

HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

SINGLE BENCH : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI,
JUDGE.

Criminal Appeal No.12/2015

Appellant Shri Tej Gurung,
S/o Late C. B. Gurung,
R/o Nam Nang, Gangtok,
East Sikkim.

Versus

Respondents	<ol style="list-style-type: none"> 1. Shri Kailash Chettri, S/o Late D. K. Chettri, R/o Plot No.26, Nehal Jute, Naxalbari, Distt.Darjeeling, West Bengal. 2. State of Sikkim.
--------------------	---

Appearance

Mr. Sudesh Joshi with Mr. Deepen Pradhan, Advocates for the Appellant.

None for the Respondent No.1

Mr. S. K. Chhetri, Assistant Public Prosecutor for the State-Respondent No.2.

Appeal under Section 378(4) of the Code of Criminal Procedure, 1973.

O_R_D_E_R
(05.08.2015)

Meenakshi Madan Rai,J.

1. Heard Mr. Sudesh Joshi, Learned Counsel for the Appellant.



2. The Complainant/Appellant (hereinafter 'Complainant') being aggrieved by the Order of the Learned Judicial Magistrate, East Sikkim at Gangtok, in P.C. Case No. 7 of 2011 dated 07.03.2015, dismissing in default the Complaint lodged by the Complainant against the Accused/Respondent No.1 (hereinafter 'Accused') has filed the instant Appeal.

3. It is submitted that the said Complaint was filed under Section 138 of the Negotiable Instruments Act, 1881 on 08.04.2011. The Learned Magistrate took cognizance of the Complaint and issued Process against the Accused after examining the Complainant and his witness on 01.06.2011.

4. As the Accused was avoiding summons, a Bailable Warrant of Arrest (BWA) was issued against him on 12.08.2011. That the Accused had in fact been arrested and was granted Bail by a Siliguri Court with a direction to appear before the Learned Magistrate, East Sikkim on 21.05.2014, which was not complied with, consequent to which a Non-Bailable Warrant of Arrest (NBWA) was issued on 04.09.2013 by the Court of the Learned Judicial Magistrate. The NBWA was returned unexecuted with the report that the Accused had gone to Dubai for three years. As the Accused was untraced, a Proclamation under Section 82 of the Code of Criminal Procedure, 1973 (for short 'CrPC') was issued against him on 06.02.2015, returnable by 07.03.2015.

5. On 06.02.2015, the Complainant appeared before the Court in person without Counsel and inadvertently noted the next date as 07.04.2015 instead of 07.03.2015 on account of which on 07.03.2015, neither the Complainant nor his Counsel were present in



the Court. Pursuant to this the learned Judicial Magistrate, East Sikkim dismissed the Complaint due to default on the part of the Complainant, resulting in the acquittal of the Accused/Respondent No.1.

6. On 07.04.2015, when the Appellant reached Court, he came to learn that the matter was dismissed on 07.03.2015 on default. On the advise of his Counsel, the Complainant/Appellant filed Crl.Misc.Application being No.21 of 2015 on 18.04.2015 for restoration of the P.C.Case No.41 of 2013 which was, however, dismissed by the Learned Magistrate on 13.05.2015, on the ground that there is no provision in the Code of Criminal Procedure, 1973 which empowers the Court to restore a Criminal Complaint which has been dismissed for default, hence this Appeal.

7. It is prayed that the Order dated 07.03.2015 in P.C.Case No.41 of 2013 be set aside and the matter be restored to the stage it existed on 07.03.2015. To fortify his submissions, Learned Counsel for the Appellant has placed reliance on -

(1) 2002 (7) SCC 727 : Mohd.Azeem vs. A. Venkatesh & Anr. and

(2) 1998(1) SCC 687 : Associated Cement Co. Ltd. Vs. Keshvanand.

8. Accused failed to appear as evident from the detailed Orders in a related matter being Crl.L.P.No.07 of 2015.

9. Learned Assistant Government Advocate for the Respondent No.2, Shri Santosh Kumar Chhetri, had no objection to the submissions put forth by Learned Counsel for the Appellant, Shri Sudesh Joshi.



