



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.03.2022

CORAM

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Crl.OP.No.5113 of 2022 in
Crl.A.SR.No.9045 of 2022

M.Vijayakumar ...Petitioner/Appellant/Complainant

Vs.

N.Thomas ...Respondent/Respondent/Accused

PRAYER:

Criminal Original Petition filed under Section 378(4) of Cr.P.C. praying to grant leave and allow the special leave petition to file Criminal Appeal as against the order passed by the learned Judicial Magistrate Court, Fast Track Court (Magistrate Level), Tiruvannamalai in CC.No.26 of 2020 dated 06.10.2021.

For Petitioner : Mr.M.J.P.Rajkumar

ORDER

This criminal original petition has been filed by the petitioner / appellant to grant leave to file Criminal Appeal as against the order dated 06.10.2021 passed by the learned Judicial Magistrate Court, Fast Track Court (Magistrate Level), Tiruvannamalai in CC.No.26 of 2020.

2. The petitioner filed a complaint alleging offence under section 138 of Negotiable Instruments Act before the Magistrate Court. It was dismissed under Section 204(4) of the Criminal Procedure Code since the petitioner failed to take steps after issuing direction to send a summons to the accused. The petitioner has filed appeal against the said order under Section 378 of the Criminal Procedure Code treating it as an order of acquittal. He also filed this petition for special leave.



3. The impugned order passed under Section 204 of the Cr.P.C. can be extracted herein.

"The complainant submits that accused is a friend to him and well known to the complainant. Based on the said acquaintance accused borrowed Rs.9,00,000/- on 30.07.2016 for his urgent family expenses and assured to repay within one month. The accused has issued a State Bank of India, Erode Branch cheque bearing No.910919 dated 30.08.2016.

2. The complainant presented the said cheque for collection on 30.08.2016 in his banker State Bank of India, Tiruvannamalai Branch and the cheque was returned with a reason "Funds Insufficient" and return memo issued by the bank on 30.08.2016. The complainant issued a legal notice on 02.09.2016 through his counsel and served acknowledgement card received on 14.09.2016. The accused neither replied nor settled the amount. Therefore the accused has committed the offence punishable under Section 138 of NI Act. The complainant filed cheque, return memo, legal notice and returned RPAD cover. Hence, the complaint is filed.

3. Prima facie case made out as against the accused and the case was taken on file in the year 2016 in J.M.No.II Court, Tiruvannamalai and summon has been issued to accused. Accused summon sent through RPAD was returned with an endorsement "Left". Hence, court again issued fresh summons to the accused. Subsequently, the case transferred to this Court in the year of 2020 and renumbered as CC.No.26 of 2020. Further, complainant absent on the following dates 20.07.2020, 22.09.2019, 19.11.2020, 20.01.2021, 23.03.2021, 03.09.2021 and process also not paid to issue fresh summons to accused. Sufficient opportunity given to complainant to pay the process to issue fresh summons to accused. On 06.10.2021 also complainant absent, complainant counsel absent and process also not filed to issue fresh summon to accused.

In the result, the complaint is dismissed for non payment of process under Section 204(4) of Cr.P.C. and non prosecution under Section 256 of Cr.P.C. Accused is acquitted."

4. It is clear from the above order that the complaint was dismissed under Section 204 of the Criminal Procedure Code. The relevant portion of Section 204 of the Criminal Procedure Code reads as follows:



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204. Issue of process.

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) a summons- case, he shall issue his summons for the attendance of the accused, or

(b) a warrant- case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub- section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing every summons or warrant issued under sub- section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process- fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

Section 204(1) shows that once the court issues summons or warrant under Section 204(1) of the Code and if the complainant does not pay the process fees or such other fees payable, within a reasonable time, the court may dismiss the complaint under Section 204(4) of the Code. The present complaint was also dismissed on the ground that the process fee is not paid. Can such an order be challenged in an appeal under Section 378 of the Code? Section 378 of the Code reads as hereunder (only the relevant portions which are necessary for the purpose of this proceedings are extracted):

Section 378. Appeal in case of acquittal.--

(1) Save as otherwise provided in Sub-section (2) and subject to the provisions of Sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court or an order of acquittal passed by the Court of Sessions in revision.



(2) xxx xxx xxx (3) No appeal under Sub-section (1) or Sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) xxx	xxx	xxx
(6) xxx	xxx	xxx.

5. Learned Counsel for petitioner submitted that the impugned order of dismissal of complaint can be treated as an order acquittal of the accused. He placed reliance upon the decision reported in Ramkumar v. K.M. Mathew 1988(1) KLT 579 in support of this argument. A reading of the decision shows that the proceedings against certain accused were dropped in that case. It was a summons case. Considering the various provisions of the Act, this court held therein that during an intermediate stage, after issue of process, there is no provision for dropping the proceedings against the accused, as was done by the Magistrate. Hence, it was held that the order of the Magistrate dropping the proceedings amounted to an order of acquittal without trial.

6. But the dictum laid down in the above decision has absolutely no application to the present case at hand. This is a case where the learned Magistrate after taking cognizance on the complaint filed by the petitioner, directed to issue summons to the accused. Being the reason that the complaint presented by the petitioner is a private complaint it is his duty to pay the process fee for sending summons to the accused. Sub-section 4 of Section 204 provides that a complaint can be dismissed on failure of payment of certain fees etc.

7. When there is a specific provision to dismiss a complaint for non-payment of process fees etc., such an order cannot be treated as an order of acquittal. Had the legislature intended that such order will also amount to an order of acquittal, coming within the purview of Section 378 of the Code, there was absolutely no difficulty in using the word "acquit" instead of "dismiss" in Section 204(4) of the Code. But in the absence of doing so, the only inference possible is that the legislature did not intend to "acquit" an accused for failure of the complainant to pay the requisite fee etc. This court cannot treat an order of dismissal under Section 204(4) of the Code as



order of acquittal, against the clear and unambiguous expressions contained in the provision. The order of dismissal of a complaint under [Section 204\(4\)](#) is therefore, not appealable under [Section 378](#) of the Code.

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8. The propriety or legality of the impugned order under [Section 204\(4\)](#) of the Code cannot be considered in an appeal under [Section 378](#) of the Code. The remedy of the petitioner is not to file appeal under [Section 378](#) of the Code and hence this petition for special leave also cannot be entertained. However, it is made clear that this order will not stand in the way of the petitioner seeking appropriate remedy available to him under law.

9. Accordingly, this Criminal Original Petition is dismissed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Judicial Magistrate Court,
Fast Track Court (Magistrate Level),
Tiruvannamalai

2. The Public Prosecutor,
High Court, Madras.

Copy to
The Section Officer
Criminal Section
High Court, Madras 104

+1 CC to Mr.M.J.P.Rajkumar, Advocate sr 15793.

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SSI (CO)
SP(22/03/2022)