

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 89 of 2002

Basu Pumps & Projects Private Limited

Vs.

The State of West Bengal & Ors.

For the Appellant : Ms. Rita Dutta.

For the State : Ms. Pushpita Saha.

Heard on : 20.07.2022

Judgment on : **31.08.2022**

Shampa Dutt (Paul), J.:

This appeal is directed against judgment and order dated 07.09.2002 passed by the learned Metropolitan Magistrate, 10th Court, Calcutta in C-

2660/99 under Section 138/141 of the N.I. Act, acquitting the opposite party nos. 2 & 3. The appellant's/complainant's case is that the appellant/complainant is a Private Limited Company having its Registered Officer at 140A, Harish Mukherjee Road, P.S. – Bhowanipore, Calcutta – 700025.

That the opposite party no. 2 is a partnership firm duly registered under the Indian Partnership Act, 1932 having its office at 95, Netaji Subhas Road, Calcutta – 700001, and opposite party no. 3 was a partner of the said opposite party no. 2 firm and he was in-charge of and responsible for the conduct of the day-to-day business of the opposite party no. 2 firm.

At the request made by the opposite party nos. 2 and 3 the appellant had duly sold and delivered diverse electric motors of the agreed specifications and at the agreed rate to the opposite party nos. 2 and 3. The opposite party nos. 2 and 3 had accepted the said goods without raising any objection thereto.

Thereafter, the appellant raised and submitted its bill in respect of and covering the price of the said goods to the opposite party nos. 2 and 3. The opposite party nos. 2 and 3 had accepted the said bill also without raising any objection thereto.

In payment of the said bills the opposite party nos. 2 and 3 had issued and made over to the appellant two cheques being nos. 165942 and 165943 both dated 17.12.1998 for Rs.42,472.80/- and Rs.8,000.00/- respectively drawn on Allahabad Bank, Netaji Subhas Road Branch, Calcutta – 700001.

On 15.06.1999 the said cheques were presented by the appellant through its banker, ANZ Grindlays Bank, 19, Netaji Subhas Road Branch, Calcutta – 700001 for encashment. The said cheques were dishonoured by the opposite party nos. 2 and 3 company's banker Allahabad Bank, Netaji Subhas Road Branch, Calcutta – 700001 with the remark 'Exceed Arrangements' that is because the amount of money standing to the credit of that account was insufficient to honour the said cheque or that it exceeded the amount arranged to be paid from that account by agreement made with that bank.

The appellant received the said intimations of such dishonour from the appellant's banker on 17.06.1999 along with the cheques and the opposite party nos. 2 and 3 banker intimations.

By a notice dated 01.07.1999, written by the appellant's advocate to the opposite nos. 2 and 3, the appellant duly made demand in writing for payment the said cheques amount of Rs.42,472.80 /- and Rs.8,000/- from the said opposite party nos. 2 and 3 nos. 1 and 2 within 15 days from the date of receipt of the said notice. The said notice was duly received by the opposite party nos. 2 and 3 on 03.07.1999.

By a letter dated 12.07.1999 the opposite party nos. 2 and 3 had requested the Advocates for the appellant to allow seven days' time to pay the said amount, but has failed and neglected to do so.

Inspite of the receipt of the said notice the opposite party nos. 2 and 3 have failed and/or neglected to pay the said cheque amount of Rs.42,472.80/- and Rs.8,000/- or any part or portion thereof to your appellant.

The accused parties pleaded not guilty under Section 251 Cr.P.C. and claimed for trial. The matter was fixed for evidence before the learned Magistrate on 30th April, 2001. On that date the complainant was absent by petition. On the next date fixed on 9th July, 2001 again the complainant was absent by petition and prayed for adjournment. On 7th September 2001 when the matter was fixed for hearing again the complainant was absent without any steps and as such none appeared on the said date on behalf of the complainant.

The learned Magistrate considering the materials on record and also the conduct of the complainant passed the impugned order dated 7th September, 2001, which runs thus:

“Complainant is absent without any steps.

*Accused no. 1 is represented under
Section 305 of the Code of Criminal Procedure.*

Accused no. 2 on CB is present.

*None appears for the complainant on
repeated calls of Court. It is now 11.25 a.m.*

*Heard learned Lawyer for the accused
persons.*

Perused the record. Considered.

On perusal of the record it appears that the complainant is absent on three consecutive dates.

Complainant was given several chances to produce the witnesses but ultimately this complainant has not produced witnesses and thereby he wants to drag and harass the accused persons. This kind of illegal long drawn proceeding should be stopped. I have no other alternative but to acquit the accused persons under Section 256 of the Cr.P.C. Hence,

Ordered

That the accused persons are acquitted under Section 256 Cr.P.C. Bail bonds stand cancelled. Bail bond register be adjusted accordingly.”

It is submitted by the learned Amicus Curiae Ms. Rita Dutta, Advocate that the learned Magistrate erroneously acquitted the accused persons under Section 256 of the Code of Criminal Procedure and that it has caused serious prejudice to the appellant. Learned Magistrate also did not apply his judicial discretion and record findings justifying dismissal of the case and acquittal of the accused persons under Section 256 of the Code and as such the order of acquittal dated 7th September, 2001 is liable to be set aside.

Learned Advocate from the State panel, Ms. Pushpita Saha appearing for all the opposite parties submits that the order under appeal is in accordance with law and that the complainant's conduct before the Trial Court and the appellant's/complainant's conduct before this Court does not deserve any sympathy in view of the fact that in spite of several administrative

notice from this Court none has appeared for the appellant/complainant before this Court and as such the Court has been pleased to appoint an Amicus Curiae in the interest of justice for expeditious disposal of this Appeal of the year 2002 connected with an incident of the year 1999 **(long 24 years)**.