10. I have heard Learned Counsels and carefully perused the Judgments relied on by Learned Counsel for the Appellant.

11. On perusal of the Order Sheets of the Learned Trial Court pertaining to P.C.Case No.7/2011, various dates have been fixed in the matter from 03.05.2011 to 07.03.2015. On the dates fixed by the Learned Court, it is clear that the Complainant was present either in person or through his Counsel. On the other hand, the Accused has failed to make an appearance before the Learned Court and it is evident from the submissions of the Learned Counsel for the Appellant that in fact the Accused had been enlarged on bail by a Siliguri Court with a direction to appear before the Learned Judicial Magistrate, East Sikkim on 21.05.2014, which he clearly disobeyed.

12. The records indicate that the Complainant was diligently pursuing the matter either by appearing personally or through Counsel. The conduct of the Appellant establishes his bona-fides.

13. On the other hand, the Learned Magistrate on 07.03.2015, when the Complainant failed to appear, dismissed the Complaint for default.

14. The date was evidently not fixed for hearing. The impugned Order reads as follows: -

“07.03.2015

Complainant absent. Ld. Counsel for the complainant Is also absent.

Accused absent.

Proclamation issued against the accused U/S 82 Cr.P.C not returned.



It is already 3.30 pm, and none appeared for the Complainant despite repeated calls being made.

In view of the above complaint is dismissed for default.

This P.C case stands disposed of accordingly.

Sd/-

Judicial Magistrate
(First Class)

East Sikkim at Gangtok.”

15. In **Mohd. Azeem’s Case** (supra), the Hon’ble Apex Court while discussing a similar matter, has held that the Petitioner was prosecuting the Complaint diligently and had been attending the Court of Magistrate on all dates, excepting one, because according to him he wrongly noted the date for hearing. Due to his absence on one day fixed for trial, the Magistrate dismissed his Complaint and acquitted the Accused. Aggrieved by the Order, an Appeal was filed before the High Court, which upheld the decision of the Learned Magistrate. The Apex Court was of the opinion that the Learned Magistrate and the High Court had adopted a very strict and unjust attitude resulting in failure of justice. That, 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.

16. In **Associated Cement Co. Ltd.** (supra), while discussing Section 256 of the Cr.PC., the Apex Court opined that the said Section afforded some deterrence against dilatory tactics on the part of a Complainant who set the law in motion through his Complaint. That, an accused who is per force to attend the Court on all posting



days can be put to much harassment by a Complainant if he does not turn up to the Court on occasions when his presence is necessary. The Section, therefore, affords protection to an Accused against such tactics of the Complainant. But that does not mean that if the Complainant is absent, the Court has a duty to acquit the Accused in *invitum*.

17. It was also opined that the Section imposes two constraints on the Court while exercising a power under this Section. The 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. The second is, when the Magistrate considers that the 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. That, 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.

18. The above Judgments deal with matters uncannily similar to the impugned Judgment.



19. The object of the provision of the CrPC is that the Court should take serious notice of the absence of the person who approaches the Court to set the law in a motion. But at the same time, the conduct of the Complainant and his seriousness in pursuing the matter is to be considered, in other words, the diligence of the Complaint is a pivotal fact to be considered by the Court. The Magistrate is not bound to dismiss a Complaint for non-appearance of the Complainant and he has to adopt one or the other course open to him, as provided under Section 256 of the CrPC and pass an appropriate order. In other words, he has to exercise his discretion judiciously.

20. In the impugned Order, I am of the considered view that it was unduly harsh on the part of the Magistrate to have dismissed the Complaint in default, when not only was the Accused absent, but the Proclamation issued against him under Section 82 of the CrPC had also not been returned and the date was not fixed for hearing. The appropriate order for the Learned Magistrate would have been to reissue notice to the Complainant and thereafter, either awaited the return of the unreturned Proclamation under Section 82 CrPC against the Accused or to reissue the Proclamation afresh, giving not less than 30 days' time, as required under the said provision.

21. In the facts and circumstances and in view of the discussions made above, the impugned Order dated 07.03.2015 in P.C.Case No. 7/2011 is hereby set aside.

22. The Complaint be restored to its original number in the File of the Learned Judicial Magistrate, East Sikkim at Gangtok and the matter be taken up from the stage it was on 07.03.2015.



23. The Appeal succeeds.

24. No order as to costs.

25. A copy of the Order be forwarded to the Court of the Learned Judicial Magistrate [E], for compliance.

Sd/-

(Meenakshi Madan Rai)

Judge

05.08.2015

Approved for Reporting : Yes / No

Internet : Yes / No

at