

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.A 200 of 2019

M/s One Textile

Vs.

Umesh Bharech

For the appellant: Mr. Samrat Choudhury, Adv.

For the Respondent: Mr. Tarique Quasimuddin, Adv.,
Ms. Sanchita Chaudhuri, Adv.

Heard on: 08 April, 2022.

Judgment on: . 20 May, 2022.

BIBEK CHAUDHURI, J. : –

1. The appellant, a proprietorship firm filed a complaint under Section 138 of the Negotiable Instrument Act. The said complaint was registered as Case No.C-79 of 2010 in the court of learned Chief Metropolitan Magistrate, Calcutta. The case was subsequently transferred to the 3rd Court of the Metropolitan Magistrate, Kolkata for trial and disposal. It appears from the lower court record that on 20th July, 2017, the accused was examined under Section 251 of the Code of Criminal Procedure. Substance of acquisition under Section 138 of the Negotiable Instrument Act was stated and explained to him. He pleaded not guilty. Accordingly the case was fixed for trial. Next date for recording evidence was fixed on

30th October, 2017. On that date the complainant was present; the accused was represented under Section 205 of the Code of Criminal Procedure by his learned Advocate; however, trial of the case did not commence and the learned Magistrate suo moto adjourned the hearing of the case fixing 13th March, 2018 for evidence. On 13th March, 2018 the complainant was absent without any step. Therefore, the learned Magistrate directed him to file show cause as to why the case shall not be dismissed for non-prosecution fixing 10th April, 2018 for filing show cause by the complainant. On 10th April, 2018 the complainant was again absent without any step. Therefore, the learned Metropolitan Magistrate, 3rd Court, Kolkata acquitted the accused under Section 256 of the Code of Criminal Procedure. The instant appeal is filed by the complainant of the aforesaid case assailing the order of acquittal passed in favour of the respondent by the court below on 10th April, 2018.

2. Learned Advocate for the appellant submits at the outset that in a summons case, the court can pass an order of acquittal under Section 256 of the Code due to non appearance of the complainant. However, the said order is not automatic. An order under Section 256 of the Code cannot be passed on mere absence of the complainant. The learned Magistrate is under obligation to exercise such power judicially and fairly without impairing the cause of administration of criminal justice. Such power cannot be invoked, unless the court finds for some good reasons, it would not be proper to adjourn the hearing of the case to some other date. In other words, before taking recourse to the provision of Section

256 of the Code, the court has to come to a conclusion that there is no justifiable reason to adjourn the hearing of the case. Therefore, even when the complainant is absent the court before exercising its discretion under Section 256 of the Code has to record that there is no good reason for which it would be proper to adjourn the hearing of the case to some other date. The learned Advocate for the appellant next takes me to the impugned order. The relevant portion of the order runs thus:-

“On perusal of the case record, I find that since 13th March, 2018 the complainant was absent without step. The complainant was directed to file show-cause but no show-cause has been filed till date.

Such conduct of the complainant only reveals a delaying tendency on the part of the complainant.

The complainant, thus, evidently shows a lack of interest on proceeding with the instant case.

It is seen that the provision of Section 256 Cr.P.C is attracted to the facts and circumstances of this case.

In view of the above, the accused person(s) is/are acquitted under Section 256 of the Code of Criminal Procedure.

The accused person(s) be discharged from his/her/their respective bail bond(s) and be set at liberty at once.

Recall process, if any.

Note in T.R.”

3. According to the learned Advocate for the appellant the learned Magistrate did not exercise his judicial discretion and mechanically passed the order. It is true that on 13th March, 2018 and 10th April, 2018, the complainant was absent but he failed to consider that the complainant was present to adduce evidence on 27th November, 2013, 19th November, 2014, 3rd June, 2014, 1st August, 2014, 1st December, 2014, 19th November, 2015, 22nd September, 2015, 22nd December, 2015, 20th April, 2017 and 30th October, 2017. The record shows that the complainant was diligent in proceeding with the case, but his evidence was not recorded due to one reason or the other. According to the learned Advocate for the appellant, before acquitting the accused under Section 256(1) of the Cr.P.C, the learned Magistrate did not even consider the previous conduct of the appellant. Therefore, the learned Magistrate was wrong in acquitting the accused under Section 256 of the Code of Criminal Procedure. In support of his contention he refers to a decision of this court in **Bijay Kumar Bhattar vs. Trimurti Assoicates Pvt. Ltd & Anr.** reported in **2010(1) CHN (Cal) 108**. On the selfsame point he also refers to anther decision of this court in Shri **G. Sekhar vs Smt. K. Prasanna Jyoti Rao and Another** reported in **(2017) 3 Cri.LR (Cal) 524**.

