

(2009) 10 MP CK 0020

Madhya Pradesh High Court

Case No: None

Yashwant Singh

APPELLANT

Vs

Shri Pyarelal Uikey

RESPONDENT

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Date of Decision: Oct. 5, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 378(4)
- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2010) 1 MPHT 473 : (2010) 2 MPLJ 163 : (2011) 2 RCR(Civil) 336

Hon'ble Judges: K.S. Chauhan, J

Bench: Single Bench

Final Decision: Allowed

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### Judgement

K.S. Chauhan, J.

This criminal appeal u/s 378 (4) of the Code of Criminal Procedure has been preferred by the appellant being aggrieved by the impugned order dated 30-11-2007 passed in Complaint Case No. R.T. 1040/2007 by Special Judicial Magistrate, Bhopal, whereby the complaint filed u/s 138 of the Negotiable Instruments Act (for short "the Act") has been dismissed on account of non-appearance of the complainant and acquitted the respondent.

The brief facts of the case are that the complainant/appellant filed complaint u/s 138 of the Act on 22-2-2006. It was registered on 12-7-2006. The respondent was summoned. He appeared. The charge has been framed on 7-8-2007. Complainant produced his affidavit on 7-9-2007. The respondent Counsel sought adjournment on 27-10-2007 and 14-11-2007. The case was fixed for the cross examination on the affidavit of the complainant on 30-11-2007. On this date the complainant and his Counsel remained absent. Consequently, the complaint was dismissed. The respondent was acquitted. Being aggrieved by the impugned order, the instant appeal has been preferred on the grounds mentioned in the memo of appeal.

Learned Counsel for the appellant submitted that the Court below has not exercised the discretion judiciously and properly and committed an illegality in dismissing the complaint and acquitting the respondent. Learned Counsel has placed reliance on the decision rendered in the case of [Right Services Vs. Chhotu Bhaiya Road Lines and Another](#),

On the contrary, learned Counsel for the respondent supported the impugned order mainly contending that the complainant deliberately remained absent. The case was fixed for his cross-examination, therefore, the Court below was rightly dismissed the complaint and acquitted the respondent.

I have heard the learned Counsel for the parties at length and perused the record.

The complaint filed u/s 138 of the Act is triable under Chapter XX as a trial of summons cases by Magistrate. The procedure required to be followed in case of non-appearance of complainant or death of complainant, has been provided u/s 256 of the Code, 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.

Thus the power vested in the Magistrate in this section is discretionary. Accordingly, either he may dismiss the complaint or adjourn the case. But, this, discretion, should be exercised judiciously and not arbitrarily.

In the case of [Mohd. Azeem Vs. A. Venkatesh and Another](#), , the Apex Court has held that on one singular default in appearance on the part of the complainant, the dismissal of the complaint u/s 138 of the Negotiable Instruments Act is not proper. The cause shown by the complainant of his absence that he had wrongly noted the date should not have been disbelieved and it should have been held to be a valid ground for restoration of the complaint. The Supreme Court has further held that the learned Magistrate and the High Court had adopted a very strict and unjust attitude resulting in failure of justice and the Supreme Court has set aside the orders and restored the complaint and directed the Magistrate to proceed with the trial of the case after issuance of formal notices to both the parties.

In the case of [Associated Cement Co. Ltd. Vs. Keshvanand](#), Apex Court has held thus:

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

In the case of *Right Services v. C.B. Road Lines* (supra), this Court has held thus:

19. From the aforesaid discussion; case laws; and the view taken by the Courts, it is clear that while dismissing the complaints in the absence of complainant, the Court should not pass the orders of dismissal of complaints and acquit the accused persons mechanically. The Court should consider the nature of the offence and the material produced by the complainant and also the stake which complainant is having in the matter. If on solitary hearing or hearings for one or the other reason if the complainant is not present, normally the Court should adjourn the case and should not arbitrarily exercise its discretion refusing the exemption. Normally in complaint cases filed u/s 138 of the Act when a complaint is filed, the complainant is having a stake in the matter. Therefore, in the absence of the complainant, complaint should not be dismissed immediately. The Court should either adjourn the case or may proceed to hear the case under the proviso of Section 256 of the Code and if the complainant is represented by an Advocate or by officer conducting the prosecution or if the personal attendance of the complainant is not necessary, the Court should either grant exemption, suo-motu or on the application of the Advocate, as the order of dismissal of complaint operates as a final order. Therefore, normally it should be passed after proper application of mind and exercise of judicial discretion.

In the instant case from the perusal of the impugned order it is clear that the Court had already taken cognizance in the matter, summoned the respondent, framed the charge, appellant filed his own affidavit, the case was fixed for cross-examination of the appellant and the respondent sought two adjournment for cross-examination. The adjournment sought on two occasions by the respondent was granted by the Court. Thus, the appellant was not deliberately delaying the matter. The transaction

was of the huge amount. Such case ought to have been disposed of on merits. Instead of doing so the Court below adopted the easy method to dismiss the complaint due to absence of the complainant and acquitted the respondent. The order has been passed mechanically which deserves to be set aside and case deserves to be remanded to the Trial Court for fresh decision.

Consequently, appeal succeeds and is allowed. The impugned order passed by the Court below is hereby set aside. The complaint is restored to its original number and the Trial Court is directed to proceed with the trial and decide the case accordingly to law.