
(2004) 09 RAJ CK 0030

In the Rajasthan High Court

Case No : Criminal Leave to Appeal No. 143 of 2004

Laxmi Steel Industries

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 03-09-2004

Acts Referred:

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

Citation : (2005) 1 ALD(Cri) 42 : (2005) 4 BC 125 : (2005) 2 RCR(Criminal) 310 : (2005) 1 RLW 654 : (2005) 1 WLC 658

Hon'ble Judges : H.R. Panwar, J

Bench : Single Bench

Advocate : Dron Kaushik, for the Appellant; Ashok Upadhayay, Public Prosecutor and Pankaj Sharma, for the Respondent

Judgement

H.R. Panwar, J.—Both these criminal leave to appeals arise out of disputes between the same parties and involve common questions of law and facts, therefore, with the consent of the learned counsel for the parties, the same have been heard together and are being decided by this common order.

2. Both these criminal leave to appeals u/s 378(4) are directed against the order dated 07.01.2003 passed by the Chief Judicial Magistrate, Hanumangarh (in short the "Trial Court" hereinafter) in Complaint Cases No. 141/01 and 140/01 respectively, whereby the Trial Court acquitted accused second respondent Surendra Pal Singh of the offence u/s 138 of the Negotiable Instruments Act, 1881 (in short "the Act" hereinafter). Aggrieved by the order of acquitted impugned, the complainant seeks leave to appeals to this Court.

3. I have heard learned counsel for the appellant and the learned counsel appearing for the accused second respondent. It was a complaint case by the private firm therefore, learned public prosecutor has nothing to say in the matter. I have carefully gone through the material placed on record.

4. The facts which are relevant and necessary are being taken from the Complaint Case No. 141/01 since the dates are almost common in both these cases.

5. Briefly stated the facts of the case are that the appellant filed a complaint u/s 138 of the Act on 22.2.2001 against second respondent Surendra Pal Singh inter alia alleging therein that the second respondent is running an account with the appellant firm and obtained loans from the appellant firm on different dates in terms of cash and goods. The second respondent issued a cheque No. 0163594 dated 15.1.2001 for a sum of Rs. 95,000/- in favour of the appellant firm. The cheque in question, on being presented to the bank on 15.1.2001 itself, was dishonoured for insufficient amount in the account of the accused second respondent. A notice, as envisaged u/s 138(b) of the Act, was issued on 27.1.2001 making a demand for payment of said amount of the cheque. The accused second respondent failed to pay the amount within 15 days from the receipt of the notice dated 27.1.2001, and therefore, a complaint was filed by the appellant before the Trial Court u/s 138 of the Act. By order dated 23.2.2001, the Trial Court took cognizance of the offence and summoned the accused second respondent. On 20.7.2001, the accused second respondent appeared before the Trial Court and was released on bail and the matter was fixed for framing of charge on 09.08.2001. On 09.08.01 accused second respondent appeared, however, the complainant failed to appear, his personal appearance on that date was exempted on an application filed by the counsel for the appellant and the matter was posted to 21.11.2001 for framing of the charge. On 21.11.2001 also, the complainant failed to appear and his personal appearance was exempted on an application moved by his counsel. However, the accused second respondent was present on that date and the substance of charge was read over to him. The matter was posted for complainant's evidence on 31.1.2002. On 31.1.2002 neither the complainant appeared nor any of his witness was present and the matter was posted to 26.3.2002 for complainant's evidence. On 26.3.2002 also, the complainant failed to appear. However, on an application moved by his counsel, his personal appearance was exempted. The matter was posted for complainant's evidence on 27.5.2002. On 27.5.2002 again, the complainant failed to appear. However, accused/second respondent was present and the matter was posted to 17.7.2002. On 17.7.2002 neither the complainant nor the accused second respondent appeared and on the applications of respective counsel for the parties, their personal appearance were exempted and the matter was posted to 12.9.2002. On 12.9.2002 also, the complainant and the accused second respondent did not appear and their personal appearance were exempted and the matter was posted to 12.11.2002. On 12.11.2002 both the parties appeared, how-ever, no witness appeared for the complainant and the matter was posted to 07.01.2003 for complainant's evidence by affording last opportunity to produce the evidence. On 07.01.2003 neither the complainant nor his counsel appeared though the accused second respondent and his counsel were present. Right from early hour of the Court, the complainant and his

counsel were called upon but neither the complainant nor his counsel appeared. The Trial Court having noticed that it was the last opportunity granted to the complainant to produce the evidence and since no evidence has been produced, therefore, the complainant's evidence was closed and for want of evidence in support of the complaint on record, the Trial Court acquitted the accused second respondent.

6. Learned counsel for the appellant has relied on decisions of Hon"ble the Supreme Court in *Associated Cement Co. Ltd. Vs. Keshvanand*, and in *Mohd. Azeem v. Venkatesh and Anr.* (2003 Cr.L.R. (SC) 211).

