

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.**

CRM-A-1178-MA of 2014

Date of Decision: 10.09.2015

Surender

....Applicant

Versus

Deshraj

....Respondent

BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Gaurav Mohunta, Advocate
for the applicant.

None for the respondent.

DAYA CHAUDHARY, J. (ORAL)

The present application for grant of leave to appeal has been filed against the judgment dated 16.09.2013 passed by the Sub Divisional Judicial Magistrate, Mohindergarh, whereby, the Criminal Complaint No.19 of 2011 filed under Section 138 of the Negotiable Instruments Act, 1881 has been dismissed on account of non-appearance of the complainant/his counsel only on one date, which resulted into acquittal of accused in view of Section 256 Cr.P.C.

Briefly, the facts of the case are that the accused-respondent took a loan of Rs.10,000/- from the applicant and to discharge his legal liability and issued one cheque bearing No.1193829 dated 01.12.2010 drawn on Oriental Bank of Commerce, Mohindergarh Branch. However, when the complainant presented the cheque, it was dishonoured by the bank with remarks "funds insufficient". Thereafter, a legal notice dated 04.01.2011 was served upon the respondent requesting him to make good the payment of the cheque in dispute but there was no response and subsequently, the complaint was filed after expiry of period of limitation.

The accused-respondent was summoned to face trial vide summoning order dated 20.04.2011. The case was fixed on various dates and only the applications for exemption from personal appearance were filed, which were allowed. On 16.09.2013, the case was fixed for hearing but none appeared on behalf of the complainant/applicant and the complaint was dismissed in view of Section 256 Cr.P.C and the accused was acquitted of the charge by Sub Divisional Judicial Magistrate, Mohindergarh vide order dated 16.09.2013. Thereafter, the said order dated 16.09.2013 was challenged before the Sessions Judge, Narnaul which was dismissed as withdrawn being not maintainable.

Now the present application has been filed under Section 378 (4) Cr.P.C before this Court.

Learned counsel for the applicant submits that no proceedings were initiated on various dates as only the applications for exemption from personal appearance were heard and allowed. Due to non-appearance of complainant/his counsel, the complaint was straightway dismissed, resulting into acquittal of the accused. Learned counsel prays for grant of one opportunity to the complainant to appear and to lead his evidence. He also submits that the trial Court should atleast has given a last opportunity but without initiating any such proceedings in the case, the complaint has simply been dismissed which has caused prejudice to the applicant.

Learned counsel for the applicant has relied upon the judgments of this Court in cases ***Dilawar Singh vs Pankaj Joshi and another 2007(2) RCR (Criminal) 398*** as well as ***Smt. Anita Sharma vs Parvesh Chaudhary (Crl. Misc. No.A-927-MA of 2011, decided on 11.10.2012)*** in support of his contentions.

Notice of motion was issued in the case on 20.01.2015 but inspite of service, none has appeared on behalf of the respondent.

Heard the arguments of learned counsel for the applicant and have also perused the *zimni* orders produced on record as well as the impugned order and other documents on the file.

Section 256 of the Cr.P.C. deals with the situation, in case the complainant fails to appear on the date fixed and the same is reproduced as under :-

“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.”

A perusal of aforesaid Section would show that the trial Court was having the option to either acquit the accused or to adjourn the matter to some other date by recording some reasons keeping in view the facts of the case.

The *proviso* to the aforesaid section stipulates that where the complainant is represented by a pleader or by any other officer conducting

the prosecution or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

It is apparent from the impugned order that the complaint was dismissed because of non appearance of the complainant/his Advocate, whereas, it was incumbent upon the trial Court to examine the case in the light of the aforesaid provisions of law and to record the finding as to whether the presence of the complainant was essential on that date or not or whether the hearing of the case could have been adjourned to some other date but nothing has been mentioned in the impugned order. Simply, it has been mentioned that none was present in spite of calling the case several times, the complaint was dismissed and the accused was acquitted of the charge.

The controversy in the case, in hand, is squarely covered by judgment of Hon'ble the Apex Court in case titled as ***The Associated Cement Co. Ltd. Vs Keshvanand 1998(1) RCR (Criminal) 309***. The relevant portion of the said judgment is reproduced as under :-

“16. 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 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 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.”

Similarly, in **Anita Sharma's** case (supra), the service upon the accused could not be effected and the case was fixed for 12.08.2010 whereon the presence of the accused was required. However, on that date, learned counsel for the complainant did not put in appearance and only on this ground, the complaint was dismissed. The order passed by the Judicial Magistrate Ist Class, Faridabad was set aside by this Court vide order dated 11.10.2012 and the matter was remanded back to the Court of Judicial Magistrate Ist Class, Faridabad to dispose of the complaint in accordance with law.

It is apparent from the *zimini* orders that only the applications for exemption from personal appearance were filed and the same were allowed. The last *zimini* order, whereby, the complaint was dismissed, is reproduced as under :-

*“ Present : None for complainant
Accused on bail with Sh. B.L. Yadav, Adv.
Case called several times since morning but none has appeared on behalf of complainant. It is already 12:50 P.M. No further wait is justified. Therefore, present complaint is hereby dismissed u/s 256 Cr.p.c. Accused is acquitted and bail bonds of accused discharged. File be consigned to record room after due compliance.*

*Sd/-
A. Mahajan,
SDJM M.garh, 16-09-2013”*

It is evident from the impugned order that it is erroneous in

nature as an extreme step of dismissal of complaint has been taken, whereas, the matter was pending before the trial Court and no proceedings have initiated except the allowing of the applications for exemption from personal appearance. The impugned order has been passed contrary to the provisions of Section 256 Cr.P.C and a great prejudice has been caused to the applicant-complainant as the accused has been acquitted of the charge.

For the reasons recorded as above, the present application is allowed. The impugned order dated 16.09.2013 passed by the Sub Divisional Judicial Magistrate, Mohindergarh is set aside and the matter is remanded back to the Court of Sub Divisional Judicial Magistrate, Mohindergarh, to dispose of the complaint in accordance with law.

10.09.2015
gurpreet

(DAYA CHAUDHARY)
JUDGE