

PETITIONER:
THE ASSOCIATED CEMENT CO. LTD.

Vs.

RESPONDENT:
KESHVANAND

DATE OF JUDGMENT: 16/12/1997

BENCH:
M.K. MUKHERJEE, K.T. THOMAS

ACT:

HEADNOTE:

JUDGMENT:

THE 16TH DAY OF DECEMBER, 1997

Present:

Hon'ble Mr. Justice M.K. Mukherjee
Hon'ble Mr. Justice K.T. Thomas

Raju Ramachandran, Sr. Adv., Sudhanshu Tripathi, U.A. Rana,
Ms. Arshi Suhail, Advs. with him for the appellant
M.L. Bhat, Sr. Adv., (Prakash Padiav,) Adv. for Ms. Purnima
Bhat KAK, Adv. with him for the Respondent

J U D G M E N T

The following Judgment of the Court was delivered:
THOMAS, J.

Leave granted

Appellant company has been prosecuting the respondent in the court of judicial magistrate (First Class), Jammu, alleging the offence under Section 138 of the Negotiable Instrument Act, but learned magistrate acquitted the respondent on 24-8-1996 solely on the ground that the complainant was absent. Appellant - Company filed an appeal in challenge of the said order of acquittal before the High Court of Jammu & Kashmir with leave but that appeal was dismissed. This appeal is against the said judgment of the High Court.

The complaint was based on a cheque issued by the respondent towards amounts allegedly due from him ranging to a little above eight lacs of rupees. Facts, which are not disputed for the present appeal, show that appellant-company was represented in the trial court by one Puneet Aggarwal with a power of attorney of the company. Learned magistrate took cognizance of the offence, and after examining Puneet Aggarwal on oath, issued summons to the offence, and after examining Puneet Aggarwal on oath, issued summons to the respondent pursuant to which he appeared in court. As the trial proceeded, Puneet Aggarwal and another person were examined as prosecution witnesses and the case was posted for further evidence to 23.8.1996. On that day the complainant was absent and the counsel for the accused pressed for dismissal of the complaint. However, the magistrate posted the case to the next day, but on that day also the complainant and his counsel were absent. Then the magistrate recorded the order of acquittal of the accused

under Section 247 of the Code of Criminal Procedure, 1998 (Which is applicable to the State of Jammu & Kashmir even now. it will hereinafter be referred to as 'the old Code').

In the appeal petition filed before the High Court it was stated that Puneet Aggarwal was posted as an officer of the appellatant company at Jammu during the period when the complaint was filed, but subsequently he was transferred to Jalandhar (in Punjab State), the advocate of the complainant (Shri K.S.Johal) faced a misfortune in his family as his brother was involved in a motor accident on 23-8-1996 and was subjected to an operation, and due to such circumstances Shri J.S.Johal could not attend the court for three days preceding 25-8-1996. It was also mentioned in the appeal petition that the aforesaid Puneet Aggarwal had in fact left jalandhar for attending the court at Jammu on 23-8-1996, but he could not reach Jammu as motor traffic on the National Highway became paralyzed due to incessant rains which lashed the region continuously for 2 days, and that Puneet Aggarwal never knew that the case was posted to next day and hence his absence on 24-8-1996 was absolutely unintentional.

Learned single judge of the High Court did not take into account any of the above facts and was not persuaded to interfere with the acquittal as the adopted a "grammatical construction" of Section 247 of the old Code in the following words:

"on a grammatical construction of Section 247 the intention of the legislature becomes clear. Non appearance of the complainant, after summons are issued, according to that intention, may result in acquittal of the accused."

On the above premise learned single judge found that there was no legal error in the order passed by the magistrate and hence dismissed the appeal.

Before we proceed to consider the merits of this appeal we may refer to a strange averment made by the respondent in the counter affidavit sworn to by him which he has filed in this court in answer to the special leave petition. After replying to various grounds, the respondent has stated, with reference to paragraph F of the special leave petition the following:

" In reply to sub-para F it is submitted that a false complaint was filed against the Respondent at the behest of one Mr. Kanwar Sein Anand, who is Forwarding and Clearing Agent of the petitioner company. The said gentleman claims to be a real brother of an Hon'ble Sitting Judge of the Supreme Court and is exploiting the name of the Hon'ble Judge without his knowledge."

