

(1997) 04 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : 81-Cr. Rev. of 1996 . S.L.A.A. of 1996

Associated Cement

APPELLANT

Vs

Keshav Nand

RESPONDENT

Date of Decision : 09-04-1997

Acts Referred:

Jammu and Kashmir Criminal Procedure Code, 1989 — Section 247

Citation : (1997) CrLJ 3898 : (1997) KashLJ 306

Hon'ble Judges : A.M.Mir, J

Bench : Single Bench

Advocate : M.L.Thusoo, K.S.Johal, K.L.Pandita, Advocates appearing for the Parties

Judgement

1. This is an appeal filed against an order passed by the Judicial Magistrate 1st Class (1st Addl. Munsiff) Jammu on 24.8.1996. By virtue of the impugned order the Trial Court dismissed a complaint pending before it against the respondent in terms of Sec. 138 of the Negotiable Instruments Act and acquitted the accused respondent. The dismissal was ordered for nonappearance of the complainant on the date of the order. The complainant has through a separate C.M.P. sought leave of the court for filing the appeal/revision as the State had not filed one against the order of acquittal. On a perusal of this application it was found that grounds taken in the appeal are required to be taken into consideration for disposal of the application. The grounds taken in the appeal are exactly the same as in the application. Therefore, my judgement is necessarily to dispose of both. So without agreeing to the grounds of application I have granted leave to the petitioner to file the appeal/revision and have heard the learned counsel for the parties in extenso on motion hearing of the whole matter.

2. The grouse of the appellant/petitioner both in the application and the appeal/revision areas under the Trial Court, while not exercising the discretion vested in it in favour of the accused has disused its power.

3. In fact there were cogent reasons for the court to adjourn the case for a future date or for dispensing with the personal appearance of the complainant. These grounds are as follows:

1. Puneet Aggarwal, through whom complaint was lodged by the company, stands transferred to Jullunder. He could not attend the court on 23rd

and 24th of August, 1996, because of torrential rain and blockade of road

2. Counsel for the complainant was engaged because his brother had met an accident and was hospitalised outside the state;

3. That no reasons for not having adjourned the case have been recorded and as such the order impugned suffers from non application of mind

4. That it is the company which is the complainant Puneet Aggarwal was only a representative of the company. His nonappearance could not have

been made the basis for the impugned acquittal.

4. Before going to the merits of the case, I would, in the first instance like to demarcate the area of influence of an appellant/revision court under

the Code of Criminal Procedure, (hereinafter called the Code), which relate to disturbing an order passed by the Trial Courts in exercise of

discretionary powers.

5. Appellate powers are will contemplated under section 423, 426, 427, 428 and 438 of the Code. Section 435 of the Code empowers the High

Court or any Sessions Judge to call for the records of any proceedings before any inferior Criminal Court situate within the local limits of his

jurisdiction and to examine that record for the purpose of satisfying itself in determining the correctness legality or propriety of any finding or order.

Section 439 also gives the revisional courts a discretion to exercise any of the powers conferred on a Court of appeal by Sections 423, 426, 427,

or 428. All these sections deal with powers of the Appellate Courts.

6. On a close reading of all these sections, Courts of appeal or revision, ordinarily, are not required to disturb the finding of a trial court passed in

exercise of its discretion simply because the former would come to a different conclusion on the same material. A Trial Court has the benefit of

knowing the full circumstances and facts of the case under adjudication before it. It also watches the demeanor of the parties, and above all, it is

the Trial Court in which the statute vests a power. No two human beings can be forced to arrive at the same conclusion. Wherever the statute

vests a power with the Trial Court, the Judge manning that Court is required to be satisfied that a case for exercise or refusal of that power is made

out. No doubt there may be an element of subjectivity but that amount of subjectivity is deliberately foreseen and allowed by the statute. This is so

because such subjectivity makes room for translating the judicial philosophy of the Magistrate into action. In my opinion our law of precedent has

developed out of this policy of the statutes. This is how time and again it has been held that appellate/revisonal courts should not ordinarily disturb

the finding of the trial courts, if a different view also could be taken on same facts. The court's concern only will be, as to whether or not the order

impugned is fraught with any illegality or impropriety.

