ABC 2019 (II) 261 GAU

ACQUITTAL & BAIL CASES

HIGH COURT OF GAUHATI

(Rumi Kumari Phukan, J.)

Criminal Appeal No. 85 of 2015

Decided on 22 April, 2019

TEA BROKERS GUWAHATI PVT LTD & ANR. ***- Appellant(s).***

Versus

STATE OF ASSAM & ORS. ***- Respondent(s).***

Law Covered:- ***(A) Negotiable Instruments Act, 1881 — Section 138 — Criminal Complaint — Dismissal for want of prosecution —Complainant was present all throughout the trial either personally or through his counsel— Case was fixed for cross-examination of the witness— Held, the presence of complainant was not necessary— the Court could have allowed the accused / respondents to cross-examine the witnesses or to adjourn the case to any further date— dismissal of the case on the part of the Court not proper. (Para 8)***

(B) Negotiable Instruments Act, 1881 — Section 138 — Criminal Complaint — Dismissal for want of prosecution — Observation by the Court — "conduct of the complainant is not satisfactory, delaying the case" — Held, trial Court itself allowed to prevail the matter for years together — one day default of complainant on the day when the case was fixed for cross-examination of witnesses, to be produced by defence itself — the case should not be mechanically wind-up. (Para 8)

(C) Negotiable Instruments Act, 1881 — Section 138 — Criminal Complaint — Dismissal for want of prosecution — Complaint was dismissed after 10 yrs. of filing the case — Held, complainant was running after his case & after 10 years of his pursuance of the matter, the case was suddenly dismissed for one day default — Held, will certainly cause prejudice to the complainant & would result mis-carriage of justice. (Para 9)

Facts:- *The appellant filed a complaint u/s 138 of N.I. Act for dishonour of cheque. The said case proceeded for trial and after framing of charge, the complainant examined two witnesses in support of his case and on the prayer of the other side the bank official was summoned for cross-examination. On the day when that witness was present, as the appellant/*

complainant was absent without step, hence, the case was dismissed by the court holding that the conduct of the complainant towards the case is not satisfactory and complainant himself is delaying this case. The case was dismissed for non-prosecution and the accused was acquitted.

In the present appeal, the Honourable Gauhati High Court observed that the learned Trial Court has not recorded the proper reason for the dismissal as provided u/s 256, CrPC while dismissing the case. It was held that the complainant/appellant should be given one opportunity to prove his case on its merit rather than mechanically dismissal, of the case for one day default.

Held:- Further examination of the record also reveals that the learned Trial Court most of the time allowed the petition so filed on behalf of the complainant and sometime he used to remain present. It appears that the complainant was present all throughout the trial either personally or through his counsel. That being the position only for the one day absence on 05.01.2015 when the case was fixed for cross-examination of the PW2, the presence of complainant is not necessary. The Court could have allowed the accused /respondents to cross-examine the witnesses or to adjourn the case to any further date. As has been found above that the presence of complainant is absolutely not necessary for the examination of the witness, dismissal of the case on the part of the Court appears to be not proper. Further observation of the Court that "conduct of the complainant is not satisfactory, delaying the case" is also not proper as Court itself allow to prevail such affair for years together since 2010 to 2015. For one day default of complainant on the day when the case was fixed for cross-examination of witnesses, to be produced by defence itself, the case should not be mechanically wind-up by the Court. (Para-8)

It cannot be loose sight that the said complainant was filed in the year 2005 and since then he is running after his case and after 10 years of his pursuance of the matter, the case was suddenly dismissed for one day default which will certainly caused prejudice to the complainant and would result mis-carriage of justice. (Para-9)

Counsel:- ***For Appellant(s):*** *Mr.T J Mahanta, Adv.*
For Respondent(s): *PP, Assamr-1.*

