

THE COURT OF PRINCIPAL SESSIONS JUDGE, SAMBA

Present: M.A. Chowdhary
(UID No: JK00019)

Criminal Appeal No : 07/2018
CNR No: JKSB0100001002018

Date of Institution : 16.07.2018
Date of Decision : 31.01.2020

M/S Narbada Gases Private Limited, SIDCO Industrial Complex, Bari Brahmana District Samba through its Chief Accounts Manager Sh. Vinod Khajuria.

(Appellant/complainant)

Versus

Rakesh Aggarwal S/O Jagdish Aggarwal, Proprietor M/S Jai Duga Traders, near Northern Zone Carrier (Regd) G.T. Road, Bari Brahmana, Samba Also at House No. 264, Partap Garh, Jammu

(Respondent/accused)

In the matter of:

Appeal against the order dated 16.05.2018 passed by the trial court (Addl. Special Mobile Magistrate Samba) in complaint file No. 47/Complaint titled M/S Narbada Gases Pvt. Limited versus Rakesh Aggarwal by which the complaint was dismissed in default and prayer for setting aside the same with direction to restore the complaint in its original number.

Appearing Counsel:

Mr. Ganesh Sharma

Mr. Satinder Gupta

ORDER

1. This criminal appeal is directed against the order dated 16.05.2018, passed by Ld. Addl. Special Mobile Magistrate, Samba (hereinafter called 'Trial Court' for short) whereby the complaint filed by the appellant/complainant titled M/S Narbada Gases Pvt. Limited versus Rakesh Aggarwal had been dismissed in default. It has been prayed for setting aside the Order and to pass direction for restoration of the complaint for further proceedings.

2. It has been pleaded that the appellant/complainant filed the above titled complaint under section 138 of Negotiable Instrument Act, 1881 against the accused person which was pending before the trial court; that the appellant/complainant led the entire evidence and statement of the accused under section 342 CrPC was recorded; thereafter the respondent/accused moved an application for summoning of defence witnesses which was dismissed on 26.10.2016 by the trial court; that against the order of the trial court, respondent/accused preferred revision petition before this court and the said revision petition was dismissed by this court on 12.09.2017; that on 14.11.2017, appellant/complainant alongwith his counsel appeared before the trial court but due to the transfer of the Presiding Officer, case was posted on 14.12.2017 for further proceedings; that the counsel for the appellant/complainant advised him that as there is no Presiding Officer in the trial court, so the personal appearance of the appellant/complainant is not necessary on each and every date of hearing and the counsel also told that he shall remain present on his behalf, as such, he did not appear before the trial court; that on one day, the appellant in order to know the progress of his case came to the trial court and on enquiry from the concerned clerk, it came to his knowledge that the complaint had been dismissed in default for non-appearance of the complainant on 16.05.2018.
3. It is further submitted that neither the respondent/accused nor his counsel was appearing before the trial court. Moreover, the presence of the appellant was not so necessary as the entire evidence of the appellant/complainant had been completed and the trial court had to pronounce judgment on the basis of evidence available to the trial court and that too in presence of the respondent/accused after hearing his argument, but the trial court instead of summoning the accused, dismissed the complaint in default of appearance of the complainant. It has been also submitted that the absence of the appellant was neither intentional nor deliberate. Finally it has been prayed to allow the appeal and for setting aside the impugned order.

4. I have heard ld. counsel for the parties and have gone through the file and the record on the trial court file.
5. Mr. Ajay Gupta, appearing vice ld. counsel for the appellant has submitted that the order impugned is against the facts and law and has been passed in haste and without application of mind. The order impugned has been passed in a mechanical manner and is unsustainable.
6. Mr. Satinder Gupta, learned counsel for the respondent, on the other hand, has submitted that the appeal is not maintainable. He has sought dismissal of the appeal. The appellant did not appear in the trial court and the court was left with no other option but to dismiss the complaint. The order is in consonance with facts of the case and law applicable and does not call for any interference.
7. On perusal of the minutes of the proceedings of the complaint before the trial court, it is revealed that the complainant/appellant completed its evidence on 29.08.2013 and file was posted for examination of accused in terms of section 342 CrPC. The respondent sought many opportunities for his examination and thereafter moved an application for dismissal of the complaint which was dismissed by ld. Trial Magistrate on 03.01.2015. The respondent/accused was examined in terms of Section 342 CrPC on 03.09.2015 and file was posted for defence evidence. The respondent moved an application seeking permission to examine witnesses and summoning these witnesses through process of court. The ld. Trial Magistrate holding that one of the witnesses namely Vinod Khajuria sought to be summoned had already been cross examined by the accused and the other witnesses namely Rahul Bansal and Diwan Bansal being directors of complainant company cannot be summoned merely at asking of the accused, without specifying necessity of these persons as witnesses and the application was dismissed vide order dated 26.10.2016.