We could not fathom or even grasp the reason for making such a statement in the counter affidavit so we asked Shri M.L. Bhat, learned senior counsel (who appeared for the respondent) as to the relevance or the raison d'etre for the said averment. Shri M.L. Bhat than submitted that he too concedes that the said averment is quite irrelevant for this case and offered to withdraw it. Later an application has been filed for deleting that portion from the affidavit. While we allow that application to deleted the said portion we cannot but express our displeasure over and disapproval

of the conduct in scribbling down such irrelevant and mischievous imputation in an affidavit filed in this Court, particularly the unwholesome attempt to drag in a judge of this Court. It is sad that when such an unsavory statement was scribed into an affidavit the idea of deleting it did not occur to him at least when the affidavit was authenticated by the advocate. Indeed, he decided to delete it only when we asked the senior counsel about its relevance. We do not wish to say anything more about it.

Learned single judge of the High Court apprised himself of the width of the appellate powers of the High Court as follows, in the impugned judgment.

" In my opinion our law of precedent has developed out of this policy of the statutes. This is how time and again it has been held that Appellate/Revisional Courts should not ordinarily disturb the finding of the trial courts, if a different view also could be taken on same facts. The Court's concern only will be, as to whether or not the order impugned is fraught with any illegality or impropriety."

It appears that learned single judge has equated appellate powers with revisional powers, and that the core difference between an appeal and a revision has been overlooked. It is trite legal position that appellate jurisdiction is coextensive with original court's jurisdiction as for appraisal and appreciation of evidence and reaching findings on facts and appellate court is free to reach its own conclusion on evidence untrammelled by any finding entered by the trial court. Revisional powers on the other hand belong to supervisory jurisdiction of a superior court. While exercising revisional powers the court has to confine to the legality and propriety of the findings and also whether the subordinate court has kept itself within the bounds of its jurisdiction vested in it. Though the difference between the two jurisdictions is subtle, it is quite real and has now become well recognised in legal provinces.

In State of Kerala vs. K.M. Charia Abdullah & Co. (AIR 1965 SC 1585) this Court has highlighted the difference between the two jurisdictions in the following words:

"There is an essential distinction between an appeal and a revision. The distinction is based on the differences implicit in the said two expressions. An appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitations prescribed. But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to review the evidence unless the statute expressly confers on it that power."

In Shankar Ramchandra Abhyankar vs. Krishnaji Dattatraya Bapat (AIR 1970 SC 1) this Court has observed that the right of appeal is one of entering a superior court and invoking its aid and interposition to rectify the error

of the court below.

In this case when the High Court considered that its only concern was to check whether the order of the magistrate "is fraught with any illegality or impropriety", the High Court has narrowed down its angle while dealing with an appeal.

When a trial court had acquitted an accused due to non-appearance of the complainant the appellate court has the same powers as the trial court to reach a decision as to whether on the particular situation the magistrate should have acquitted the accused. What the trial court did not then ascertain and consider could, perhaps, be known to the appellate court and a decision different from the trial court can be taken by the appellate court, whether the order of acquittal should have been passed in the particular situation.

Section 247 of the old Code reads thus:

" If the summons has been issued on complaint, and upon the day appointed of 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 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."

Section 256 of the Code of Criminal Procedure, 1973 (for short 'the new Code') is the corresponding provision to Section 247 of the old Code. The main body of both provisions is identically worded, but there is a slight difference between the provisos under the two sections. The proviso to section 230 of the new code is reproduced here:

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."

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 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 a protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, court has a duty to acquit the accused in

invitum.

Reading the Section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. 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. Second is, when the magistrate considers that 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. 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 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. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice.

