
(2008) 04 MAD CK 0206
In the Madras High Court
Case No : Criminal Appeal No. 105 of 2002

N. Rengaraj

APPELLANT

Vs

P. Dhamodarasamy

RESPONDENT

Date of Decision : 03-04-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 188, 220(1), 221(1), 221(2), 249
General Clauses Act, 1897 — Section 26
Income Tax Act, 1961 — Section 276C(2)

Citation : (2009) 319 ITR 216

Hon'ble Judges : T. Sudanthiram, J

Bench : Single Bench

Advocate : Ramasamy K., Special Public Prosecutor for I.T, for the Appellant;
Rupert J. Barnabas, for the Respondent

Judgement

T. Sudanthiram, J.—The appellant herein is the Deputy Commissioner of Income Tax, Coimbatore and this appeal is filed against the order passed by the learned Judicial Magistrate No. II, Coimbatore in C. C. No. 856 of 2000 acquitting the accused u/s 256 of the Criminal Procedure Code for non-appearance of the complainant.

2. The learned special public prosecutor submitted that the complaint was filed against the accused for offence punishable u/s 276C(2) of the Income Tax Act, 1961. After complaint being filed, process was issued to the accused on January 29, 2001, and the accused also made his appearance on March 7, 2001.

3. The learned special public prosecutor submitted that on August 3, 2001, the learned Magistrate passed an order acquitting the accused erroneously invoking the provisions u/s 256 of the Criminal Procedure Code. The offence u/s 276C(2) is punishable for a maximum period of three years and as such, the procedure to be adopted is only warrant procedure as per Chapter XIX of the Code of Criminal Procedure.

4. The learned special public prosecutor submitted that on August 3, 2001, the

accused was also absent and an application u/s 317 of the Criminal Procedure Code was filed. The learned Counsel for the appellant relied on the decision reported in Associated Cement Co. Ltd. Vs. Keshvanand, and the same reads as follows (at page 368):

When the court notices, that the complainant is absent on a particular day the court must consider whether the 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.

5. The learned Counsel for the appellant further submitted that being warrant procedure to be followed if at all, only provision u/s 249 of the Code of Criminal Procedure should have been invoked, under which acquittal of the accused is not possible and only the accused can be discharged and as such, the complainant has got right even to file second complaint in such a case. By invoking a wrong provision of Section 256 of the Code of Criminal Procedure, grave prejudice is caused to the complainant and the administration of criminal justice is also affected.

6. The learned Counsel for the respondent submitted that as per the records of the court, the complainant was absent on April 27, 2001, May 21, 2001, and on July 9, 2001. As the complainant was absent, the notice was ordered to be issued to the complainant for his appearance. But even on August 3, 2001, the complainant was absent. Only, under the said circumstances, the learned Magistrate dismissed the complaint.

7. The learned Counsel for the respondent further submitted that the case arises on the basis of the demand notice issued to the respondent. But the said demand notice has been set aside by the Appellate Tribunal. As such, no useful purpose will be served by setting aside the order of the learned Magistrate and remitting back the matter for trial.

8. This Court considered the submissions made by both parties and also perused the order of the learned Magistrate and also the court docket entry. As per the court docket entry, the complaint was taken on February 29, 2001, and process was issued to the accused and the case was posted to February 5, 2001, and again it was adjourned to March 7, 2001. On that date, the complainant was present and the accused was also present. The case was adjourned to April 27, 2001, and on April 27, 2001, both the complainant and the accused were absent. The case was adjourned to May 21, 2001. On that date, the complainant was absent but the accused was present. Again, on July 9, 2001, the complainant

was absent but the accused was present. Notice was ordered to be issued as the complainant not appeared on August 3, 2001. On August 3, 2001, the complainant was absent and there was no representation on behalf of the complainant and Section 317 petition was filed for non-appearance of accused and an order had been passed u/s 256 of the Criminal Procedure Code acquitting the accused.

9. From the docket entry, it is not clear whether notice which was issued to the complainant on July 9, 2001, was served or not in this private complaint, being unwarrant case, the procedure to be adopted is only under Chapter XIX-B (cases instituted otherwise than on police report). As such, under Chapter XIX, Section 249 of the Code of Criminal Procedure deals about the absence of the complainant which reads as follows:

249. Absence of complainant.-When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

10. The order passed by the learned Magistrate under Chapter XX which is for trial of summons cases by Magistrate. Section 256 of the Code of Criminal Procedure under the said Chapter is as follows:

Non-appearance or death of complainant.-(1) If the summons has been issued on complaint, and on the date 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 necessary, the Magistrate may dispense with his attendance and proceed with the case.

11. The provision invoked by the learned Magistrate u/s 256 is absolutely not applicable to this case. Further, there are several variations between Section 249 of the Code of Criminal Procedure and Section 256 of the Code of Criminal Procedure. u/s 249 of the Criminal Procedure Code in the absence of the complainant, the learned Magistrate may discharge the accused and that too only before framing of charge ; wherein u/s 256 of the Criminal Procedure Code, the Magistrate shall acquit the accused unless for some reason, he thinks it proper to adjourn the case to some other day. Therefore, it is clear that Section 249 cannot be used as liberally as that of Section 256 of the Criminal Procedure Code.

12. Apart from that, the effect that releasing the accused u/s 249 of the Code of

Criminal Procedure only amounts to discharging the accused wherein, it amounts to acquittal u/s 256 of the Criminal Procedure Code. Once the accused is acquitted u/s 256 of the Criminal Procedure Code, second complaint is not maintainable but if a person is discharged u/s 249 of the Criminal Procedure Code, second complaint is maintainable.

13. Section 300 of the Criminal Procedure Code is as follows:

300. Person once convicted or acquitted not to be tried for same offence.-(1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Sub-section (1) of Section 221, or for which he might have been convicted under Sub-section (2) thereof.

(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him at the former trial under Sub-section (1) of Section 220.

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged u/s 258 shall not be tried again for the same offence except with the consent of the court by which he was discharged or any other court to which the first-mentioned court is subordinate.

(6) Nothing in this section shall affect the provisions of Section 26 of the General Clauses Act, 1897 (10 of 1987) or of Section 188 of this Code.

Explanation.-The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section.

14. If a person is discharged u/s 249 of the Criminal Procedure Code, can be tried again for the same offence and Section 300 of the Criminal Procedure Code, does not operate as a bar for a second complaint.

15. The learned Magistrate without understanding the procedure to be adopted by the court in this case and also invoking the wrong provision of Section 256 of the Criminal Procedure Code, had acquitted the accused. This Court holds that

Section 256 of the Criminal Procedure Code is not applicable to this case which is covered under Chapter XIX of the Criminal Procedure Code. The acquittal of the accused has to be set aside.

16. For the reasons stated above, the order passed by the learned Magistrate No. II, Coimbatore, in C. C. No. 856 of 2000 on August 3, 2001, is set aside and the criminal appeal is allowed. The learned Magistrate is directed to issue fresh summons to the accused and proceed with the case further.