Respondent/accused was given last and final opportunity vide order dated 27.12.2016, to lead defence evidence against order dated 26.10.2016, the respondent/accused moved a revision petition before this court which was dismissed vide order dated 22.09.2017 and the trial court record was sent back. The case was listed before the trial Magistrate on 10.10.2017 when the complainant was absent and accused was present. On next date on 14.11.2017, complainant appeared and the accused absented. On next three dates, neither the appellant/complainant nor the respondent/accused appeared. On 24.04.2018, the accused appeared whereas the complainant was absent and file was posted to 16.05.2018 when the Id. Trial Magistrate in absence of complainant dismissed the complaint in default of appearance of the appellant/complainant.

8. Complaint under section 138 of NI Act is a summon trial case. Chapter XX of CrPC deal with the trial of summons case. It is profitable to reproduce section 247 CrPC which reads as under:

Section 247-Non appearance of complainant.

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 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.

9. From bare perusal of this section, it is evident that where the complainant is absent on the date of hearing, the Magistrate may either (i) acquit the

accused, or (ii) adjourn the case for some future date; or (iii) dispense with the attendance of the complainant and proceed with the case. The magistrate has the discretion to choose any of these three alternatives applying his judicial mind. Its proviso also provide that magistrate may proceed with the case further keeping aside the absence of the accused due to his non appearance, where he finds it necessary to do so in the interest of justice. Section 256 of CrPC is pari material to section 247 of State code.

10. Dismissal of a complaint even in default amounts to acquittal of the accused. Now it is to be seen as to which could be remedy against such an order to the applicant herein. Section 471 (2) CrPC provides as a provision for filing of appeal. The relevant portion is extracted as under:

417. Appeal in case of acquittal-

(1) subject to the provisions of sub Section (4), the government may, in any case, direct the Public Prosecutor to present an appeal to-.....

(2) If such an order of acquittal is passed in any case instituted upon complaint and the High Court on an application made to it by the complainant in this behalf, grant special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

From bare perusal of this section, it is evident that in case of order of acquittal passed in a complaint case, High Court may grant special leave to appeal from the order of acquittal on the application made by the complainant. After granting leave to file appeal, complainant has a right to file acquittal appeal before High Court.

11. Hon'ble Delhi High Court reported in **2013 CrLJ 149** in a case titled Krishan Kumar Gupta vs. Mohammed Jaros & Anr. wherein it is held that in a cheque bounce case u/s 138 NI Act the dismissal of complaint in

default results into acquittal of accused and appeal against acquittal would lie to High Court and not a revision and further that the revision before Sessions Court is without jurisdiction. Hon'ble Supreme Court of India in a case titled 'Punjab State Warehousing Corporation Faridkot vs. M/S Sh. Durga Ji Traders & Ors.' reported in **2012 AIR (SC) 700** has held that the availability of alternative remedy of filing of appeal is not an absolute bar in entertaining petition under section 482 of the Code.

12. Appellant has chosen wrong forum to challenge the impugned order which may be indefensible, before this court, whereas the proper forum to file an appeal was before Hon'ble High Court against the acquittal of accused. The submission of Id. Counsel for appellant that the appeal of appellant be treated as revision petition is also misplaced in view of clear statutory provision regarding filing of appeal against the impugned order
13. Hon'ble High Court of J&K in CRMC No. 96/2009 titled 'Sachin Sharma vs. Pawan Gupta' in similar fact situation relying upon judgments reported as 2002 CrLJ 4741, 2003 CrLJ 2750, 2003 CrLJ 149 and 2006 CrLJ 601, held that once a complaint under section 138 NI Act is dismissed due to non-appearance of complainant in terms of section 265 CrPC, accused is deemed to be acquitted, then only remedy available to complainant is to file acquittal appeal and revision would not be maintainable. Therefore it is clear that the order impugned, whereby, the complaint of applicant has been dismissed in default is an appealable order. The acquittal appeal, however, lies to Hon'ble High Court and not to this court. The plea of Id. Counsel for appellant that the appeal preferred by appellant before this court may be treated as revision petition to set aside the illegal order passed by the trial court, is not tenable as such a course is not available in view of law laid down by Superior courts as approvingly relied upon by our own High Court in case CRMC 96/2009 titled 'Sachin Sharma vs Pawan Gupta'.

14. Having regard to the above facts and circumstances in the legal backdrop, it is held that the appeal before this court is incompetent and cannot be proceeded further even if the impugned order may not be sustainable in the eyes of law. The appeal in hand is misconceived and is liable to be rejected. For the foregoing reasons and observations made hereinabove, the appeal being incompetent is not maintainable before this court and as a sequel is dismissed. Record of the trial court be sent back forthwith alongwith a copy of this order.

15. Disposed of. Consign to Records.

Announced
31.01.2020

SV*

(M. A. Chowdhary)
Principal Sessions Judge
Samba