

(2017) 04 GUJ CK 0023
In the Gujarat High Court
Case No : 10623 of 2016

KISHORBHAI S/O. SUGNUMAL MATAI

APPELLANT

Vs

STATE OF GUJARAT & ANR.

RESPONDENT

Date of Decision : 04-04-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 482](#), [Section 256](#), [Section 378\(4\)](#)
a> - Saving of inherent powers of High Court - Non-appearance or death of complainant - Appeal in case of acquittal

Citation : (2017) 04 GUJ CK 0023

Hon'ble Judges : J.B.Pardiwala

Bench : Single Bench

Advocate : ASHISH M DAGLI, MAHAVIR BHANSALI, SANDIP M PATEL, THAKORE

Final Decision : Allowed

Judgement

1. Rule returnable forthwith. Mr. Sandip Patel, the learned counsel, waives service of notice of rule for and on behalf of the respondent No.2 and Ms. Thakore, the learned APP, waives

service of notice of rule for and on behalf of the respondent No.1.

2. By this application under section 482 of the Code of Criminal Procedure, 1973, the applicant-original complainant, seeks to invoke the inherent powers of this Court praying for quashing of the order dated 01.10.2015 passed by the learned JMFC, Vadodara in the Criminal Case No.17724 of 2008, by which, the learned Magistrate dismissed the complaint for non- prosecution.

3. Section 256 of the Code of Criminal Procedure, reads as under;

"(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. Thus, section 256 makes it clear that if the complainant fails to appear, the Magistrate shall acquit the accused, unless for some reason, he thinks it proper to adjourn the hearing of

the case to some other day.

5. A preliminary objection is raised on behalf of the respondent No.2-original accused as regards the maintainability of this application under section 482 of the Code. According to Mr. Patel, there is no denying that the dismissal of the complaint, in default, under section 256, entails the acquittal of the accused. Once an accused has been acquitted of the offence, the law provides the remedy by way of an appeal against the order of acquittal under section 378(4) of the Code.

6. To meet with such preliminary objection raised by the learned counsel appearing for the respondent No.2, Mr. Poojara, the learned counsel appearing for the applicant has invited my attention to a decision of the Supreme Court in the case of Punjab State Warehousing Corp., Faridkot vs. Shree Duragji Traders & Ors ., 2011 (14) SCC 615, wherein the Supreme Court has taken the view that availability of alternative remedy of filing an appeal is not an absolute bar to entertaining an application under section 482 of the Code. I may quote the relevant observations made by the Supreme Court;

"9. The short question that falls for consideration is whether in the fact situation the High Court was justified in declining to exercise its jurisdiction under Section 482 of the Code-

10. It is trite law that the inherent power of the High Court ought to be exercised to prevent miscarriage of justice or to prevent the abuse of the process of the Court or to otherwise secure the ends of justice. The Court possesses wide discretionary powers under the Section to

secure these ends. In this behalf it would be profitable to refer to the decision of this Court in Jeffrey J. Diermeier & Anr. Vs. State of West Bengal & Anr.4, wherein one of us (D.K.Jain, J.), speaking for the bench, explained the scope and ambit of inherent powers of the High Court under Section 482 of the Code as follows:

"20.The Section itself envisages three circumstances under which the inherent jurisdiction may be exercised, namely,

(i) to give effect to an order under the Code ; (ii) to prevent abuse of the process of Court; and (iii) to otherwise secure the ends of justice. Nevertheless, it is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. Undoubtedly, the power possessed by the High Court under the said provision is very wide but it is not unlimited. It has to be exercised sparingly, carefully and cautiously, *ex debito justitiae* to do real and substantial justice for which alone the court exists. It needs little emphasis that the inherent jurisdiction does not confer an arbitrary power on the High Court to act according to whim or caprice. The power exists to prevent abuse of authority and not to produce injustice.

22. In *Dinesh Dutt Joshi v. State of Rajasthan* [(2001) 8 SCC 570], while dealing with the inherent powers of the High Court, this Court has observed thus (SCC p. 573, para 6):

"6. ...The principle embodied in the section is based upon the maxim: *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest* i.e. when the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable. The section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in 4 (2010) 6 SCC 243 6 the section. As *lacunae* are sometimes found in procedural law, the section has been embodied to cover such *lacunae* wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this section are however required to be

reserved, as far as possible, for extraordinary cases."

11. Bearing in mind the afore-stated legal position in regard to the scope and width of the power of the High Court under Section 482 of the Code, we are of the opinion that the impugned decision is clearly indefensible. As noted above, the High Court has rejected the petition under Section 482 of the Code on the ground of availability of an alternative remedy without considering the seriousness of the nature of the offences and the fact that the Trial Court had dismissed the complaint on a hyper technical ground viz. since the complainant had been appearing in person, despite order dated 16th April 1999, exempting him from personal appearance, the said exemption order became redundant and the complainant should have sought a fresh exemption from personal appearance. We feel that such a view defies any logic. An order of exemption from personal appearance continues to be in force till it is revoked or recalled.

