

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.1718 of 2012

Sri Bhabani Shankar Das Petitioner

Mr. M. Agarwal, Advocate

-Versus-

State of Odisha and another Opposite Parties

Mr. D.R. Parida, ASC

Mr. D.K. Sahoo, Advocate for OP No.2

CORAM:
JUSTICE R.K.PATTANAIK

ORDER
25.03.2022

Order No.

- 07.
1. Present application under Section 482 Cr.P.C. is filed by the petitioner assailing the impugned orders dated 4th, 5th and 13th April of 2012 passed in I.C.C. No.709 of 2008 pending before the court of learned J.M.F.C., Cuttack and also to dismiss the complaint on the ground of its non-prosecution and to acquit him as a result thereby in terms of Section 256 Cr.P.C.
 2. According to the petitioner, the learned court below was not justified in rejecting petition filed under Section 256 Cr.P.C. notwithstanding habitual default/absence of the complainant, namely, OP No.2 on the appointed dates of the trial. That apart, it is also alleged that the learned court below failed to exercise the judicial discretion in not dismissing the complaint and therefore, the impugned orders deserve to be quashed.
 3. In fact, OP No.2 filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the NI

Act') against the petitioner, which was registered as I.C.C. No.709 of 2008. In the instant case, the petitioner filed copies of order sheets (Annexure-1) in I.C.C. Case No.709 of 2008 from 18th May 2011 to 12th April, 2012 to show the conduct of OP No.2. The petitioner also enclosed a copy of the petition moved under Section 256 Cr.P.C. marked as Annexure-2. It is contended that the learned court below rejected the aforesaid petition by order dated 30th April, 2012. As revealed from the above order at Annexure-4, the learned court below rejected the petition under Section 256 Cr.P.C. after participation of OP No.2 on the date fixed when his re-examination on recall was rather declined and thereafter, on evidence being closed, the case was posted to 22nd June 2012 for recording of statement of the petitioner under Section 313 Cr.P.C.

4. Learned counsel for the petitioner submits that the court below was required to dismiss the complaint in view of Section 256 Cr.P.C. due to repeated default by OP No.2 on number of dates fixed for trial when his re-examination on recall was pending. The learned counsel for the State, on the other hand, contended that the order in question is absolutely justified. Likewise, learned counsel for OP No.2 submitted that the court below correctly continued with the complaint instead of dismissing it and rightly exercised the jurisdiction which calls for no interference in so far as impugned order under Annexure-4 is concerned.

5. As per Section 256 Cr.P.C. if on the appointed day for appearance of the accused or any day subsequent thereto to which the hearing of the case is adjourned and on that date, the complainant does not appear, the Magistrate shall acquit the accused unless for some reason, he thinks it proper to adjourn the

hearing of the case to some other day but where the complaint is represented by a lawyer or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. The petitioner contends that the learned court below unnecessarily waited for the participation of OP No.2 instead of straightaway dismissing the complaint as per Section 256 Cr.P.C. On a bare perusal of the impugned order dated 5th April 2012, it appears that petition filed under Section 256 Cr.P.C. was posted for hearing and objection to the subsequent dates and finally, it was rejected on 30th April, 2012. In other words, the learned court below in spite of absence of OP No.2 on certain dates adjourning the hearing of the case and ultimately, after closure of evidence, posted it to 22nd June, 2012 for recording of statement of the petitioner under Section 313 Cr.P.C.

6. It is no doubt true that Section 256 Cr.P.C. affords some deterrence against dilatory tactics on the part of the complainant but that is not to mean that if the complainant is absent on a particular date, the court has a duty or oblige to acquit the accused which has been held so by the Supreme Court in **Associated Cement Company Ltd. Vrs. Keshavananda** reported in (1998) 1 SCC 687 and in catena of decisions. In other words, notwithstanding the expression 'the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused' as appearing in Section 256 Cr.P.C. does mean that there is an element of discretion involved and not that the complaint is simply to be dismissed. So to say, either on account of default or death of complainant, the Magistrate does not necessarily to pass an order of acquittal, as it is not mandatory, the exercise of any such discretion, rather, depends

on variety of factors. Instead of elaborating further, this Court is of the considered arrives at a conclusion that the learned court below did not commit any wrong or illegality in passing the impugned orders under Annexure-1&4 and it calls for no interference.

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7. The learned counsel for OP No.2 submits that the complainant undertakes to appear before the court on each and every date till the hearing of the case stands concluded and would fully cooperate with the trial. In view of the above submission and for the discussions as aforesaid, the Court is not inclined to interfere with the impugned orders, particularly, dated 30th April, 2012 which suffer from no legal infirmity.

8. Accordingly, it is ordered.

9. In the result, application under Section 482 Cr.P.C stands dismissed with a direction that OP No.2 shall appear before the learned court below on 8th April, 2022 in I.C.C. No.709 of 2008 and remain present on each and every date till completion of the trial.

(R.K.Pattanaik)
Judge