal, under Section 256 (1) of Cr.P.C.

2. The learned counsel appearing for the appellant would submit that though discretion has granted under Section 256 of Cr.P.C, to acquit the accused, the discretion has to be exercised with judicial restraint and to advance the cause of justice. He has further submit that though the impugned order states that notice has been issued to the appellant, it does not speak whether notice has been served on the appellant or not. He would further submit that there is no observation in the order that the presence of the appellant before the Court on the particular day was very much essential for the progress of the case. He would further submit that there are no particulars, as to how many hearings the accused was waiting and no materials were shown that the absence of the appellant was deliberate and willful before the Court.

3. The learned counsel for the appellant would further submit that exercise of discretion should be tempered by judicial conscience, reasonableness and must be with a touch of desire to alleviate the sufferings of those who knock at the doors of the Court. He would rely on the judgement of this Court in Kumaresan Vs. Girirajan, reported in 1999(1) CTC 371 and also unreported judgement of the High Court of Delhi in CrI.M.C.No.1280 of 2014, dated 01.12.2014, M/s.J.S.Engineering Works Vs. The State and Others, wherein the Hon'ble Court had allowed the appeal on the ground that there is no observation that the Court notice issued to the complainant was served or not.

4. The learned counsel appearing for the respondent would submit that the Trial Judge had exercised the discretion in a careful manner and he would further submit that even as per the order, it is seen that the complainant has not appeared before the Court below on several hearings and thereby, the trial Judge has dismissed the complaint.

5. In Kumaresan Vs. Girirajan, reported in 1999(1) CTC 371, this Court has held as follows :

"Hence, I have already pointed out that there is no indication in the order that summon has been issued to the accused on the complaint. Nor the order discloses that the date 23.11.1990 was fixed for appearance of the accused or for trial. In such circumstances, the exercise of the jurisdiction under Section 256 Code of Criminal Procedure is capricious and unjustifiably arbitrary. It is not as if the code compels the Magistrate concerned to dismiss the complaint and acquit the accused. The discretion to adjourn the hearing of the case to some other day is also there. Thus, the disposal in this case by the Magistrate would reveal his desire to tick off the case from his file. Such statistics oriented disposal will not augur well for the administration of justice. The parties have come to Court for redressal of their grievance and in exercise of certain rights. Therefore, it is just and proper that a reasonable opportunity should be given to the parties who knock at the doors of the Court. Earnest and sincere effort must be made to do justice by administering the law and to advance the cause of justice. But what we find in this case is an abandonment of judicial responsibility and a disregard of the obligations imposed by the law of reasonableness upon a Judicial Officer. There is nothing to show that

the absence of the petitioner was deliberate and wilful. If it was a case which had been pending for number of years, the discretion exercised by the Magistrate can well be understood. But, that is not the case here. In a hurry, the Magistrate has acted. The order is not supported by rhyme or reason. It is but a sacrifice of Justice at the altar of frenzied disposal. It is an order made to reach an end which is disposal. There has been no attempt to do real justice. If such disposals are resorted to the confidence the public have in the system will be greatly eroded. There is certain accountability to the society. Therefore, any exercise of discretion should be tempered by judicial conscience, reasonableness and must be with a touch of desire to alleviate the sufferings of those who knock at the doors of the Court. The order passed by the Magistrate, does not fall within any of the accepted notions. Therefore, I have no hesitation to set aside the order, which eminently deserves the said fate.

3. In the result, this appeal is allowed. The order passed by the Judicial Magistrate No.1, Kancheepuram dismissing the complaint and acquitting the accused is hereby set aside. The Judicial Magistrate No.1 Kancheepuram is hereby directed to take the case on his file and dispose of the case in accordance with law."

6. In the unreported decision of the Hon'ble Delhi High Court in CrI.M.C.No.1280 of 2014 dated 01.12.2014, M/s.J.S.Engineering Works Vs. The State and Others, wherein at paragraph Nos.18 to 20, it has been observed as follows :

"18. In the instant case, the complaint was filed in the year 2011, after recording pre-summoning evidence and respondent Nos.2 and 3 were summoned. The respondent Nos.2 and 3 failed to appear on 07.10.2011 on which bailable warrants were issued against them. Thereafter, respondent Nos.2 and 3 appeared on 24.03.2012. Notice under Section 251 of Cr.P.C. was served on respondent Nos.2 and 3 on 03.04.2013. An application under Section 145(2) of NI Act was filed and the case was adjourned to 03.08.2013 for reply and arguments on the said application. On 03.08.2013 the complaint was transferred and the transferee court adjourned the complaint to 28.09.2013. The petitioner/ complainant did not appear on 28.09.2013 and Court notice was issued to

complainant for 07.12.2013. Again the complainant was absent on 07.12.2013 and the complaint was dismissed for non- appearance of the complainant and non-prosecution of the matter. It is not clear whether the Court notice issued to the complainant on 28.09.2013 was served or not.

19. Taking into account the aforesaid facts and circumstances of the case, this Court is of the opinion that it is a fit case whether the Court should exercise its discretion under Section 482 of Cr.P.C. instead of relegating the petitioner to avail his alternative remedy of filing an application for special leave to appeal.

20. In view of the aforesaid observations the petition is allowed. Consequently, the order dated 07.12.2013 passed by learned Metropolitan Magistrate (North West), Rohini, Delhi is set aside and the complaint is restored to its original number and stage."

7. I have gone through the impugned order dated 15.09.2009, which is extracted here under :

" Accused present. Complainant absent. Notice issued. The complainant called Morning 10.40 a.m. No representation. Called absent again 12.45 p.m. the complainant called absent. The accused waiting more hearing finally the case and complainant called 1.00 p.m no representation called absent. On perusal of records, the case was closed dismissed u/s.256(1) Cr.P.C. The accused acquitted."

8.It is stated that notice has been issued, whereas there is nothing on record to show that notice has been served on the complainant. Further, there is no observation in the order that the presence of the complainant on the particular day is very much essential for the progress of the trial.

9. In view of the above the Criminal Appeal is allowed, the order passed by the trial Court in C.C.No.232 of 2008, dated 15.09.2009 is set aside. The prosecution would now proceed from the stage where it reached from the order of acquittal was passed. Registry is directed to send back the records to the Trial Court. The Trial Judge shall issue summons afresh to the accused and take steps to dispose of the complaint as expeditiously as possible, preferably within a period of six months, from the date of receipt of summons by the accused. The appellant is directed to pay the cost of Rs.3,000/- (Rupees

Special Magistrate No.III,
Tiruchore.

Through The Chief Judicial Magistrate,
Tiruchore.

Section Officer,
Legal Section, High Court, Madras.

Secretary,
Legal Services Authority,
Tiruchore District.

Mr.S.Gunalan, Advocate Sr.No.12976

Criminal Appeal No.

2019

सत्यमेव जयते

Assistant Registrar (CS III)

Sub Assistant Registrar

To

- Copy To:

- +1 cc to Mr.S.Gunalan, Advocate Sr.No.12976

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VGII (CO)
CSL/27.03.2019

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