

IN THE HIGH COURT OF JUDICATURE AT MADRAS  
DATED:25.06.2012

CORAM:

THE HONOURABLE MS. JUSTICE R. MALA

Criminal Appeal No.709 of 2010

K.Niranjani .. Appellant/Complainant

v.

1.R.T.Dinesh  
2.R.T.Giri  
3.T.Amsa .. Respondents

Prayer:Criminal appeal filed under Section 378 of Cr.P.C., against the judgment dated 19.10.2010, in M.P.No.5872 of 2010 in D.V.C.No.1 of 2010, on the file of the learned XV Metropolitan Magistrate, George Town, Chennai.

For Appellant : Mr.P.Ezhil Nilavan

For Respondents : Mr.S.V.Vijay Prashanth

J U D G M E N T

This appeal arises out of the judgment of dismissal dated 19.10.2010, in M.P.No.5872 of 2010 in D.V.A.C.No.1 of 2010, on the file of the learned XV Metropolitan Magistrate, George Town, Chennai, stating that on the absence of complainant, the complaint has been dismissed and the accused were acquitted.

2.The appellant/wife had filed an application against the respondents herein, who is her husband, father-in-law and mother-in-law respectively, under Sections 12 R.W.S. 18, 19, 20(1) & 22 of the Protection of Women from Domestic Violence Act, 2005, which was taken on file in D.V.A.C.No.1 of 2010 and interim order of Rs.25,000/- per month has been awarded to the wife as maintenance and the right of residence was ordered. As per the order dated 08.03.2010, the above said order has been modified. Therefore, her husband, who is the first respondent herein had filed C.A.No.39 of 2010 before the Appellate Forum for reducing the maintenance and the wife, who is the appellant herein, had filed C.A.No.46 of 2010 for right of residence. Both the appeals have been disposed of on 24.09.2010, with a direction to dispose of the main petition in D.V.A.C.No.1 of 2010 within 60 days. But on 19.10.2010, since the appellant/complainant was called absent, the learned XV Metropolitan Magistrate, by invoking

Section 256 Cr.P.C., dismissed the complaint and acquitted the respondents herein, against which, the present appeal has been preferred by the wife/complainant.

3.Mr. P.Ezhil Nilavan, learned counsel for the appellant/ complainant submitted that when the matter was posted on 19.10.2010, the counsel for the wife, who has to appear before the Court, was admitted in hospital. As the wife/appellant herein was also suffering from stomach pain, she sent the medical certificate through her uncle and on her behalf, her uncle appeared before the Court. But the Court, not accepting to receive the adjournment petition, dismissed the complaint. In the after noon, on the same day, the wife/appellant/complainant herself appeared before the Court and she was directed to file an application for restoration of the same on the very next day. But that restoration petition was not entertained by the trial Court. He further submitted that even though 60 days time has been granted, the learned XV Metropolitan Magistrate without giving any opportunity, dismissed the complaint for non prosecution. Since wife/appellant is a deserted wife and she is left in lurch, he prayed for setting aside the order.

4.Resisting the same, Mr.S.V.Vijay Prashanth, learned counsel appearing for the respondents submitted that the main aim of the appellant/complainant is to drag on the proceedings. She filed an application under Domestic Violence Act and obtained an interim order of Rs.25,000/- per month as interim maintenance, against which, both husband and wife preferred appeals in C.A.Nos.39 and 46 of 2010 respectively. In the appeals, an order was passed on 24.09.2010 to dispose of the entire matter within 60 days and the maintenance was reduced to Rs.5,000/-. He further submitted that on 04.09.2011, there was an agreement between the spouses. In pursuance of the agreement, the wife/appellant/complainant has received all the belongings, jewels and also cash, which was present at the time of marriage and she consented for divorce. The learned counsel would take me through page-89 of the typed set of papers and submitted that but on 19.09.2011, she filed an application for setting aside the exparte order passed on 08.09.2011. It shows that the main aim of the wife/appellant/complainant is to drag on the proceedings and to make the paternal in laws to face the proceedings before the Court. Hence, he prayed for the dismissal of the appeal.

