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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.04.2022

DELIVERED ON : 06.06.2022

CORAM

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CRIMINAL ORIGINAL PETITION NO.6905 OF 2022

M/s.Viswak Garments,
rep. by its Partner
B.T.Murali
presently having office at
No.136, Main Street,
Muthoot Fincorp Backside,
Thirumuruganpoondi Post,
Avinashi Taluk,
Tirupur District.

... Petitioner

vs.

1. M/s.Woodstock Merchandising Private Ltd.,
rep. by its Director
Jibi Mahathu George,
No.904, 9th Floor, Business Suits 9,
A Wing, SV Road, Santacruz West Mumbai,
and also having office now at
C/o.Dream Theatre (P) Ltd.,
No.701, 7th Floor, Ramee Emerald-II,
F.P.No.65 A, C.S.No.G/571,
Linking Road, Opp. ICICI Bank,
Santacruz West,
Mumbai 400 054.
Maharashtra State.
2. Jibi Mahathu George,
No.904, 9th Floor, Business Suits 9,
A Wing, SV Road, Santacruz West Mumbai,
and also having office now at
C/o.Dream Theatre (P) Ltd.,
No.701, 7th Floor, Ramee Emerald-II,
F.P.No.65 A, C.S.No.G/571,
Linking Road, Opp. ICICI Bank,
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3. Jiggy Chempithanam Thomas George,
Director of
M/s.Woodstock Merchandising
Private Ltd.,
No.904, 9th Floor, Business Suits 9,
A Wing, SV Road, Santacruz West Mumbai,
and also having office now at
C/o.Dream Theatre (P) Ltd.,
No.701, 7th Floor, Ramee Emerald-II,
F.P.No.65 A, C.S.No.G/571,
Linking Road, Opp. ICICI Bank,
Santacruz West,
Mumbai 400 054.
Maharashtra State.

... Respondents

Criminal Original Petition filed under Section 482 Cr.P.C.
to set aside the order dated 12.11.2021 in unnumbered S.T.C.No.
of 2020 on the file of Judicial Magistrate, Avinashi and direct
to assign CMP number.

For Petitioner : Mr.K.Sudhakar

ORDER

An order of dismissal of a private complaint filed by the
petitioner, came to be passed by the Judicial Magistrate,
Avinashi, invoking Section 256 Cr.P.C. is put to challenge in
the present Criminal Original Petition.

2. The case of the petitioner is as under:-

i) The petitioner is a Partnership Firm engaged in the
business of manufacturing and selling of knitted hosiery
garments. A1 is a Private Limited Company engaged in the
business of purchase and sales of knitted hosiery garments and
A2 and A3 are the Directors of A1 Company.

ii) The accused were dealing with the complainant on credit
basis in purchasing knitted hosiery garments during the year
2019 and 2020. The complainant had manufactured the knitted
hosiery garments and supplied to the accused as demanded by them
and had raised invoices for the same.

iii) To discharge the liability, the accused had issued
various cheques from 8.2.2020 to 16.2.2020 which were



dishonoured when presented for payment with the endorsement "Funds Insufficient" and thereby, a sum of Rs.33,37,657/- was due to be paid by accused.

iv) The complainant had issued a notice to the accused on 18.5.2020 calling upon them to settle the amounts and thereupon, they had paid a sum of Rs.15,00,000/- and thereafter, they failed to settle the remaining amount due to the complainant.

v) The accused, knowing well that they have no sufficient funds in their account, had issued the cheques and they have not come forward to settle the dues fully, even after receipt of statutory notice and thereby, they have committed an offence punishable under Section 138 of the Negotiable Instruments Act and hence, the petitioner had filed the private complaint before the Judicial Magistrate, Avinashi on 16.7.2020.

vi) The complaint was returned for certain compliances on 17.7.2020 and after compliances, it was re-presented on 24.7.2020. Again, the complaint was returned on 28.7.2020 and it re-presented on 22.9.2020. Once again it was returned on 25.9.2020 and after compliance, it was re-presented on 12.10.2020 in unnumbered S.T.C. of the year 2020.

vii) Whilesso, when the complaint was still in unnumbered stage, the matter had been taken up by the Magistrate on 12.11.2021 and the learned Judicial Magistrate had dismissed the complaint under Section 256 Cr.P.C. with the following order:-

"Complainant called absent. No representation. Past several hearings complainant called absent. No representation. Complainant is not interested to proceed the case further. Hence the complaint is dismissed U/S 256 Cr.P.C."

viii) The present criminal original petition has been filed seeking to set aside the order.