7. Mr. Johal, appearing for the petitionerappellant, submits that Section 247 empowered the Magistrate to adjourn the case for a future date and

also to dispense with the personal appearance of the complainant. The Magistrate, according to him, should have first exhausted the two options

given to him which would have benefited the complainant. For this purpose Mr. Johal wants to justify before this Court the cause of complainant's

nonappearance on the fateful day. According to him the complaint's nonappearance on 23rd and 24th of August, 1996 was fully justified and was

caused by circumstances beyond their control. The court should also have taken the noncorporal status of the company into account and should

have not passed the impugned order against the appellant company.

8. The results following the nonappearance of the complainant are contemplated in Section 247 of the Code. It reads as under:

247Nonappearance of the complainantIf the summons has been issued on the complainant and upon a date appointed for the appearance of the

accused, or any day subsequent thereto, to which hearing may be adjourned, the complainant does not appear, the Magistrate shall,

notwithstanding anything here before contained, acquit the accused unless for some reasons he thinks proper to adjourn the hearing of the case to

some other day.

Provided that where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

9. In this case nonappearance of the complainant on 23rd and 24th of August, 1996 is not denied. The stage at which the Magistrate has exercised his power is also not under any challenge. The only ground taken while assailing the order is that the Magistrate neither adjourned the case nor passed any order dispensing with the personal attendance of the complainant. Thus this was a wrong exercise of power because legitimacy and sufficiency of the cause which prevented the complainant from appearing before the court was not taken into consideration. To me this argument seems to be preposterous. Because if that view is taken, it will be equivalent to asking the Magistrate to exercise the discretion vested in him by Section 247 in a particular way. On a grammatical construction of Section 247, the intention of the legislature becomes clear. Nonappearance of the complainant, after summons are issued, according to that intention, may result in acquittal of the accused. This is a general rule and to this general rule the statute recognises two exceptions; one provided under the very text of the section by which the Magistrate can adjourn the hearing of the case to some other date. This grant of adjournment is made dependant on the Magistrate being satisfied that it will be proper to do so. There must be some reasons which may weigh with him for coming to a conclusion that granting of adjournment would be proper. These reasons can be either expressed before him by any other persons or same can be gathered from the circumstances of the case. However, whatsoever the source through which such reasons come to light, it is the exclusive domain of the Magistrate to be satisfied or not to be satisfied, with regards to propriety of such adjournment.

10. Then comes the next exception postulated in the proviso attached to Section 247. Under this proviso the Magistrate has the power to dispense with the personal attendance of the complainant and proceed ahead with the case. Again the sinequanon for exercise of power under the proviso is that the Trial Magistrate should form an opinion with respect to the personal attendance of the complainant not being necessary. The formation of opinion or making of mind in terms of the proviso again falls within the ambit of

power of the Magistrate. There must be some circumstances, record or some person to suggest that complainant's attendance in the case is not necessary. Where there is no circumstances or record before the Magistrate, and where no body makes even a suggestion for exercise of discretion in favour of the complainant, no fault can be found with the order of acquittal passed by the magistrate. This is particularly so when there is no application before the Magistrate and when no other person appears on behalf of the complainant on the date when the case was fixed for hearing. The section does not make any mention of nonappearance of the counsel. Therefore, any person, other than the counsel for the complainant, could have made a request in this behalf.

11. Associated Cement Co. Ltd. filed a complaint through one Puneet Aggarwal, Senior Officer Marketing, before the Trial Court. After summons were issued and the accused was present. Puneet Aggarwal did not appear for three consecutive hearings. The order impugned was passed on 24.8.1996. Prior to that the case was taken up on 23.8.1996. ON that date complainant was not present and the counsel appearing for the accused seems to have made a prayer for exercise of power in terms of Section 247, of the Code but the same was declined. Even before that date the case came up on 27.7.1996. On that date also the complainant did not appear. The accused has all along been remaining present on all the above mentioned dates, alongwith his counsel. The Magistrate seems to have taken abundant precaution in waiting for the complainant and has not acquitted the accused on previous dates of hearing. He has demonstrated sufficient judicial restraint in the case and passed the order on third consecutive date of nonappearance of the complainant.

