
(2022) 12 GUJ CK 0040
In the Gujarat High Court
Case No : R/Criminal Appeal No. 1920 Of 2022

Nitin Shashikant Rathod

APPELLANT

Vs

Isha Suppliers Thro Proprietor & 2 Other(S)

RESPONDENT

Date of Decision : 13-12-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 256, 378
Negotiable Instruments Act, 1881 — Section 138
Code Of Criminal Procedure, 1898 — Section 247

Citation : (2022) 12 GUJ CK 0040

Hon'ble Judges : Gita Gopi, J

Bench : Single Bench

Advocate : Dhruv K Dave, Hardik Mehta

Final Decision : Allowed

Judgement

Gita Gopi, J

1. Mr. Dhruv K.Dave, learned advocate for the appellant submits that the present appeal has been filed under section 378 of the Cr.P.C., against the order dated 15. 09.2021 in Criminal Case Nos.5312 of 2013, which came to be dismissed for default under section 256 of Cr.P.C. by the 25th Additional Chief Judicial Magistrate, Vadodara, which laid to acquittal of the accused.

2. Mr. Dave submits that the matter was eight years old, which is also reflected in the order. He states that as per the order only on earlier date and the day on which the order was passed, the complainant and the Advocate could not appear or pray for any adjournment and therefore the learned trial Court Judge came to conclusion that the complainant is not interested in proceeding with the matter; hence, it was dismissed. Mr. Dave states that the order itself is bad in law since under section 256 Cr.P.C., the learned trial Court Judge ought not to have exercised the power, as the complainant was represented by an Advocate on record.

3. In *Associated Cement Co. Ltd. Vs. Keshvanand*, reported in (1998) 1 SCC 687, the Hon'ble Apex Court while referring to the provisions of section 256 of Cr.P.C. in context of the complaint filed under section 138 of the N.I. Act, has made observations as under:

"15. Section 256 of the Code of Criminal Procedure, 1973(for short 'the new Code') is the corresponding provision to Section 247 of the old Code. The main body of both provisions is identically worded, but there is a slight difference between the provisos under the two sections. The proviso to section 256 of the new code is reproduced here:

"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."

16. 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 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.

17. 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 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."

3.1 This Court in case of *State v. Keshavram*, reported in 1977 GLR 524, held as under:

"The power under Sec. 256 of the Criminal Procedure Code has been conferred

on the Magistrate obviously for the ends of justice and with a view to see that an accused person is not subjected to any undue harassment. The proviso to Sec. 256 further lays down that when the complainant is represented by a Pleader or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. In the instant case, the situation on the day in question squarely fall within the proviso and still the learned Magistrate has acted under the main part of this section. This is really unfortunate and it is hoped that repetition of such instances would not be there in future in the Court of the Magistrate."

3.2 Similarly, in the the case of Sureshchandra Chandulal Patni V. Natwarlal Keshavlal Patni, reported in 1992 (1) GLR 626, this Court held that:

"In the instant case, the learned Magistrate has not recorded any reason about his thinking it proper to adjourn the hearing of the case to some other date. It appears that he has ignored the proviso to Sec. 256 of the Code of Criminal Procedure. The power under Sec. 256 of the Code of Criminal Procedure has been conferred on the Magistrate obviously in the interest of justice, with a view to seeing that the accused is not subjected to any undue harassment. It is clear from the proviso to Sec. 256 of the Code of Criminal Procedure that when the complainant is represented by a pleader or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with the personal attendance of the complainant and proceed with the case. In the instant case, the learned Magistrate does not appear to have applied his mind in dispensing with the personal attendance of the complainant and to proceed with the case or to adjourn the case to some other date as requested in the application submitted by the Advocate for the complainant. In the present case, the situation as on March 5, 1984 squarely falls within the aforesaid proviso and still the learned Magistrate acted under sub-sec. (1) of Sec. 256 of the Code of Criminal Procedure acquitting the accused. It is therefore, clear that the learned Magistrate has ignored the provision contained in the proviso to Sec. 256 of the Code of Criminal Procedure."

4. Section 256 of Cr.P.C. has given the power to the Court concerned to dismiss the complaint only on the day when the summons has been issued on the complaint and on the day appointed for the appearance of the accused or in any subsequent day thereto, to which the hearing may have been adjourned, the complainant does not appear, the Magistrate shall despite anything contained in Cr.P.C. acquit the accused, unless for some reason he deems fit to adjourn the hearing of the case to some other day. The proviso to the said sub-section (1) clarifies that when the complainant is represented by a pleader or by an officer conducting the prosecution or where the Magistrate is of the opinion that personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

5. Here, in this case, the complainant was represented by an Advocate on record.

When the pendency of matters with arrears show a long list, it would be not possible for the Court to deal with all the matters and it would not be expected from a litigant to simply sit in the Court while there would not be any progress in the matter, and more specifically when he is represented by an Advocate. In a case of this nature under section 138 of N.I. Act, on every dates, in all the proceedings, the presence of complainant is not necessary, more so, when he has engaged an Advocate.

5.1 The learned trial Court Judge has taken a shortcut to dispose of the matter rather than considering the case of the complainant to decide on merits. The learned trial Court Judge ought to have kept in mind that the order below section 256 Cr.P.C. dismissing the complaint in default leads to acquittal of the accused, and once an accused has been acquitted in the offence, the law provide a remedy by way of appeal against the order of acquittal under section 378(4) of the Cr.P.C. A simple order of dismissal of the case without any scope of restoring the same would drag the litigant to the higher Court for filing the appeal to get the order quashed and set aside. The order is without any application of mind; it is a mechanical order for disposing of the case rather than deciding the case on merits.

6. Thus, in view of the reasons given above, the appeal is allowed. The order dated 15.09.2021 in Criminal Case Nos.5312 of 2013 passed by the 25th Additional Chief Judicial Magistrate, Vadodara, is quashed and set aside. The Criminal Case No.5312 of 2013 is ordered to be restored in original status on the file of the concerned Court with a direction to proceed the matter from the stage of evidence of the complainant. Record & Proceedings, if any, be sent back to the concerned Court.