IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 1606 of 2017

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RMG ALLOY STEEL LTD. REMI METALS GUJARAT LTD THRO' NILESH JAVKER

Versus

STATE OF GUJARAT

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Appearance:
MR.NANDISH H THACKAR(7008) for the PETITIONER(s) No. 1
MR RM PARMAR(591) for the RESPONDENT(s) No. 2
NOTICE NOT RECD BACK(3) for the RESPONDENT(s) No. 3
MR KP RAVAL, ADDL.PUBLIC PROSECUTOR for the RESPONDENT No. 1

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CORAM: HONOURABLE MS JUSTICE SONIA GOKANI

Date : 19/12/2017

ORAL ORDER

1. This appeal is taken up for final hearing at an admission stage, where both the sides have agreed to make detailed submissions.

2. By way of present appeal preferred under section 378(4) of the Code of Criminal Procedure, 1973, the appellant challenges the legality and validity of the order dated September 07, 2017, rendered by the learned 3rd Additional Civil Judge and JMFC, Bharuch, while dealing with Criminal Case No.2230 of 2016, whereby the learned Magistrate has disposed of the case

under section 256(1) of the Code of Criminal Procedure and discharged the accused on the ground of the present appellant not prosecuting the matter.

3. As emerges from the record, the appeal is filed by RMG Alloy Steel Ltd. (Formerly known as Remi Metals Gujarat Ltd.). On the ground of dishonour of cheques to tune of Rs.80,00,000/- drawn on Abhyudaya Cooperative Bank Ltd., Chorvad Branch, Sunshine Marks, Mumbai-Pune Road, Opposite Ambedkar Statue, Pimpari, Pune, a Criminal Case bearing No.2230 of 2016 came to be preferred before the Court of the learned Judicial Magistrate, First Class, Jhagadia and thereafter, the same was transferred to the learned Judicial Magistrate, First Class, Bharuch.

4. The bailable warrants came to be issued against the respondents-accused and only thereafter, their presence could be secured. However, on September 07, 2017, when the complainant and his learned advocate did not remain present, the

said criminal case came to be dismissed by the trial Court for want of prosecution and thereby, discharged the respondents-accused and, hence, the present appeal.

5. The chronology of events have been narrated in detail in paragraph 3 of the memorandum of appeal and thereby, it is urged that only two times, the appellant-original complainant and his lawyer could not remain present and yet, the trial Court had not considered that aspect. The presence of the original complainant was not required at all. Moreover, once the process is issued, the respondents-accused were to remain present for recordance of their plea. It is further urged that even after service of bailable warrants, the accused chose not to remain present. The parties should not be made to suffer and feel remedyless on the ground of technicality.

6. This Court has heard Shri Navin Pahwa, learned Senior Counsel appearing with Shri Nandish Thackar, learned counsel appearing for the

appellant, who has urged this Court that a grave error has been committed by the trial Court, which has disregarded the consistent presence of the appellant with his lawyer and absence of the respondents-accused. He has sought to rely upon the decision of this Court in the case of ***Harisinh Bhagwatsinh Sarvaiya v. State of Gujarat***[1], wherein this Court was dealing with a case, where the original complainant and his lawyer did not remain present before the trial Court on four consecutive dates as inadvertently the date was wrongly mentioned in the diary of the lawyer. This Court after discussing the law at length on considering the totality of facts had allowed the appeal by holding that for the absence of the learned advocate appearing for the original complainant, the original complainant cannot be punished and the exercise of powers under section 256 of the Code of Criminal Procedure by the trial Court should be pragmatic and not technical.

1 ***2013 (3) GLR 2723***

Apt would it be to regurgitate the relevant observations and findings of this Court in the said decision, which read as under :

> *"11. In the above factual background, reference may be made to the provisions of Section 256 of the Code, which are reproduced hereinbelow:*
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> *"256. Nonappearance 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 hereinabove 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 subsection (1) shall, so far as may be, apply also to cases where the nonappearance of the complainant is due to his death."

12. Though it is not disputed that the power to dismiss a complaint for nonappearance of the complainant has been conferred by Section 256 of the Code, at the same time, this provision of law also confers discretion upon the learned Magistrate to adjourn the hearing of the case to some other day, if he thinks it proper to do so. The approach to be adopted by the Court in each situation would depend on the facts and circumstances of the case. However, it would be a prudent exercise of power if a balance is maintained, weighing the facts against the interest of justice.

