

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 506 of 2007

M/s. Amrit Feeds Limited

-Vs-

Asha Ram & Anr.

For the Appellant : Ms. Subhanwita Ghosh
(Amicus Curiae)

For the State : Ms. Faria Hossain

Heard on : 15.09.2023, 28.11.2023

Judgment on : 28.02.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against an judgment and order dated 30.06.2006 passed by the learned Metropolitan Magistrate 12th Court, Calcutta in connection with Case No.C-13961 of 2004 under Sections 138/141 of the Negotiable Instruments Act thereby aquatinting the accused persons.
2. On the basis of a complaint filed by the petitioner under Section 138 read with Section 141 of the Negotiable Instruments Act before the learned Chief Metropolitan Magistrate, Calcutta a complaint case being C-13961/04 was initiated against the accused/opposite parties.

3. The Learned Chief Metropolitan Magistrate, was pleased to take cognizance of the offence and transfer the same to the Court of learned Metropolitan Magistrate 12th Court, Calcutta for enquiry, trial and disposal.

4. The allegations made in the petition of complaint were as follows:

- a. The accused persons issued a cheque towards the discharge of the legal debts and/or liability in favour of the complainant. The details of which are given as : Cheque No.- 966702 date- 12.10.04 Drawee Bank/Branch- Punjab National Bank, Dharuhera Branch, Haryana, Amount- Rs.1,78,131/-
- b. The aforesaid cheque on request of the accused was duly presented for encashment through the Banker of the Complainant's Company viz. Punjab National Bank, New Market Branch, Kolkata within the validity period of the cheque, but the said cheque was dishonoured and returned back to the complainant along with a return memo of the accused person's banker dated 22.10.2004 within the remark "Insufficient Funds". The complainant company on 03.11.2004 through the complaint's banker received the intimation of such dishonour of cheque. The accused did not have requisite funds in his bank A/c. to honour the above cheque at the time when the same was presented to his bank.
- c. The facts of such dishonour of cheque was communicated to the accused by a notice dated 04.11.2004 issued by Mr. RajatKantiJha, Advocate and posted on 05.11.2004 at the address given in the Cause title under Registered Post with

Acknowledgement Due demanding the payment of the said dishonoured cheque amount of Rs.1,78,131/- (Rupees One Lakh Seventy Eight Thousand One Hundred Thirty One) only within 15 days from the date of receipt of the said notice.

- d. The aforesaid notice was categorically stated that in case of failure to make the payment as demanded therein a criminal proceeding would be initiated against the accused without any further reference thereto.
 - e. The above mentioned notice sent to the accused person on his correct address but the parcel returned back to the Complainant Advocate with the endorsement of the Post Office 'Door Closed' and last of such endorsement was made on 23.11.04 and it presumes that intimation has been given by the postal authority to the accused and in the eye of law it is a good service and presumes that the service has been made properly.
 - f. In spite of the service of the above notice upon the accused person the accused person fails and/or neglected to make the payment of the said cheque amount to the Complainant and as such the accused has thus committed an offence punishable Under Section 138 of the Negotiable Instrument Act as amended by the Banking Public Financial Institution and Negotiable Instrument Laws (Amendment Act) 1988.
5. The Learned Magistrate on 08.02.2005 was pleased to issue summons upon the accused person.

6. On 07.10.2005 when the Complainant was present the summons issued upon the accused person returned as 'un-served and the Learned Magistrate was pleased to issue warrant of arrest against the accused person to secure his presence.
7. On 07.01.2006 a petition was filed by the Complainant Company for substitution of Sri Partha Sarkar in place of Sri R. Chowdhury as the authorized representative of the company. Such petition for substitution was allowed by the Magistrate. On the same date the warrant of arrest issued against the accused person returned as 'non-executed'.
8. On 7. 5.4.2006 when the matter was called on for hearing the Complainant was absent and the Learned Magistrate was pleased to issue a 'show cause' upon the Complainant.
9. On 30.06.2006 when matter was called on for hearing and due to the absence of the complainant or any of its authorized representative and non-filing of a reply to the Show cause issued upon the Complainant the Learned Magistrate was pleased to acquit the accused person under provisions of Section 256(1) of the Code of Criminal Procedure from the charges under Sections 138/141 of the Negotiable Instruments Act.
10. Heard the submissions of the Learned Amicus Curiae for the appellant as well as the Learned Advocate for the State.
11. The Trial Court records reveal as follows:-
 - i. Complaint case being C-13961/04 was filed by the complainant company under Sections 138/141 of N.I. Act on the allegation that in lieu of existing debt and/or liability, the accused issued one cheque

dated 12.10.2004 drawn on PNB, Dharuhera Branch, Punjab amounting to Rs.1,78,131/- which was dishonoured on 22.10.2004 with the endorsement “Insufficient Funds”. Demand notice was sent but accused did not pay.

