

In the High Court of Punjab and Haryana at Chandigarh

CRA-AS-17 of 2014

Date of Decision: 12.01.2015

Suresh Seth

---Appellant

versus

Jasmer Singh

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Arvind Bansal, Advocate
for the appellant

Mr.J.K.Goel, Advocate
for the respondent.

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

REKHA MITTAL, J.

The present appeal has been directed against the order dated 22.2.2012 passed by the Additional Chief Judicial Magistrate, Kaithal whereby complaint under Section 138 of the Negotiable Instruments Act, 1881 (in short “the Act”) filed by the appellant was dismissed for want of prosecution.

Counsel for the appellant contends that criminal proceedings were initiated in the year 2007 and the court took cognizance of the offence and issued process against the accused (respondent) proceeding against him for committing offence punishable under Section 138 of the Act. During

pendency of the proceedings, compromise was effected between the parties and it was agreed that the accused will make payment to the complainant in May and the case was adjourned sine die. The accused failed to comply with the terms and conditions of the compromise. The complainant moved an application for restoration of the complaint. The complainant examined CW3 on 6.12.2011 and the case was adjourned to 21.12.2011 on which date, the case was adjourned to 22.2.2012. On 22.2.2012, in the morning the complainant was present in the Court but after lunch he could not put in appearance and the case was dismissed for non-prosecution. It is argued that the trial court neither considered the conduct of the appellant in pursuing the proceedings consistently since 2007 nor adverted to the fact if personal appearance of the complainant could be dispensed with. It is argued with vehemence that in case order dated 22.2.2012 is not set aside, it will cause serious prejudice to the rights of the appellant to be heard on merits with regard to liability of the accused for committing offence punishable under Section 138 of the Act as the cheque for a sum of Rs. 20 lakhs issued by the accused in discharge of his legally enforceable liability got dishonoured on its presentation to the bank. The last submission made by counsel is that absence of the appellant from the proceedings on 22.2.2012 was neither intentional nor mala fide.

Counsel for the respondents submits that despite grant of number of opportunities, the complainant failed to examine its witnesses. On 22.2.2012, the complainant failed to appear in the court and as such complaint was rightly dismissed by the court.

I have heard counsel for the parties and gone through the case

file.

There is nothing on record to suggest that prior to 22.2.2012, the appellant ever committed any default in ensuring his presence before the trial court since the filing of the complaint. The learned trial court while passing the impugned order did not advert to the previous conduct of the appellant and if her presence was necessary on the date fixed.

The Hon'ble the Supreme Court of India in ***The Associated Cement Company Limited vs. Keshvanand 1998(1) R.C.R.(Criminal) 309*** has held that reading of Section 256 of the Code of Criminal Procedure (for short "the Code") 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 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 day is 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.

As has been noticed hereinbefore, the court has not at all applied its mind to the two constraints imposed on the court for exercising power under Section 256 of the Code. The impugned order has been passed by the learned trial court without application of mind and without considering if personal attendance of the complainant was essential on that day or the situation did not justify the case being adjourned to another date.

Keeping in view the above, the impugned order cannot be allowed to sustain. As a result, the appeal is allowed, the order dated 22.2.2012 is set aside and the matter is remitted to the trial court with a direction to proceed with the case from the stage at which it was dismissed for non-prosecution.

(REKHA MITTAL)
JUDGE

12.01.2015

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