

Don Bosco Vs. Partech Computers Ltd.

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Court : Kerala

Decided On : Mar-14-2005

Reported in : 2005(2)KLT1003

Judge : J.M. James, J.

Acts : Negotiable Instruments Act - Sections 138; ;[Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 82, 83, 247, 256 and 256(1)

Appeal No. : Cri.A. No. 2152/2004

Appellant : Don Bosco

Respondent : Partech Computers Ltd.

Advocate for Def. : P.M.A. Kalam, Public Prosecutor

Advocate for Pet/Ap. : Jacob Abraham, Adv.

Disposition : Appeal allowed

Judgement :

J.M. James, J.

1. The following aspects of daily importance have been raised for consideration of this Court:

(i) whether notice to the respondent, accused, is necessary in an appeal, filed from the dismissal of the complaint by the Court below, when the accused did not appear at all before that Court;

(ii) whether the Magistrate can dismiss a complaint and acquit the accused under Section 256(1) Cr.P.C., even when the personal attendance of the complainant is not necessary before that Court; and

(iii) whether the Magistrate, within the scope of Section 256 Cr.P.C, could dismiss the complaint without recording any reason for such dismissal.

2. The facts show that the appellant, hereinafter referred to as the complainant filed S.T.No. 1700/2000 before the Judicial First Class Magistrate Court, Kozhikode under Section 138 of the Negotiable Instruments Act, in short 'the Act', against respondents 1 and 2, hereinafter referred to as the accused. The first accused is a company registered under the Companies Act and the 2nd accused is its Director, who is looking after the day to day affairs of the first accused company as stated in paragraph 2 of the complaint filed before the Court below. The accused did not appear before the Magistrate Court. On 12.3.2004, the complainant was absent. The Magistrate, therefore, passed the impugned order stating that 'Complainant absent. No representation. Hence, accused is acquitted under Section 256(1) Cr.P.C'. The same is under challenge through this appeal.

3. It is averred that both the accused evaded service of summons. Therefore, steps under Sections 82 and 83 Cr.P.C. were initiated and the case was posted to 12.3.2004. But the counsel appearing for the complainant noted the date as 18.3.2004. Therefore, when the case was taken up on 12.3.2004 there was no representation. That resulted in the dismissal of the complaint and acquittal of the accused.

4. Section 256 Cr.P.C, inter alia, empowers the Magistrate to acquit the accused unless the Court adjourns the case to some other date when the case is posted for appearance of the accused and the complainant is absent. The proviso thereunder further states that in the opinion of the Magistrate, if the personal attendance of the complainant is not necessary, the Magistrate may dispense with the attendance of

the complainant and proceed with the case. On a number of occasions, the application of Section 256 Cr.P.C. came up for consideration of this Court as well as the Supreme Court. In *Sivaraman v. Agarwal*, 1978 KLT SN Case No. 51 P.20, a learned Single Judge (Janaki Amma, J.), of this Court, while dealing with Section 256 Cr.P.C, has laid down that while acquitting the accused or adjourning the case to a future date or proceeding with the case after dispensing with the attendance of the accused, when the complainant is absent, it should be done with a view to advance justice and not to deny it. It is also opined that the Magistrate, should take stock of the whole situation before he exercised his discretion, within the scope of Section 256(1) Cr.P.C and that the absence of the complainant should not be taken as a short cut for disposal of the case. The above view has been accepted by another learned Single Judge of this Court in *Joseph v. Dharmarajan*, 1998(2) KLT SN 13P.12.

5. In *Associated Cement Co. Ltd. v. Keshvanand*, 1998 (1) KLT 179 (SC), the Supreme Court had an occasion to examine the application of Section 247 of the Code of Criminal Procedure, 1898, hereinafter referred to as 'the old Code', which is applicable to the State of Jammu and Kashmir even now, and which is similar to that of Section 256 Cr.P.C. The accused was absent and there was no representation from the counsel as well. It was subsequently revealed that the complainant, who was in Jammu, was transferred to Jalandhar. On the posting date of the case, the complainant proceeded to Jammu. But, because of the incessant rain for two days, motor traffic in the area was fully paralysed. Hence, he could not reach the Court. The brother of the Advocate appearing for the complainant met with an accident. Therefore, the Advocate also could not attend the Court continuously for three days preceding the date of posting of the case in question. The Magistrate dismissed the complaint and acquitted the accused under Section 247 of the old Code. Analysing the fact situation of that case, the Supreme Court observed that Section 247 of the old Code (Section 256 of the new code) afford some deterrence against the dilatory tactics of the complainant, so that, after filing the petition, he could not force the accused to attend the Court on all posting days and thereby harass him by he remaining absent. Interpreting the Section, the Court laid down that firstly, in a situation where it is proper to adjourn the case to some other date for hearing, then the Magistrate shall not acquit the

accused; and secondly, if the 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.