13. In this context, it would be appropriate to refer to the decision in State of Gujarat v. Keshavram Shivram Devmurari & Anr. 1977 (18) GLR 524, wherein this Court has held as below:

"5. Under Sec.256 of the Code the Magistrate has no doubt power to acquit the accused if the complainant does not appear on the day appointed for the appearance of the accused or any day subsequent thereto. This power has been conferred on the

Magistrate obviously for the ends of justice and with a view to see that an accused person is not subjected to any undue harassment. By way of abundant caution, the very section further provides that it is not obligatory on the part of the Magistrate to dismiss the complaint and he has been clothed with the power to adjourn the hearing of the case to some other day. The proviso annexed to this section further makes the position crystal clear. It lays down that where the complainant is represented by a pleader 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. The situation as was before the learned Magistrate on the day in question squarely fall within the proviso and still the learned Magistrate has acted under the main part of this section. This is really unfortunate and it is hoped that repetition of such instances would not be there in future in the court of this learned Magistrate or in the court of any other Magistrate. A copy of this judgment is directed to be circulated to all the Magistrates in the State."

14. Further, in Ratanlal Gulabchand Gupta

v. Sahara Sev Gruh Udyog Bhandar and Ors. (supra), this Court has held as below:

"3. ....In our this adversary system in the country there is nothing wrong of dependent of a litigant who have chosen to engage an Advocate in the matter on him. In the case of this nature, on every date is fixed or the proceedings are taken up, the complainant's presence is not necessary and more so, where he has engaged an Advocate. It is unfortunate that the Advocate was not sufficiently vigilant in conducting the matter. But for this act of the Advocate, why the poor complainant should suffer. On 24101996, the petitioner was present in the Court and 24121996 was the next date fixed therein. On that date the matter was not on the Board. The best course available in these facts to the petitioner was to contact his Advocate and I do not find any perversity in the approach of the litigant to act in accordance with the advice of the Counsel. I fail to see why the case of the petitioner has not been accepted by both the Courts below. A complainant, on his absent, may face consequences of the dismissal of the complainant as well as discharge of the accused. How absence of the complainant in the criminal case is beneficial to him. The absence of the

complainant in the matter results in dismissal of his complaint, he has to take all the precautions and in this case petitioner did and he engaged an Advocate. On 24.12.1996 the next date was not fixed in case could not be known by the petitioner and I do not find any abnormality in the approach of the petitioner to rely upon the advice of his Advocate. The Advocate has told him to inform him the next date fixed in the matter. It is is a different matter that the Advocate has not informed the petitioner the next date fixed in the matter. Though Advocate is supposed to take all the care in the matter of his client, but for his action, omission or lapse, ultimately the poor litigant has to pay heavily. It is not the case of the respondents that the complainant petitioner has not engaged an Advocate in this case. He had engaged the Advocate to avoid any adverse order in the complaint for his absence and to defend his case. It is unfortunate that the Advocate did not remain present and for this act, he has paid heavily. By keeping himself absent in the proceedings the complainant is not benefited. The trial Court as well as the Revisional Court has not considered this aspect of the matter. They proceeded with

totally a technical approach despite the fact that in series of decisions this Court their approach is not appreciated. Even for the timebeing it is accepted that the complainant was not present, how far it is justified on the part of the trial Court to dismiss the complaint where he engaged an Advocate to represent him. It is the case where trial Court has punished the petitioner for the inaction or omission of the Advocate. The learned Court below should not have given any premium to the accused for his benefit on the ground of the absence of the Advocate. In the facts of this case, the orders passed by both the Courts below cannot be allowed to stand. A time comes where the trial Court as well as the Sessions Court are to look into the matter with justiceoriented approach..... ... ... … In such matters, the approach of the Courts should have been pragmatic and not pedantic. If the matters are decided by use of the power to dismiss the matter for default, it does not give a good name to the institution. Where the litigants approach the Court for redressal of grievances, the cases are to be decided on merits with a judicial approach rather than the Courts exercising power to dismiss the matter for default."

15. In Mohd. Azeem Vs. A. Venkatesh and another reported in (2002)7 SCC 726, the Supreme Court has held as below:

"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."

(emphasis supplied)

16. Considering the factual matrix of the present appeal in light of the principles of law enunciated by this Court and the Supreme Court in the above-quoted judgments, it is clear that the result of the impugned order would be that the appellant is being penalised for the mistake committed by his advocate in not posting the next date of hearing in his diary. This resulted in his missing the next three dates as well. The cause shown by the appellant appears to be reasonable and has not been disputed. Exercise of power ought to be pragmatic and not technical. Instead of being heard and decided on merits, the complaint of the appellant has been thrown out due to the absence of the advocate, giving a premium to the accused.

