

(1999) 08 AP CK 0161

In the Andhra Pradesh High Court

Case No : Criminal A.No. 1124 of 1999

Puchakayala Venkateswarlu

APPELLANT

Vs

M. Laxminarasaiah and another

RESPONDENT

Date of Decision : 12-08-1999

Acts Referred:

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

Citation : (1999) 6 ALD 106 : (1999) 2 ALD(Cri) 533 : (2000) 1 ALT(Cri) 33

Hon'ble Judges : D.S.R. Varma, J

Bench : Single Bench

Judgement

1. Appellant is the complainant. He directed this appeal against the judgment dated 18-5-1999 passed in CCNo.28 of 1999 by the 1 Additional Judicial Magistrate of First Class, Khammam dismissing the complaint u/s 256(1) Cr.PC.

2. When the matter came up for admission, this Court directed to issue notices to the respondents to show cause why the criminal appeal should not be admitted. Accordingly, notices were despatched by the Registry and the same were returned with an endorsement as "unclaimed" insofar as the 1st respondent is concerned; the second respondent is the State represented by the learned Public Prosecutor.

3. It is brought to my notice that this Court while dealing with the aspect of the service of notices u/s 138 of Negotiable Instalments Act in A.Sudershan v, Mannan (Shabir) and another, 1997(1) ALD (CrI.)795(AP), has considered a judgment in Sosamma v. Rajendran 1993 (I) KLT 629. In the said case, it was held that "the notice which was returned with postal shara" unclaimed" to be deemed service of notice". In the present case also, it is found that when the notices from this Court were sent, the same were returned with an endorsement as "unclaimed". In view of that matter and drawing inspiration from the above referred decision, I am of the opinion that the return of the notice of this Court by the respondent/accused with an endorsement as "unclaimed" amounts to

deemed service of the notice, and therefore, I am taking up this criminal appeal for admission deeming that the service of the notice has been effected.

4. Coming to the impugned judgment resulting the dismissal of complaint u/s 256(1) Cr.PC, the facts in brief are as follows:

The complaint u/s 138 of the Negotiable Instruments Act was taken on file on 13-1-1999 by the 1 Additional Judicial Magistrate of First Class, Khammam and was posted on 22-3-1999 for appearance of the accused. On 22-3-1999 the accused was not present. It was contended in the grounds of memorandum of appeal that the accused evaded to receive summons and on representation of the Counsel for the accused, fresh summons were issued and posted on 18-5-1999. Though the service of summons are awaiting on accused on 18-5-1999, the accused was acquitted u/s 256(1) Cr.PC as the complainant was not present.

5. The contention of the learned Counsel for the appellant is that the learned Magistrate failed to notice that on both the occasions i.e., on 22-3-1999 and 18-5-1999, the complainant was represented by the Counsel even though he was not present personally and he submits that the learned Magistrate is not correct in passing the impugned judgment, particularly, in the circumstances where the presence of the accused was required on the date of passing the impugned judgment. Here, it is necessary to extract the impugned judgment for convenience.

"Complainant called absent. No representation to complainant. Accused called absent, summons not served, not returned. Complainant is absent last time also. It appears that he has no interest in the matter. Hence, the complaint is dismissed u/s 256(1) Cr.PC."

It is seen from the said judgment that the case was actually posted for the presence of accused after issuing summons. It can also be seen from the judgment that the summons were not served and returned, which shows that the case was being posted for the appearance of the accused after service of summons. Obviously, the summons were riot served as recorded by the learned Magistrate. -

6. Coming to the contention of the learned Counsel for the appellant that on both the occasions i.e., on 22-3-1999 and 18-5-1999, the complainant (appellant) was represented by the Counsel though he was not physically present. That fact is not established by the impugned judgment. However, it is clear that the case has been coming up for the appearance of the accused only after service of summons.

7. Now the question is, in the circumstances mentioned in the impugned judgment, whether the learned Magistrate is justified in invoking the provisions of Section 256(1) Cr.PC and dismissing the complaint?

8. In this connection, the learned Counsel for the appellant relies on a judgment

rendered by the Hon"ble Supreme Court in Associated Cement Company Limited v. Keshavanand 1998 (1) ALD (Cri.) 374 (SC) wherein their Lordships held that:

"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 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".

9. Therefore, in view of the above observations of their Lordships, the Court is free to dismiss the complaint for justifiable reasons for want of presence of the complainant. In the instant case, as could be seen from the impugned judgment that the case was being adjourned for the appearance of the accused after issuing summons and that it was recorded that the summons were not returned served. In those circumstances, the learned Magistrate is certainly, in my view, not justified in dismissing the complaint on the sole ground that the complainant was not present on earlier occasions. The situation on the date of the judgment of the learned Magistrate was that, if the summons could not be served, there could be no progress in the matter and the case could not be taken up for trial. The presence of the complainant would not certainly make any difference except the Court adjourning the matter for appearance of the accused after service of summons. The Court cannot be permitted to apply the provisions u/s 256(1) Cr.PC mechanically and as a matter of routine. In other words, if the Courts feels that the progress of the case is thwarted for the non-appearance of the complainant, perhaps it is justified by recording the reasons to dismiss the complaint by invoking the provisions of Section 256(1) Cr.PC. Therefore, 1 feel that the impugned judgment passed by the learned Magistrate is apparently not justifiable on the face of the record, and therefore, the impugned judgment is liable to be set aside.

10. Accordingly, the judgment dated 18-5-1999 in CC No.28 of 1999 on the file of the 1 Additional Judicial Magistrate of First Class, Khammam is set aside and the matter is remitted back to the trial Court for proper disposal afresh.

11. Accordingly, the appeal is allowed.