

HIGH COURT OF RAJASTHAN

Bench: JUSTICE ANOOP KUMAR DHAND

Date of Order: 18 April 2024

S.B. Criminal Appeal (SB) No. 2765/2023

**K. K. CONSTRUCTION, PROPRIETOR SHRI KISHAN S/O SHRI BADRI
NARAYAN ...APPELLANT**

VERSUS

**SHRI BHAGWAN SINGH POSWAL CHAIRMAN SHRI VINAYAK MISSION
MEDICAL AND EDUCATION SOCIETY JAIPUR
SECRETARY SHRI BIRBAL MEDICAL EDUCATION SOCIETY
SHRI VINAYAK MISSION MEDICAL AND EDUCATION SOCIETY JAIPUR
...RESPONDENTS**

Legislation:

Section 138 of the Negotiable Instruments Act, 1881

Section 256, 378(4) of the Criminal Procedure Code (Cr.P.C.)

Subject: Appeal against the dismissal of a criminal complaint under Section 138 of the Negotiable Instruments Act, 1881 due to non-appearance of the complainant, leading to acquittal of the accused.

Headnotes:

Dismissal for Want of Prosecution – Challenge against Special Metropolitan Magistrate's order dismissing complaint for non-appearance of complainant under Section 256 Cr.P.C. - Acquittal of accused for charges under Section 138 of the Negotiable Instruments Act due to complainant's absence on several court dates, despite history of presence and legal representation [Para 1-6].

Judicial Review of Magistrate's Decision – High Court examines whether Magistrate acted justifiably in dismissing complaint without complainant's

presence despite ongoing efforts since 2013 to prosecute, including issuance of arrest warrants against absent accused [Paras 5, 12-14].

Legal Implications of Section 256 Cr.P.C. – Discussed necessity of judicial discretion in dismissing cases under Section 256 Cr.P.C., emphasizing protection against dilatory tactics by complainants and potential misuse leading to undue harassment of accused [Paras 10-11].

Restoration of Complaint – High Court finds dismissal and acquittal by Magistrate hasty and lacking in judicial prudence – Orders restoration of complaint to original status and continuation of proceedings from last effective stage – Critiques lack of opportunity given to complainant to rectify non-appearance [Paras 18-20].

Directive for Further Proceedings – Trial court instructed to proceed lawfully with complaint, ensuring both parties are given fair opportunity to present their cases [Para 20].

Referred Cases:

- Bijoy vs. State of Kerala, 2016 (2) KLT 427
- The Associated Cement Co. Ltd vs Keshvanand, 1998 (1) SCC 687

Order

18/04/2024

Reportable

1. This criminal appeal under Section 378(4) Cr.P.C. challenges the impugned order dated 05.04.2022 passed by the Special Metropolitan Magistrate (NI Act) Cases, No.12, Jaipur Metropolitan-I, Headquarter Sanganer in Criminal Case No.1336/21 by which the complaint filed by the appellant/complainant (hereinafter referred as “the complainant”) has been dismissed for want of prosecution under Section 256 Cr.P.C. and the accused-respondents (hereinafter referred as “the respondents”) have been acquitted of the charge under Section 138 of the Negotiable Instruments Act, 1881 (for short “Act of 1881”).

2. Counsel for the complainant submits that a complaint under Section 138 of the Act of 1881 was submitted by the complainant against the respondents initially before the Court of Special Metropolitan Magistrate, NI Act Cases, No.3, Jaipur Metro and the same remained pending before the Court of Metropolitan Magistrate No.17, Jaipur Metro-I for a considerable time since 2013 till 2021. Counsel submits that almost on each and every occasion, counsel for the complainant appeared before the Court concerned and thereafter the case was transferred to the Court of Special Metropolitan Magistrate (NI Act) Cases, No.12, Jaipur Metropolitan-Ist, Headquarter Sanganer by the orders of Chief Metropolitan Magistrate, Jaipur Metro-I. Counsel submits that after transfer of the aforesaid complaint, the complainant could not appear before the Special Metropolitan Magistrate on 2-3 occasions. Counsel submits that even the accused were not putting their appearance before the concerned Court and their arrest warrants were issued on 27.01.2022. Counsel submits that on account of absence of the complainant and his counsel on 05.04.2022, the complaint was dismissed in default and the respondents were acquitted, in terms of the mandate contained under Section 256 Cr.P.C. Counsel submits that absence of the complainant was bonafide, therefore, the order dated 05.04.2022 be recalled and the complaint be restored to its original number.