17. Looking to the totality of the fact situation in the present case, it is not as though the appellant or his lawyer were absent for years together, as was the case in ***S.Rama Krishna v.S.Rami Reddy (Dead) by His LRS. And Others (supra)****, relied upon by learned advocate for respondent No.2. In that case, the matter had remained pending for more than five years. The original complainant had died and his heirs had failed to prosecute the application for*

substitution. The appellant (accused therein) had been attending the case for a long time. He was present on not less than 20 occasions after the death of the original complainant. In that context, that the Supreme Court allowed the appeal of the appellant therein reversing the judgment of the concerned High Court. However, the factual matrix in the present case is totally different. This judgment would, therefore, not be applicable to the facts of the present case.

18. The explanation offered by the appellant that his advocate could not remain present as he inadvertently forgot to post the next date of hearing in his diary, leading to further defaults on four occasions, appears to be credible. It is not as though the default was deliberate or continued for a number of years. It would be highly unjust and unfair to penalize the appellant because of the default committed by his advocate, in such circumstances.

19. As a result of the above discussion, the appeal deserves to be allowed, and is allowed."

7. Shri R.M. Parmar, learned counsel appearing for

the respondents-accused, has urged that the respondents have already paid the entire amount and if the Court concerned has exercised the powers under section 256 of the Code of Criminal Procedure, this Court need not interfere with the same merely because this Court has possibility of arriving at a different conclusion, it may not be *per se* a ground for this Court to interfere with such an order.

8. Upon hearing both the sides, this Court notices from the chronology of events that the Criminal Case came to be filed on October 06, 2012, before the Court of the learned Magistrate for dishonour of cheques to the tune of Rs.80 lakh. The matter was pending for service of summons to the respondents, wherein even the trial Court directed to reissuance of summons. It was only after reissuance of bailable warrants till the year 2017, the respondents' presence could not be procured and it was awarded for service of bailable warrant. Nothing was to be done at the end of the present appellant-original complainant.

9. Undoubtedly, there are wide powers given to the trial Court concerned for dismissing the complaint for non-appearance of the complainant and since this being a discretionary power, the Court needs to be extremely cautious as it was penalising the one who approached the Court as there is already considerable delay in service of summons and warrant to the respondents. In a case under section 138 of the Negotiable Instruments Act, the exercise of powers under section 256 of the Code of Criminal Procedure, is often noticed by this Court, where it is expected of the complainant to be present every time although the service to the respondent, who more often than not chooses to present, takes years. As has also happened in the present case, the original complainant was waiting for justice since the year 2012. Instead of ensuring that the matter is posted for service of bailable warrant, which was reissued, the trial Court had expected the presence of the original complainant and his learned advocate, who, in fact, had hardly to do anything when the process

fee had been paid by him. It is for the Court concerned to strike balance in favour of the complainant who had abided by the order of the Court qua payment of process fees and had awaited for the respondents at whose instance the dishonour of cheques is alleged, but who also had dodged the proceedings ensuring that the bailable warrant does not get served upon him. For securing the ends of justice, when the powers are given to the Court, it is already expected that the same are used with utmost care and with prudence. This Court finds that the impugned order is passed without application of mind and in complete disregard to certain cannons of law. It is done at the stage when there is barely any requirement of presence of the original complainant and even otherwise also, the proviso to section 256 of the Code of Criminal Procedure permits the pleader to represent the complainant to conduct the prosecution, where the learned Magistrate opined that the personal attendance of the complainant is not necessary. In the opinion of this Court,

it was the stage in the present case where the presence of the original complainant was not necessary. In that view of the matter, the impugned order deserves to be quashed and set aside and the matter deserves to be restored to its original file.

10. For the foregoing reasons, the present appeal succeeds and the same is, accordingly, allowed. The impugned order is quashed and set aside. Criminal Case No.2230 of 2016 is restored to its original file.

10.1 Let there be no separate service of summons to the respondent Nos.2 and 3 herein, who shall remain present before the trial Court concerned on June 25, 2018, through their learned advocate or an authorised representative or as provided and permissible under the law.

10.2 The matter shall proceed further from the stage of recordance of the plea.

10.3 The appellant herein shall furnish the

documentary evidence within a period of four weeks from the date of receipt of a copy of this order to the concerned trial Court.

10.4 The recordance of evidence shall be conducted as expeditiously as possible. Neither side shall seek any adjournment. If any such adjournment is sought for, the cause thereof shall be scrutinised strictly and as far as possible, unless there is a genuine reason, the Court shall not allow such adjournment. It is expected that the matter with the cooperation of both the sides shall be completed without further loss of time.

Disposed of accordingly.

Direct Service is permitted.

(SONIA GOKANI, J)

Aakar