

**Sr. No.217
IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.**

**CRR No. 2635 of 2014
Date of Decision: 29.10.2015**

Anoop Kumar

...Petitioner

Vs.

M/s Bedi Enterprises

...Respondent

CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

1. Whether reporters of local papers may be allowed to see the judgment? YES/NO
2. To be referred to the reporters or not? YES/NO
3. Whether the judgment should be reported in the digest? YES/NO

Present: Mr. Harsh Garg, Advocate,
for the petitioner.

None for the respondent.

RAMESHWAR SINGH MALIK, J.

Feeling aggrieved against the impugned order dated 11.07.2014, passed by the learned Additional Sessions Judge, Ludhiana, whereby order dated 01.10.2010 passed by the learned Judicial Magistrate Ist Class, Ludhiana, dismissing the complaint under Section 138 of the Negotiable Instruments Act (for short 'NI Act') filed by respondent-complainant, was set aside, petitioner-accused has approached this Court by way of instant criminal revision petition, for setting aside the impugned order.

Notice of motion was issued.

Learned counsel for the petitioner submits that once the

complaint of the respondent-complainant was dismissed for want of prosecution vide order dated 01.10.2010, no revision petition was maintainable and the learned revisional Court has exceeded its jurisdiction while passing the order dated 11.07.2014. Relying upon the following three judgments in ***Jitender Bajaj Vs. State (U.T.Chandigarh) and others, 2005 (3) R.C.R. (Criminal) 69, Om Parkash Vs. M/s Golden Forest India Ltd. and others 2008 (4) R.C.R.(Criminal) 445 and Purushotam Mantri Vs. Vinod Tandon alias Hari Nath Tandon 2009(1) R.C.R.(Criminal) 442***, in support of his contentions, learned counsel for the petitioner prays for allowing the present revision petition.

None has come present on behalf of the respondent. In fact, on the last date of hearing i.e. 28.07.2015, following order was passed by this Court:

“As per office report dated 25.07.2015, service is complete. However, nobody is present on behalf of the respondent.

In the interest of justice, adjourned to 29.10.2015.”

After hearing learned counsel for the petitioner and going through the record of the case, this Court is of the considered opinion that since the impugned order passed by the revisional Court has been found an order without jurisdiction, the same cannot be sustained and the present petition deserves to be accepted, for the following more than one reasons.

When neither the complainant nor anyone on his behalf appeared in the Court on 01.10.2010, the learned Judicial Magistrate

Ist Class passed the following order:

“Present: None for the complaint.

Neither complainant nor any one on behalf of the complainant has appeared despite complaint repeatedly called since morning. It is already 4.00 PM. This Court has sufficient ground to believe that the complainant is not interested in pursuing the present complainant in any further. Hence, present complaint stand dismissed in default for want of prosecution. File be consigned to the record room after due completion.”

Section 256 Cr.P.C.reads 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 bare reading of the above said provisions of law contained under Section 256 Cr.P.C. and the order passed by the

learned Magistrate would show that the said order would amount to acquittal of the accused-petitioner. Once it is so, the only remedy with the complainant-respondent was to approach this Court by way of a petition under Section 482 Cr.P.C. for getting the said order quashed. No revision was maintainable before the learned Court of Sessions. However, in spite of the fact that the above said three judgments were not only cited but also recorded by the learned Additional Sessions Judge in para 3 of the impugned order, but has miserably failed to follow the law laid down therein, by passing the impugned order dated 11.07.2014 and the same has resulted in miscarriage of justice. Since the impugned order passed by the learned Additional Sessions Judge is not only palpably illegal but the same is also an order without jurisdiction, it cannot be sustained for this reason as well.

It is also pertinent to note here that neither an application for restoration was maintainable before the learned trial Court because it was not having any jurisdiction to review its above said order dated 01.10.2010 nor the said order was revisable because it amounts to acquittal. However, since the learned Additional Sessions Judge fell in serious error of law while passing the impugned order, the same cannot be sustained, for this reason also.

The above said view taken by this Court also finds support from the above said three judgments. The relevant observations made by this Court in para 4 of the ***Om Parkash's Case (supra)***, which can be gainfully followed in the present case reads as under:-

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 Vs. State (U.T.Chandigarh) and others, 2005(3) RCR (Criminal) 69:2005 CrI.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.”

Reverting back to the facts of the present case and respectfully following the law laid down by this Court in the judgments referred to here-in-above, it is unhesitatingly held that since the learned revisional Court has proceeded on a factually incorrect and legally misconceived approach, while passing the impugned order, the same runs counter to law laid down by this Court, hence cannot be sustained.

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that since the impugned order passed by learned Additional Sessions Judge has been found to be patently illegal order, the same cannot be upheld. Consequently, the impugned order dated 11.07.2014, passed by learned Additional Sessions Judge, Ludhiana is, hereby, set aside.

Resultantly, with the above said observations made, present petition stands allowed, however, with no order as to costs.

29.10.2015

vandana

**(RAMESHWAR SINGH MALIK)
JUDGE**