4. Referring to the decision of the Hon'ble Supreme Court in the case of **The Associated cement Company Ltd. vs. Keshavanand** reported in **1998 (1) SCC 687**, it is submitted by the learned Advocate for the appellant that before applying to the provision of Section 256 of the Code of Criminal Procedure, the Magistrate ought to decide if the appearance of

the complainant is necessary on the date when the accused is acquitted under Section 256 of the Code of Criminal Procedure. When the court notices that the complainant is absent on a particular date, 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.

5. In **S. Rama Krishna vs. S. Rami Reddy (D) By His Lrs. & Ors** reported in **2008(5) SCC 535**, the Hon'ble Supreme Court lays down the following grounds when an order of acquittal may be recorded in favour of the accused. The ground are:-

- (i) That summons must have been issued on the complainant.
- (ii) The Magistrate should be of the opinion that for some reasons, it is not proper to adjourn the hearing of the case to some other date.
- (iii) The date on which the order under Section 256(1) can be passed is the day appointed for appearance for the accused or any day subsequent thereto, to which the hearing of the case has been adjourned.

6. Learned Advocate for the respondent, on the other hand, submits that the trial court examined the accused under Section 251 of the Code of Criminal Procedure on 20th July, 2018. On that date the complainant was absent without any step. He was directed to submit show cause as to

why the case shall not be dismissed for non-prosecution by 10th April, 2018. When the complainant was absent on 10th April, 2018 and did not take any step, the learned Magistrate had no option but to record the order of acquittal under Section 256(1) of the Code of Criminal Procedure in favour of the respondent. The impugned order does not suffer from any illegality or apparent error on the face of the record. Therefore, this Court should not interfere with the order dated 10th April, 2018. It is contended by the learned Advocate for the respondent that while sitting in judgment over an acquittal, the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or entirely unsustainable. If the appellate court answers the above question in the negative, the order of acquittal is not to be disturbed only on the ground that an alternative view might have been taken by the trial court on the basis of the evidence or materials on record. If there is no perversity in the findings by the learned Magistrate and the findings of the trial court do not suffer from any illegality, the appellate court should not interfere with the order passed by the trial court. In support of his contention the learned Advocate for the respondent refers to a decision of the Hon'ble Supreme Court in **Ramesh Babulal Doshi vs. State of Gujarat** reported in **(1996) 9 SCC 225**. He also refers to another decision of the High Court of Allahabad in the case of **Saurabh Kumar Gupta vs. State of U.P & Anr.** reported in **(2017) SCC OnLine ALL 1236**.

7. Having heard the learned Counsels for the parties and on careful perusal of the reported decisions cited by the learned Counsels for the appellant and the respondents, it is ascertained that 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. Having gone through the impugned order, I am of the view that the approach of the learned court was clearly erroneous and not in accordance with law. On the date of passing of the impugned order the accused was represented under Section 205 of the Code and he was physically absent. The learned Magistrate 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 date. The learned Magistrate has also not recorded any finding 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 date. Absence of judicial discretion is apparent on the face of 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 date.

8. In view of the above discussion, this Court is of the considered opinion that the impugned order dated 10th April, 2018 is liable to be set aside.

9. Accordingly, the instant appeal is allowed on contest, however without cost.

10. The order dated 10th April, 2018 passed by the learned Metropolitan Magistrate, 3rd Court, Kolkata in C-79 of 2010 is set aside.

11. The learned Magistrate is directed to dispose of the case in accordance with law expeditiously.

12. Let a copy of this judgment be sent to the court below along with the lower court record.

(Bibek Chaudhuri, J.)