

indocon Micro Engineers Vs. Pine Technology P. Ltd.

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Court : Delhi

Decided On : Sep-10-2002

Reported in : 2003(2)ALT(Cri)7; 100(2002)DLT211

Judge : Mahmood Ali Khan, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 256 and 397;
[Negotiable Instruments Act, 1881](#) - Sections 138

Appeal No. : Crl. R. No. 554 of 2002

Appellant : indocon Micro Engineers

Respondent : Pine Technology P. Ltd.

Advocate for Def. : Nemo

Advocate for Pet/Ap. : Bhupesh Narula, Adv

Judgement :
ORDER

Mahmood Ali Khan, J.

1. This revision petition is filed under Section 397 of Cr.P.C. assailing the order of the Metropolitan Magistrate dated 27.3.2001 by which he has dismissed the criminal complaint filed by the petitioner for prosecution of the respondent under

Section 138 of Negotiable Instruments Act in default of the appearance of the complainant.

2. Case of the petitioner is that the criminal complaint was fixed before the Court on 9.9.2000 for recording of the pre-summoning evidence when it was adjourned to 27.3.2001 but the Counsel has wrongly noted the date as 27.3.2002. Consequently, the complainant and the Counsel could not appear and the complaint was dismissed in default. Petition is supported by the affidavit of Mr. Vinod Kumar Mittal, an employee of the complainant. The respondent has not been served as yet. Notice of the petition need not be issued to them.

3. The criminal complaint was dismissed by the Additional Sessions Judge in exercise of the power vested by Section 256 of Cr.P.C. which has given two options to the Court in the event the complainant failed to appear at the hearing; either to dismiss the complaint or to adjourn the case, if he finds some reason. Section 256 of the Cr.P.C. is extracted below.

'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.'

4. The Supreme Court in *Associated Cement Co. Ltd. v. Keshavanand*, : 1998 CriLJ856 , interpreting this section 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 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.'

5. A similar view was earlier taken by a Division Bench of this Court in Shiv Kumar v. Mohd. Saghir and Ors. 1997 JCC 149. The case law cited above, thus, shows that the Magistrate is not bound to dismiss a complaint for non-appearance of the complainant under Section 256, Cr.P.C. and he has to adopt one or the other course open to him in passing appropriate order. He has to exercise his discretion judicially. The contention of the petitioner that the default for appearance was on account of wrong noting of the date by the Counsel is supported not only by the affidavit of the employee of the complainant but also the file cover and the case diary of the Counsel. From them it appears that there was sufficient cause which prevented the complainant and the Counsel from appearing on the date of hearing. Since the presence of the complainant was not essential on the date of hearing, the learned Magistrate ought to have considered the second option of giving an adjournment of the case and not dismissing it in default. Learned Magistrate does not seem to have exercised his discretion judicially.

6. Having regard to the above facts and the law laid down by the Supreme Court in the above cited case, the impugned order dated 27.3.2001 passed by the learned

Metropolitan Magistrate is set aside. The criminal complaint is restored and it shall be proceeded with from the stage on which it was pending on 27.3.2001. Petition stands disposed of.

Parties shall appear before the Trial Court on 23.9.2002.

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