

CASE NO.:

Appeal (crl.) 311 of 2008

PETITIONER:

S. Anand

RESPONDENT:

Vasumathi Chandrasekar

DATE OF JUDGMENT: 14/02/2008

BENCH:

S.B. Sinha & V.S. Sirpurkar

JUDGMENT:

J U D G M E N T

[Arising out of SLP (Crl.) No. 3772 of 2007]

S.B. SINHA, J :

1. Leave granted.

2. Appellant was being prosecuted in the Court of Metropolitan Magistrate, Saidapet, Chennai for alleged commission of an offence under Section 138 of the Negotiable Instruments Act (for short the Act) on the

basis of a complaint petition filed by the respondent herein.

3. In the said proceedings, witnesses on behalf of the prosecution had been examined. Complainant closed her case. A date was fixed for examination of the defence witness and argument on 10.04.2006.

However, the appellant filed an application for cross-examination of the complainant herself which was rejected. A revision application was filed thereagainst in the Court of the Sessions Judge.

In the said revision application, no order of stay was passed. Whereas the appellant had continuously remained present before the Trial Judge, the complainant remained absent.

4. On or about 18.04.2006, the appellant filed an application for his acquittal on the ground of absence of the complainant. By an order dated 24.04.2006, the learned Metropolitan Magistrate acquitted the accused under Section 256(1) of the Code of Criminal Procedure stating:

Complainant absent. No representation for several hearings. Accused present. Petition u/s 256(1) Cr. P.C. is allowed. Complainant continuously absent from the hearing date 3.3.05. Hence, Complainant called three times. Neither the complainant nor his counsel represent before the Court till 5.30 p.m. CW1 examined. Hence Accused is acquitted u/s 256(1) of Cr.P.C.

5. An appeal was preferred thereagainst before the High Court. The same was allowed relying on or on the basis of a decision of this Court in *Associated Cement Co. Ltd. v. Keshvanand* [(1998) 1 SCC 687 : AIR 1998 SC 536].

6. We may, at the outset, notice that before passing the impugned order, the High Court did not choose to serve notice upon the appellant opining that no useful purpose would be served in keeping the appeal pending and one G. Vinodkumar was appointed as a legal aid counsel. Aggrieved thereby, the appellant is before us.

7. It was submitted by Mr. Anand, appearing in person, that the complainant having remained absent for more than one year, the High Court ought not to have interfered with the discretionary jurisdiction exercised by the learned Metropolitan Magistrate, particularly when he had been appearing in person and the complainant not only executed a power of attorney in favour of another, a lawyer was also appointed.

Mr. Anand would submit that it was obligatory on the part of the advocate who is an agent of his client to appear on the dates of hearing, more so when an accused had been appearing in person and remained present in court for all the days of hearing. In any event, it was urged, the High Court committed a serious error in disposing of the appeal only upon hearing a legal aid counsel and even the submissions made by him had not been noticed.

8. Mr. A. Regunathan, learned senior counsel appearing on behalf of the respondent, however, submitted that in view of the fact that the matter was adjourned for examination of DWs, the learned Magistrate could not have exercised its jurisdiction under Section 256 of the Code of Criminal Procedure.

9. Chapter XX of the Code of Criminal Procedure deals with trial of summons cases by Magistrates.

Section 256 of the Code 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.

10. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of complainant have already been examined.

11. The date was fixed for examining the defence witnesses. Appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence.

12. The accused was entitled to file an application under Section 311 of the Code of Criminal Procedure. Such an application was required to be considered and disposed of by the learned Magistrate. We have noticed hereinbefore that the complainant did not examine herself as a witness. She was sought to be summoned again for cross-examination. The said prayer has not yet been allowed. But, that would not mean that on that ground the court would exercise its discretionary jurisdiction under Section 256 of the Code of Criminal Procedure at that stage or the defence would not examine his witnesses.

13. Presence of the complainant or her lawyer would have been necessary, as indicated hereinbefore, only for the purpose of cross-examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter.

14. We are not concerned herein as to whether the constituted attorney of the complainant could represent the complainant.

Reliance in this behalf having placed on Jimmy Jahangir Madan v. Bolly Cariyappa Hindley (Dead) By Lrs. [(2004) 12 SCC 509] need not, thus, be considered by us.

15. Similar contention of the complainant that the advocate is an agent of his client and it is his duty to appear on behalf of his client, in our opinion, is beyond the scope of this appeal.

16. We, therefore, although do not approve the manner in which the appeal has been disposed of by the High Court, are of the opinion that it is not a fit case where we should exercise our jurisdiction under Article 136 of the Constitution of India.

17. However, keeping in view of the fact that the complaint petition was filed as far back on 10.01.2002, the learned Trial Judge should proceed with the matter in accordance with law and dispose of the case as expeditiously as possible. On the date(s) on which the accused remains present, the complainant would not take any adjournment and in the event she does not choose to be represented in the court, the court shall proceed in the matter in accordance with law. Both the accused and complainant are directed to appear in the Trial Court within two weeks from date.

17. The appeal is dismissed with the aforementioned observations.