7. In *Associated Cement Co. Ltd. v. Keshvanand*'s case (supra), the Magistrate acquitted the respondent therein solely on the ground that the complainant was absent. In that case, the complaint was filed by a company before the Trial Court through one Puneet Agarwal with a power of attorney of the company. Puneet Agarwal was posted as an Officer of the company at Jammu during the period when the complaint was filed, but subsequently he was transferred to Jalandhar (Punjab). The Advocate of the complainant faced a misfortune in his family as his brother was injured in a motor accident and was subjected to an operation and due to such situation, the counsel for the complainant could not attend the Court for three days. Thus, on the date fixed by the Magistrate i.e. on 24.8.96 neither the complainant nor his counsel were present and the accused respondent was acquitted.

8. Section 256 of the Code of Criminal Procedure (in short "New Code" hereinafter) reads thus :-

"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."

9. The Apex Court in *Associated Cement Co. Ltd.*'s case (supra), while considering the provisions of Section 247 of the old Code, provision of which is identically worded to Section 256 of the New Code, except slight difference between the provisos. Proviso to Section 256 of the New Code provides 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. While considering the proviso to Section 256 of the New Code in Associated Cement Co. Ltd.'s case (supra), Hon''ble Apex Court, in para 17 of the judgment, observed as under :-

"17. 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 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.

10. It was further held by Their Lordships of the Hon''ble Supreme Court, in para 18, as under :-

"18. 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 the progress of the case and also whether 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."

11. In the case of Associated Cement Co. Ltd. (supra), the complainant was already examined as witness in the case besides examining yet another witness for the prosecution.

12. In Mohd. Azeem v. A. Venkatesh's case (supra), the complainant therein was prosecuting the complaint diligently and had been attending the Court of Magistrate on all the dates except the one because, according to him, he wrongly noted the date of hearing. Due to complainant's absence on one day fixed for trial, the Magistrate dismissed his complaint and acquitted the accused. The cause shown by the complainant for his absence that he had wrongly noted the date had not been disbelieved by the Magistrate, yet the Magistrate refused to restore the complaint. The Hon''ble Apex Court held that the Magistrate committed an error in acquitting the accused only for absence of the complainant

on one day and refusing to restore the complaint when sufficient cause for absence was shown by the complainant.

13. In the instant case, from the facts set out herein above, and the various order sheets particularly of 20th July, 2001 and thereafter when the accused second respondent on being summoned on the complaint appeared before the Trial Court, are relevant to ascertain as to whether the appellant complainant had been prosecuting the complaint diligently and had been, attending the Trial Court on all the dates. On 20.7.01, 9.8.01, 21.11.01, 31.1.02, 26.3.02, 27.5.02, 17.7.02 and 12.9.02 the complainant remained absent from the Trial Court and failed to appear. The matter was posted for complainant's evidence on 21.11.01, 31.1.02, 26.3.02, 27.5.02 and 17.7.02, but on all these dates neither complainant nor his witnesses were present. On 17.7.02 the complainant was directed to keep his witnesses present on the next date fixed by the Trial Court i.e. on 12.9.02. On 12.9.02 also neither the complainant nor his witnesses were present. The matter was posted for complainant's evidence on 12.11.02. On 12.11.02 also, the complainant did not produce any witness and the last opportunity was afforded to the complainant to produce his witnesses on 7.1.03. On 7.1.03 neither the complainant or his witnesses nor his counsel appeared and thus there was no material before the Trial Court to proceed any further in the matter. No cause had been shown before the Trial Court by the complainant or his counsel for their non appearance on 7.1.03.

14. Section 256 of the new Code provides firstly that if the Court thinks that in a situation it is proper to adjourn the hearing, the Magistrate shall not acquit the accused; secondly, when the Magistrate considers that the 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. The latter situation which arises before the Court when the court notices that the complainant is absent on a particular date, the court must consider whether the personal appearance of the complainant is essential for the progress of the case, 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. On the given set of facts, as noticed above, if the case in hand is examined, then there was no occasion for the Magistrate to adjourn the hearing in absence of the complainant and his counsel as also the complainant's witnesses. It was not the situation before the Trial Court to hold that the, personal attendance of the complainant is not necessary as the complainant was the witness in the case and the matter was posted for various dates for recording the statement of the complainant and his witnesses, and therefore, the presence of the complainant was necessary. In absence of the complainant and his witnesses on the date fixed for the complainant's evidence, the Trial Court could not have progressed the case any further and therefore, the situation did not justify to adjourn the case, and the Trial Court was fully justified in acquitting the accused/second respondent for want of evidence. The cases relied upon by the learned counsel for the appellant turn to their own facts. In both the cases relied

on by the learned counsel for the appellant, the facts were entirely different. In case of Associated Cement Co. Ltd. (supra), the complainant and his witnesses had already been examined, and in the case of Mohd. Azeem (supra), the complainant had been attending the Trial Court on all the dates and prosecuting the complainant diligently. Whereas, in the instant case, from the various order sheets, as noticed above, it has been established that the complainant has not been appearing before the Trial Court and the Trial Court granted numerous adjournments to the complainant's counsel for producing complainant's evidence. In the circumstances therefore, in my considered view, the Trial Court was justified in acquitting the accused/second respondent. In this view of the matter, it is not a fit case to grant leave to appeal to this Court. The applications seeking leave to appeal to this court are therefore rejected.