IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 1034 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE V.P. PATEL

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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RAJENDARKUMAR SHRIRAM DITTAMAL CHUGH
Versus
PRAVIN CHIMANLAL DHINGADA & 2 other(s)

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Appearance:
MR HARDIK A DAVE(3764) for the Appellant(s) No. 1
MR KUNAL S SHAH(5282) for the Opponent(s)/Respondent(s) No. 1,2
RULE NOT RECD BACK(63) for the Opponent(s)/Respondent(s) No. 3

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CORAM: **HONOURABLE MR.JUSTICE V.P. PATEL**

Date : 16/01/2020

ORAL JUDGMENT

1. The appellant has filed this appeal under Section 372 proviso and 378(1) read with Section 378(4) of the Code of Criminal Procedure, 1973 (hereinafter referred as “the Code”), being

aggrieved and dissatisfied with the order dated 05.12.2017 passed by the learned 9th Additional Civil Judge and Judicial Magistrate, First Class, Surat (hereinafter referred as "the learned Trial Court") in Criminal Case No. 102058 of 2003 (Old Case No. 653/2003).

2. Heard learned Advocate Mr.Hardik A. Dave for the appellant, learned APP Ms. Jirga Jhaveri for respondent No.3 -State and learned Advocate Mr. Kunal Shah, for the respondent Nos. 1 and 2.

Order under Challenge:

3. Learned 9th Additional Civil Judge and Judicial Magistrate, First Class, Surat passed an order dated 05.12.2017, dismissing the private complaint being Criminal Case No, 102058 of 2003 filed by the present appellant against the respondent No. 1 and 2 for the offences punishable under Section 323, 504, 506(1) and 114 of the Indian Penal Code (For brevity "IPC") for default for non-prosecution under Section 256 of the Code as the appellant stopped to remain present for proceeding with the criminal case.

Arguments of the Appellant:

4. The learned Advocate for the appellant has submitted that the Private Complaint was filed in the year 2003 and given Criminal Case No. 653 of 2003 (old). That, the appellant has engaged an advocate for conducting the matter before the learned Trial Court. That, the appellant was used to remain present on each and every date the matter used to be on board. The learned advocate further submitted that the respondent Nos. 1 and 2 used to give an application for the transfer of case and that the appellant was not aware that said Private Complaint was given new Case number i.e.

Criminal Case No.102058 of 2003. The appellant used to search about the matter through old case and appellant was not aware about the new case number and thus the appellant was not able to remain present for proceeding further with the said criminal case. The learned advocate for the appellant has further submitted that upon checking the old case number, nothing was found and even no summons were received by the appellant upon changing the case number, which cause the dismissal of the private complaint filed by the appellant on the ground of non-prosecution. The learned advocate for the appellant has submitted that in the above circumstances, the impugned order of dismissing the complaint for non-prosecution is illegal, erroneous and contrary to law. That, the learned Trial Court has erred in not giving any further opportunity by way of giving one adjournment and disposed of the complaint of the appellant merely on the ground that the appellant failed to remain present in the matter. The learned advocate for the appellant has further submitted that the learned Trial Court has erred by not appreciating the law laid down by this Hon'ble Court that ordinarily all efforts should be made to dispose of the case on merits by taking pragmatic view. While concluding, the learned advocate for the appellant has requested to quash and set aside the impugned order passed by the learned Trial Court and the matter may be remanded back to the learned Trial Court for hearing the matter on merits.

Arguments of the respondent Nos. 1 and 2:

5. The learned Advocate for the respondent Nos. 1 and 2 has submitted that the order passed by the learned Trial Court is legal and proper. That, the appellant has engaged an advocate for

conducting the matter and therefore, he is supposed to know the new case number, therefore the ground taken by the appellant that he is not aware of the new case number does not stand. That, the appellant - the original complainant was not remaining present in the matter and therefore the learned Trial Court has rightly dismissed the matter for non–prosecution. He therefore requested that the present Appeal may be dismissed.

Arguments of the learned APP for the State:

6. Learned APP has submitted that the present Appeal is with regard to the complaint between private parties. She therefore requested that Hon'ble Court may pass just and equitable orders in the interest of justice.

