

(2014) 07 CHH CK 0047
In the Chhattisgarh High Court
Case No : Acquittal Appeal No. 108/2014

Rahul Kalwani

APPELLANT

Vs

Sunita Shankar Lal Jadwani and Others

RESPONDENT

Date of Decision : 08-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 256, 256(1)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2015) 4 BC 173 : (2015) 2 MPHT 28 : (2015) 2 RCR(Criminal) 898

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : Jitendra Gupta, Advocates for the Appellant; Rajeev Bharat, Advocates for the Respondent

Judgement

Sanjay K. Agrawal, J.—Questioning the impugned order dismissing the criminal complaint filed under the provisions of Section 138 of the Negotiable Instruments Act, 1881 (hereinafter called as "NI Act"), present acquittal appeal has been filed by appellant/complainant seeking setting aside of the said order and for restoration of criminal complaint. The core facts required for judging the correctness of the impugned order are that:--

1.1. The appellant/complainant-Rahul Kalwani filed complaint under Section 200 of the Code of Criminal Procedure, 1973 (hereinafter called as "the Code") against the respondents herein for the commission of offence punishable under Section 138 of the NI Act on 20-4-2012 stating all the details of the facts of the case and prayed therein that the respondents be punished in accordance with law.

1.2. The complainant/appellant appeared along with his Counsel before the said Court, thereafter, the learned Magistrate has taken cognizance of the offence on 23-4-2012, the matter thereafter was listed on 2-7-2012, 5-9-2012, 10-9-2012, 21-9-2012, 26-9-2012, 3-11-2012, 7-11-2012, 8-11-2012, 9-11-2012, 21-11-2012, 27-11-2012, 10-12-2012, 18-1-2013, 1-3-2013, 2-3-2013, 6-3-2013, 11-3-2013, 19-3-2013, 12-4-2013, 28-6-2013, 23-7-2013,

21-8-2013, 13-9-2013, 8-10-2013, 9-10-2013, 22-10-2013 and ultimately, thereafter, the case was fixed for complainant's evidence on 13-12-2013. On that day, the complainant and his Counsel remained absent and the Trial Magistrate finding the complainant and his Counsel absent, dismissed the complaint in exercise of power conferred under Section 256 of the Code and acquitted the respondents for the aforestated offence.

2. Questioning the order dismissing the complaint and acquitting the respondents, the present appeal has been filed by appellant/complainant.

3. Mr. Jitendra Gupta, learned Counsel appearing for the appellant/complainant would submit that complainant was regularly appearing before the Trial Magistrate either personally or through his Counsel right from the date of institution of the complaint, i.e., 20-4-2012. On 13-12-2013, he could not appear, as on that day, one of his close relatives had died, therefore, the order passed by the Trial Magistrate dismissing the complaint in his absence without recording any reason and thereby acquitting the respondents is unsustainable in law and as such, impugned order deserves to be set aside and the matter be remanded back to the Trial Magistrate for proceeding in accordance with law.

4. Opposing the submission, Mr. Rajeev Bharat, learned Counsel appearing for the respondents/accused would submit that the Trial Magistrate is absolutely justified in dismissing the complaint, as the complainant deliberately did not appear on 13-12-2013, the date fixed for recording his evidence, and therefore, there is no illegality in dismissing the complaint in exercise of jurisdiction conferred under Section 256 of the Code.

5. I have heard learned Counsel appearing for the parties and considered their rival submissions made therein and also perused the available record carefully.

6. In order to have proper comprehension of the attack made to the order dismissing the complaint, it would be profitable to notice Section 256(1) of the Code, which provides as under:--

"Section 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 herein before 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."

7. From the careful and close perusal of Section 256 of the Code, it appears that in a summons case, instituted on a complaint, if the complainant is absent on the date of hearing, the Magistrate has to follow either of the three courses, namely:--

(1) Acquit the accused;

(2) To adjourn the case; and

(3) To dispense with the attendance of the complainant and to proceed with the case.

8. In a decision reported in *Associated Cement Co. Ltd. Vs. Keshvanand*, , the Supreme Court has held that Section 256 of Code, imposes two constraints on the Court for exercising the power for dismissing the complaint and provides as under:--

"17. Reading the section in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the section. The 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. The 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."

9. In a decision reported in *Memon Mohmedrafik Rasalbhai Vs. Desai Rameshkumar Virsangbhai and Another*, , the High Court of Gujarat has held that in a complaint filed under Section 200 of the Code for offence punishable under Section 138 of the Negotiable Instruments Act, 1881, if the complainant was present before the Court on all days except earlier on the date of order, dismissal of the complaint and the acquittal of the accused persons on the ground of absent of complainant is not justified.

10. Thus, before proceeding to dismiss the complaint, in absence of complainant in exercise of jurisdiction under Section 256 of Code of Criminal Procedure, it must be considered by the Court whether the presence of the complainant is really necessary and the Court should act judicially and not capriciously as the duty has been cast on the Court to consider whether the personal attendance of the complainant is or is not necessary. The discretion vested in the Court should

be exercised carefully and not hastily. An order of acquittal under Section 256 of the Code would bar a fresh trial and therefore, such an order is of immense significance. The order must show that the wide discretion vested in the Court had properly been exercised in accordance with law.

11. Having noticed the statutory provision in this regard and principle laid down by the Supreme Court relating to dismissal of complaint in absence of complainant, reverting back to the facts of the present case, it appears that complainant was regularly appearing before the Trial Magistrate either personally or through his Counsel right from the date of institution of the complaint, i.e., 20-4-2012 except the date on which complaint was dismissed (13-12-2013). The Trial Magistrate did not record any reason whether presence of the complainant was absolutely necessary for the progress of the case and whether there was no reason to adjourn the case for any other date considering the fact that he had appeared on all the dates earlier to 13-12-2013 either personally or through his Counsel throughout and on that accused was also not present. In the considered opinion of this Court, the Trial Magistrate has failed to meet the legal and essential requirements of recording reasons for dismissing complaint under Section 256 of the Code. The reason assigned by the appellant/complainant for his absence on 13-12-2013 is held to be sufficient reason for his absence. Accordingly, his absence is condoned. Consequently, the impugned order being unsustainable is hereby set aside. The Complaint Case No. 140/2012 is restored to its original file of the Judicial Magistrate First Class, Bilaspur for hearing and disposal in accordance with law on merits. Resultantly, the acquittal appeal is allowed with no order as to cost(s).