

HON'BLE SMT. JUSTICE LALITHA KANNEGANTI

CRIMINAL APPEAL No.172 of 2021

JUDGMENT:

Appellant is the complainant. He preferred this Criminal Appeal against the docket order dated 18.09.2019 in C.C. No. 240 of 2019 on the file of XXII Additional Metropolitan Magistrate, Cyberabad at Medchal, Ranga Reddy District.

2. The learned Magistrate *vide* docket order, dismissed the case for default which reads as under:

“ Both parties are absent. Summons of accused are pending since 21.05.2019. The complainant is absent since 27.06.2019. No representation for complainant for all these days though matter adjourned from time to time. The complainant has not deposited process for issuance of summons to accused. He is not showing interest. No representation for complainant even at 1.00 p.m. Hence, the complaint is dismissed for default. Accused is discharged.”

3. Assailing the said order, the complainant filed CrI.R.C(SR).No. 123 of 2020 before the Metropolitan Sessions Judge, Ranga Reddy District at L.B. Nagar. The learned Judge held that, ‘in the light of the principle laid down in ***Himachal Pradesh Financial Corporation v. Continental Spinners Limited (2003 Law Suit (HP) 19*** and ***Smt. P. Vijaya Laxmi v. Smt. S.P. Sravana***, the remedy to complainant is to seek an Appeal under Section 378(4) of Cr.P.C., hence, this Petition is not maintainable and it is liable to be returned. Hence, this Petition is returned to be presented before the Hon’ble High Court.”

4. Learned counsel for the appellant Ms. T. Siva Parvathi submits that the appellant filed two complaints before the XXIII Additional Metropolitan Magistrate, Cyberabad at Medchal

vide S.R.No. 2583 of 2019 and 2584 of 2019 for the offence under Section 138 of the Negotiable Instruments Act. It is submitted that XXII Additional Metropolitan Magistrate at Medchal, being in-charge of XXIII Additional Metropolitan Magistrate, took cognizance of both the cases and directed the Section to number the cases, however, Section of XXIII Additional Metropolitan Magistrate numbered S.R.No. 2583 of 2019 *vide* C.C.No. 688 of 2019, but erroneously sent S.R.No. 2584 of 2019 to the Court of Hon'ble XXII Additional Metropolitan Magistrate. It is also submitted that when the counsel for appellant approached the Section Officer, he requested the counsel to verify the register of XXII Additional Metropolitan Magistrate, where, to their utter surprise, the case was found as C.C.No. 240 of 2019 and the same was dismissed for default. She further submits that non-representation and non-deposit of process in the above C.C. is purely accidental and due to lack of knowledge, hence the learned Magistrate ought not to have dismissed the same for default. Learned counsel further submits that there are fair chances for the appellant to succeed in the case, therefore, she prays to set aside the order under challenge.

5. Learned counsel for the appellant has taken out notice to the respondent and filed memo of proof of service on 20.11.2021. In spite of receipt of notice, none appears on behalf of the respondent - accused.

6. Heard learned counsel for appellant and perused the entire material on record.

7. The Court below dismissed the complaint solely on the ground that summons of accused were pending since 21.05.2019 and complainant is absent since 27.06.2019. According to the

appellant, erroneously complaint in S.R.No. 2584 of 2019 was sent to the Court of Hon'ble XXII Additional Metropolitan Magistrate, and the same was numbered as C.C.No. 240 of 2019. It is submitted that appellant has no knowledge of transfer of case to the Court of XXII Additional Metropolitan Magistrate, and the proceedings going on in the said case, hence, he could not attend the same.

8. At this juncture, it is apt to quote Section 256 Cr.P.C. which reads as under:

“ 256. Non-appearance or death of complainant: - 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.”

9. In ***Arumugham v. Valliammal***¹, the Madras High Court, in paragraph 7, followed the guidelines which were to the following effect:

“ Section 256(1) empowers the Magistrate to acquit the accused if on any date of hearing to which the case may be adjourned the complainant does not appear unless for some reasons he thinks proper to adjourn the hearing of the case to some other day. It cannot be said that the section contemplates that the order of acquittal should be a matter of routine and followed automatically on the absence of the complainant. All the surrounding

¹ 1982(2) Cri.L.J. 1609

circumstances and facts have to be taken into consideration before the Magistrate dismissed the case under the section. The section invests in the court a discretion. It should not be used for merely disposing of the case. In matters like this the real test will be good faith.”

10. The Orissa High Court in the case of ***Nityananda Samal v. Naraprasad***², has observed that:

“ In order to decide whether the presence of the complainant is necessary, the court should act judicially and not capriciously. A duty has been cast on the court to consider whether the personal attendance of the complainant is or is not necessary. In the court, heavy responsibility rests on it in deciding as to whether to adjourn the case or to record an order of acquittal. The discretion vested in the court should be exercised carefully and not hastily. An order of acquittal under Section 256 of Criminal P.C would bar a fresh trial and therefore, such an order is of immense significance. The order should show that the wide discretion vested in the court had properly been exercised.”

11. In ***C.K. Sivaraman Achari v. D.K. Agarwall***³, the Kerala High Court considered three options available to the Magistrate and in paragraph 10 it observed:

“ Under the section as it now stands three courses are open to the court in a case where the complainant is absent on the date of hearing. The Magistrate may (1) acquit the accused, or (2) adjourn the case for a future date, or (3) dispense with the attendance of the accused and proceed with the case. Which course is to be followed in a particular case is entirely left to the discretion of the Court, which discretion, however, is expected to be exercised in a judicial manner. While exercising the discretion, the Courts should not forget that their very existence is for dispensation of justice, no doubt within the frame-work of the statutes governing particular cases. But even such statutes should be availed of with a view to advance justice and not to deny it. A complainant usually approaches the court with a case that he has been wronged by the accused. While maintaining the presumption of the innocence of the accused, the Court should not be harsh towards the complainant. Absence of the complainant on a particular day when the case was called could be for umpteen reasons.”

² 1982 Cri.L.J.927

³ 19078 Cri.L.J. 1376

12. In the light of the law laid down by different Courts taking into consideration the facts of the case, this Court is of the view that just because the power is vested with the Court under Section 256 Cr.P.C. on the ground of absence of complainant, the complaint shall not be dismissed. The learned Judge has to exercise the discretion judiciously by looking at the facts of the case and the Courts need not be so harsh on the complainant.

13. In view of the above discussion and also in the interest of justice, it is appropriate to set aside the order dated 18.09.2019 in C.C.No. 240 of 2019 on the file of XXII Additional Metropolitan Magistrate, Cyberabad at Medchal. The matter is remitted back to the said Court, however, on condition of the appellant paying an amount of Rs.10,000/- (Rupees ten thousand only) to the respondent. The Court below shall issue fresh notices to both the parties.

14. The Criminal Appeal is accordingly, allowed. The miscellaneous Applications, pending if any, shall stand closed.

LALITHA KANNEGANTI, J

21st January , 2021

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