

Court No. - 44

Case :- MATTERS UNDER ARTICLE 227 No. - 8397 of 2023

Petitioner :- Arvind Kumar

Respondent :- State of U.P. and Another

Counsel for Petitioner :- Shiv Bhushan Singh, Mahendra Kumar Yadav

Counsel for Respondent :- G.A., Prashant Yadav, Rajeev Kumar

Hon'ble Manoj Bajaj, J.

Arvind Kumar-Complainant has filed this petition under Article 227 Constitution of India to challenge the impugned order dated 12.1.2023 passed by Judicial Magistrate, Etah in Complaint Case No. 8990 of 2020, titled *Arvind Kumar Vs. Rubal Kumar*, whereby his complaint under Section 138 Negotiable Instruments Act, 1881 filed against the respondent no.2 was dismissed on the ground of his non appearance.

Learned counsel for petitioner has submitted that the accused-respondent no.2 while discharging his liability had issued a cheque amounting to Rs.8,50,000/- in favour of the petitioner, however, the same had dishonored, whereupon a complaint under Section 138 Negotiable of Instruments Act, 1881 (hereinafter referred to as the 'Act') was filed. Learned counsel for petitioner has further drawn the attention of the Court to the Annexure No.4 and submitted that in support of the complaint, the petitioner adduced his evidence by way of affidavit, but thereafter, the complainant did not appear before the court on 12.1.2023 and the Magistrate dismissed the complaint for his non appearance. He submits that on 12.1.2023 the complainant was not keeping good health, therefore, he failed to appear before the trial court, and for this absence, the trial court has passed the extreme order of dismissal

of the complaint. He prays that impugned order dated 12.1.2023 be set aside and the complaint be restored to its original number.

The prayer is opposed by learned counsel for accused-respondent no.2, who relies upon his counter affidavit dated 3.9.2023 and submitted that the cheque in question was never given by the respondent no.2 voluntarily to the complainant, as it was a result of fraud and coercion, therefore, the petition deserves to be dismissed. He submits that initially the complainant got a sale deed executed relating to the immovable property, from respondent no.2 on 24.12.2019, however, when this was questioned, the complainant after two days i.e. on 26.12.2019 reversed the said transaction by executing the sale deed of the said land in favour of the sons of respondent no.2. He submits that in this background, the complaint is nothing, but misuse of the process of law, therefore, the impugned order does not warrant any interference.

At this stage, learned counsel for petitioner has pointed out that the cheque in question, which is the subject matter of the complaint dated 15.7.2020, was issued much after the alleged sale transaction of the land, therefore, at this stage, the said cheque cannot be connected to the sale deeds.

Learned counsel for the parties have been heard and with their assistance, the case file has been perused.

Upon hearing the learned counsel for the parties and considering their submissions, this Court finds that the complaint pertains to alleged commission of offences punishable under Section 138 of the Act and in support of his case, complainant has also adduced his pre-summoning evidence. The scheme of the Act contemplates certain conditions to be fulfilled by complainant before the process is issued against the accused for prosecution, and if, the complaint/

evidence on record discloses the same, the Magistrate is to issue process against the accused. Since, in the present case, no process has been issued against the accused and the evidence and the contents of the complaint are yet to be evaluated by the trial court, therefore, at this stage, this Court is not inclined to make any observation on merits of the case. The argument advanced by learned counsel for respondent no.2-accused relates to his defence, and it would require evidence, therefore, the same has no relevance for ascertaining the correctness and validity of the impugned order.

Further, a perusal of the impugned order dated 12.1.2023 shows that the trial court has observed that on 29.11.2022 the case was adjourned on the request of learned counsel for complainant for addressing arguments on the issue of process, but as his counsel did not appear, and previously also on some occasions there was no appearance on behalf of complainant, it proceeded to dismiss the complaint. In the considered opinion of this Court, if the previous instances of absence were condoned by the court as the complaint was adjourned, therefore, subsequently this circumstance could not have been taken against the complainant. Here it may be noted that many a times a litigant is prevented by a sufficient reason to put in appearance on a given date and every such absence cannot be necessarily construed as willful. The explanation given by the complainant that on 12.1.2023 he could not appear before the trial court because of his sickness appears to be probable, therefore, his absence on the said date cannot be construed as deliberate. The complaint is at initial stage, and if, the same is restored to its original number, no prejudice would be suffered by the accused as the complainant is yet to make out a *prima facie* case for issuance of process.

Resultantly, impugned order dated 12.1.2023 is set aside and the complaint is restored to its original number. The complainant is directed to appear before the trial court on 4.12.2023.

The petition is accordingly, allowed.

Order Date :- 17.11.2023

P.S.Parihar