

(2022) 12 GUJ CK 0041

In the Gujarat High Court

Case No : R/Criminal Appeal No. 789, 811, 815 Of 2022

Hardik Manharlal Kotecha

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 13-12-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 256, 378
Negotiable Instruments Act, 1881 — Section 138
Code Of Criminal Procedure, 1898 — Section 247

Citation : (2022) 12 GUJ CK 0041

Hon'ble Judges : Gita Gopi, J

Bench : Single Bench

Advocate : Bhavik R Samani, Pranav Trivedi, Sudhanshu A Jha

Final Decision : Disposed Of

Judgement

Gita Gopi, J

1. Mr. Samani, learned advocate for the appellant submits that the present appeals have been filed against the order passed by the learned 11th Additional Chief Judicial Magistrate, Rajkot on 12.3.2022 dismissing the complaints being Criminal Cases no.2208/17, 2207/17 and 2206/17 respectively under Section 256 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') in a Special Sitting which was held in the Lok Adalat and submits that in the Special Sitting, the matter was placed and the advocate and the complainant were found absent and therefore, the learned Trial Court Judge found that the complainant was not interested in proceeding with the matter. Mr. Samani submits that because of the internal bar dispute, the lawyer on record was debarred from practice for a period of one year and this fact was known to the Court concerned. Apart from that, Mr. Samani submits that about 4 matters were instituted by the present appellant against the accused and in Criminal Case no.1387 of 2017, the respondent was convicted, which itself suggests on record the vigilance and the interest of the complainant to pursue the matter. Mr. Samani submits that the

learned Trial Court Judge was not right in observing that the complainant was remaining absent during the trial proceedings and Section 256 of the Cr.P.C. makes a provision to even grant exemption to the complainant when he is represented by a lawyer on record.

2. While countering the same, Mr. Sudhanshu Jha, learned advocate for the respondent no.2 states that the learned Trial Court Judge has considered the conduct of the complainant to dismiss the matters and thus, submits that the order under Section 256 of the Cr.P.C. would necessarily follow with acquittal of the accused and hence, submits that there is no ground to interfere in the matters.

3. In *Associated Cement Co. Ltd. Vs. Keshvanand*, reported in (1998) 1 SCC 687, the Hon'ble Apex Court while referring to the provisions of section 256 of Cr.P.C. in context of the complaint filed under section 138 of the N.I. Act, has made observations as under:

"15. Section 256 of the Code of Criminal Procedure, 1973(for short 'the new Code') is the corresponding provision to Section 247 of the old Code. The main body of both provisions is identically worded, but there is a slight difference between the provisos under the two sections. The proviso to section 256 of the new code is reproduced here:

"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."

16. What was the purpose of including a provision like Section 247 in the old code (or section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The Section, therefore, affords a protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, court has a duty to acquit the accused in invitum.

17. 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 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."

4. This Court in case of State v. Keshavram, reported in 1977 GLR 524, held as under:-

"The power under Sec. 256 of the Criminal Procedure Code has been conferred on the Magistrate obviously for the ends of justice and with a view to see that an accused person is not subjected to any undue harassment. The proviso to Sec. 256 further lays down that when the complainant is represented by a Pleader or 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. In the instant case, the situation on the day in question squarely fall within the proviso and still the learned Magistrate has acted under the main part of this section. This is really unfortunate and it is hoped that repetition of such instances would not be there in future in the Court of the Magistrate."

5. Similarly, in the the case of Sureshchandra Chandulal Patni V. Natwarlal Keshavlal Patni, reported in 1992 (1) GLR 626, this Court held that:

"In the instant case, the learned Magistrate has not recorded any reason about his thinking it proper to adjourn the hearing of the case to some other date. It appears that he has ignored the proviso to Sec. 256 of the Code of Criminal Procedure. The power under Sec. 256 of the Code of Criminal Procedure has been conferred on the Magistrate obviously in the interest of justice, with a view to seeing that the accused is not subjected to any undue harassment. It is clear from the proviso to Sec. 256 of the Code of Criminal Procedure that when the complainant is represented by a pleader or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with the personal attendance of the complainant and proceed with the case. In the instant case, the learned Magistrate does not appear to have applied his mind in dispensing with the personal attendance of the complainant and to proceed with the case or to adjourn the case to some other date as requested in the application submitted by the Advocate for the complainant. In the present case, the situation as on March 5, 1984 squarely falls within the aforesaid proviso and still the learned Magistrate acted under sub-sec. (1) of Sec. 256 of the Code of Criminal Procedure acquitting the accused. It is therefore, clear that the learned Magistrate has ignored the provision contained in the proviso to Sec. 256 of the Code of Criminal Procedure."

6. As per the record, the matters stood transferred to the place of jurisdiction,

where the complainant's Bank is found situated which in this case is Dena Bank Branch at Rajkot. Hence, a complaint was returned to the complainant by the learned JMFC, Nashik and considering the matter, inquiry under Section 202 was ordered and process for summons was ordered to be issued. In a case under Section 138 of the Negotiable Instruments Act, 1881, to prove the facts, the complainant is required to place on record the affidavit of the examination-in-chief along with the documents relied upon. The complainant had appointed an advocate to represent him, one matter against the respondent was successfully conducted, which led to conviction by the same complainant and the advocate. In the case of this nature, on every date so fixed for the proceedings, the complainant's presence is not necessary, more so, where he has engaged an advocate. Here in this case, the matters were placed in Special Sitting, which was held in the Lok Adalat. Unfortunately, the learned Trial Court Judge, while finding the absence of the advocate on that day and even of the complainant, deemed fit to dismiss the matters for default. The power under Section 256 of the Cr.P.C. has been conferred on the Magistrate obviously for the ends of justice and with a view to see that the accused persons are not subjected to any undue harassment, but the proviso to Section 256 of the Cr.P.C. lays down that where the complainant is represented by a pleader, where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with the attendance and proceed with the case. It is unfortunate to note that the learned Trial Court Judge took a very easy and convenient way of rejecting the matters rather than conducting the matters on merits. Mr. Samani states that the examination-in-chief was produced on record supported with the documents to be relied upon and in all the matters, even an application was moved from the side of the complainant drawing attention of the Court that the accused was not remaining present for cross-examination, though the complainant was before the Court which was kept for hearing and the learned Judge had even passed an order for exhibiting the documents on record. The learned Trial Court Judge rather than dismissing the matters on the very date, if at all had found that the presence of the complainant was necessary or had come to the conclusion that the matters were getting derailed by the complainant, should have closed the stage of evidence of the complainant rather than dismissing the matters and acquitting the accused. The order impugned is inherently bad in law and is nothing but a mere disposal than the decision on merits.

7. Thus, for the above reasons, the impugned orders dated 12.3.2022 passed by the learned 11th Additional Chief Judicial Magistrate, Rajkot in Criminal Cases no.2208/17, 2207/17 and 2206/17 respectively are hereby quashed and set aside. The said Criminal Cases are restored to the original file with a direction that the matters be conducted in accordance with law from the stage of cross-examination of the complainant. Accordingly, the present appeals stand disposed of.