

IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH

DATED THIS THE 30TH DAY OF SEPTEMBER, 2022

BEFORE

THE HON'BLE MR. JUSTICE P.N.DESAI

CRIMINAL APPEAL NO.200033/2022

BETWEEN:

SRI.NAGARAJ

...APPELLANT

(BY SHRI.SANTOSH PATIL, ADVOCATE.)

AND:

SRI. ISHWAR

...RESPONDENT

(BY SHRI.M.A.JAGIRDAR AND
SHRI. G.B.YADAV, ADVOCATES.)

THIS CRL.A. FILED U/S. 378 (4) OF CR.P.C BY THE ADVOCATE FOR APPELLANT PRAYING THAT THIS HONOURABLE COURT MAY BE PLEASED TO ALLOW THE APPEAL FILED BY THE APPELLANT AND DIRECT THE TRIAL COURT i.e. V ADDL. CIVIL JUDGE AND JMFC COURT AT KALABURAGI, TO RESTORE THE CASE TO ITS ORIGINAL STAGE IN C.C. NO.2735/2013, DISMISSED FOR NON PROSECUTION VIDE ORDER DATED 17.10.2018, IN THE INTEREST OF JUSTICE.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

Appeal is filed assailing the order dated:17.10.2018 passed by Vth Additional Civil Judge and JMFC Court at Kalaburagi in C.C.No.2735/2013, wherein the learned JMFC dismissed the case for non-prosecution.

2. The brief case which has given rise for consideration of this appeal is that:-

The appellant was a complainant before the Trial Court who filed a private complaint against the respondent/accused for offences under Section 138 of Negotiable Instruments Act, 1881 (for short hereinafter referred to as 'N.I Act'). After recording the sworn statement, the criminal case number was given as C.C.No.2735/2013, but the said case came to be dismissed for non-prosecution, as the complainant has not appeared before the Court. Being aggrieved by the impugned order, this appeal is filed.

3. Heard Sri. Santosh Patil, learned counsel for the appellant and Sri. M.A.Jagirdar, learned counsel for the respondent.

4. The learned counsel for the appellant argued that the learned JMFC has not dismiss the case on merits instead the case was dismissed for default. Learned counsel submits that respondent/accused has borrowed a sum of Rs.4,50,000/- from the complainant. But the accused did not repay the said amount and when the complainant approached him, the accused gave a cheque bearing No.037971 dated 12.02.2013 in favour of the complainant drawn on IDBI Bank Ltd., Kalaburagi. But the said cheque given by the respondent/accused came to be dishonoured with an endorsement 'in sufficient fund'. Hence, the complainant issued a legal notice. Even then the respondent/accused did not turn-up to pay the amount. Hence the complainant filed a private complaint. But the Trial Court has dismissed the case of the complainant for default. Learned counsel argued that infact challenging the dismissal order, the appellant filed a revision petition under Section 397 of Code of Criminal Procedure, 1973 (for short hereinafter referred to as 'Cr.P.C') before the learned Sessions Judge in CrI.R.P.No.2/2019, learned Sessions judge vide order dated 21.10.2019 allowed the petition and

directed to restore C.C.No.2735/2013 to its original file. Aggrieved by the said order, the respondent/accused filed a petition under Section 482 Cr.P.C., before this Court, wherein this Court allowed the petition and held that the remedy of complainant/appellant is to file an appeal. Hence he has filed this appeal. Learned counsel also argued that this Court by order dated 16.8.2022 has condoned the delay. Looking into the stage of the case and the cheque amount involved, he prays to allow the appeal by remanding the matter back to the trial Court.

5. Against this learned counsel for respondent/accused argued that there is an exorbitant delay in filing the appeal. Even looking into the averments made in the appeal, it does not show why he has not presented the appeal before this Court well in time. There are no valid grounds in the appeal to allow the appeal. The appellant should give detail reason for restoration of the case. In paragraph No.8 of the appeal memo, the grounds stated with regard to limitation cannot be considered, as it does not disclose sufficient cause for filing the appeal at a belated stage. In view of the fact that there is inordinate delay in

filing the appeal, if the appeal is allowed and the C.C.No.2735/2013 is restored to its original file, it will cause much hardship to the respondent/accused, as there is no bonafide reason mentioned for non-appearance of complainant/appellant before Trial Court. The learned counsel in support of his arguments, relied on the decision of Bombay High Court in the case of **Vamsi Labs Private Ltd. Vs. Alpine laboratories**, passed in **Criminal Appeal No.498 Of 1998 dated 15.11.2019**, wherein the Bombay High Court at paragraph No.6 has considered that there is no explanation regarding absence of complainant or his pleader. The Bombay High Court held that the Magistrate has rightly exercised jurisdiction under Section 256(1) of Cr.P.C and dismissed the appeal. With these contentions he prayed to dismiss the appeal.

