

In the High Court of Punjab and Haryana at Chandigarh

CRM-M-31560 of 2014
Date of Decision: 24.02.2015

Rishi Sharma

---Petitioner

versus

Akhilesh Sharma

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Sandeep Kotla, Advocate
for the petitioner

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 petition under Section 482 of the Code of Criminal Procedure (in short “Cr.P.C.”) has been preferred for quashing order dated 22.7.2014 passed by the Judicial Magistrate Ist Class, Panchkula whereby the complaint bearing No. 769 of 2012 dated 16.2.2012 titled '*Rishi Sharma Proprietor, M/s Durga Pharmaceuticals vs. Akhilesh Sharma*' has been dismissed for want of prosecution.

The petitioner filed the complaint under Section 138 of the Negotiable Instruments Act, 1881 (in short “the Act”) in respect of dishonour of cheque for a sum of Rs.1,00,000/-.

Counsel for the petitioner contends that the petitioner had been

attending to the proceedings without default since filing of the complaint in February 2012 till July 2014, the date on which the trial Magistrate resorted to axing process for a single default without appreciating if presence of the complainant on that day was necessary for progress in proceedings or could be dispensed with. It is further argued that the petitioner has already concluded his evidence and the case was fixed for recording statement of the accused under Section 313 Cr.P.C. on 22.7.2014. A serious prejudice would be caused to the petitioner in case the impugned order is not set aside and the petitioner does not get an opportunity to seek adjudication of the matter on its merits. The order passed by the Judicial Magistrate has resulted in miscarriage of justice and thus should not be allowed to sustain.

There is no representation on behalf of the respondent despite service. As a result, there is no counter to averments set up in the petition.

I have heard counsel for the petitioner and perused the records.

The present petition has been preferred by the petitioner by invoking provisions of Section 482 Cr.P.C. when as a matter of fact, the appropriate remedy to be availed in the circumstances of the present case is to file an appeal under Section 378(4)Cr.P.C. as dismissal of the complaint under Section 256 Cr.P.C. amounts to acquittal of the accused. However, the question of maintainability of proceedings under Section 482 Cr.P.C. is no longer res integra in the light of judgment of this Court **Chander Dev vs. Raj Kumar Bhatia** CRM-M- 33896 of 2011 decided on 11.12.2013 wherein reference has been made to judgment of Hon'ble the Supreme Court of India *Punjab State Warehousing Corporation Faridkot v. M/s Shri Durga Ji Traders and others, 2012 (1) R.C.R. (Criminal)*.

The criminal proceedings were almost at its fag end when the same have culminated in its dismissal for want of presence of the petitioner on 22.7.2014. There is nothing on record to suggest that the trial Magistrate adverted to the issue if presence of the complainant-petitioner was necessary for progress in proceedings or the situation did not justify the case being adjourned to some other date awaiting his appearance. Perusal of the impugned order would make it evident that on 22.7.2014, the case was fixed for recording statement of the accused under Section 313 Cr.P.C. and presence of the complainant was not necessary as it is for the court to put all incriminating circumstances to the accused to provide him an opportunity of tendering his explanation thereto.

The Hon'ble Supreme Court of India in *The Associated Cement Company Limited vs. Keshvanand 1998(1) R.C.R.(Criminal) 309* has dealt with the purpose of including a provision like Section 247 in the old Code or 256 in the new Code. On a detailed consideration of the relevant provisions, the Court has held in paras 15 to 17, quoted thus:-

“15.What was the purpose of including a provision like Section 247 in the old code (or section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The Section, therefore, affords a protection to an accused

against such tactics of the complainant. But that does not mean if the complainant is absent, court has a duty to acquit the accused in invitum.

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 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.

17. When considering the situation of this case as on 24-8-1996, from the facts narrated above, we have no manner of doubt that the magistrate should not have resorted to the axing process, particularly since the complainant was already examined as a witness in the case besides examining yet another witness for the prosecution.”

In view of authoritative enunciation of law laid down in the aforesaid extract, it is incumbent upon the trial court to examine whether personal attendance of the complainant is essential on that day for progress in the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. As has been mentioned hereinbefore, the court has not exercised its discretion judicially and proceeded to dismiss the complainant which was being prosecuted by the petitioner without any default and thus deprived him an opportunity to bring the criminal proceedings to its logical end. The impugned order has resulted in miscarriage of justice, therefore, cannot be allowed to sustain.

In view of what has been discussed hereinabove, the petition is allowed, the impugned order is set aside and Criminal Complaint No. 769 of 2012 dated 16.2.2012 is restored on the Board of the trial court at the stage at which the same was dismissed.

(REKHA MITTAL)
JUDGE

24.02.2015

PARAMJIT