When considering the situation of this case as on 24-8-1996, from the facts narrated above, we have no manner of doubt that the magistrate should not have resorted to the axing process, particularly since the complainant was already examined as a witness in the case besides examining yet another witness for the prosecution.

Appellant has adopted an alternative contention that as the complainant in this case is a company which is an incorporeal entity there is no question of the complainant being absent in the court on any day fixed for hearing and hence Section 247 of the old Code (or Section 256 of the new code) was inapplicable. Learned single judge repelled the said alternative contention when it was raised in the High Court. It is true that the complainant M/s. Associated Cement Company Ltd. is not a natural person. We have no doubt that a complaint can be filed in the name of a juristic person because it is also a person in the eye of law. But then, who would be the complainant in the criminal court for certain practical purposes.

The word "complainant" is not defined in the Code of Criminal Procedure, whether old or new. Any person can set the law in motion except in cases where the statute has specifically provided otherwise. The word "person" is defined in the Indian Penal Code (Section 11) as including "any company or association or body of persons whether incorporated or not". By virtue of Section 2(y) of the new Code words and expressions used in that Code but not defined therein can have the same meaning assigned to them in the Penal Code. Thus when the word "person" is specifically defined in the Penal Code as including a company that definition can normally be adopted for understanding the scope of the word "complainant". However, the definition clauses subsumed in Section 2 of the new Code contains the opening key words that such definitions are to be adopted "unless the context otherwise requires". We have, therefore, to ascertain whether and company or association of persons or body corporate can be a complainant as per the new Code as for all practical purposes, looking at different contexts envisaged therein,

Chapter XV of the new Code contains provisions for lodging complaints with magistrates. Section 200 as the starting provision of that chapter enjoins on the

magistrate, who takes cognizance of an offence on complaint, to examine the complainant on oath. Such examination is mandatory as can be discerned from the words "shall examine on oath the complainant..." The magistrate is further required to reduce the substance of such examination to writing and it "shall be signed by the Complaint". The magistrate is further required to reduce the substance of such examination to writing and it "shall be signed by the Complaint. Under Section 203 the magistrate is to dismiss the complaint if he is of opinion that there is no sufficient ground for proceeding after considering the said statement on oath. Such examination of the complaint on oath can be dispensed with only under two situations, one if the complaint was filed by a public servant, acting or purporting to act in the discharge of his official duties and the other when a court has made the complaint. Except under the above understandable situations the complainant has to make his physical presence for being examined by the magistrate. Section 256 or Section 249 of the new Code clothes the magistrate with jurisdiction to dismiss the company when the complainant is absent, which means his physical absence.

The above scheme of the new Code makes it clear that complainant must be a corporeal person who is capable of making physical presence in the court. Its corollary is that even if a complaint is made in the name of an incorporeal person (like a company or corporation) it is necessary that a natural person represents such juristic person in the court and it is that natural person who is looked upon, for all practical purposes to be the complainant in the case. In other words, when the complainant is a body corporate it is the de jure complainant, and it must necessarily associate a human being as de facto complainant to represent the former in court proceedings.

As the corresponding provisions in the old code are the same for all practical purposes, the legal position discussed above is applicable to the complaint filed under the old code as well.

Be that so, we suggest as a pragmatic proposition that no magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone can continue to represent the company till the end of the proceedings. There may be occasions when a different person can represent the company e.g. the particular person who represents the company at the first instance may either retire from, the company's service or may otherwise cease to associate therewith or he would be transferred to a distant place. In such cases it would be practically difficult for the company to continue to make the same person represent the company in the court. In any such eventuality it is open to the de jure complainant company to seek permission of the court for sending any other person to represent the company in the court. At any rate

For those reasons we are not persuaded to uphold the contention that Section 247 of the old Code (or Section 256 of the new Code) is not applicable in a case where the complainant is a company or any other justice person.

However, as we have taken the view that the magistrate should not have acquitted the respondent under Section 247 of the old Code on the facts of this case we allow the appeal and set aside the order of acquittal as well as the impugned judgment of the High Court. The prosecution would now proceed from the stage where it reached before the order of acquittal was passed.

JUDIS