3. Learned counsel for the petitioner would submit that the a complaint has been filed for offence under Section 138 of the Negotiable Instruments Act and despite the fact that the petitioner complied with the returns, the court had repeatedly returned the Application stating one reason or the other. The petitioner had represented the petition and later, during the covid pandemic period, there was no proper functioning of the courts and the case had been taken on file on 12.11.2021 and the court, finding that there was no representation, had called the complainant absent and dismissed the complaint under Section 256 Cr.P.C. even before numbering the Application.



4. The learned counsel for the petitioner would further submit that dismissal of the complaint under Section 256 Cr.P.C. can be only at the post cognizance stage and in this case, even prior to the cognizance being taken, the Trial Court had dismissed the Application. He would submit that dismissal of complaint under Section 256 Cr.P.C. can be resorted to only after the complaint is taken on file. He would also submit that as per the very wording in Section 256 Cr.P.C., a complaint can be dismissed only after the summons has been issued on the complaint and on the date appointed for the appearance of the accused or any day subsequent thereof to which the hearing may be adjourned, if the complainant does not appear, the Magistrate shall acquit the accused. When the complaint has not been taken on file, the impugned order passed by the Magistrate invoking Section 256 Cr.P.C. is illegal. He would further submit that the Trial Court had also not issued any notice to the petitioner before dismissing the complaint. In support of his contention, he would rely upon the following decisions:-

- i) S.Sankar v. C.V.Pasupathi (2001 Cri.LJ 2144)
- ii) K.Meenakshi vs. S.Mohana (2008 Cri.LJ 1781)
- iii) O.C.Periyasamy vs. D.Venkatesan @ Ravi (CDJ 2010 MHC 4389)

5. Heard the learned counsel appearing for the petitioner and perused the materials available on record.

6. The present complaint is by a private party for the offence punishable under Section 138 of the Negotiable Instruments Act. The complainant is not a public servant. Therefore, presence of the complainant and his/her examination on oath is absolutely necessary before taking the complaint on file. Since the complainant was absent on 12.11.2021, he was called absent and the court finding that the complainant is not interested to proceed with the case further, had dismissed the complaint under Section 256 Cr.P.C.

7. The dismissal of the complaint can be made only after the same is taken on file. In the instant case, it appears that the learned Magistrate, even before issuing process to the accused, had dismissed the complaint for default viz., for the absence of the complaint. It is useful to refer to the provision under which the learned Magistrate had dismissed the complaint viz., Section 256 Cr.P.C.

"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



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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."

8. Section 256 Cr.P.C. is the only provision which deals with the dismissal of the complaint leading to the acquittal of the accused. As per the provision, it will be applicable only if the complaint is taken on file and summons is issued to the accused and on the date appointed for the appearance of the accused, on his/her appearance, if the complainant does not appear, the Magistrate shall acquit the accused unless, if, for some reason, he thinks proper to adjourn the hearing of the case to some other date.

9. The object of the provision is that the court should take serious note of the absence of the person who approached the court to set the law in motion, when the accused person makes himself present before the court for enquiry.

10. In this regard, it is relevant to place reliance on the decision in Associated Cement Co. Ltd. vs. Keshavanand (1998(1) Crimes 88), which was followed by this court in S.Sankar v. C.V.Pasupathi (2001 Cri.LJ 2144). The relevant portion of the decision is extracted hereunder for ready reference:-

"3. What was the purpose of including a provision like S. 247 in the old Code (or S. 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint.

An accused who is per force to attend the Court on all posting days can be put to much harassment by a complainant if he does not turn up to the Court on occasions when his presence is necessary. The section, therefore, affords a protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, Court has a duty to acquit the accused in invitum.



