

Nityananda Samal Vs. Naraprasad

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Court : Orissa

Decided On : Oct-30-1981

Reported in : 53(1982)CLT71; 1982CriLJ927

Judge : B.K. Behera, J.

Appellant : Nityananda Samal

Respondent : Naraprasad

Judgement :

B.K. Behera, J.

1. The appellant was the complainant and the respondent was the accused person in ICC No. 14 of 1978(395-T/78) of the court of Mr. S. K. Das, Judicial Magistrate, Second Class, Cuttack. The case was one Under Section 342 of the Penal Code. After cognizance was taken of the offence, the respondent had been issued a summons and on his appearance, the case proceeded. On 28-11-1978, the date fixed for recording the evidence of the witnesses, the appellant was present with some witnesses, but at the instance of the defence, the case stood posted to 5-1-1979 for recording evidence of all the prosecution witnesses. On 5-1-1979, the date fixed for hearing, the appellant was absent on repeated calls and no steps were taken on his behalf till after 12 noon. The learned Magistrate acquitted the respondent Under Section 256 of Criminal P. C. At 1.15 p.m. that day, the advocate for the appellant filed the Hazira of the appellant and his witnesses along

with an application praying to recall the previous order passed on that day. The application was rejected. The appellant has come to this Court in appeal after obtaining leave therefor in Cr. Misc. Case No. 13 of 1979 of this Court,

2. The learned Counsel for the appellant has submitted that the appellant was diligent in the prosecution of his case and had come ready with his witnesses on 5-1-1979, but the appellant, being a Harijan and a rustic villager, went to call his advocate when the case was called on leaving his witnesses on the verandah of the court and when he came back with his advocate, it could be known that an order of acquittal had been passed. It has been submitted on his behalf that the learned Magistrate had improperly exercised his discretion while passing an order of acquittal and the order of acquittal, being wrong and illegal, ought to have been recalled. The learned Counsel for the respondent has, however, submitted that the order of acquittal was neither illegal nor improper and the learned Magistrate had duly exercised his discretion in not adjourning the hearing and there was no justifiable reason to recall the order.

3. As earlier indicated, the offence for which cognizance was taken was punishable Under Section 342 of the Penal Code and the case was to be governed by the summons procedure. After cognizance was taken, a summons had been issued to the respondent. Section 256 of Criminal P. C, would, therefore, be applicable to the case. This section, corresponding to Section 247 of the old Code, read 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 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.' The orders passed by the learned Magistrate on 5-1-1979 are extracted below:

Complainant absent. Accused is present. Nobody responds on behalf of the complainant despite reiterated calls. No step is also taken on behalf of the complainant. It is past 12 noon now. Hence I don't think it expedient to adjourn this case further on any ground. Hence I ac-; quit the accused Under Section 256 of Cr.P.C.

Sd. S. K. Das,

J.M.S.C.

Later

1.15 p.m.

Advocate for the complainant files a hazira of the complainant and four other witnesses along with a petition praying to recall the previous order. Heard. It is rejected as such a prayer has no merit at all and moreover there is neither any rule nor indication anywhere to justify this recall,

Sd. S. K. Das,

J. M, S. C.

4. Each case has to be examined in its own context to determine as to whether there has been proper exercise of the discretion vested in the court. When the complainant is absent, the court can proceed in either of the three ways :i) it may acquit the accused or (ii) adjourn the case or (iii) proceed to hear the case under the proviso if the complainant is represented by an advocate or by the officer conducting the prosecution or if the personal attendance of the complainant is not considered necessary. In order to decide whether the presence of the complainant is necessary, the court should act judicially and not capriciously. A duty has been cast on the court to consider whether the personal attendance of the complainant is or is not necessary. In view of the discretionary power vested in the court, heavy

responsibility rests on it in deciding as to whether to adjourn the case or to record an order of acquittal. The discretion vested in the court should be exercised carefully and not hastily. An order of acquittal Under Section 256 of Criminal P. C. would bar a fresh trial and therefore, such an order is of immense significance. The order should show that the wide discretion vested in the court had properly been exercised.

5. In the instant case, the date on which the order of acquittal was passed was the date of hearing and the presence of the appellant and his witnesses was necessary. As the record of the court would show, the appellant was found to be absent on repeated calls. He had not filed his Hazira and no step had been taken by him. The learned Magistrate had not proceeded with the case hurriedly in the beginning of the day. As his order would indicate, till past 12 noon, the appellant had not appeared on calls. It was for these reasons, which had been recorded by the learned Magistrate in the body of the order, that he did not consider it to be expedient to adjourn the case and he passed the order of acquittal. The learned Magistrate had, therefore, properly exercised his discretion and being cognizant of the fact that he had the discretion to adjourn the case, did not do so for the reason stated in the order. While it is true that an order of acquittal passed Under Section 256 of Criminal P. C. would bar a fresh trial and would cause irreparable injury to a complainant, such an order can, in fit and appropriate cases, be passed if the complainant is not vigilant and has not come in time to the court when the case is called on for hearing. If, as submitted before this Court, the appellant was, in fact, present when the case was called on, he could inform the court that he would go and call his advocate. There was no material on record that the court had been informed about the presence of the appellant at the time the case was called on for hearing. As the record of the learned Magistrate would show, the appellant and his advocate came to the court as late as at 1.15 p.m. and an application for recalling the order of acquittal was made. After due exercise of his discretionary power, the learned Magistrate, instead of adjourning the case, had recorded an order of acquittal. The order, therefore, could not be said to be a nullity. The learned Magistrate certainly did not go wrong in rejecting the application made by the appellant to recall the order of acquittal which had been passed after due consideration.

6. For the aforesaid reasons, I find no justification to interfere with the impugned order.

7. In the result, the appeal fails and the same is dismissed.

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