12. There would be no justification forgoing through the genuineness or otherwise of the grounds, which are advanced for the complainant's inability to appear. Even if the genuineness of the ground of nonappearance is tested by this Court, the ground fails as Mr. Thussu, appearing for the respondent has produced a copy of the certificate issued by Manager passenger service, J&K SRTC, Jammu, which shows that J&K SRTC buses were plying on the fateful dates and Delhi Jullunder road did not get blocked. This certificate is made a part of the file.

13. Then arises the question as to whether or not it is necessary for the

Magistrate to record reasons for not adjourning the case, or not dispensing with the personal appearance of the accuse. The statute does not lay down that reasons should be recorded. Section 247 of the Code seems to be couched in clear language. Once the complainant, after summons are issued, declines to appear, the natural consequence arising out of such nonappearance would be acquittal of the accuse. This is so because once a complainant sets into motion a criminal proceeding, he must follow such proceedings and prove his case. Otherwise, complainants would be free to hold the accused and the Court at ransom. The two options left open to the Magistrate can be exercised on being satisfied that the cause for nonappearance was genuine or sufficient. Here one could presume that while taking resort to either of the two options, reasons might be recorded for exercise of discretion under these options. But to say that the Magistrate has to give reasons as to why did he not adjourn the case if dispense with the personal appearance of the complainant, is quite the opposite of that proposition. When statute is silent, we cannot put words into the mouth of the statute and read between the lines that reasons for not exercising the power under the two options are required to be recorded.

14. Thus, I hold that a Magistrate, while not exercising power in terms of the two options left open for him under section 247, is not required to record any reasons.

15. It is true that the complainant company is a noncorporate entity but it is not existing in air. It filed its complaint through Mr. Puneet Aggarwal. It is Mr. Aggarwal whose statement in support of the complaint was recorded in the date of filing of the complaint was recorded on the date of filing of the complaint. No doubt under Companies Act, a company can sue and can be sued on its corporate nomenclature but for purposes of a criminal complaint that may not hold good.

16. The term 'complainant' has not been defined in the Code. Black's Law Dictionary (Sixth Edition) defines the word complainant as "one who applies to the courts for legal redress by filing complaint. Also one who initiates prosecution or who prefers accusation against suspected person'.

Calcutta High Court in a case titled National Samanta Vs. Rabin Ghosh, reported in AIR 1964 Calcutta 64, held that the term 'complainant' can

only mean the person whose statement in support of the complaint was recorded

at the time of filing of the complaint before the court. His

Lordship held that no other person, howsoever high his interest in the prosecution, can be said to be the complainant.

17. A Bench of this Court (A.Q. Parray J) while disposing of criminal revision No. 32 of 1987, titled Food Inspectors Vs. Ghulam Qadir Qani

(reported in 1995 KLJ 349) also seems to have dealt with the point, though indirectly. The complaint in this case was filed by a Food Inspector,

who was transferred. He did not appear before the Court, as a result of which the complaint was dismissed for nonprosecution. State also took the

same plea that Food Inspector's nonappearance would have not resulted into dismissal of the case. This plea was rejected.

18. Criminal Liability of a company has been viewed differently from its civil liability. In Richmond upon Thames London Borough Council Vs

Pinn and Wheeler, reported in 1989 Grim. L.R. 510, it was held that a limited company cannot be convicted for driving a vehicle without permit.

Similarly in MC. Millian Graham Printers Ltd. Vs. R.R. (UK) Ltd, reported in the Time, March 19,1993(UK) it was held that a company cannot

be punished for contempt by way of imposition of fine also. These two judgments show that the position of law with regard to criminal cases is

different from the concept of civil liability, being joint and several.

19. I, therefore, while falling in line with the Calcutta High Court, have no hesitation in holding that for purpose of Section 247 of the Code, the

word 'complainant' would mean the person whose statement in support of the complaint was recorded by the Court at the time of filing of the

complaint. Here it was Puneet Aggarwal whose statement was recorded therefore it will be he who will be treated as complainant for purpose of

this case That being so, his nonappearance would naturally arm the Trial Court with power to proceed in terms of Section 247 (supra). That

clinches the point.

20 Accordingly, I find that the order impugned has been passed in exercise of powers granted by the statute. The Trial Court while passing the

order has only exercised his discretion in a permissible way. I therefore, do not find any error of law or impropriety in the order impugned.

Therefore, neither appeal against the order is maintainable nor can this court, while exercising its revisional powers, interfere with the same. The

appeal/revision is dismissed.