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IN THE HIGH COURT OF SIKKIM AT GANGTOK

Criminal Appellate Jurisdiction

Criminal Appeal No. 05 of 2008

Shri Suresh Subba,
Son of Late Aita Raj Subba,
R/o Lall Market,
P.O. & P.S. Gangtok,
East Sikkim.

.....Appellant/Petitioner

-Versus-

Shri Udai Sarkar,
S/o Sh. J.N. Sarkar,
R/o Sripalli, Road No. 6,
Kathalthala, Siliguri,
District Darjeeling,
West Bengal.

.....Respondent

For the appellant : Mr. K.T. Bhutia, Senior Advocate with Mr.
Dinesh Agarwal, Advocate.

Date of Hearing : 22.4.2009

Date of Judgment : 22.4.2009

**PRESENT: HON'BLE THE CHIEF JUSTICE
MR. JUSTICE AFTAB H. SAIKIA
HON'BLE MR. JUSTICE A.P. SUBBA**

JUDGMENT AND ORDER (ORAL)

Saikia, CJ

Heard Mr. K.T. Bhutia, learned Senior Counsel assisted by
Mr. Dinesh Agarwal, learned Counsel representing the appellant herein.

2. Although, the notice was duly sent on 11.4.2009 to be served
upon the sole respondent by Registered Post with A/D, the respondent

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refused to accept the same and the same is duly reflected by the undelivered envelope returned back to the Registry indicating that the acceptance of the notice was refused on 16.04.2009.

3. The above notice was sent to the respondent in compliance to the order dated 09.04.2009 by which the learned Counsel for the appellant was directed to take fresh steps to serve notice upon the sole respondent by Registered Post with A/D.

4. It further transpires from office note dated 04.04.2009 that the notice sent earlier upon the respondent by Registered Post with A/D on 23.03.2009 was also duly served and the A/D card received back on 04.04.2009.

5. Hence, despite notice the respondent has preferred not to appear before this Court. In view of the same, this Court proposes to proceed with the hearing of the instant appeal in absence of the respondent.

6. This Criminal Appeal has been directed against an order dated 17.10.2008 passed by the learned Judicial Magistrate (First Class), East Sikkim at Gangtok (hereinafter referred to as 'the learned Magistrate') in Private Complaint Case No. 09 of 2008 whereby the respondent was acquitted from the charge under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act').

7. The brief facts of the case are that the appellant/complainant lodged a complaint against the respondent being private complaint case No. 09 of 2008 with the Court of the learned Magistrate



alleging that the complainant made over some money and took a policy of Tata A.I.G. bearing policy No. U520002782 through one J.N. Sarkar, the father of the present respondent. However, later on the appellant came to know that the said amount had not been invested by J.N. Sarkar, the father of the respondent. Then when the appellant approached J.N. Sarkar, the father of the respondent, they had arrived at an amicable settlement by the intervention of the respondent who accepted the liability of his father and agreed to undertake the liability of payment of the amount so taken by his father from the complainant and accordingly, executed a post dated cheque bearing No. 935604 dated 31.12.2007 for a sum of Rs.1,60,000/- to be drawn on H.D.F.C. Bank, Siliguri, West Bengal in favour of the appellant and the policy so given to the appellant was taken back by the respondent. When on 31.12.2007 the said cheque was presented for its encashment at State Bank of India, Gangtok Branch, the same was dishonoured with the note "Payment Stopped by Drawer". Immediately the appellant informed the respondent about such dishonour of the cheque and the respondent in turn requested the appellant to wait for two months and thereafter to deposit the same. Again when on 27.03.2008 the said cheque was presented before the State Bank of India, Gangtok Branch, again the same was returned back unpaid with the reason "Cheque Stop Instruct".

8. Thereafter, again the appellant approached the respondent for redressal of his grievance by way of payment of his amount. Since the respondent refused to heed to any request from the appellant, a legal notice dated 01.04.2008 was served upon the respondent through his counsel making a demand for payment of the amount mentioned in the



legal notice within a period of 15 days from the date of receipt of notice along with other incidental charges. Despite such notice the respondent did not make any endeavour to make the payment of the amount through cheque which was issued by the respondent in favour of the appellant.

9. Having no other option/alternative for getting his money back through the cheque so issued by the respondent, the appellant as a complainant lodged the instant complaint on 20.05.2008 before the learned Magistrate.

10. The learned Magistrate by his order dated 20.5.2008 took cognizance of the complaint under Section 138 read with Section 142 of the Act and the complainant was examined under Section 200 Cr. P.C. on 06.06.2008 and summons were issued to the complainant's witnesses to be examined by the complainant.

11. On 21.6.2008 the complainant was present before the learned Magistrate with his two witnesses namely, Mr. Ajay Rathi and Mr. Shiva Kumar. Both the witnesses of the complainant were examined and the learned Magistrate was pleased to fix another date on 25.6.2008 for examination of the remaining witnesses including the Branch Manager, State Bank of India, Gangtok Branch.