3. Per contra, counsel for the respondents opposed the arguments raised by counsel for the complainant and submitted that even on 2-3 dates prior to passing of the impugned order dated 05.04.2022, the complainant failed to appear before the trial Court, hence the trial Court has not committed any error in rejecting the complaint for want of prosecution. Counsel submits that under these circumstances, interference of this Court is not warranted.
4. Heard and considered the submissions made at Bar and perused the material available on the record.
5. The short question that arises for consideration of this Court is whether in the facts and circumstances of this case, the learned Magistrate was justified in dismissing the criminal complaint for non-appearance of the complainant at the stage where the accused were summoned through warrants and the case was transferred from the Court of Metropolitan Magistrate No.17, Jaipur Metro-I, Sanganer to the Court of Special Metropolitan Magistrate No.12, Jaipur Metro-I, Headquarter Sanganer without any intimation to the complainant.

6. In order to appropriately address the above issue, it would be apposite to mention a brief sketch of the facts giving rise to this appeal.
7. The respondents issued three cheques of Rs.1,00,000/- each to the complainant on different dates.

When the complainant presented the said cheques before his bank, the same were dishonoured with the remarks "Funds Insufficient". The complainant sent a legal notice to the respondents for payment of the amount mentioned in the said cheques. When, neither the amount was returned nor any reply to the above notice was given, the complainant submitted a criminal complaint No.247/2013 under Section 138 of the Act of 1881 against them before the Court of Special Metropolitan Magistrate (N.I. Act Cases) No.3, Jaipur Metropolitan, Jaipur on 04.04.2013 and cognizance was taken against the respondents under Section 138 of the Act of 1881 vide order dated 03.09.2013 and they were summoned to appear before the Court.

8. Thereafter, the case was transferred to the Court of Metropolitan Magistrate No.26 and then to Metropolitan Magistrate No.17 and the respondents were continuously summoned through summons but the counsel for the complainant remained present in the Court almost on each and every date. When the accused failed to appear before the Court, then on 12.11.2020, arrest warrants were issued for securing their presence before the Court. The case was posted for 05.02.2021 and 06.04.2021 and the counsel for the complainant remained present in the Court.
9. The Chief Metropolitan Magistrate, Jaipur Metro-I vide office order dated 05.04.2021 directed the Metropolitan Magistrate No.17 to transfer the file of the case to the Court of Metropolitan Magistrate No.12, Headquarter Sanganer, Jaipur Metro-I and the same was transferred on 05.08.2021. It appears that the aforesaid order of transfer of the case was passed without any intimation to the complainant, hence he could not appear before the Court of Special Metropolitan Magistrate (NI Act Cases) No.12 on 20.11.2021, 24.11.2021, 27.01.2022, 28.02.2022 and 05.04.2022. Hence the complaint was dismissed for want of presence of the complainant on 05.04.2022 and the accused / respondents were acquitted, in terms of provisions contained under Section 256 Cr.P.C. 10. Before proceeding further, it would be useful and apposite to quote the extract of Section 256 Cr.P.C., which reads as follows:

"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 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 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. ”

11. A plain reading of the proviso attached to subsection (1) of the Section 256 Cr.P.C. would indicate that where the Magistrate is satisfied that the personal attendance of the complainant is not necessary, he can dispense with the attendance of the complainant and proceed with the case. Section 256 Cr.P.C. is an analogous provision and the same is evidently intended to prevent dilatory tactics on the part of the complainant and consequently harassment to the accused persons. The power under this Section has to be used judicially. It is not proper to throw out a case in a hasty or thoughtless manner where the complainant has proved his bona fides and shown himself vigilant in prosecuting the accused.
12. Here in this case the counsel for the complainant remained present in the Court almost on each and every occasion since 2013 till 2021 and the complainant was quite vigilant in prosecuting the accused / respondents. The stage of his complaint was for securing presence of the accused since 2013 till 2022. The complainant could not appear before the Court due to lack of knowledge about transfer of the case and his complaint was rejected on 05.04.2022 for want of his presence without assigning any reasons.
13. The Kerala High Court has dealt with the similar situation in the case of **Bijoy vs. State of Kerala** reported in **2016 (2) KLT 427** while dealing with the provisions contained under Section 256(1) Cr.P.C., it has observed as under: “9. The Magistrate in complaint cases should not dismiss the complaint and acquit the accused by calling the case immediately. Where the case is fixed for appearance of both parties the complainant and accused is represented by lawyers, rejection of the application of the complaint's

