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Right Services Vs. Chhotu Bhaiya Road Lines and anr.

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Court : Madhya Pradesh

Decided On : Feb-13-2003

Reported in : 2004CriLJ406; 2003(3)MPHT561; 2003(2)MPLJ523

Judge : A.K. Gohil, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138; Code of Criminal Procedure (CrPC) , 1974 - Sections 256

Appeal No. : Criminal Appeal Nos. 159 and 160/2003

Appellant : Right Services

Respondent : Chhotu Bhaiya Road Lines and anr.

Advocate for Def. : None for Respondent No. 1

Advocate for Pet/Ap. : Mayank Upadhyay, Dy. Govt. Adv. for State ;Jaisingh, Sr. Adv. and ;Amicus Curiae;A. Panchal and ;M. Sinjonia, Adv.

Disposition : Appeal allowed

Judgement :

A.K. Gohil, J.

1. This judgment shall also govern the disposal of connected Criminal Appeal No. 159 of 2003 (Chandra Prakash Chordiya v. New Jain Doodh Dahi Bhandar,

Indore).

2. This appeal has been filed under Section 378(4) of the Code of Criminal Procedure (for short 'the Code') against the impugned order dated 20-12-2001 passed by the Judicial Magistrate, First Class, Ratlam, in Criminal Case No. 338/2001, by which the Trial Court has dismissed the private complaint in the absence of the complainant having filed under Section 138 of the Negotiable Instruments Act (for short 'the Act') and has also acquitted the respondent/accused.

3. In Criminal Appeal No. 4362 of 2002, the Trial Court has also dismissed the complaint filed under Section 138 of the Act vide order dated 28-9-2002 in the absence of the complainant and also acquitted the respondent/accused and thereafter also dismissed the application for restoration, against which the appellant has preferred this appeal after obtaining leave from this Court.

4. The case of the appellant, in nutshell, is that he filed a complaint under Section 138 of the Act on 26-3-2001 which was registered and the statement of the complainant under Section 200 of the Code was recorded and thereafter cognizance was taken by the learned Magistrate in the case and a case was registered and the respondent/accused was summoned by bailable warrant. Thereafter the respondent appeared and was released on bail and when the case was put to trial on 20-12-2001, the complainant became absent. The Trial Court dismissed the complaint in the absence of the complainant and acquitted the respondent/accused, against which appellant has preferred this appeal after obtaining leave from this Court.

5. I have heard Shri A. Panchal and Shri M. Sinjonia, learned Counsel for appellants; Shri Mayank Upadhyay, learned Deputy Govt. Advocate for State; and Shri Jaisingh, learned Senior Advocate as Amicus Curiae; and perused the record. No one appeared on behalf of the private respondent/accused despite service of notice.

6. The facts of the case are not in dispute. It is also not in dispute that on the date when the complaint was listed for hearing, complainant was not present in the

Court and in the absence the learned Trial Court dismissed his complaint and acquitted the respondent/accused. No doubt the complaint filed under Section 138 of the Act is triable under Chapter XX as a trial of summons cases by Magistrate. The procedure which is to be followed in a case of non-appearance of complainant or death of the complainant, has been provided under Section 256 of the Code, which reads as under :--

'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.'

7. This section applies to summons cases only. If the summons has been issued on the complaint and on the date of hearing 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. A proviso has been inserted to this section and according to the said proviso if 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. Under the aforesaid section, Magistrate has been given a discretion to dispense with the attendance of the complainant whether he be a public servant or not. If the Magistrate is of opinion that his personal attendance is not necessary, in exercising his discretion he can dispense with the personal attendance of the complainant. It is also true that under this section while exercising such discretion

the Magistrate should act judicially and not arbitrarily. It is also not in dispute that the discretion under the proviso may be exercised suo-motu or on the application of the complainant. It is also true that under the Code of Criminal Procedure there is no provision for restoration, the Magistrate is also not having any power to review or recall any of the order and also can not order for restoration of the case.

8. It has been held by Supreme Court in the case of Maj, Genl. A.S. Gaurava and Anr. v. S.N. Thakur and Anr., reported in AIR 1986 SC 1440, that the Magistrate has no inherent power to review his order of dismissal and restore the case. Such an order of dismissal of complaint and acquittal of the accused either can be set aside in revision or in appeal against acquittal. The Revisional Court can also set aside the order and direct the case to proceed according to law.

9. It was submitted that under Section 249 of the Code if the complainant is absent before framing of charge, the Court may discharge the accused but after framing of charge or taking of cognizance the Court can not dismiss the complaint. Though Section 249 and Section 256 of the Code both are analogous, under Section 256 if the complainant is absent the Court may acquit the accused; but under Section 249 the Court may discharge the accused before the charge has been framed. There is also no dispute that the scope of two sections, Sections 249 and 256 of the Code is different and they apply in two different set of facts.

10. In this case, I do not think that there is any dispute about the application of the provisions of Section 256 of the Code in these cases.

11. The Supreme Court and various High Courts have liberally construed the scope of Section 256 of the Code and its application and use in the complaint cases. The Supreme Court has considered the scope of Section 256 of the Code in the following two cases specially in relation to the complaints filed under Section 138 of the Act.