Cases Referred:-

1. *Associated Cement Company Limited v. Keshvanand; (1997) 1 SCC 687, (Para-5)*
2. *Kazim Kazim v. A Venkateshwar; (2002) 7 SCC, (Para-5)*
3. *S. Anand v. Vasumathi Chandrasekar; (2008) 4 SCC, (Para-5)*
4. *Wahrid Rahman v. Jatin Kumar Pegu and Another, 5 GL 625(Para-5)*

JUDGMENT

a ***RUMI KUMARI PHUKAN, J.: -*** 1. Heard Mr. T.J. Mahanta, the learned counsel for the appellants and also Mr. A.K. Bhuyan, the learned counsel for respondent nos. 2 and 3. Respondent No. 1 is a formal party.

b 2. The appellant here as a complainant filed a complaint under Section 138 of N.I. Act for dishonour of cheque amounting to Rs. 60 (lacs) issued by respondent, which is registered as CR Case No. 2953C/2005. The said case proceeded for trial and after framing of charge, the complainant examined two witnesses in support of his
c case and on the prayer of the other side the bank official PW2 was summoned for cross-examination. On the day when that witness was present, that is, on 05.01.2015, as the appellant/complainant was absent without step, hence, the case was dismissed by the court with
d the following order.

> "Complainant is absent without any step.
>
> Accused is present. One witness has appeared but could not be examined due to the absence of complainant. On perusal of CR, it appears that the complainant has personally not
e appeared since long. It also appears from the record that the conduct of the complainant towards this case is not satisfactory and complainant himself is delaying this case.
>
> Considering above, instant case is dismissed for non-prosecution.
>
f Accused is acquitted.
>
> Set him at liberty forthwith."

3. After passing of the aforesaid order the complainant
g referred the present appeal against acquittal, on the ground that absence on the particular day was neither intentional, nor mala fide. It is said that on the fateful day due to the communication gap between the complainant and the engaged counsel, the complainant could not appear before the Court neither the counsel represented him before
h the Court as a result, of which the Ld. Court dismiss the case. It is however contended that learned Trial Court should have offered the complainant another opportunity to proceed with the case instead of dismissing the case for one default on the part of the complainant or his counsel. It is stated that the impugned order passed by the learned Trial Court is unreasonable and erroneous resulting miscarriage of

justice. Accordingly, prayer has been made to set aside the aforesaid order and to restore the case to the original position.

4. I have heard the submission of learned counsel for the appellants who has led this Court towards the order of the Trial Court to show that in fact the examination of the complainant and his witness PW-2 was already over and the said PW-2 was examined on 18.02.2010 and also cross-examined by the defence side. But however on the prayer of the accused/respondents the Court was pleased to recall the said witness for further crossexamination along with certain documents. Accordingly, the said witness was directed to appear before the Court along with documents and respondents /accused was directed to take step for the said witness. It is submitted that even if the complainant remained absent on the last occasion, the respondents who had called for the said witness, could have crossexamined the witness, in absence of the complainant or his counsel.

5. Reliance has been placed upon the decision of ***(1997) 1 SCC 687 Associated Cement Company Limited v. Keshvanand; (2002) 7 SCC Kazim Kazim v. A Venkateshwar; (2008) 4 SCC S. Anand v. Vasumathi Chandrasekar; 5 GL 625 Wahrid Rahman v. Jatin Kumar Pegu and Another***, to submit, that only for non-appearance of the complainant the Magistrate is not justified in acquitting the accused unless presence of the complainant on that day found necessary. I have gone through the decisions rendered by the Court referred. The Hon'ble Supreme Court in (1997) 1 SCC 687 Associated Cement Company Limited (supra) has laid down that it is not the duty of the Magistrate to dismiss the case for absence of complainant.

6. The learned counsel for the respondents has however tried to justifying the order of the trial Court on the ground that the complainant was very much casual in attending the case. He also did not bother to appear personally before the Court nor did he was represented and hence on the last date even though, the witness was present the same could not be examined due to absence of the complainant as well as his counsel. It is submitted that there is no illegality in the aforesaid order so passed by the learned Trial Court. The complainant used to remain absent before the Court, all through the hearing without there be any order of the Court dispensing his personnel appearance.

