

J. RAJU S/O JAYAPPA v. SRI F. MUKTAR @ MUKTAR UJJNI , 2021 PLRonline 5104 (Kar.)

HIGH COURT OF KARNATAKA AT BENGALURU

BEFORE : JUSTICE K.NATARAJAN

J. RAJU S/O JAYAPPA v. SRI F. MUKTAR @ MUKTAR UJJNI

APPEAL NO.775 OF 2020

01.04.2021

NIA S. 138 - CrPC S. 70(2) - Once warrants has been issued, the complaint can not be dismissed for non prosecution - Trial Court has committed error in dismissing the complaint for the reason that once NBW has been issued by the competent Court to secure the presence of the accused, the question of taking further steps and dismissing the complaint for default does not arise - As per Section 70(2) of Cr.P.C., once the warrant has been issued, until the warrant is cancelled by the said Court and until execution of charge- sheet, it remains in force - Complaint could not have been dismissed for default.

Held, On a bare reading of 70(2), which shows that every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. Here in this case, warrant has been issued by the trial Court on 19.10.2011 to be returnable by 26.11.2011, but it was not at all executed, was not cancelled and the warrant is in force and also returned to the Court as unexecuted. Such being the case, the question of taking further steps is not required. Therefore, the trial Court ought to have received or called back the warrant and the reason for not executing the warrant shall have to be ascertained before dismissing the case for default. Therefore, I am of the view that the trial Court has committed an error in dismissing the complaint for default on the ground for not taking steps. Therefore, the order under appeal requires to be set aside and requires to be sent back for disposal of the case on merits as per the provisions of law. Hence, I pass the following:

Criminal Appeal is allowed.

Advocates; BY SRI S.G. RAJENDRA REDDY, P. PRASANNA KUMAR.

JUDGMENT

This appeal is filed by the appellants who are the legal representatives of the complainant before the trial

Court challenging the order of dismissal of the case for non-prosecution in C.C.No.746/2010 dated 24.12.2011 on the file of Prl. Civil Judge and J.M.F.C., Hosadurga, Chitradurga District.

2. Heard the arguments of learned counsel for the appellants and learned counsel for the respondent.

3. The rank of the parties before the trial court is retained for the sake of convenience.

4. The brief facts of the case is that, Raju filed a complaint before the trial Court under Section 200 of Cr.P.C., for the offence punishable under [Section 138](#) of the Negotiable Instruments Act, 1881 (for short 'N.I. Act') against the respondent-accused alleging that the cheque issued by the accused was dishonored due to insufficient funds. In spite of issuance of legal notice, the respondent-accused has not replied or complied with the said notice. After taking cognizance, the trial Court issued summons to the accused and the presence was not able to secure.

Therefore, non-bailable warrant has been ordered to secure the presence of the accused. But the same was returned unexecuted. Subsequently, the case was posted for taking steps on 26.11.2011. On 26.11.2011 and 24.12.2011, the complainant and his counsel remained absent and steps were not taken. Hence, the complaint came to be dismissed for default. Assailing the same, the legal representatives of the complainant filed a review petition before the Sessions Court, Chitradurga which came to be allowed and restored the case in the original file. Assailing the same, the respondent-accused approached this Court by filing Crl.P.No.8475/2018 and taken contention that the revision is maintainable against the dismissal of the complaint under Section 256 of Cr.P.C. Based upon the submission, the Co-ordinate Bench of this Court allowed the petition and set aside the order of Revisional Court with a liberty to approach the Court by filing an appeal. Accordingly, the appellants are before this Court.

5. Learned counsel for the appellants has contended that the trial Court has committed an error in dismissing the complaint. In spite of taking cognizance and issuing the summons to the accused, the presence of the accused was not able to secure by the trial Court. Such being the case, one more date was given for securing the presence of the accused by issuing further warrant through Higher Officer. Therefore, the trial Court has committed error in dismissing the entire complaint as default, which is not correct. Hence, prayed for setting aside the same.

6. On the other hand, learned counsel appearing for respondent-accused has objected the same and contended that the appellants are the legal representatives of the original complainant. They filed an appeal without seeking permission of the Court and also they entered the case as legal representatives only after dismissal of the complaint and not obtained permission of the Court. Even in the Revision Petition, they have not made the accused as party and further contended that the entire contentions or grounds urged by the learned counsel has to be raised before the trial Court. Hence, prayed for rejecting the appeal.

7. Upon hearing the arguments and on perusal of the records, the point that arises for my consideration is:

“Whether the order under challenge by the appellants in this appeal calls for interference

by this Court?"

8. The order sheet of the trial Court reveals that the original complainant filed a private complaint under Section 200 of Cr.P.C., for the offence punishable under Section 138 of N.I. Act against the accused for taking appropriate action. The cheque issued by the complainant was towards the legally dischargeable debt. The complainant himself has given sworn statement and got marked the documents and the trial Court took cognizance of the offence on 6.10.2016 and issued summons to the accused to be present before the Court on 19.11.2016. Subsequently, the summons was returned as unserved and the summons also issued through RPAD which was served and later, the complainant also filed an application along with P.F. and taken the summons to the accused through Azad Nagar Police Station, Davanagere and again on 19.11.2016, the summons was returned as accused refused to receive the same. Therefore, NBW was issued through the Circle Inspector of Police of Davanagere through Azad Nagar Police. That on 26.11.2011, the complainant was absent and his counsel was also absent. Case was adjourned for taking further steps on 24.12.2011. On 24.12.2011, again the complainant and his counsel were absent and later the trial Court has held that steps not taken and hence, complaint is dismissed for default.

9. By looking to the order sheet of the trial Court which appears that the trial Court has committed error in dismissing the complaint for the reason that once NBW has been issued by the competent Court to secure the presence of the accused through CPI, Davanagere as the accused refused to receive the summons issued by the Court and NBW was ordered to be returnable by 26.11.2011. The order sheet never reveals as to whether the warrant has been neither executed by the Police nor returned unexecuted. Such being the case, the question of taking further steps and dismissing the complaint for default does not arise. As per Section 70(2) of Cr.P.C., once the warrant has been issued, until the warrant is cancelled by the said Court and until execution of charge-sheet, it remains in force. For the convenience, the provisions of Section 70(1) and (2) reads of follows:

"70. Form of warrant of arrest and duration:

(1) Every warrant of arrest issued by a court under this Code shall be in writing, signed by the presiding officer of such court and shall bear the seal of the court.

(2) Every such warrant shall remain in force until it is cancelled by the court which issued it, or until it is executed."

10. On a bare reading of 70(2), which shows that every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. Here in this case, warrant has been issued by the trial Court on 19.10.2011 to be returnable by 26.11.2011, but it was not at all executed, was not cancelled and the warrant is in force and also returned to the Court as unexecuted. Such being the case, the question of taking further steps is not required. Therefore, the trial Court ought to have received or called back the warrant and the reason for not executing the warrant shall have to be ascertained before dismissing the case for default. Therefore, I am of the view that the trial Court has

committed an error in dismissing the complaint for default on the ground for not taking steps. Therefore, the order under appeal requires to be set aside and requires to be sent back for disposal of the case on merits as per the provisions of law. Hence, I pass the following:

Criminal Appeal is allowed.

The impugned order of dismissal of the complaint for default dated 24.12.2011 is hereby set aside and the complaint has to be restored to its file.

Both the parties shall have to appear before the trial Court on 25.05.2021 without expecting any further notice.

Office is directed to send a copy of this order to the trial Court and the trial Court shall dispose of the matter as early as possible as it is an oldest case.

Both the parties shall co-operate with the trial Court for speedy disposal.