lawyer without recording the reason is illegal. In such situation, Court should record the reason for his absence and set the law in motion and direct the complainant to appear before Court in person on a particular date for the enquiry. If after giving such opportunity the complainant remains absent and not obey the directions issued by the Court, dismissal of the complaint under such circumstances is proper. If there is sufficient reason for his absence an order passed against him in his absence will vitally affect him and the consequence will be serious. If the Magistrate subsequently discovers that there had been good reason for the absence of the complainant, the Magistrate has no power to correct that mischief. In order to avoid this embarrassing situation it is not proper to throw out the case in a hurry manner, when the complainant states his bona fides. Considering the facts and circumstances of the case, it is necessary to give a chance to the complainant to prove his case in the Trial Court."

14. In the case of **The Associated Cement Co. Ltd vs Keshvanand** reported in **1998 (1) SCC 687**, the purpose of inserting the provisions like Section 256 Cr.P.C. was discussed by the Hon'ble Apex Court and it was observed in para 16 as under:

"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."

15. It is far too well settled position of law that the power of the Magistrate under Sec.256 Cr.P.C to acquit an accused should be exercised judicially, based on a definite conclusion that the complainant no longer desires to prosecute the complaint. The power is not to be indiscriminately exercised whimsically and mechanically for the statistical purposes of removing a docket from its rack

as it undermines the cause of justice. Instead, the judicious course would be to direct the complainant to appear for the hearing, if it is imperative, and decide whether the drastic step of acquittal is to be passed in case he fails to appear.

16. Instant case is not a case where the accused persons were appearing regularly before the trial Court to attend the Court proceedings and the complainant was using dilatory tactics to prolong the disposal of the complaint to unnecessary harass the accused respondents. Rather the complainant or his Advocate was appearing almost on each and every date posted before the trial Court regularly since 2013 till 2021.
17. The timeline of the dates and events narrated hereinabove reveals that the counsel for the complainant remained present before the court on every occasion and the stage of the case was for securing appearance of the accused persons and in the meantime the case was transferred to a new Court without intimation to the complainant.
18. Undisputedly, on the fateful day i.e. on 05.04.2022, neither the complainant was present for trial nor any order directing complainant to remain present was passed on the earlier occasion, therefore the learned Magistrate ought to have adjourned the complaint to a later date directing the complainant to positively remain present on the next date. Without adopting the above reasonable course and providing the complainant a fair opportunity, the learned Magistrate rejected the complaint for want of presence of the complainant and acquitted the accused respondents vide impugned order dated 05.04.2022. Such an action on the part of the Magistrate was unreasonable and irregular. The impulsive decision of the learned Magistrate has led to miscarriage of justice warranting interference of this Court.
19. This Court, therefore, is of the considered view that the learned Magistrate was not justified in straight away dismissing the complaint and ordering acquittal of the accused respondents on mere non-appearance of the complainant, therefore, the impugned order dated 05.04.2022 is liable to be quashed and set aside.
20. For the reasons stated above, the impugned order dated 05.04.2022 stands quashed and set aside. The proceedings shall stand restored to its original number on the file of the learned Magistrate and the prosecution shall now proceed from the stage where it was, when the order of acquittal/dismissal of the complaint was passed. The trial Court is directed to proceed with the matter in accordance with law.

21. The appeal is allowed in the aforesaid terms.
22. The parties are directed to appear before the trial Court on 16.05.2024.
23. Stay application and all pending applications, if any, also stand disposed of.

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