12 We are convinced that in the instant case, rejection of appellant's petition under Section 482 of the Code has resulted in miscarriage of justice. Availability of an alternative remedy of filing an appeal is not an absolute bar in entertaining a petition under Section 482 of the Code. As aforesaid, one of the circumstances envisaged in the said Section, for exercise of jurisdiction by the

High Court is to secure the ends of justice. Undoubtedly, the Trial Court had dismissed the complaint on a technical ground and therefore, interests of justice required the High Court to exercise its jurisdiction to set aside such an order so that the Trial Court could proceed with the trial on merits. "

7. Mr. Poojara has also placed reliance on one decision of the Delhi High Court in the case of M/s. J.S. Engineering Works vs. The State & Ors., CrI. M.C. No.1280 of 2014, decided on 1st December, 2014. I may quote the relevant observations as under;

"9. The first and foremost question which comes for consideration is whether the dismissal of the complaint by the trial court for non- appearance of the petitioner is justified. At this juncture it is relevant to reproduce Section 256 of Cr.P.C., which reads as under: -

"256. 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."

10. On a perusal of the aforesaid provisions of Section 256 of Cr.P.C., it is manifestly clear that the Magistrate has discretionary powers to acquit the accused in the absence of the complainant unless he thinks it fit to adjourn the hearing for another day. Section 256 of Cr.P.C. affords some deterrence against dilatory tactics on the part of the complainant. This section affords protection to an accused against such dilatory tactics of the complainant. But it does not mean that if the complainant is absent the Court is bound to acquit the accused in invitum. If the Court considers that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. If the Magistrate considers that personal appearance of the complainant was required on that day the Magistrate has power to dispense with his attendance and proceed with the case.

11. In S. Anand's case (supra) relied upon by learned counsel for petitioner, it was held that: -

"12. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case

as the witnesses on behalf of the complainant have already been examined.

13. The date was fixed for examining the defence witnesses. The appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence.

15. Presence of the complainant or lawyer would have been necessary, as indicated hereinbefore, only for the purpose of cross-examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter."

12. In Associated Cement Company's case (supra) it was held that the purpose of conferring power on the Magistrate under Section 256 of Cr.P.C. is to deter dilatory tactics on the part of the complainant, once he sets in motion criminal proceeding by instituting a complaint. The purpose being that accused is perforce required to attend Court proceedings on dates fixed by the Court and is thus put to harassment if the complainant does not turn up in the Court on dates when his presence is necessary. This provision afforded protection to the accused against such tactics being adopted by the complainant. This, however, does not mean that if the complainant is absent the Court is duty bound to acquit the accused. If the situation mandates the Magistrate has the power to adjourn the hearing. On the other hand, if the Magistrate considers that some personal appearance of the complainant is not necessary it has the power to dispense with his attendance and proceed with the case. It is for the Court to consider whether the presence of the complainant is necessary for

the progress of the case on the day when the complainant is absent or the situation is such that the case be adjourned to another date. If the situation mandates that there is no reason to adjourn the case, the Magistrate is empowered to dismiss the complaint and acquit the accused.

13. The ratio of aforesaid judgment in Associated Cement Company's case (supra) has been followed by the Apex Court in S. Anand's case (supra) and observed as under: -

"12. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined.

13. The date was fixed for examining the defence witnesses. The appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence.

15. Presence of the complainant or lawyer would have been necessary, as indicated hereinbefore, only for the purpose of cross-examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter."

14. In the present case, the complaint was fixed for arguments on application under Section 145(2) of NI Act and the presence of petitioner was not necessary.

15. The second question which comes up for consideration is whether the complainant can file a petition under Section 482 of Cr.P.C. seeking setting aside of dismissal of complaint as the remedy of filing special leave to appeal is available.

16. It is correct that the dismissal of a complaint in a summons case results in acquittal of the accused as envisaged in Section 256 of Cr.P.C. It is also true that the complainant can challenge the order of acquittal by filing an application for special leave to appeal. A similar question came up for consideration before the Apex Court in - Punjab State Warehousing Corporation vs. Shree Durga Ji Traders -, (2011) 4 SCC 615. In the said case the High Court had dismissed the petition under Section 482 of Cr.P.C. for setting aside of complaint in default and restoration thereof by holding that dismissal in default of complaint amounts to acquittal of accused and statutory remedy exists in Cr.P.C ., a petition under Section 482 of Cr.P.C. cannot be entertained. The Hon-ble Supreme Court while considering various judgments passed from time to time observed as under: - "9. The short question that falls for consideration is whether in the fact situation the High Court was justified in declining to exercise its jurisdiction under Section 482 of the Code-

10. It is trite law that the inherent power of the High Court ought to be exercised to prevent miscarriage of justice or to prevent the abuse of the process of the court or to otherwise secure the ends of justice. The Court possesses wide discretionary powers under the section to secure these ends. In this behalf it would be profitable to refer to the decision of this Court in Jeffrey J. Diermeier v. State of W.B . [(2010) 6 SCC 243 : (2010) 2 CrL. M.C. No.1280/2014 Page 8 of 12 SCC (Civ) 656 : (2010) 3 SCC (Cri) 138] wherein one of us (D.K. Jain, J.), speaking for the Bench, explained the scope and ambit of inherent powers of the High Court under Section 482 of the Code as follows: (SCC p. 251, paras 20 & 22)

