

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Crl. Misc. No. M-26292 of 2014

Date of decision : 13.07.2015

Rashmi Gupta

..... Petitioner

versus

M/s Surinder Cement Store

... Respondent

CORAM:- HON'BLE MRS. JUSTICE ANITA CHAUDHRY

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

**Present: Mr. Prashant Bansal, Advocate
for the petitioner**

ANITA CHAUDHRY, J. (ORAL)

This petition has been filed under Section 482 Cr.P.C for quashing the order dated 25.02.2014 and 21.07.2014 passed by SDJM, Dera Bassi in a complaint filed under Section 138 of Negotiable Instruments Act.

I find that notice had been issued to the respondent though it was not required to be given, as the respondent had not put in appearance before the Court below.

Learned counsel for the petitioner contends that complaint filed under Section 138 of Negotiable Instruments Act was dismissed in default for non-prosecution as the complainant failed to appear as wrong date was noted. He urges that the case was fixed for 25.02.2014 but the date noted was 26.02.2014. It has been urged that bailable warrants had been issued and the presence of the petitioner was not required on that day as it was fixed for service

upon the accused and the matter could have been adjourned. He further contends that an application for recall of the order was filed but then they were advised to approach the High Court. Thereafter, they failed to appear and the application was dismissed vide order dated 21.7.2014 (Annexure P-4).

Reliance has been placed upon ***Om Parkash vs. M/s Golden Forest India Ltd. and others, 2008(4) RCR(Criminal) 445*** and ***Standard Corporation India Limited vs. Kamblekar Rames, 2011(4) RCR(Criminal) 564.***

Since service had not been effected upon the accused in the complaint case, the presence of the respondent is not required.

The complaint has been dismissed for non-prosecution because of non-appearance of the complainant. The case was adjourned for notice to the respondent against whom bailable warrants had been issued.

This Court while considering an identical issue in ***Criminal Misc. No. 36522-M of 2006 (Purushotam Mantri vs. Vinod Tandon alias Hari Nath Tandon) vide judgment dated January 30, 2008*** opined as under:-

“Learned counsel for the petitioner did not dispute that application filed by the petitioner before the Court below for recalling the order was not maintainable and accordingly the same was rightly dismissed by the Court below. However, submission is that this Court under Section 482 of the Code can certainly direct restoration of the complaint, which was dismissed in default if sufficient reason is found for his non-appearance on the date fixed. For the purpose he has relied upon the

*observations made by this Court in **Jitender Bajaj v. State (U.T. Chandigarh) and others**, 2005(3) RCR (Criminal) 69 : 2005 Crl. L.J. 3136, which are reproduced below:-*

“.....When the Magistrate, in a summon case, has dismissed the complaint and acquitted the accused due to absence of the complainant on the day of hearing, he cannot later on restore the complaint and set aside the order of acquittal, even if the complainant shows very good reasons for his failure to be present on the day of dismissal of the complaint. In such situation, the only remedy available with the complainant is to file appeal or revision against such order or petition under Section 482 of the Code before this Court for setting aside the said order of dismissal of the complaint and acquittal of the accused on the ground that in the given facts and circumstances, the dismissal of the complaint and acquittal of the accused was not justified or there were sufficient reasons for non-appearance of the complainant before the Court on the date fixed, or the Magistrate has not properly exercised his discretion while not adjourning the complaint and dismissing the same.”

In view of the above enunciation of law, it is held that application for restoration of complaint under Section 138 of the Act, which was dismissed in default was not maintainable.

The reason given by the petitioner is that they had noted a wrong date and, therefore, could not appear. The reason for non-appearance is bonafide. The complaint should not have been dismissed in default for non-prosecution when his presence on that day was not necessary. The petition is accepted and the complaint

is restored to its original number. The petitioner would appear before the Court below on 27.07.2015, who would proceed in accordance with law.

July 13, 2015

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**(ANITA CHAUDHRY)
JUDGE**