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S. ANAND

v.

VASUMATHI CHANDRASEKAR
(Criminal Appeal No. 311 of 2008)

B

FEBRUARY 14, 2008

[S.B. SINHA AND V.S. SIRPURKAR, JJ.]

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Code of Criminal Procedure, 1973 – ss.256 and 311 – Alleged commission of offence under s.138 of the NI Act – Criminal complaint – Metropolitan Magistrate acquitted accused-appellant under s.256(1) of CrPC stating that the complainant had been continuously absent and there was no representation on her behalf for several hearings – Order set aside by High Court – On appeal, held: Presence of complainant or her lawyer would have been necessary only for 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 prosecution had closed its case and the accused had been examined under s.311 of CrPC, the Court was required to pass a judgment on merit of the matter – Although, manner in which appeal was disposed of by High Court not proper, case not fit for exercising jurisdiction under art. 136 of the Constitution – Negotiable Instruments Act, 1881 – s.138.

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Appellant was being prosecuted in the Court of Metropolitan Magistrate, for alleged commission of an offence under s.138 of the Negotiable Instruments Act on the basis of a complaint petition filed by the Respondent. The Metropolitan Magistrate acquitted the accused-appellant under s.256(1) of CrPC stating that the complainant had been continuously absent and there was no representation on her behalf for several hearings. Appeal filed thereagainst was allowed by the High Court.

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It was submitted by the Appellant, 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 Metropolitan Magistrate, particularly when he had been appearing in person and the complainant not only executed a power of attorney in favour of another person, but a lawyer was also appointed.

Respondents, however, submitted that in view of the fact that the matter was adjourned for examination of the DWs, the Magistrate could not have exercised its jurisdiction under Section 256 of CrPC.

The question which arose for consideration in the present appeal is whether S.256 of CrPC, which provides for disposal of a complaint in default, could have been resorted to in the facts of the case as the witnesses on behalf of complainant have already been examined.

Dismissing the appeal, the Court

HELD:1.1.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. [Para 11] [875-D, E]

1.2. The accused was entitled to file an application under s.311 of CrPC. Such an application was required to be considered and disposed of by the Magistrate. 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 s.256 of CrPC at that stage or the defence would not examine his witnesses. [Para 12] [875-E, F, G]

1.3. Presence of the complainant or her lawyer would

A have been necessary 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 CrPC, the Court was required to pass a judgment on merit of the matter. [Para 13] [875-H; 876-A, B]

C 1.4. Although, the manner in which the appeal has been disposed of by the High Court is not proper, it is not a fit case where one should exercise jurisdiction under Article 136 of the Constitution. [Para 16] [876-D, E]

D 1.5. However, keeping in view of the fact that the complaint petition was filed as far back on 10.01.2002, the 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. [Para 17] [876-E, F]

F *Associated Cement Co. Ltd. v. Keshvanand* [(1998) 1 SCC 687: AIR 1998 SC 536] and *Jimmy Jahangir Madan v. Bolly Cariyappa indley (Dead) By Lrs.* (2004) 12 SCC 509 – referred to.

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal No. 311 of 2008.

G From the Judgment and Order dated 15.09.2006 of the High Court of Judicature at Madras in Criminal Appeal No. 537 of 2006.

S. Anand (Petitioner-in-person)

A. Regunathan, P. Vinay Kumar for the Respondent.

H The Judgment of the Court was delivered by

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].

A 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
B 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
C 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.

D 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
E legal aid counsel and even the submissions made by him had
not been noticed.

F 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.

G Section 256 of the Code reads as under:

H "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: A

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. B

(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." C

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. D

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. E

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. F G

13. Presence of the complainant or her lawyer would have H

A 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
B 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
C 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.

D 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
E 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
F 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
G complainant are directed to appear in the Trial Court within two
weeks from date.

17. The appeal is dismissed with the aforementioned
observations.

H B.B.B.

Appeal dismissed.