

(2011) 01 MAD CK 0270
In the Madras High Court
Case No : Criminal A. No. 465 of 2010

Mrs. Kamalam

APPELLANT

Vs

C. Manivannan

RESPONDENT

Date of Decision : 21-01-2011

Acts Referred:

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

Citation : (2011) 1 LW(Cri) 265

Hon'ble Judges : V. Periya Karupiah, J

Bench : Single Bench

Advocate : G. Nagalingam, for the Appellant; G.R. Swaminathan, for the Respondent

Judgement

V. Periya Karupiah, J.—This appeal is directed against the order of acquittal u/s 256 of Cr.P.C., dated 09.04.2009 passed in S.T.C. No. 592 of 2004 on the file of the learned Judicial Magistrate No. III, Madurai.

2. Heard Mr. G. Nagalingam, learned Counsel appearing for the Appellant and Mr. G.R. Swaminathan, learned Counsel appearing for the Respondent.

3. The Appellant is the complainant before the Lower Court in a private complaint and the Respondent is the accused. The complaint filed by the complainant was dismissed by the learned Judicial Magistrate No. III, Madurai, u/s 256(1) of Cr.P.C., owing to the absence of the complainant on the appointed day. The present Appeal has been filed by the legal representatives of the deceased complainant against the said order.

4. The learned Counsel appearing for the Appellant would submit in his argument that the complainant was dead and it was informed to the Court sufficiently earlier and the Lower Court has not given any opportunity to the legal representatives to implead themselves to step into the shoes of the complaint and to prosecute the said complaint against the Respondent.

He would also submit that the Lower Court instead had posted the case and found that the complainant was absent and it was also noted by the Lower Court that the complainant was dead and no steps were taken for a long period and called the complainant and found him absent and had dismissed the complaint and acquitted the Respondent, which is ex-facie illegal. He would further submit in his argument that when the complainant is dead without impleading the legal heirs of the complainant, there would not be any complainant for attracting the provisions of Section 256 of Cr.P.C., to dismiss the complaint or to acquit the accused. He would bring it to the notice of this Court yet another judgment of the Hon'ble Apex Court made in *Associated Cement Co. Ltd., v. Keshvanand* reported in AIR 1998 SCC 596 for the principle that the provision of Section 256 of Cr.P.C., should have been applied by the learned Magistrate only when the presence of the complainant was imminent for the progress of the case. He would further submit in his argument that in this case, both the principles have not been followed by the Lower Court and the Judgments of this Court made in *A.V. Balu Vs. K. Jeyakumar* reported in (2007) 1 MLJ (CrI) 718 will be applicable and the order passed by the Lower Court has to be set aside and revised and the Appeal may be allowed.

5. The learned Counsel appearing for the Respondent would submit his argument that the Petitioners herein have not initiated any steps to implead themselves before the Lower Court, on the death of the complainant and without other way to proceed with the case, the Lower Court had no other way except to acquit the accused. He would further submit that the arguments advanced by the learned Counsel appearing for the Appellant are not applicable to the present case since there was no complainant and the accusation against the Respondent became abated.

Therefore, he would request the Court not to entertain the appeal but to dismiss the same.

6. I have given anxious consideration to the arguments advanced on either side.

7. The undisputed facts are that the complainant before the Lower Court had presented the complaint u/s 138 of the Negotiable Instrument Act against the Respondent and it was taken on file and during the pendency of the said complaint before the Lower Court, the complainant died and it was also promptly reported before the Lower Court. However, the legal representatives were not impleaded to prosecute the complaint.

The Lower Court had posted the case on 09.04.2009 and on that day, it is found that no steps were taken for impleadment of the legal representatives and the complainant was also absent and therefore, it had utilised the provisions of Section 256 of Cr.P.C., and acquitted the accused.

8. The point for consideration before this Court is whether the acquittal of the Respondent by the Lower Court is correct?

9. Admittedly the complainant died long back and there was no complainant as on 09.04.2009. The complaint was not dismissed on the ground that the accusation against the Respondent was abated for not impleading the legal representatives of the complainant. When there was no complainant, since he was died and no legal representatives were impleaded, how the Lower Court had applied the provisions applicable to a defaulted complainant. However, the Lower Court had dismissed the claim of the complainant on the absence of the complainant u/s 256 of Cr.P.C.

10. It is the dictum laid down by the Hon''ble Apex Court in Associated Cement Co. Ltd., v. Keshvanand as reported in AIR 1998 SCC 596, would run in the relevant passage as follows:

""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 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.""

In the said Judgment, it has been categorically pointed out that the Magistrate has to exercise the provisions u/s 256 of Cr.P.C., only when the presence of the complainant was imminent. As far as this case is concerned, there was no complainant since he was dead. The Magistrate has not applied his mind to see that the provisions of Section 256 of Cr.P.C., would not be applicable when there is no complainant. However, he has found that the complainant was called absent and passed a mechanical order u/s 256 of Code of Criminal Procedure Therefore, it has become necessary for this Court to set aside the order passed by the learned Judicial Magistrate No. III, Madurai, in S.T.C. No. 592 of 2004, dated 09.04.2009.

11. Accordingly, the order passed by the learned Judicial Magistrate No. III, Madurai, in S.T.C. No. 592 of 2004, dated 09.04.2009, is set aside and the Appeal is allowed. Consequently, the learned Judicial Magistrate No. III, Madurai, is directed to restore the complaint on file to proceed with the case in accordance with law after recording the impleadment of the Appellant herein as legal representatives of the complainant and permit her to prosecute the said

complaint.