

GAUHATI HIGH COURT**Bench: Honourable Mr. Justice Mridul Kumar Kalita**

Date of Decision: 18 November 2023

Case No. : CrI.A./212/2019

Shyam and sons (huf)

Versus

The state of assam and anr represented by pp,
assam.

Mr. Uddhab nath

Sections, Acts, Rules, and Articles Mentioned:

Section 256, 378 of the Code of Criminal Procedure, 1973.

Section 138, 142 of the Negotiable Instruments Act, 1881.

Section 256 of the Code of Criminal Procedure, 1973.

Subject: Dismissal of a criminal appeal challenging the trial court's dismissal of a complaint case (No. 1963c/2018) under Section 138/142 of the Negotiable Instruments Act, 1881, for non-prosecution due to the complainant's repeated absence without justification.

Headnotes:

Criminal Appeal – Dismissal of Complaint for Non-Prosecution – Appellant's challenge against dismissal of complaint case No. 1963c/2018 by Judicial Magistrate First Class, Kamrup, for non-prosecution. Complainant absent for several hearings without justification, leading to dismissal and acquittal of accused. Appeal against dismissal based on contention of absence due to counsel's inadvertence. [Paras 2, 4, 10, 14]

Negotiable Instruments Act, 1881 – Section 138/142 – Original complaint for dishonor of cheques issued by respondent no. 2 in favor of appellant. Case transferred for disposal, but complainant absent repeatedly without steps, leading to dismissal. [Paras 3, 10]

Judicial Discretion and Process – Application of Judicial Mind – Argument that trial Magistrate dismissed the complaint without proper judicial consideration. Discussion of the powers under Section 256 of the Code of Criminal

Procedure, 1973, regarding acquittal for complainant's non-appearance. Reference to Supreme Court and High Court precedents on the exercise of judicial discretion in such cases. [Paras 5, 11, 12, 13]

Decision – Upholding Trial Court's Dismissal of Complaint – High Court finds no merit in the appeal, noting complainant's repeated absence and lack of diligence in pursuing the case. Dismissal of complaint for non-prosecution and acquittal of accused affirmed, with no intervention warranted in the impugned order. [Paras 14, 15, 16, 17]

Referred Cases:

- Associated Cement Company Limited vs. Keshvanand, reported in (1998) 1 SCC 687.
- Shriram Transport Finance Company Limited vs. Manju Devi, reported in MANU/HP/0296/2020.

Representing Advocates:

Advocate for the Petitioner: Mr. S K Agarwal.

Advocate for the Respondent: Mr. D. Das, Additional Public Prosecutor, Assam.

JUDGMENT AND ORDER

Date : 18-11-2023

1. Heard Mr. S. K. Agarwal, learned counsel for the appellant. Also heard Mr. D. Das, learned Additional Public Prosecutor for the State.

2. This criminal appeal has been preferred under Section 378 of the Code of Criminal Procedure, 1973, by the appellant, namely, Shyam and Sons (HUF) represented by its proprietor Karta Shyam Harlalka, impugning the order dated 16.02.2019 passed by learned Judicial Magistrate First Class, Kamrup, (Metro) in complaint Case No. 1963^c/2018 whereby the complaint petition filed by the present appellant was dismissed for default and the respondent no. 2 was acquitted and was set at liberty.

3. The facts relevant for adjudication of this appeal, in brief are as follows:-

(i) That the present appellant had filed a complaint case under Section 138/142 of the Negotiable Instrument Act, 1881, against respondent no. 2

alleging dishonor of eight cheques issued by respondent no.2 in favor of the present appellant and discharge of the liability which respondent no. 2 owed to the present appellant. The said complaint case was registered as complaint case No. 1963^c/2018 and was transferred by learned Chief Judicial Magistrate, Kamrup (Metro), Guwahati to the Court of Smti P. Dutta, learned Judicial Magistrate First Class, Kamrup, Metro for disposal.

(ii) On receipt of this said CR Case, after taking cognizance of the case under Section 138 of the Negotiable Instrument Act, 1881, learned trial Magistrate issued processes to the respondent and apprise of offence under Section 138 of the Negotiable Instrument Act, 1881, was explained to him and to which the respondent No.2 pleaded not guilty and claimed to be tried and the case was fixed for cross-examination of PW that is the complainant (present appellant).

4. It is averred by the appellant in the memo of appeal that the appellant had appeared in the said case No. 397/2018, however, due to inadvertent mistake of the counsel of the appellant he could not collect the next date i.e., 29.08.2018 and it went out of the mind of the counsel and he failed to collect the subsequent dates of the case. It is further submitted by the learned counsel for the appellant that it is only on 02.04.2019 the counsel for the complainant came to know about the fate of the case that it was dismissed for default on 16.02.2019.