7. I have considered the rival contention of both the parties as well as gone through the LCR and the various order of the Court. So

far as the LCR is concerned placed before this Court, it reveals that the complainant examined his witnesses on 18.02.2010 and thereafter a prayer was made by the accused-respondents to examine the said official address along with further documents vide order dated 04.06.2010. By allowing the said prayer of the respondents the Court also directed the defence (the Respondents) to take steps for the said witness and accordingly step was also taken by them. Pursuant to such order one witness/Bank Officer appeared on 20.02.2014 but he could not be examined as the Presiding Officer transferred and thereafter on the very next date i.e. on 02.05.2014 although the complainant was present and accused remained absent without step and as the Presiding Officer was transferred, the case again fixed for cross-examination by respondent no. 2.

8. Further examination of the record also reveals that the learned Trial Court most of the time allowed the petition so filed on behalf of the complainant and sometime he used to remain present. It appears that the complainant was present all throughout the trial either personally or through his counsel. That being the position only for the one day absence on 05.01.2015 when the case was fixed for cross-examination of the PW2, the presence of complainant is not necessary. The Court could have allowed the accused /respondents to cross-examine the witnesses or to adjourn the case to any further date. As has been found above that the presence of complainant is absolutely not necessary for the examination of the witness, dismissal of the case on the part of the Court appears to be not proper. Further observation of the Court that "conduct of the complainant is not satisfactory, delaying the case" is also not proper as Court itself allow to prevail such affair for years together since 2010 to 2015. For one day default of complainant on the day when the case was fixed for cross-examination of witnesses, to be produced by defence itself, the case should not be mechanically wind-up by the Court.

9. It cannot be loose sight that the said complainant was filed in the year 2005 and since then he is running after his case and after 10 years of his pursuance of the matter, the case was suddenly dismissed for one day default which will certainly caused prejudice to the complainant and would result mis-carriage of justice.

10. The learned Trial Court has not recorded the proper reason for the dismissal as provided under Section 256 proviso column while dismissing the case. The learned Trial Court also failed to appreciate

the fact that the Court itself has allowed the complainant to be represented on several occasions and in the circumstances the complainant/appellant should be given one opportunity to prove his case on its merit rather than mechanically dismissal, of the case for one day default.

11. Persuaded by what has been discussed above appeal is allowed and accordingly the impugned order dated 05.01.2015 passed in C.R. Case No. 2953C/2005 under Section 138, N.I. Act is hereby set aside with a direction to the learned Trial Court to restore the case to the original position and to proceed with the case, at the stage when it was dismissed, with further direction to conclude the case without any further delay in view of the long pendency of the matter, preferably within a period of 3 months from today. Both the parties are directed to appear before the Court on 29.05.2019.

Return the LCR immediately.

Result:- Appeal allowed.

ABC 2019 (II) 266 GAU
ACQUITTAL & BAIL CASES

HIGH COURT OF GAUHATI

(Rumi Kumari Phukan, J.)
Criminal Revision Petition No. 415 of 2010
Decided on 9 May, 2019

BHARAT KUMAR NANDI ***- Petitioner(s).***

Versus

UTTAM MITRA & ANR. ***- Respondent(s).***

Law Covered:- ***(A) Negotiable Instruments Act, 1881 — Section 138 — Stop payment by the accused — denial for the payment — Concurrent conviction by the Courts below — Held. considering the age of the accused petitioner & the submission made by the learned counsel — sentence converted to the fine. (Para 17)***

(B) Code of Criminal Procedure, 1973— Sections 397,401- Revision against the order of the appellate Court— Jurisdiction of Revisional Court — Held, Revisional Court has limited jurisdiction to appraise as to whether there is any illegality or irregularity in the decision so rendered by the Court below or it suffers from any perversity which has resulted miscarriage of justice— The Revisional