

(2002) 07 MAD CK 0093

In the Madras High Court

Case No : Criminal Appeal No. 454 of 1994

L. Rajkumar, Prop: Raj Finance

APPELLANT

Vs

S. Arunkumar, Prop: Sri Venkateswara and Company

RESPONDENT

Date of Decision : 09-07-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 247, 256, 62, 63, 64
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2002) 07 MAD CK 0093

Hon'ble Judges : A.K. Rajan, J

Bench : Single Bench

Advocate : N. Kumarasamy, for the Appellant; C. Muthusaravanan, Legal Aid Advocate, for the Respondent

Final Decision : Allowed

Judgement

A.K. Rajan, J.—This appeal is against the acquittal of the respondent in a private complaint filed by the appellant for violation of provision of

Section 138 of the Negotiable Instruments Act.

2. This Court directed private notice to be taken to the respondent. Accordingly, the respondent has taken private notice by registered post. It has

been returned with an endorsement, ""left"". The appellant has sworn to an affidavit stating that the respondent is residing in the above address and

he is evading service of summons on him. In the postal endorsement, there is no other endorsement, except the word, ""left"". Therefore, it is proved

that the private notice has been sent to the correct address. The appeal is pending from 1994. All the summons sent to them were returned

unserved. Ultimately, it was sent by registered post. As per Section 65 of the Criminal Procedure Code,

If service cannot by the exercise of due diligence be effected as provided in Section 62, Section 63 or Section 64, the serving Officer shall affix

one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and

thereupon the Court, after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh service in

such manner, as it considers proper.

By order dated, 1.7.2002, this Court found that the respondent has been evading service of summons, though the notice was sent to the correct

address. Hence, this Court exercising the powers u/s 65 of the Code has come to the conclusion that the notice sent to him is sufficient and

declared that the summons has been duly served. Then this Court directed the Legal Aid Committee to appoint an advocate for the respondent.

Therefore, the counsel appointed by the Legal Aid Committee, presented the case of the respondent.

3. A complaint has been filed due to the dishonour of three cheques, for Rs.10,000/-, Rs.10,000/- and Rs.15,000/- respectively issued by the

respondent. The complaint was taken on file and summons was also issued. Thereafter, the respondent filed a petition for quashing the complaint;

that was pending for some time and ultimately, it was dismissed, as withdrawn.

4. Thereafter, the matter was taken up by the Magistrate. On 10-6-1994 when the matter was posted for hearing, the complainant was not

present. Therefore, as there was no representation on behalf of the complainant and as the accused was also absent, the Magistrate found that

there is no reason to adjourn the case; by examining the Court Clerk as Court Witness to the effect that the complainant was not present, the

Magistrate acquitted the accused. Against that order of acquittal, this appeal against acquittal has been filed.

5. Learned counsel for the appellant argued that u/s 256 Cr.P.C., a Magistrate shall acquit the accused, unless there is reason for adjourning the

case. This case was not posted for recording of evidence; it was only a formal hearing; on that date, neither the complainant, nor the accused was

present. When the matter was not posted for another date. and the accused was also not present, the Magistrate could have adjourned the matter

for trial. Instead, the Magistrate dismissed the complaint and acquitted the

accused. This procedure followed by the Magistrate is not warranted, in the circumstances of the case and therefore, the order of acquittal is liable to be set aside.

6. Learned counsel for the respondent relied on the decision in *Tonkya v. Jagannatha* AIR 1926 Mad 1009 wherein it was held,

The object of S.247 is to prevent the complainant from being dilatory in the prosecution of the case, and if he does not care to be present when

the case is called on, the accused is entitled to an acquittal, unless the Magistrate chooses for reasons he thinks proper to adjourn the case.

Learned counsel for the respondent argued that this being the judgment of the Division Bench of this Court and since that was not over-ruled by

any other judgment of the Division Bench of this Court, the above decision is binding on this Court. Therefore, the Magistrate was right in

acquitting the accused when the complainant was not present. Learned counsel for respondent has also brought to the notice of this Court a

decision in *K. Narasimhamurthy v. K.S. Rangachari* reported in 1986 L.W. (Cri) 289 wherein an acquittal on the ground that neither the

complainant nor his counsel was present when the case was called was upheld in appeal against acquittal as within the competence of the

Magistrate in his discretion. Therefore, the learned counsel for respondent submitted that the acquittal of the accused cannot be interfered with .

7. The argument of the learned counsel for respondent is not acceptable. In the case of *Amarchand v. Sanjeev Rastogi* 2001 2 L.W.(Cri) 529 this

Court held in an identical case, where the accused appeared in Court only on one day and remained absent on all other hearing dates for more

than one year, while complainant continuing to appear on every hearing date and when the complainant remained absent on one date, the

Magistrate acquitted the accused and that order was set aside in revision by the complainant. It was further held that the Court shall not axe down

the case merely because the complainant could not be present while even if he had been present on that date Court could not have proceeded with

the trial in view of the absence of the accused. This decision was rendered following the decision of the Supreme Court in *Associated Cement Co.*

Ltd. Vs. Keshvanand, .

8. From the records available, there is no evidence to show that the matter was

posted on 10.6.1994 for examination of the witnesses; the accused was also absent on that day. When that being the case, the Magistrate has ample reasons to adjourn the case to some other date. Therefore, the procedure adopted and the discretion exercised by the Magistrate in dismissing the complaint is not in accordance with law. Therefore, the order of acquittal is liable to be set aside.

9. In the result, the appeal is allowed.