
(2011) 11 MAD CK 0095

Madras High Court

Case No: Criminal A. No. 59 of 2010

Selvakumar

APPELLANT

Vs

Subramani

RESPONDENT

Date of Decision: Nov. 23, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 256
- Negotiable Instruments Act, 1881 (NI) - Section 138

Hon'ble Judges: Aruna Jagadeesan, J

Bench: Single Bench

Advocate: N.S. Sivakumar, for the Appellant; T.M. Ramalingam, for the Respondent

Final Decision: Allowed

Judgement

Honourable Mr. Justice Aruna Jagadeesan

1. The appellant herein is the complainant in S.T.C.No.4 of 2009, on the file of the learned Judicial Magistrate No.II, Namakkal.

2. This appeal emanates from the criminal complaint filed u/s 138 of the Negotiable Instruments Act against the respondent. Before the lower court, parties were summoned. The learned Judicial Magistrate No.II, Namakkal dismissed the complaint, acquitting the accused u/s 256 of Cr.P.C., for non appearance of the complainant.

3. It is stated in the impugned order that inspite of the specific direction made by the learned Magistrate for the appearance of the complainant, the complainant was absent and hence, the petition was dismissed for non appearance of the complainant.

4. The learned counsel for the appellant strenuously contended that the complainant was appearing regularly in the earlier hearings and on the hearing date i.e., on 11.08.2009, a petition was filed by him u/s 256 of Cr.P.C., stating that his wife was suffering from illness and he has to take her for treatment seeking to dispense with his appearance but the

learned Magistrate without considering whether the presence of the complainant was necessary, rejected his petition and dismissed his complaint. He would emphasize and pointed out that there was no imminent necessity for the appearance of the complainant and there is also no indication in the impugned order to that effect. The learned counsel contended in vehemence that the learned Magistrate failed to adopt a proper procedure and such non observance would tantamount to failure of justice.

5. On the other hand, Mr.T.M.Ramalingam, the learned counsel for the respondent supported the order and would submit that the case was posted for trial and since the complainant was not present, the trial could not be proceeded with and therefore, the learned trial judge has rightly dismissed the complaint and acquitted the respondent/accused which does not warrant any interference.

6. Heard the submissions made on either side and perused the impugned order passed by the learned Magistrate.

7. A bare reading of Section 256 of Code of Criminal Procedure itself obviously reveals that in the prosecution case, nothing was required to be done by the complainant, especially when the petitioner was duly represented by the Advocate, then it was imperative upon the Magistrate to form his opinion by taking care of the matter as to whether it was appropriate to dismiss the complaint especially in the present case when the advocate has filed a petition u/s 256 of Cr.P.C. to dispense with the presence of the complainant. From the contents of the impugned order of the trial court, it is noted that there was one singular default in the appearance on the part of the appellant/complainant and there was no indication that the case could not be proceeded with due to the absence of the complainant.

8. It is well settled by the Hon"ble Supreme Court in the case of [Associated Cement Co. Ltd. Vs. Keshvanand](#), , that two constraints are imposed on the court for exercising the power u/s 256 of Cr.P.C. 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 the attendance and proceed with the case. 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 administrative of criminal justice.

9. The real test in such like matter is always good faith and it would necessarily imply as to whether the complainant was absent for any good reason or not. There was nothing to indicate any lack of good faith or due diligence on the part of the complainant to prosecute the complaint. At this juncture, it is relevant to refer to the dictum laid down by

the Hon"ble Supreme Court reported in [Associated Cement Co. Ltd. Vs. Keshvanand](#), wherein in para 18, it has dealt with the legal requirements to be complied with by the lower courts as warranted by Section 256 of Cr.P.C. It is 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.....

10. If the parameters of the above dictum of law as held by the Hon"ble Supreme Court is applied to this case, the impugned order passed by the learned Magistrate is ex-facie illegal and not sustainable as there was nothing to indicate that there is lack of good faith or due diligence to prosecute the complaint. The principles of natural justice requires the court to give opportunity to the parties though they failed to use such opportunity at times and the party having a fair case should not suffer because of his absence.

In the result, the Criminal Appeal is allowed and the order passed by the learned Judicial Magistrate No.II, Namakkal in S.T.C.No.4 of 2009 dated 11.08.2009 is hereby set aside. The complainant is directed to appear before the trial court within a period of three weeks from the date of receipt of a copy of this order and the learned trial judge is directed to revive the complaint in question and proceed with the same in accordance with law.