12. On 25.6.2008 the last witness i.e. Branch Manager, SBI, Gangtok was examined and the complainant was also present on that date. On that date the learned Magistrate issued the summons to the respondent fixing 22.07.2008.



13. On 22.07.2008 when the complainant was present, the respondent did not respond to the summons issued to him and remained absent and fresh summon was ordered to be issued fixing 06.8.2008.

14. The respondent pursuant to summon of 6.8.2008 made his appearance through his learned Counsel Mr. Kausik Das who filed an application seeking exemption for personal appearance of the respondent on the ground that his father was seriously ill and accordingly his appearance was exempted on that date fixing 16.09.2008.

15. On 16.09.2008 though the complainant appeared, the respondent being the accused did not appear personally despite the order. However, he was represented by his counsel Mr. Kausik Das who again filed an application for exemption of appearance on that date along with another application seeking stay of the proceedings on the ground that the respondent had instituted a civil suit. The learned Magistrate allowing time to the complainant to file reply to the application for stay fixed the matter on 17.10.2008.

16. On 17.10.2008 being the date of appearance of the respondent as well as to file the reply by the appellant to the application against the application for stay, due to certain unavoidable circumstances, neither the complainant nor his engaged counsel could appear before the trial Court. It is stated that even on that date the accused was also not present, however, his engaged counsel, one Mr. Sandip Mandal was present.

17. Since the appellant being the complainant was absent for the first time since the institution of this complaint case, the learned



Magistrate observed that the complainant did not want to pursue the matter and accordingly dismissed the complaint for default/non-appearance and in the result the respondent accused was acquitted.

18. Being dissatisfied with the impugned order dated 17.10.2008 the appellant on 21.10.2008 preferred an application for grant of restoration of the case which was registered as Crl. Misc. Case No. 201 of 2008.

19. For sake of convenience, the said application preferred by the applicant is quoted hereunder: -

“IN THE COURT OF THE HON’BLE JUDICIAL
MAGISTRATE (FIRST CLASS), EAST SIKKIM AT
GANGTOK.

Crl Misc. Case No. 201 of 2008

(Matter Arising out of Private Complaint Case No. 09
OF 2008)

AND IN THE MATTER OF:

Shri Suresh Subba
..... Complainant

Versus

Shri Uday Sarkar
..... Respondent

AN APPLICATION FOR GRANT OF RESTORATION OF
THE CASE

The humble Petition on behalf
of the Complainant named above
MOST RESPECTFULLY

SHEWETH:

1. That on 17th Day of October 2008 was the date fixed for reply/steps in the instant case.
2. That the Complainant had intended to engage another Counsel in place of his previous Counsel, Sh. Jorgay Namkha in the instant case.



3. That the petitioner could not appear before this Hon'ble Court on time when the matter was called for as he got stuck up in the Traffic Jam on his way to the Hon'ble Court. And further he was coming to attend/ appear before this Hon'ble Court after having a meeting with the Doctor for his ailing Child. (The copy of the Medical Prescription is annexed herewith and marked as Annexure-I).

4. That when the petitioner came to appear before the Hon'ble Court, the matter was already dismissed for default by this Hon'ble Court. (The copy of the Order Dated 17th Day of October 2008 passed by this Hon'ble Court is Annexed herewith and marked as Annexure-II).

5. That the non appearance of the petitioner in time was not intentional but was due to bonafide reason as stated above as he was prevented by sufficient cause.

6. That such being the position, this application is for recalling the Order dated 17th Day of October, 2008, passed by this Hon'ble Court and further for restoring the matter in its original form.

7. That if the matter is not considered sympathetically, the petitioner shall be highly prejudiced and shall suffer irreparable loss.

8. That this petition is made bonafide and in the interest of justice.

Under the Facts and Circumstances mentioned above, it is MOST RESPECTFULLY prayed to YOUR HONOUR to be graciously pleased enough to pass an order for recalling the Order Passed on 17th Day of October 2008 and further be pleased enough to restore the matter to its original number and or to pass any other order or orders as YOUR HONOUR may deem fit and proper in the interest of justice.

And for which act of kindness, the petitioner as in duty bound shall ever pray.

Gangtok

Dated: 21st Day of October 2008

Filed Through
Sd/-
(Sh. Dinesh Agarwal)
ADVOCATE "



20. However, the learned Magistrate vide his order dated 24.10.2008 rejected that application holding that he had no jurisdiction to restore the complaint as there was no provision of law empowering the Magistrate to restore his own order of dismissal for default.

21. The impugned order dated 17.10.2008 has been basically assailed by Mr. Bhutia, the learned Senior Counsel on the following three grounds: -

- (i) The petitioner was absent on that day only and that was one singular default for which the learned Court not ought to have taken such drastic action to dismiss the application;
- (ii) Since the date fixed on 17.10.2008 was only the date for filing reply against the application for stay by the respondent, the presence of the appellant was not necessary and
- (iii) It was a question of non-payment of a huge amount of money to the tune of Rs.1,60,000/- which was at stake due to apathy shown by the respondent.

