

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

CRA 667 of 2018

**Sri Jayshankar Chaubey
-Vs.-
The State of West Bengal & Anr.**

For the appellant : Mr. Shashanka Sekhar Saha, Adv.,

For the State : Mr. Pratick Bose, Adv.

**For the Opposite : Mr. Navanil De, Adv.,
No. 2 Mr. Subhrajit Dey, Adv.**

Heard & Judgment on: 29.03.2022.

Bibek Chaudhuri, J.

Vokatatnama filed by Mr. De on behalf of the Private Respondent be taken on record.

A Short question is involved in the instant appeal. The accused was acquitted by the Trial Court under Section 256 of the Code of Criminal Procedure by an order dated 1st September, 2018. The said order of acquittal is assailed by the complainant in the instant appeal.

I have heard Mr. Saha and Mr. De appearing on behalf of the appellant and the respondent no. 2 respectively. Section 256 of the

Code of Criminal Procedure states the circumstances for non-appearance or death of the complainant. The said provisions runs thus: -

256. Non-appearance or death of 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 contained, 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 appears from the certified copy of the order sheet of Complaint Case No. 175/2018 that the Learned Chief Judicial Magistrate, South 24-Parganas at Alipore took cognizance of offence

under Section 138 of the Negotiable Instrument Act vide order dated 19th January, 2018. Subsequently vide order dated 6th March, 2018 on the basis of the statement of the complainant on solemn affirmation process was issued against the accused persons under Section 138 of the Negotiable Instrument Act. The accused appeared before the Court below on 16th May, 2018 and filed an application under Section 205 of the Code of Criminal Procedure. The said application was allowed and the next date for examination of the accused under Section 251 of the Code of Criminal Procedure was fixed on 31st May, 2018. On 31st May, 2018 there was no judicial proceeding in the Trial Court due to a resolution taken by the local Bar. Next date for examination of the accused under Section 251 of the Code of Criminal Procedure was fixed on 4th July, 2018. On 4th July, 2018 the accused appeared but the complainant was absent without any step. Therefore, the complainant was directed to show cause as to why the complaint under Section 138 of the Negotiable Instruments Act shall not be dismissed fixing 1st April, 2018 for showing cause by the complainant. Finally, on 1st September, 2018 the Court dismissed the petition of complaint under Section 256 of the Code of Criminal Procedure for absence of the complainant without any step and the accused was acquitted from the case. The said order of acquittal was assailed in the instant appeal.

On perusal of the entire order sheet it is found that the conduct of the complainant in the Trial Court was really unfortunate. However, it is also found at the same time that the trial Court even after fixing date for examination of the accused under Section 251 of the Code of Criminal Procedure did not examine him due to absence of the complainant. It is needless to say that examination of the accused under Section 251 of the Code of Criminal Procedure is a mandatory provision between Court and the accused when the accused appears in pursuance to summons. Presence of the complainant on the date of examination of the accused under Section 251 of the Code of Criminal Procedure is not necessary. The learned Trial Judge however, failed to comply with the mandatory provision of Section 251 of the Code of Criminal Procedure on the ground that on the date of examination of the accused, the complainant was absent.

It is needless to say that Section 256 of the Code of Criminal Procedure is a deterrent provision where the Court can pass an order of acquittal in the absence of the complainant. However, In ***Associated Cement Co. Ltd. Vs. Keshvanand*** reported in **1998 (1) SCC 687**, the Hon'ble Supreme Court observed that Section 256 affords some deterrence against dilatory techniques on the part of the complainant but does not mean that if the complainant is absent the Court has a duty to acquit the accused. In other words, Section 256

is not a mandatory provision. The Court can either acquit the accused or defer the case for trial.

In the instant case, it is clear that though the date was fixed for recording plea of the accused under Section 251 of the Code of Criminal Procedure, the learned Magistrate did not record the plea on the date fixed. I am not unmindful to note that the conduct of the accused during trial of the case is not satisfactory. However, only for non-appearance of the complainant for two days, the case of the complainant for non-payment of debt and liability should not be thrown away adopting the provision laid down in Section 256 of the Code of Criminal Procedure.

For the reasons stated above, the impugned order dated 1st September, 2018 is set aside subject to payment of cost of Rs.10,000/- to be paid by the appellant in the Trial Court to the account of the District Legal Services Authority.

The appellant is directed to appear before the Trial Court within a fortnight from the date of passing of the order. The appellant is further directed to attend the Court proceedings on each and every date of trial.

The instant appeal is, accordingly, **allowed** with the above order and direction.

A copy of this order be sent to the Court below forthwith along with the lower court record.

Parties are at liberty to act on the server copy of this order.

Urgent photostat certified copy of this order may be supplied to the parties expeditiously, if applied for.

[Bibek Chaudhuri, J.]

**Srimanta/Mithun
A. Rs. (Court)**