

**(2014) 04 GUJ CK 0099**  
**In the Gujarat High Court**

**Case No :** Criminal Appeal (Against Acquittal) No. 1665 of 2013

Brijeshkumar Kiritkumar Mehta

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

**Date of Decision :** 23-04-2014

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 256, 378(4)  
Negotiable Instruments Act, 1881 (NI) — Section 138, 142

**Citation :** (2014) 04 GUJ CK 0099

**Hon'ble Judges :** Rajesh H. Shukla, J

**Bench :** Single Bench

**Advocate :** N.V. Gandhi, Advocate for Appellant(s) No. 1, Advocate for the Appellant; Monali Bhatt, APP for Respondent(s) No. 1, Advocate for the Respondent

**Final Decision :** Partly Allowed

## Judgement

Rajesh H. Shukla, J.—The present Criminal Appeal is filed by the Appellant/ Original Complainant u/s 378(4) of the Code of Criminal Procedure, 1973 assailing the impugned order passed by the learned Principal Civil Judge and Judicial Magistrate First Class, Songadh below Exhibit-1 in Criminal Case No. 3935 of 2013 dated 21.8.2013 dismissing the complaint of the complainant for non-prosecution.

2. Though the notice has been served, no one has remained present for Respondent No. 2 even though it was adjourned for couple of occasions.

3. Heard learned Advocate Shri N.V. Gandhi for the Appellant and learned APP Ms. Monali Bhatt for the Respondent State.

4. The facts of the case briefly summarized that the complaint being Criminal Case No. 3935 of 2013 was filed by the complainant for the offence u/s 138 read with Section 142 of the of the Negotiable Instruments Act. Learned Advocate Shri Gandhi referred to the Rojkam and submitted that earlier it was before the court

of Vyara and later on it was transferred to the concerned court at Songadh. The notice was issued by the court at Songadh to the parties and thereafter the matter was placed on board. Learned Advocate Shri Gandhi submitted that the exercise of power u/s 256 is not justified in the background of the facts. He referred to the facts and submitted that the appellant could not remain present on 21.8.2013 due to the death of the partner and it was conveyed to the court. He submitted that the rojkam would reflect that there is no lethargy or negligence in appearance. Therefore, learned Advocate Shri Gandhi submitted that the court below has failed to appreciate that for the genuine reason beyond the control if the party or the Advocate has not remained present, would not justify the exercise of such powers. He therefore submitted referring to the judgment of the High Court reported in Harisinh Bhagwatsinh Sarvaiya Vs. State of Gujarat and Another, and pointedly referred to the observations.

5. Learned APP Ms. Monali Bhatt has stated that the appropriate order may be passed.

6. Though served, no one has remained present for Respondent No. 2 and he has refused the notice.

7. Therefore, having regard to the facts and circumstances as well as the impugned order, it is evident that the Appellant Complainant was vigilant and it could not be said that he was negligent or not pursuing the matter. As stated in the application as well as submitted by learned Advocate Shri Gandhi, due to the illness, the Appellant was unable to remain present on 21.8.2013. On earlier occasion there was a genuine reason. As could be seen from the record on 29.6.2013, the application was given for adjournment. It is also a fact that the speedy trial is the requirement and the court would be justified in curbing the adjournments. However, it is also well accepted that the matter should be decided on merits rather than technicalities. The Hon''ble Apex Court has made the observations in a judgment reported in S. Rama Krishna Vs. S. Rami Reddy (D) by his LRs. and Others, with regard to the speedy trial. However, at the same time, the earlier judgment of the Hon''ble Apex Court reported in Mohd. Azeem Vs. A. Venkatesh and Another, has made the observations that when the matter is dismissed for non-appearance of the complainant, the court should not have adopted a strict and unjust attitude resulting in failure of justice. Therefore, even if the discretion is vested it has to be exercised in background of the facts in a given case. Such a discretion could be exercised if the party is negligent and not pursuing the matter but it would not justify the exercise of such power merely because the litigant has not remained present due to unavoidable circumstances. It is well accepted that the basic principle of criminal jurisprudence is that the matter should be decided on merits rather than technicalities and the parties need not suffer if there is lapse or default on the part of the Advocate. The judgment of the High Court in the case of Harisinh Bhagwatsinh Sarvaiya v. State of Gujarat & Anr. (supra) has discussed this aspect referring to Section 256 of the Criminal Procedure Code at length and quoting the earlier judgment of this

Court has clearly observed that the court below should not have given any premium to the accused on the ground of absence of the Advocate. A useful reference can also be made to the observations made by the Hon''ble Apex Court in a judgment in case of Mohd. Azeem v. A. Venkatesh and Anr. (supra).

8. It is in this circumstances, the interest of justice would be served if the matter is remanded and the impugned order is quashed and set aside. Therefore, the present Criminal Appeal deserves to be allowed and accordingly stands allowed to the aforesaid extent. The impugned order passed by the learned Principal Civil Judge and Judicial Magistrate First Class, Songadh below Exhibit-1 in Criminal Case No. 3935 of 2013 dated 21.8.2013 is hereby quashed and set aside. It is directed that Criminal Case No. 3935 of 2013 may be decided on merits by the trial court preferably within a period of six months from the date of receipt of this order.

9. It goes without saying that the trial court shall consider the same on merits after affording an opportunity of hearing as well as leading the evidence to both the sides in accordance with law.

10. Learned Advocate Shri Gandhi has assured that his client would cooperate for expeditious disposal of the matter and will not ask for any unnecessary adjournments.

11. With the aforesaid directions, the present Criminal Appeal stands allowed to the aforesaid extent. Direct service is permitted.