5. Learned counsel for the appellant has submitted that the learned trial Court while dismissing the case for default has observed that the complainant (present appellant) is not interested to proceed further in the case and dismissed the complaint case for default on 16.02.2019. It is submitted by the learned counsel for the appellant that the ground mentioned in the order of dismissal which is impugned in this appeal is not correct. Learned counsel for the appellant has submitted that the learned Trial Magistrate has dismissed the complaint case by impugned order without application of judicial mind and therefore, same is liable to be set aside.

6. It is also submitted that the applicant would suffer irreparable loss if the said complaint case is not restored to file after setting aside the impugned order.

7. Learned counsel for the appellant in support of his submission has relied upon the ruling of Hon'ble Apex Court in "**Associated Cement Company Limited Vs. Keshvanand**" reported in (1998) 1 SCC 687 as well as another ruling of the High Court of Himachal Pradesh in "**Shriram**

Transport Finance Company Limited Vs. Manju Devi” reported in MANU/HP/0296/2020.

8. Since the respondent no.2 did not appear in this appeal in spite of due service of notice on him, this appeal proceeded ex-parte against the respondent no.2.

9. I have heard submissions made by learned counsel for the appellant and have perused the materials on record including the case record of CR Case

No. 1963^C/2018. For the sake of convenience the impugned order dated 16.02.2019 is quoted hereinbelow:

“Complainant is absent without any steps.

Today is the fixed date for NO.

Perused the C/R from which it appears that the complainant remained absent for several days without any steps.

This implies that the complainant is not interested to proceed further with the case any more.

Accordingly, the instant case is dismissed for none prosecution.

Accused is acquitted.

Bail bond of the accused shall remain in force for next six months.”

10. On perusal of the impugned order, it appears that on 16.02.2019 the appellant who was the complainant in above mentioned CR Case was absent without any steps. It also appears from the record that prior to that date, the case was fixed on 13.12.2018 when the said complaint case was fixed for cross-examination of the complainant. On that date also the complainant (i.e., the present appellant) was absent without steps, though the accused was present in the court. It also appears that, prior to 13.12.2018, the said complaint case was fixed on 19.10.2018 and before that on 29.08.2018, and on those dates also the complainant (i.e., present appellant) was absent, however the accused was present on those dates also.

11. I have perused the ruling in ‘**Shriram Transport Finance Company Limited versus Manju Devi (Supra)**’ cited by learned counsel for the

appellant. It appears that the facts of that case is distinguishable from the facts of the instant case, as in the said case, the complainant was contesting the case and the trial was almost complete and was pending at the stage of argument, whereas in the instant case, the complainant had appeared before the trial court only once personally and since then he defaulted thereafter, though, the case was fixed for cross-examination of the complainant (the present appellant). Hence, this instant case does not appear to be a case where the complainant appears to have shown due diligence in pursuing the complaint against the respondent.

12. Regarding the power of the court to acquit the accused under Section 256 of the Code of Criminal Procedure, 1973, due to non-appearance of the complainant, Hon'ble Supreme Court of India in "**Associated Cements Corporation Limited versus Keshwanand (Supra)** " has observed as follows:

"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 complainant if he does not turn up to the court on occasions when his presence is necessary. The section, therefore, affords protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, the 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. 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 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.”

13. Thus, from above observation of Hon’ble Apex court, it appears that the Magistrate has to consider as to whether, on a given date, personal attendance of the complainant is necessary or not, and if he feels that the personal attendance of the complainant is essential and the complainant is absent without any justification, then it would not be improper on the part of the Magistrate to exercise the power under Section 256 (1) of the Code of Criminal Procedure, 1973 to acquit the accused person.

14. In the instant case, it appears that the complainant last appeared before the trial court in CR Case No. 163C/2018 on 19.07. 2018 and thereafter, defaulted on 4 occasions to appear before the trial court without any justification. It also appears that from the date of his first default, which was in the month of August, 2018, the date when the case was ultimately dismissed and the accused was acquitted, i.e., on 16.02.2019, almost six months have elapsed, and therefore the plea of the learned counsel for the appellant that the counsel for the appellant could not collect the next day due to inadvertent mistake does not appear to have much persuasive force, as the learned trial court did not dismiss the complaint case on the first occasion, rather, it had adjourned the case on three occasions. It was only after the default was made for the 4th consecutive date, after lapse of about six months from the first date of default, the complaint case was dismissed.

15. This court is of considered opinion that the Appellant remained absent in the trial court for 6 consecutive months and on 4 successive dates whereas the accused was regularly appearing before the trial court on these dates, the learned trial court was not unjustified in invoking its powers under Section 256

(1) of the Code of Criminal Procedure, 1973, in acquitting the accused by the order which has been impugned in this appeal.

- 16.** For the reasons discussed herein above, this court does not find any merit in the appeal and finds no reasons to interfere in the impugned order.
- 17.** With the above observation, this Criminal Appeal is hereby dismissed.
- 18.** No orders as to costs.

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