20. ... The section itself envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code ; (ii) to prevent abuse of the process of court; and

(iii) to otherwise secure the ends of justice. Nevertheless, it is neither possible nor desirable to lay down any inflexible rule which would govern the

exercise of inherent jurisdiction of the Court. Undoubtedly, the power possessed by the High Court under the said provision is very wide but is not unlimited. It has to be exercised sparingly, carefully and cautiously, *ex debito justitiae* to do real and substantial justice for which alone the court exists. It needs little emphasis that the inherent jurisdiction does not confer an arbitrary power on the High Court to act according to whim or caprice. The power exists to prevent abuse of authority and not to produce injustice.

22. In *Dinesh Dutt Joshi v. State of Rajasthan* [(2001) 8 SCC 570: 2002 SCC (Cri) 24] , while dealing with the inherent powers of the High Court, this Court has observed thus: (SCC p. 573, para 6) -6. ... The principle embodied in the section is based upon the maxim: *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest* i.e. when the CrI. M.C. No.1280/2014 Page 9 of 12 law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable. The section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in the section. As lacunae are sometimes found in procedural law, the section has been embodied to cover such lacunae wherever they are discovered.

The use of extraordinary powers conferred upon the High Court under this section are however required to be reserved, as far as possible, for extraordinary cases.-

12. We are convinced that in the instant case, rejection of the appellant's petition under Section 482 of the Code has resulted in miscarriage of justice. Availability of an alternative remedy of filing an appeal is not an absolute bar in entertaining a petition under Section 482 of the Code. As aforesaid, one of the circumstances envisaged in the said section, for exercise of jurisdiction by the High Court is to secure the ends of justice. Undoubtedly, the trial court had dismissed the complaint on a technical ground and therefore, interests of justice required the High Court to exercise its jurisdiction to set aside such an order so that the trial court could proceed with the trial on merits."

17. In *Subhash Chand's* case (*supra*) relied upon by learned counsel for respondent, Hon'ble Supreme Court has not considered the question of maintainability of a petition under Section 482 of Cr.P.C. against an order dismissing the complaint in default resulting in acquittal of the accused.

18. In the instant case, the complaint was filed in the year 2011, after recording pre-summing evidence and respondent Nos.2 and 3 were summoned. The respondent Nos.2 and 3 failed to appear on 07.10.2011 on which bailable warrants were issued against them. Thereafter, respondent Nos.2 and 3 appeared on 24.03.2012. Notice under Section 251 of Cr.P.C. was served on respondent Nos.2 and 3 on 03.04.2013. An application under Section 145(2) of NI Act was filed and the case was adjourned to 03.08.2013 for reply and arguments on the said application. On 03.08.2013 the complaint was transferred

and the transferee court adjourned the complaint to 28.09.2013. The petitioner/ complainant did not appear on 28.09.2013 and Court notice was issued to complainant for 07.12.2013. Again the complainant was absent on 07.12.2013 and the complaint was dismissed for non- appearance of the complainant and non-prosecution of the matter. It is not clear whether the Court notice issued to the complainant on 28.09.2013 was served or not.

19. Taking into account the aforesaid facts and circumstances of the case, this Court is of the opinion that it is a fit case whether the Court should exercise its discretion under Section 482 of Cr.P.C. instead of relegating the petitioner to avail his alternative remedy of filing an application for special leave to appeal. "

8. It can be said that the acquittal of the accused was on a technical ground. The purpose of conferring the power on the Magistrate under section 256 of the Code, is to deter dilatory tactics on the part of the complainant, once he sets in motion the criminal proceedings by instituting a complaint. The

purpose being that the accused is obliged to attend the Court proceedings on the dates fixed by the court and is thus put to harassment if the complainant does not turn up in the court on the dates when his presence is necessary. This, however, in my view, does not mean that if the complainant is absent, the court is duty bound to acquit the accused. If the situation demands or mandates, the Magistrate has the power to adjourn the hearing.

9. Thus, in view of the judgment of the Supreme Court referred to above, the preliminary objection as regards the maintainability of this application raised on behalf of the original accused is rejected. I must now consider whether there was any good reason for the learned Magistrate to dismiss the complaint under section 256 for non-prosecution.

10. It appears that on the date, on which, the complaint came to be dismissed for non-prosecution, the complainant could not remain present for being cross-examined by the accused.

11. I am of the view that one opportunity should be given to the complainant to make good his case.

12. In the result, this application is allowed. The impugned order passed by the learned Magistrate, dismissing the complaint under section 256 of the Code, is quashed. The proceedings are remitted to the court of the learned JMFC, Vadodara. The proceedings shall commence from the stage they had stopped on the complaint being dismissed for default. Rule is made absolute to the aforesaid extent.

Direct service is permitted.