12. It has been held by the Supreme Court in relation to Section-256 of the Code in the case of Mohd. Azeem v. A. Venkatesh and Anr., reported in (2002) 7 SCC 726, that on one singular default in appearance on the part of the complainant, the dismissal of the complaint under Section 138 of the Negotiable Instruments Act is

not proper. The cause shown by the complainant of his absence that he had wrongly noted the date should not have been disbelieved and it should have been held to be a valid ground for restoration of the complaint. The Supreme Court has further held that the learned Magistrate and the High Court had adopted a very strict and unjust attitude resulting in failure of justice and the Supreme Court has set aside the orders and restored the complaint and directed the Magistrate to proceed with the trial of the case after issuance of formal notices to both the parties.

13. Again in the case of *Associated Cement Co. Ltd. v. Keshvanand*, reported in AIR 1998 SC 596, the Supreme Court has considered the scope of Section 256 of the Code in relation to the complaint filed under Section 138 of the Negotiable Instruments Act and has held as under :--

'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 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 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 other High Courts have also taken liberal view in the matter. The Kerala High Court, in the case of *Santosh and Ors. v. State of Kerala and Anr.*, reported in 1985 Cr.LJ 756, has held as under :--

'Non-appearance of complainant-- Acquittal of accused need not follow in every case. Courts are existing for denying it. Acquittal of the accused for the simple reason that the complainant came a little late may not be what was intended by the legislature. If for the simple reasons that the complaint was not present when the case was called on for the first time, the accused is acquitted, it may result in injustice at least in some cases. Such contingencies will have to be avoided.'

15. Again in the case of C.K. Sivaraman Achari v. D.K. Agarwal and Anr., reported in 1978 Cr.LJ 1376, the Kerala High Court has held as under:--

'Absence of complainant at time of hearing-- Effect of--Course to be followed. Discretion, however, is expected to exercise in a judicial manner.'

16. The Calcutta High Court in the case of Govinda Chandra Bag v. Radhakanta Bad and Ors., reported in 1987 Cr.LJ 477, has held as under:--

'Summons case--Section 256--Acquittal of accused for non-appearance of complaint--Complainant remaining present on all dates of hearing--Remaining absent only on date of hearing arguments due to certain unavoidable circumstances--Date of hearing arguments was also date fixed for report from police against allegation made by complainant against accused--Acquittal of accused on ground that complainant was not eager to proceed with case held, was not proper.'

17. The Orissa High Court in the case of Executive Officer, Sambalpur Municipality v. Rama Chandra Agrawala, reported in 1989 Cr.LJ 1170, has held as under :--

'Prosecution for carrying out unauthorised construction of house-- Absence of complainant and his advocate on call--Acquittal of opposite party under such circumstances held, illegal.'

18. The Madras High Court also in the case of Arumugham v. Valliammal and Ors., reported in 1982 Cr.LJ 1609, held as under:--

'The order of acquittal should not be a matter of routine followed automatically on the absence of the complainant. All the surrounding circumstances and facts have

to be taken into consideration before the Magistrates can dismiss the case. Section 256(1) invests in the Court a discretion. It should not be used for merely disposing of the case. The real test will be good faith. In the instant case, when all the cases were posted for hearing to that relevant date and when the complainant's case was called, he appeared before the Court. But when the case was called a second time he was absent as he had gone out to bring his Counsel. Before he came with his Counsel the case was disposed of by the Magistrate under Section 256. Under these circumstances, the acquittal of the accused was not justified.'

19. From the aforesaid discussion; case laws; and the view taken by the Courts, it is clear that while dismissing the complaints in the absence of complainant, the Court should not pass the orders of dismissal of complaints and acquit the accused persons mechanically. The Court should consider the nature of the offence and the material produced by the complainant and also the stake which complainant is having in the matter. If on solitary hearing or hearings for one or the other reason if the complainant is not present, normally the Court should adjourn the case and should not arbitrarily exercise its discretion refusing the exemption. Normally in complaint cases filed under Section 138 of the Act when a complaint is filed, the complainant is having a stake in the matter. Therefore, in the absence of the complainant, complaint should not be dismissed immediately. The Court should either adjourn the case or may proceed to hear the case under the proviso of Section 256 of the Code and if the complainant is represented by an Advocate or by officer conducting the prosecution or if the personal attendance of the complainant is not necessary, the Court should either grant exemption, suo-motu or on the application of the advocate, as the order of dismissal of complainant operates as a final order. Therefore, normally it should be passed after proper application of mind and exercise of judicial discretion.

20. In the instant case from the perusal of the impugned order it is clear that the Court had already taken cognizance in the matter and has also summoned the respondent/accused by a bailable warrant of Rs. 15,000/- and he was also released on bail, therefore, when on a singular day, the complainant was absent. In the absence of the complainant normally the Court should have adjourned the

case instead of dismissing it and acquitting the accused person. According to this Court looking to the nature of offence the Trial Court has not exercised its discretion properly and judicially.

21. In the result, both these appeals are allowed. The impugned orders, dismissing the complaints and acquitting the respondent/accused, are hereby set aside. The complaints are restored to their original number and the Trial Court is directed to proceed with the trial of the case in accordance with law.

22. A copy of this order be transmitted to the Trial Court immediately, along with the record.

21. Retain this order in the record of this case and place its copy in the record of connected Criminal Appeal, as particularised above.

22. I record my deep appreciation for the valuable assistance rendered by Shri Jaisingh, Senior Advocate as Amicus Curiae in these appeals.

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