6. I have perused the appeal memo, the trial Court records and other materials placed on record. It is evident from the records that a complaint came to be lodged by the appellant under Section 138 of N.I.Act and the order sheet of the Trial Court reveals that the present respondent who is accused did not appear before the Court for several years

and NBW came to be issued. Thereafter, the accused appeared and got himself released on bail. Though the case is of the year 2013, this respondent/accused appeared before the Court after five years i.e. on 13.06.2018. When the matter was posted for recording plea of accused, learned JMFC dismissed the complaint on 17.10.2018 for non-appearance of the complainant.

7. Be that as it may, the appellant filed revision petition against said dismissal order. There was 44 days delay in filing the revision and that was condoned by the learned Sessions Judge and the revision was allowed. The complaint was restored to its original file. Against that order, respondent/accused filed criminal petition under Section 482 of Cr.P.C., which came to be allowed on 12.07.2021 by this Court. Consequently, this appeal is filed on 11.02.2022.

8. The Hon'ble Supreme Court in the case of **Collector, Land Acquisition, Anantnag and another vs. Mst.Katiji and others** reported in **AIR (1987) Supreme Court 1353** at paragraph No.3 held as under:

3.xxxx

1.xxxx

2.xxxx

3.xxxx

4.xxxx

5. xxxx

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal.

xxxx"

9. In the light of these principles, let me consider the contentions of appellant. The order sheet of the trial court discloses that the respondent/accused did not appear before the Court when the summons was issued in the year 2013. Subsequently only after five years i.e., on 13.6.2018 he appeared before the Court. The case was posted for recording plea of the accused. On 15.9.2018 the accused

was absent. But the Court without taking into consideration all these aspects after lapse of five years of lodging the complaint, kept the case pending for want of appearance of respondent/accused but, dismissed the complaint when the case is posted for recording plea of the accused for non-appearance of the complainant. The complainant presence is not at all essential at the time of recording plea of the accused is not at all essential. It is the duty of the Court to record plea of the accused by putting substance of accusation against him. The complainant presence is not all essential.

10. In order to appreciate dismissal of complaint, it is necessary to refer to the provisions of Section 256 of Cr.P.C, which reads as under:

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. On perusing the said Section, it is evident that the Court has to exercise its discretion judiciously. The proviso clearly indicates that when the Court is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may be dispense with attendance of complainant and proceed with the case. Here complainant is represented by an advocate. The stage of the case is for recording of plea. The complainant presence was not necessary and recording plea is by the Court. It is the task to

be performed by the Court for progress of case. Therefore, when the presence of complainant on that day is not necessary, the learned JMFC ought not to have dismissed the complaint for non-appearance of the complainant. The case is not posted for hearing. For non-appearance of the complainant on each and every date of hearing, an order of acquittal cannot be passed in every case. The Court has to see the stage of the case and the previous appearance of the accused and complainant and how many years the complaint is pending, what is the nature of case before passing any such dismissal order. Simply to dispose of the cases or get rid of the case, the complaint cannot be dismissed when there no necessity of presence of complainant.

12. Here the complainant's case is under Section 138 of N.I Act. The amount of cheque involved is stated to be Rs.4,50,000/-. The sworn statement of complainant is given and he has produced documents in support of his case. Therefore, keeping in mind, the exercise of power under appeal and the peculiar facts and circumstance of this case, and in view of Section 256 Cr.P.C., in my considered view the appeal deserves to be allowed. Simply because the

drafting of appeal memo is lacking some ingredients is not a ground to dismiss the appeal. Keeping in mind the purpose for which the Courts are meant and making justice oriented approach in my considered view, the appeal deserves to be allowed. Accordingly, I pass the following :

ORDER

- i) The appeal is allowed.
- ii) The order dated 17.10.2018 passed in C.C.No.2735/2013 by V Additional Civil Judge, JMFC, Kalaburagi is hereby set aside. The C.C.No.2735/2013 is restored to the original file of V Additional Civil Judge, JMFC, Kalaburagi.
- iii) The Trial Court shall proceed further from the stage when the complaint is dismissed in accordance with the procedure prescribed for trial of such cases.
- iv) As the case of the year 2013, both Appellant and Respondent shall appear before Trial Court on **21.10.2022** and assist the Court in disposing the said case as expeditiously as possible.

Sd/-
JUDGE

HJ