22. In support of his submissions, Mr. Bhutia, the learned Senior Counsel has relied upon the following judicial authorities (a) *Mohd. Azeem vs. A. Venkatesh and another* reported in (2002) 7 SCC 726, (b) *Right Services, Ratlam vs. Chhotu Bhaiya Road Lines and another* reported in 2004 Cr. L.J. 406 and (c) *S. Anand vs. Vasumathi Chandrasekar* reported in (2008) 4 SCC 67.



23. In *Mohd. Azeem's* case (supra), the Apex Court while dealing with basically a similar issue of dismissal of complaint for non-appearance of the complainant on a singular default in appearance, observed in paragraphs 3 and 4 as follows: -

"3. From the contents of the impugned order of the High Court, we have noticed that there was one singular default in appearance on the part of the complainant. The learned Judge of the High Court observes that even on earlier dates in the course of trial, the complainant failed to examine the witnesses. But that could not be a ground to dismiss his complaint for his appearance (sic absence) on one single day. The cause shown by the complainant of his absence that he had wrongly noted the date, has not been disbelieved. It should have been held to be a valid ground for restoration of the complaint.

4. In our opinion, the learned Magistrate and the High Court have adopted a very strict and unjust attitude resulting in failure of justice. In our opinion, the learned Magistrate committed an error in acquitting the accused only for absence of the complainant on one day and refusing to restore the complaint when sufficient cause for the absence was shown by the complainant."

24. The Madhya Pradesh High Court in *Right Services, Ratlam vs. Chhotu Bhaiya Road Lines and another's* case (supra), in a case of non-appearance of the complainant on a date of hearing during the trial of the case of cheque dishonour under Section 138 of the Act, in paragraphs 19 and 20 observed as under: -

"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 under Section 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.

20. In the instant case from the perusal of the impugned order it is clear that the Court had already taken cognizance in the matter and has also summoned the respondent/accused by a bailable warrant of Rs.15,000/- and he was also released on bail. Therefore, when on a singular day, the complainant was absent. In the absence of the complainant normally the Court should have adjourned the case instead of dismissing it and acquitting the accused person. According to this Court looking to the nature of offence the trial Court has not exercised its discretion properly and judicially."

25. In *S. Anand's* case (supra), the Supreme Court in paragraphs 12, 13, 14 and 15 observed as under: -

"12. 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 the complainant have already been examined.

13. The date was fixed for examining the defence witnesses. The 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.

14. 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.

15. 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."

26. Having considered the ratio laid down in the above cited cases, it transpires that the dismissal of a case for non-prosecution on the ground of absence of the complainant has been discouraged. In the instant case, as already noted hereinabove while narrating the facts, it manifestly appears that on 17.10.2008, the appellant was prevented by sufficient reasons for non-appearance in the Court as a complainant. Moreso, the date 17.10.2008 was fixed only for reply to be filed by the appellant against an application for stay filed by the respondent. It is also seen that on the earlier occasions from the date of initiation of the complaint i.e. on 20.5.2008 itself, the appellant as a complainant has all along been present before the Court. Even he has examined all his witnesses so projected by him to support his case by issuing due summons to them. On the other hand, the respondent though required under law to be present personally, either on one or other plea preferred not to appear in person and he was all along represented by his learned Counsel. Having carefully gone through the entire facts of the case, we are of the considered view that on 17.10.2008, presence of complainant or his lawyer has not been necessary. Furthermore, the complainant from his prosecution side has examined himself and examination of all his witnesses has also been closed. Further it also appears that the instant absence of the appellant on the date 17.10.2008 was only one singular default.

27. It is to be noted that in a case under Section 138 of the Act it is always the complainant who is at stake for his money which ought to

have been paid through the cheque. Unfortunately the cheque in question was dishonoured. Under such circumstances, a complaint should not have been dismissed immediately and the learned Court ought to have adopted the course either to adjourn the case for hearing to some other day under provision of Section 256 of the Cr. P.C. or to grant exemption to the complainant on particular date of his non-appearance.

28. It would be necessary and apt to quote the provisions of Section 256 Cr. P.C. and the same 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."

29. Having meticulously scrutinized and scanned the impugned final order passed by the learned Magistrate dismissing the complaint of the appellant in the backdrop of the provisions of law stipulated under Section 256 Cr. P.C. including the judicial authorities so placed on record and also after giving our anxious consideration to the arguments placed on record by Mr. Bhutia, the learned Senior Counsel, we are of





the considered view that the impugned order deserves interference and, accordingly, for the reasons stated above, we accept the appeal.

30. In the result, the appeal stands allowed. The impugned order and judgment dated 17.10.2008 hereby stands quashed.

31. The complaint is ordered to be restored and the learned Magistrate is directed to proceed with the trial of the case after issuance of the formal notices to both the parties of the next date to be fixed in the case.

32. The learned counsel appearing for the appellant is directed to furnish a certified copy of this order before the learned Magistrate as indicated above on or before 11.05.2009 to obtain necessary orders in this regard.

33. LCR be sent down forthwith.


Judge
Chief Justice.