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14. Reading the section in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the section. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second, is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with this attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day 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. If the situation does not justify the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice."

11. In K.Meenakshi vs. S.Mohana (2008 Cri.LJ 1781), it has been held as under:-

"8. The present Complaint is by a private party for the offence punishable under Section 138 of Negotiable Instruments Act and not by a public servant. Therefore, the presence of the complainant and his/her examination on oath is absolutely necessary before taking the Complaint on file. Since on 10.04.2003 the complainant was called absent, an endorsement was made, dismissing the Complaint for default. Dismissal of a Complaint could be made only after the same is taken on file. In the instant case, it appears that the learned Magistrate, even before issuing process to the accused, has dismissed the Complaint for default viz., for the absence of the complainant. Section 256, Cr.P.C. deals with non-appearance of complainant, which reads as follows:-

"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



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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 subsection (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death".

9. Section 256, Cr.P.C is the only provision which deals with dismissal of a Complaint leading to acquittal of the accused and it will be applicable only after the Complaint is taken on file and summons are issued to the accused and on the day appointed for the appearance of the accused, on his/her appearance and if 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. The object of the provision is that Courts should take serious note of absence of the person, who approaches the Court to set the law in motion, when the accused person makes himself present before Court for enquiry.

10. On 24.04.2003, at the time when the Complaint was taken on file, the accused/Petitioner did not have any role to play. Only after summons are issued, the role of the accused commences, as she is aggrieved by the orders of the learned Magistrate. The Order dated 10.04.2003 cannot be ascribed to be a judicial order, but could be construed only as an Office Note made on the Complaint for certain compliance. Unless all the requirements stipulated under Section 200, Cr.P.C. are complied with, the learned Magistrate cannot proceed further on the basis of the Complaint made. In the absence of dismissal of a Complaint on merits, there is no bar for filing even a second Complaint on the same set of facts and allegations.



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11. Under such circumstances, I am of the considered view that no prejudice has been caused to the accused/Petitioner and the contentions that the endorsement dated 10.04.2003 must be taken as final order and that the respondent/complainant has only Appeal remedy against such endorsement are not well founded. It follows that the action of the learned Magistrate in taking the Complaint on file is well within his jurisdiction and is in consonance with the procedure prescribed under the Code and therefore, the present Petition filed under Section 482, Cr.P.C. to quash the proceedings is not well founded."

12. In O.C.Periyasamy vs. D.Venkatesan @ Ravi (CDJ 2010 MHC 4389) = (2010) 2 MWN (Cri.) DCC 68, it has been held as under:-

"Under Section 190(1)(a), Cr.P.C., the Magistrate has to receive the Complaint and thereafter, under Section 200, Cr.P.C. shall examine upon oath of the Complainant and the witnesses present, if any, for recording the sworn statement of the Complainant and other witnesses and the Magistrate may take cognizance of the offences or he may dismiss the Complaint under Section 203, Cr.P.C. on considering the oath of the Complainant and witnesses. Of course, as pointed out by the learned Counsel for the Petitioner, there is no specific provision for dismissing the Complaint for the absence of the Complainant before recording the sworn statement of the Complainant. At the same time, this Court is not agreeing with the contention of the learned Counsel for the Petitioner that the Complaint cannot be dismissed before recording the sworn statement even if the Complainant is absent before the Court. After taking cognizance of the Complaint and issuing summons to the Accused, if the Complainant is absent, as per summons case procedure, the Magistrate may invoke Section 256, Cr.P.C. and acquit the Accused. After filing the Complaint and the Magistrate, on receiving the Complaint fixes any date for recording the sworn statement of the Complainant and the Complainant is absent on that date and also on the subsequent dates fixed for the same, though there is no specific provision for discharging the Accused, it would not be proper and justifiable to say that the Court has to wait compulsorily and indefinitely for the Appearance of the Complainant. In such situation, the Magistrate may close the Complaint, which would not amount to acquittal of the Accused. Therefore, in



To

The Judicial Magistrate,
Avinashi.

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+1cc to M/s.K.Sudhakar, Advocate, S.R.No.32393

Cr1.O.P. No.6905 of 2022

PMK (CO)
RLP (10/06/2022)