6. In the case at hand, as the facts narrated above show, the attendance of the complainant was not at all necessary. The Court did not apply its judicial discretion to reach a conclusion whether the personal attendance of the complainant was essential on that-day for the progress of the case or not. When the presence of the complainant was quite unnecessary and the Magistrate could proceed with the case by adjourning the same even if there was no representation from the counsel, the Magistrate should have adjourned the case, particularly when steps under Sections 82 and 83 of the Cr.P.C. were pending against the accused. Therefore, the Magistrate did not apply his judicial discretion with the required judicial caution, while dismissing the complaint and acquitting the accused.

7. The Court has dismissed the complaint without affording any reason. The Apex Court has, time and again, called upon the High Courts and other Subordinate Courts, exercising judicial and quasi-judicial functions, to pass reasoned orders. The Court also deprecated the tendency of the High Courts and other Subordinate Courts dismissing petitions without a speaking order, just by using the laconic words 'rejected' or 'dismissed'. See *Arun v. Additional Inspector General of Police*, (1986) 3 SCC 696. The Magistrate Courts are seen dismissing the complaints, particularly the one filed under Section 138 of the Act, through very short orders, as quoted above. Although Section 256 Cr.P.C. gives authority to the Magistrate to acquit the accused, it can only be done after applying the judicial mind and discretion. An arbitrary action on the part of the Magistrate, without applying the true spirit and intention of Section 256 Cr.P.C, would create a dangerous situation, where the complainant has to approach the High Court to redress, his grievances. It would also cause unbearable hardships and delay in getting the matter ultimately disposed of. Such a situation would make the litigant public to lose faith in the judicial system. The Magistrate Courts should not take the absence of the complainant as an opportunity to increase the number of disposal of the cases. Mechanical, fanciful and whimsical disposals are absolutely not the rule of law as contemplated under Section 256(1) Cr.P.C. The said provision has to be applied

with all responsibility that is required of a Magistrate. He shall give fair and brief reasons for dismissal of the complaint or the acquittal of the accused.

8. The accused did not appear before the Court below and steps were pending against him. Therefore, the impugned order passed by the Magistrate was not known to him. Even if I issue notice and the accused appear before this Court, the ultimate result would be the remand of the matter for reconsideration of the case by Magistrate. A learned single Judge of the Gujarat High Court had considered this aspect in *State of Gujarat v. Tha Somaji Jamaji*, 1994 Cri.L.J. 3458. The High Court was considering the inadequacy of the sentence that was raised before it. The Court was of the opinion that in a case where remand is the only inescapable and irreversible conclusion, even after the issuance of a notice to the respondent, the mechanical issuance of notice would unnecessarily add to the burden of the Court and no useful purpose would be served. Therefore, the Court held that giving of the notice to the accused by the Trial Court would be sufficient. In the case under discussion, the Magistrate dismissed the case before appearance of the accused. Therefore, no notice is necessary in this appeal and it can further be given or appearance of the accused can be compelled by the Magistrate, as per law. Issuing of notice by this Court in this appeal and waiting for the service of the said notice, is quite unnecessary. Therefore, I hold that when the accused did not appear before the lower Court and ultimate finding in a given case, after considering the facts, would necessitate remand to the lower Court for reconsideration, there is no need to issue a notice to the respondent, accused, and the same could be done by the Court below, on receipt of the records from this Court. Hence, in this appeal, there is no need to issue notice to respondents 1 and 2. On the other hand, if the accused appeared or contested the proceedings, natural justice demands that notice be given to the respondent and he be heard before a decision is taken, even if it would result into only a remand.

9. In view of the above discussions, I allow this appeal, set aside the impugned order and remit the case to the Judicial First Class Magistrate Court, Kozhikode. S.T.No. 1700/ 2000 is restored to its file. The learned Magistrate shall proceed against the accused from the point at which the complaint was dismissed.

The complainant shall appear before the Court below on 4.4.2005.

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