

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.02.2019

CORAM:

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.A.No.163 of 2010

Lokesan ... Appellant / Complainant

/Vs/

Ramachandran ... Respondent / Respondent

PRAYER: Criminal Appeal filed under section 378 of the Criminal Procedure Code, to allow this appeal and set aside the order passed in C.C.No.141 of 2006 on the file of the learned Judicial Magistrate II, Virudhachalam dated 04.04.2008.

For Appellant : Mr.Sebastian for
Mr.C.K.M.Appaji

For Respondent : Mr.S.Haroon-Al-Rashad
Legal Aid Counsel
* * * * *

J U D G M E N T

This criminal appeal has been filed by the appellant/complainant against the order dated 04.04.2004 in C.C.No.141 of 2006 dismissing the complaint filed under Section 138 of Negotiable Instrument Act for non appearance of the complainant.

2. Though notice has been served on the respondent and proof has also been filed and the name of the respondent is also printed in the cause list, there is no representation for the respondent/accused. Hence, this Court appointed Mr.S.Haroon-Al-Rashad, legal aid counsel to appear on behalf of the respondent/accused.

3. 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 further submit that originally, the complaint was filed on 06.03.2006 and sworn statement was recorded by the Court on 28.04.2006. Thereafter,

the complaint was taken on file and process was issued for the appearance of the accused and notice was ordered for appearance of the accused on 15.05.2006 and it was posted on the next day i.e., on 16.05.2006. The accused was questioned on the day and the accused pleaded not guilty and the matter was posted for trial on 02.06.2006. Thereafter, this matter is pending before this Court. While so, by order dated 04.04.2008 the learned Judge calling the complainant absent and finding that no representation for the complainant and that process also not filed, dismissed the complaint due to non appearance of the complainant and acquitted the accused under Section 256 of Cr.P.C.

4. The learned counsel for the appellant/complainant would submit that for exercising powers under Section 256 Cr.P.C two constraints are imposed on the Court 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. 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. 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. 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.

5. Mr.S.Haroon-Al-Rashad, legal aid counsel appearing on behalf of the respondent/accused would submit that the learned Trial Judge finding that there was no representation for the complaint had dismissed. He would further submit that there is no observation with regard to the essentially of the complainant appearing before the Court on the particular day.

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

ORDER

"Complainant called absent till 3.45 p.m. No representation for the complainant. Process also not filed. Hence, this case is dismissed due to non-appearance of the complainant and the accused is acquitted under Section 256 of Cr.P.C."

7. 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."

8. While analysing the impugned judgement in view of the above decisions, 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 adjoined 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.

9. Taking into consideration the facts of the case, the submissions made by the learned counsel on both sides and also the judgements referred above, the order passed by the learned Magistrate dated 04.04.2004 in C.C.No.141 of 2006 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(CS-IV)

//True Copy//

Sub Assistant Registrar

kv

To

1. The Judicial Magistrate II, Virudhachalam.
2. The Section Officer,
Criminal Section, High Court of Madras.

Cr1.A.No.163 of 2010

SR(CO)
SSM(20/03/2019) .