Thus considering the conduct of the appellant before this Court and the Trial Court, and the order of the learned Magistrate being in accordance with law, as the learned Magistrate had applied judicial discretion and recorded his findings justifying dismissal of the case and rightly acquitted the accused persons under Section 256 of the Code of Criminal Procedure and that there being no irregularity in the order under appeal, the instant appeal is liable to be dismissed.

Findings

Section 256 of the Code of Criminal Procedure lays down as follows:

“Non appearance or death of the 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 contend, 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.”

It has been held in several decision of this Court that while acquitting an accused under Section 256 of the Code of Criminal Procedure, the Court must apply its judicial discretion and record the findings justifying dismissal of the case. It has been held that the Magistrate cannot pass such an order merely due to non-appearance of the complainant without forming judicial opinion.

Section 256 of the Code mandates that if the complainant does not remain present on the appointed date after the summons have been issued on the prayer of the complainant and unless attendance of the complainant has been dispensed with, **the Magistrate shall acquit the accused. The provision further provides that if the Magistrate feels that the order of acquittal should not be passed on that date, the Magistrate has to give reasons.**

As such it is on the Magistrate to give reasons if he feels that the order of acquittal should not be passed. If the complainant does not appear as provided, there is no provision for adjournment, which if allowed has to be by giving reasons as to why order of acquittal should not be passed on that date in the absence of the complainant.

The Court has observed “..... acquittal of the accused on the absence of the complainant under Section 256(1) of the Code of Criminal Procedure is not automatic; the Court must apply its judicial discretion to the facts and circumstances of the case where it is expedient for the Court to acquit the accused under Section 256 (1) of the Code”.

The Court in the said case before it held that the concerned Magistrate had passed the order of dismissal of the case **without forming any opinion that there is no good reason to adjourn the hearing of the case to some other day**. Opining that the impugned order does not contain any judicial discretion the Court held – “Learned Magistrate has also not recorded any findings justifying dismissal of the case. The case was dismissed because the complainant failed to submit any application showing cause of his absence on the previous dates. Absence of judicial discretion is apparent on the face of the record, because the learned Magistrate did not assign any reason in support of the requirement that it is not proper to adjourn the hearing of the case to some other day and the Court thus set aside the impugned order of acquittal passed by the Magistrate.

The facts and circumstances of the present case is not similar to the said case in which the findings as above has been recorded by the Court.

In the present case the learned Magistrate had given opportunity on three occasions but the complainant had failed to appear before the learned Magistrate for adducing evidence. There was no representation on behalf of the

complainant for adjournment on the date of the order under appeal. The Court considered the conduct of the complainant on repeated occasions on which the accused persons were present but the complainant was absent and also considered the fact that in spite of giving sufficient time/opportunity to the complainant to appear and adduce evidence, he failed to appear before the Trial Court and also did not produce any witness thus delaying the trial.

The complainant was absent on all three days and the learned Magistrate categorically recorded his findings to the effect that the complainant is wanting to drag the case and harass the accused persons and also held that this kind of illegal long drawn proceeding should be stopped and finding no other alternative the learned Magistrate acquitted the accused persons under Section 256 of the Code of Criminal Procedure.

As such this Court finds that in the order under appeal, the learned Magistrate had applied his judicial discretion and recorded his findings justifying dismissal of the case and acquitted the accused therein. The learned Magistrate has given specific reasons in support of the requirement that it is not proper to adjourn the hearing of the case on so many occasions and thereby dismissed the case and acquitted the accused under Section 256 of the Code of Criminal Procedure.

It is also seen that Section 256 of the Code clearly lays down that if the complainant does not appear, the learned 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.**

Conclusion

Thus the said provision of Section 256 of the Code of Criminal Procedure clearly **imposes a duty upon the Magistrate to proceed with the provisions of the said Section leading to acquittal of the accused if the complainant is found absent. It has been specifically provided in the said Section that unless for some reason he thinks it proper to adjourn the hearing of the case to some other day.**

In the present case learned Magistrate on three occasions thought it proper to adjourn the hearing of the case to another day (without reasons).

But on the date of dismissal i.e. 7th September, 2001 the learned Magistrate did not find any reason, which he thought proper, to adjourn the hearing of the case to some other day (as the Section clearly provides) Learned Magistrate did not adjourn the case on the said date by recording specific reasons and justified his decision in his order relating to the conduct of the complainant on several occasions and proceeded to dismiss the case and finally acquitted the accused persons rightly, complying with the provisions of Section 256 of the Code of Criminal Procedure.

Accordingly the order under appeal being in accordance with the provisions under Section 256 of the Code of Criminal Procedure, wherein the learned Magistrate has recorded specific reasons justifying dismissal of the case and also applied judicial discretion to the facts and circumstances of the case before proceeding to acquit the accused persons under Section 256(1) of the Code of Criminal Procedure by dismissing the case.

Thus considering the conduct of the appellant/complainant before the Trial Court as also before this Court, (in a case of as old as 24 years), this Court is of the view that it seems that the appellant/complainant has lost interest in the appeal as also before the Trial Court and as such this Court finds no reason to interfere with the said order/judgment of acquittal under appeal.

The appeal being CRA 89 of 2002 stands dismissed.

Lower court records along with a copy of this judgment be sent down at once to the learned Trial Court for information and necessary action, if any.

Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Shampa Dutt (Paul), J.)