

M/S. BIs Infrastructure Ltd. vs M/S. Rajwant Singh on 1 March, 2023

Author: Sanjay Kishan Kaul

Bench: Sudhanshu Dhulia, Sanjay Kishan Kaul

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 657-664 OF 2023
(Arising out of SLP (Criminal) Nos.867-874 of 2020)

M/s. BLS INFRASTRUCTURE LIMITED ... Appellant

Versus

M/s. RAJWANT SINGH & OTHERS ... Respondents

JUDGMENT

MANOJ MISRA, J.

1. Leave granted.

2. These appeals by way of special leave petitions are directed against the judgment and order dated 07.11.2019 passed by Delhi High Court dismissing CrI.L.P. Nos.315 to 322 of 2019 filed by the appellant against the order of Metropolitan Magistrate-04 (N.I. Act)/South East, Saket Courts, New Delhi (for short “learned Magistrate”) dated 25.01.2019 dismissing Criminal Complaints No.621744/16, 1718/16, 1276/16, 1277/16, 621743/16, 621742/16, 12742/17 and 12744/17 for non-appearance of the complainant (the appellant herein).

3. The short question that arises for our consideration in these appeals is whether in the facts of the case, the learned Magistrate was justified in dismissing the criminal complaints for non-appearance of the complainant even though the statement of the complainant had been recorded and, vide order of the learned Magistrate dated 26.10.2017, the complainant’s evidence was closed with a direction to list the matter for recording of defence evidence as also for consideration of application under Section 311 of the Code of Criminal Procedure, 1973 (for short “the Code”) filed by the complainant.

4. To appropriately address the aforesaid issue, it would be apposite to give a brief sketch of the facts giving rise to these appeals.

5. The appellant in all filed eight complaints against the respondents under Section 138 of the Negotiable Instruments Act, 1881. Three complaints were filed in the year 2011, three in the year 2013 and remaining two in the year 2017. Out of the aforesaid eight complaints, in Complaint Case Nos.621742/16, 621743/16 and 621744/16 the complainant was subjected to cross-examination. On 26.10.2017, the learned counsel for the accused made a statement before the learned Magistrate that the cross-examination of CW-1 (the complainant), as made in the above three cases, shall be adopted in the remaining complaints. On basis of the above statement, the complainant's evidence was closed and the cases were directed to be listed for recording of defence evidence. At that stage, an application was filed by the complainant under Section 311 of the Code for summoning certain witnesses. While the matter was pending at that stage, according to the appellant, appellant's counsel misled the appellant into a belief that appellant's presence is not required as a settlement was being negotiated. It is the case of the appellant that in these circumstances, the appellant did not appear and ultimately the complaints were dismissed for non-appearance vide order dated 25.01.2019.

6. The order dismissing the complaints for non-prosecution was subjected to challenge before the Delhi High Court through eight separate petitions which came to be dismissed by a common order dated 07.11.2019 impugned in these appeals.

7. We have heard Shri Maninder Singh, learned Senior Advocate appearing for the appellant; and Mr. Samrat Nigam, learned Advocate for the respondents.

8. The learned counsel for the appellant submitted that the learned Magistrate while dismissing the complaints for non- prosecution lost sight of the proviso to sub-section (1) of Section 256 of the Code. It is submitted that the said proviso enables the Magistrate to dispense with the attendance of the complainant and proceed with the case where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary.

It is submitted that as the statement of the complainant had been recorded and the complainant was also subjected to cross-examination, there existed admissible evidence on record in support of the complaint case. In these circumstances, even if the complainant was absent, the learned Magistrate could have proceeded to decide the case on merits. Thus, the order of the learned Magistrate stands vitiated for having failed to notice that there existed evidence on record enabling the matter to proceed even in absence of the complainant under the proviso to sub- section (1) of Section 256 of the Code. It is urged that the High Court also failed to notice the aforesaid aspect; consequently, the order(s) of the High Court as well as of the learned Magistrate are liable to be set-aside and the matter be restored to the stage at which the learned Magistrate had dismissed the complaint.