- ii. Learned CMM, Calcutta took cognizance of the offence and transferred the case to the Learned 12th MM, Calcutta for trial and disposal.
 - iii. On 08.02.2005, the Learned Magistrate issued summons against the accused but the said summons was returned as “unserved” and as such on 07.10.2005, the Learned Magistrate issued warrant of arrest against the accused.
 - iv. On 07.01.2006, a substitution petition was filed by the complainant which was allowed and on the very same day, the warrant of arrest was issued against the accused person returned as “non-executed”.
 - v. On 05.04.2006, the complainant was absent without any steps and the Learned Magistrate show-caused upon the complainant.
 - vi. On 30.06.2006, due to the absence of the complainant and for not giving reply to the show cause, the Learned Magistrate dismissed the cause under Section 256(1) of the Criminal Procedure Code.
12. Reliance was placed by the Learned Amicus Curiae for the appellant in the judgment of ***BLS Infrastructure Limited Vs. Rajwant Singh & Ors.***¹, where the Hon’ble Supreme Court observed as follows:

“16. Further, if the complainant had not appeared to press the application under Section 311 of the Code, the learned Magistrate could have rejected the application under Section 311 of the Code and proceeded with the case

¹ (2023) 4 SCC 326

on the basis of the available evidence. We are, therefore, of the considered view that the learned Magistrate was not justified in straightaway dismissing the complaint(s) and ordering acquittal of the accused on mere non-appearance of the complainant. The High Court too failed to take notice of the aforesaid aspects. Thus, the orders impugned are liable to be set aside.”

13. Reliance was further placed by the Learned Amicus Curiae for the appellant in the judgment of **Associated Cement Co. Ltd. Vs. Keshvanad²**, where the Hon’ble Supreme Court held as follows:-

“13. When a trial court had acquitted an accused due to non-appearance of the complainant the appellate court has the same powers as the trial court to reach a fresh decision as to whether in the particular situation the Magistrate should have acquitted the accused. What the trial court did not then ascertain and consider could, perhaps, be known to the appellate court and a decision different from the trial court can be taken by the appellate court, whether the order of acquittal should have been passed in the particular situation.

...

16. What was the purpose of including a provision like Section 247 in the old Code (or Section 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 protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, the court has a duty to acquit the accused in invitum.

17. Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the section. The 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. The 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 his 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.”

14. The Learned Amicus Curiae further submitted that in the case of **Champalal Kapoorchand Jain Vs. Navyug Cloth Stores & Ors.**³, it was held as follows:

“6. Therefore, if the summons has been issued on complaint and on the date appointed for the appearance of accused or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, acquit the accused, unless for some reason the Magistrate thinks it proper to adjourn the hearing of the case to some other day. Therefore, Section 256 mandates that if the complainant does not remain present on the appointed day after summons has been issued on complaint and unless attendance of complainant has been dispensed with, the Magistrate shall acquit the accused. If the Magistrate feels that the order of acquittal should not be passed on that date, the Magistrate has to give reasons. In this case, the Magistrate has acquitted the accused as provided under Section 256 because he did not find any reason to

³ 2019 SCC OnLine Bom 4805

adjourn the hearing of the case to some other day. The Magistrate in terms of subsection (1) of Section 256 exercises wide jurisdiction. Although an order of acquittal is of immense significance, there cannot be any doubt or dispute whatsoever that the discretion in this case had been properly exercised by the Magistrate. As noted above, out of the 31 dates, on 11 dates the complainant was absent but still the Magistrate did not dismiss the complaint on those dates. In such a situation, I cannot say there is any illegality in the order that requires this Court's interference."

15. Section 256(1) of the Code of Criminal Procedure in its entirety would reveal two constraints to be imposed on the court for exercising the power under the Section. Primarily, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Secondly, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case.
16. It is a settled principle of law that when 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. However, if the presence of the complainant on that day was quite unnecessary then resorting to the step of eradicating the complainant will not be a proper exercise of the power envisaged in the aforesaid Section. This discretion therefore must be exercised judicially and fairly without impairing the cause of administration of criminal justice.

17. In the instant case the Learned Magistrate by an order dated 5.4.2006 was pleased to issue show cause upon the complainant. Therefore on the next date it was incumbent upon the Learned Magistrate to find out whether at all the show cause notice was served upon the complainant company. The Learned Magistrate without recording any subjective satisfaction in respect of the service of the show cause notice erroneously passed the impugned order under Section 256 of the Code. The Learned Magistrate has sufficient powers to ensure the presence of the complainant before the Court issuing direction upon the police authorities to produce the same before the Court. Mere absence for a day or failing to file a reply to show-cause justifiably does not render the accused to the acquitted without considering the merits of the case.
18. The judgment and order dated 30.06.2006 passed by the learned Metropolitan Magistrate 12th Court, Calcutta in connection with Case No.C-13961 of 2004 under Sections 138/141 of the Negotiable Instruments Act is set aside. The Trial Court is to decide the aforesaid case merits without granting unnecessary adjournments to either of the parties. Both the parties shall be present on each and every date of the hearing before the Trial Court, failing which the Learned Trial Court shall pass necessary orders for such noncompliance.
19. Accordingly, the instant criminal appeal being CRA 506 of 2007 stands disposed of.
20. There is no order as to costs.

21. I record my appreciation for the able assistance rendered by Ms. Subhanwita Ghosh, Learned Advocate, as *Amicus Curiae* in disposing of the appeal.
22. Let the copy of this judgment be sent to the Learned Trial Court as well the police station concerned for necessary information and compliance.
23. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)