Facts of the Case:

7. Brief facts of the case are that the relative of the appellant Bhupendrabhai had lodged Criminal Case No. 68/2001 under Section 138 of the Negotiable Instruments Act against the present respondent Nos. 1 and 2 wherein summons and warrant came to be issued and sent to the Umra Police Station, Surat for service and execution. For the purpose of service and execution of summons and warrant and identify the accused, on 5/4/2003, the appellant went to the house of the accused. At that time, accused agitated and told to the appellant to go out. Therefore, appellant returned. Keeping grudge of the incident of dated 05/04/2003, on 06/04/2003, accused came to the residence of the appellant at Satynagar and threatened and used abusive language to the appellant. Therefore, on 07/04/2003 the appellant has lodged complaint at Udhna Police Station, however, no action was taken

on the said complaint. On 15/04/2003, accused came to the residence of the appellant and beaten the appellant and used abusive language. When, wife and children of the appellant came to rescue the appellant, accused also beaten them and used abusive language for them. Therefore, the appellant lodged the private complaint before the learned Trial Court which was numbered as Criminal Case No. 653/2003 (New Number Criminal Case No.102058/2003). The learned Trial Court vide order dated 05/12/2017, dismissed the said criminal case for non-prosecution as the appellant had not remained present to proceed with the matter.

Merits of the case:

8. Heard the learned advocates for the parties. The main argument of the learned Advocate for the appellant is that as the old criminal case was re-numbered and the appellant was unaware of the new number. Therefore he was searching the status of the case from old case number but he could not remain present in the matter, which resulted in dismissal of the criminal case on the ground of non-prosecution.

9. I have perused the papers of the appeal as well as the impugned order. The private complaint filed by the appellant was registered as Criminal Case. The appellant had engaged an advocate. Summons had been issued to the accused. Thereafter, on several occasions, learned advocate for the appellant had sought time for adducing evidence of prosecution side. Thereafter, neither the advocate nor the appellant remained present to proceed with the case. It is pertinent to note that the private complaint was registered

as criminal case and summons has also been issued upon the accused. Thereafter, matter could not proceed further on merit and resulted into dismissal for non-prosecution. There are ample powers to the Court to secure presence of the witnesses or accused. From bare reading of the impugned order, it appears that no efforts have been made for this purpose. Therefore, considering the principle of natural justice, this Court is of the view that an opportunity is to be given to prove the case on merits by remanding the matter to the learned Trial Court for hearing the case on merit.

10. This Court has come across the judgment of the Apex Court reported in AIR 1998 SC 596 delivered in case of Associated Cement Co. Ltd. Vs. Keshavanand, wherein scope and purpose of insertion of Section 256 in the Code is discussed, which reads as under:

"17. What was the purpose of including a provision like S. 247 in the Code (or S.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 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. <u>But that does not mean if the complainant is absent, Court has a duty to acquit the accused in invitum.</u>

18. Reading the Section in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the Section. 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. 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 steps of axing down the complainant 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."

11. The learned Trial Court has in the impugned order recorded that on several occasions learned advocate for the appellant – original complainant has sought time for adducing evidence of prosecution side, thereafter, neither the learned advocate nor the appellant remained present to proceed further with the case. As such negligence is established on the part of the appellant. Therefore, this Court is of the view that cost is required to be awarded to the respondents.

12. For the reasons recorded here-in-above, the present appeal is partly allowed. The impugned order dated 05/12/2017 passed by the 9th Additional Civil Judge and Judicial Magistrate, First Class, Surat in Criminal Case No.102058 of 2003 is hereby quashed and set aside and the matter is remanded back to the learned Trial Court for deciding the case on merits.

13. The Appellant – original complainant is directed to extend full co-operation and see to it that he remains present on the dates of the hearing before the trial court. As the case is filed in 2003, the trial Court shall proceed further and see to it that the entire case is

completed with the judgment within a period of four months from the date of receipt of this order.

14. The appellant shall pay cost of Rs.10,000/= (Rupees Ten Thousand only) to respondent No. 1 and 2. The cost is to be paid within 2 month from today. If it is not paid, the respondents may recover according to law.

15. Record and proceedings, if any received by the Registry shall be sent back to the learned Trial Court forthwith.

16. Rule is made absolute the aforesaid extent.

(V. P. PATEL,J)

J.N.W.