In support of his submissions, the learned counsel for the appellant placed reliance on the decisions of this Court in *Associated Cement Co. Ltd. v. Keshvanand*¹; *S. Anand v. Vasumathi Chandrasekar*²;

and, S. Rama Krishna v. S. Rami Reddy (Dead) By His LRs & Others³.

9. Per contra, the learned counsel for the respondent(s) submitted that sub-section (1) of Section 256 of the Code mandates the Magistrate to acquit the accused if, 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. It is submitted that since it is not in dispute that the complainant had filed an application under section 311 of the Code and the complainant remained absent from the proceedings, the learned Magistrate was justified in dismissing the complaint(s) for non-appearance of the complainant. It has also been urged that if there is any technical defect in dismissing the complaint(s) for non-appearance of the (1998) 1 SCC 687 (2008) 4 SCC 67 (2008) 5 SCC 535 complainant, the same be treated as an order of acquittal as per provisions of sub-section (1) of Section 256 of the Code.

10. Having noticed the rival submissions, before we proceed further, it would be useful to notice the provisions of Section 256 of the Code, which are reproduced below:

“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.” A plain reading of the proviso to sub-section (1) of Section 256 would indicate that where the Magistrate is satisfied that the personal attendance of the complainant is not necessary, he can dispense with the attendance of the complainant and proceed with the case. Such a situation may arise where complainant’s/prosecution’s evidence has been recorded and to decide the case on merits, complainant’s presence is not necessary.

11. In the case of S. Anand (supra), addressing a situation where the complainant was absent but had already examined his witnesses, this Court observed as follows:

“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.” After observing as above, in paragraph 15, it was held thus:

“15. ... 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.”

12. In Associated Cement Co. Ltd. (supra), the purpose of inserting a provision like Section 256 of the Code was discussed and in light thereof, in paragraph 16, it was observed as under:

“16. What was the purpose of including a provision like Section 247 in the old Code (or Section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. 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 if the complainant is absent, the court has a duty to acquit the accused in invitum.” After observing as above, it was held that where the complainant had already been examined as a witness in the case, it would not be appropriate for the Court to pass an order of acquittal merely on non-appearance of the complainant. Thus, the order of acquittal was set-aside and it was directed that the prosecution would proceed from the stage where it reached before the order of acquittal was passed.

13. In the instant case, we notice that there is a specific averment in the Special Leave Petition(s) that the appellant had led its evidence in the case and thereafter had moved an application under Section 311 of the Code to summon and examine further witnesses. In Paragraph 5(u), it is stated that the trial court as well as the High Court did not take into consideration that the complainant’s cross-examination had been over in Complaint Case Nos.621742/16, 621743/16 and 621744/16, and no cross-examination was sought in other cases. Rather, CW-1’s cross-examination in the above three complaint cases was adopted. There appears no specific denial of the aforesaid factual position. However, we find that neither the High Court nor the learned Magistrate has taken notice of the aforesaid position. Both the courts below thus failed to consider whether in the facts of the case under the proviso to sub-section (1) of Section 256, the court could proceed with the matter after dispensing with the attendance of the complainant.

Further, if the complainant had not appeared to press the application under Section 311 of the Code, the learned Magistrate could have rejected the application under Section 311 of the Code and proceeded with the case on basis of the available evidence. We are, therefore, of the considered view that the learned Magistrate was not justified in straight away dismissing the complaint(s) and

ordering acquittal of the accused on mere non- appearance of the complainant. The High Court too failed to take notice of the aforesaid aspects. Thus, the orders impugned are liable to be set aside.

14. For the reasons above, the order(s) of the High Court as well as of the learned Magistrate are set-aside. The proceedings shall stand restored to their original number(s) on the file of the learned Magistrate and the prosecution shall now proceed from the stage where it was when the order of acquittal/dismissal of the complaint(s) was passed.

15. The appeals are allowed in the aforesaid terms.

.....J. (Sudhanshu Dhulia)J. (Manoj Misra) New Delhi;

March 01, 2023