5.Considered the rival submissions made on both sides and the materials available on record.

6.The relationship of the appellant and the respondents is not disputed and the factum of the marriage is also not disputed. The wife/appellant filed an application under Domestic Violence Act against her husband and in-laws and obtained interim order of Rs.25,000/- as maintenance and her right of residence was modified, against which, both husband and wife preferred appeals in C.A.No.39/2010 for reducing interim maintenance and C.A.No.46/ 2010 for right of residence respectively. After hearing both sides, the learned Sessions Judge passed an order dated 24.09.2010, stating that the interim maintenance has been reduced to Rs.5,000/- and right of residence has been cancelled and the wife was directed to live with her husband and the husband should provide suitable atmosphere to live in the matrimonial home in the newly rented house. In para-63 of the above order, a specific direction was given to the learned XV Metropolitan Magistrate to dispose of the D.V.A.C.No.1 of 2010 within 60 days. The above factum are admitted by both sides.

7.Admittedly, on 19.10.2010, due to non-appearance of the complainant/appellant herein, complaint was dismissed and the accused were acquitted, against the same only, the present appeal has

been preferred. While perusing the order, the learned XV Metropolitan Magistrate has specifically mentioned as follows:

"Complainant absent. No representation. Respondent 1 present. Respondents 2 & 3 are absent. Petition u/s 317 Cr.P.C. filed allowed. Direction issued by the Fast Track Court to dispose within the stipulated time. Even after specific direction to appear & proceed with the case complainant is absent. No representation. Hence complaint is dismissed. Accused are acquitted. "

But the order in the appeals have been pronounced only on 24.09.2010, within 30 days, the learned XV Metropolitan Magistrate dismissed the complaint for non prosecution by invoking Section 256 Cr.P.C.

8. At this juncture, it is appropriate to consider the decision relied upon by the learned counsel for the appellant reported in 2004 (1) CTC 689 (R.Sekar v. S.Rajendran) in para-4, it reads as follows:

"4. The Supreme Court in the case in Associated Cement Co. Ltd. Vs. Keshjvanand 1998 CrL.L.R. 856 has held as follows:

"Two constraints are imposed on the Court for exercising the power under section 256. 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 the 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 date was quite unnecessary, then resorting to the step of axing down the complaint may not be proper exercise of power envisaged in the Section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

9. It is appropriate to incorporate Section 256 Cr.P.C., which reads as follows:  
"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. "

Considering the above decision along with Section 256 Cr.P.C., it is a discretion of the Magistrate to adjourn the matter or dispose of the matter, the Magistrate has to exercise his discretion judicially. Since it is a matrimonial dispute and the complainant is residing away from her matrimonial home, the learned Magistrate has to give one more opportunity to put forth her case. But the discretion exercised

by the learned Metropolitan Magistrate is not legally sustainable. But however, the matter is pending in the matrimonial Court (i.e.) Sub-Court Tambaram in respect of divorce petition filed by the husband under Section 13(1)(i)(a) of the Hindu Marriage Act. Considering the gravity of the complaint and relationship between both sides, I am of the view, the order passed by the learned XV Metropolitan Magistrate is liable to be set aside and hence, it is hereby set aside.

10. In fine,

- (i) Criminal Appeal is allowed.
- (ii) Acquittal order passed by the trial Court is set aside.
- (iii) The matter is remitted back to the learned XV Metropolitan Magistrate, George Town, Chennai.
- (iv) Both the appellant and the first respondent are directed to appear before the trial Court on each and every hearing and shall extend their co-operation.
- (v) Respondents 2 and 3 are directed to appear before the Court whenever they directed to appear.
- (vi) The learned XV Metropolitan Magistrate, George Town, Chennai. is directed to dispose of the matter within a period of 45 days from the date of receipt of copy of this order on day to day basis.

25.06.2012

Index:Yes

Internet:Yes

Note to office: The Registry is directed to issue copy of the order within a week.

kj

R.MALA,J.

Kj

To

XV Metropolitan Magistrate's Court  
George Town, Chennai.

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