

In the High Court of Punjab and Haryana at Chandigarh

.....

Criminal Appeal No.S-920-SB of 2014 (O&M)

.....

Date of decision:11.1.2016

Rattan Singh Dagar

...Appellant

v.

Nirdesh Sharma alias Nardev Sharma

...Respondent

....

Coram: Hon'ble Mr. Justice Inderjit Singh

.....

Present: Mr. Jagjot Singh, Advocate for Mr. Kunal Dawar, Advocate for the appellant.

None for the respondent.

.....

Inderjit Singh, J.

This appeal has been filed for quashing the impugned order dated 1.6.2012 passed by learned Additional Sessions Judge, Faridabad dismissing the criminal appeal filed against the impugned order 16.3.2011 passed by learned Judicial Magistrate Ist Class, Faridabad, dismissing the complaint of the appellant/complainant filed under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the NI Act') against the accused/respondent on account of non-appearance of complainant/appellant, resulting in acquittal of the accused/respondent.

In this case, notice of motion was issued, but no one has appeared on behalf of the respondent to contest this appeal.

The brief facts of this case are that the complaint was fixed for

16.3.2011 for execution of warrants issued against the respondent, but the appellant could not appear in the Court for the reason that his counsel had wrongly noted the date as 18.3.2011 instead of 16.3.2011. It is because of said fact that neither the complainant/appellant nor his counsel could appear in the complaint as a result of which the complaint was dismissed. The applicant/complainant had been appearing regularly before the trial Court. From the record, it is clear that on 16.3.2011 as per interim order the complainant absented. The accused was arrested and produced on that date and he was released on bail. The presence of the complainant, in no way, was necessary on that date.

This complaint was pending before the learned Judicial Magistrate Ist Class, Faridabad and on one date for the non-appearance of the complainant, this complaint filed under Section 138 of the NI Act has been dismissed for want of prosecution vide the impugned orders.

The learned counsel for the appellant argued that the appellant was appearing in this complaint case and his absence on one of the dates was not intentional. Neither the appellant nor his counsel could appear before the trial Court on 16.3.2011 due to the fact that wrong date was noted i.e. 18.3.2011 instead of 16.3.2011. Learned counsel for the appellant argued that the appellant in these proceedings was regularly appearing in the Court and there was no mala fide intention for not appearing before the trial Court. A perusal of the record also shows that, in no way, by the absence, the complainant/appellant is to be benefitted in this petition nor there is anything on the record to show that there was any mala fide intention on the

part of the complainant/appellant for his absence from the proceedings. The complainant/appellant has given the ground in the appeal that the complainant and his counsel could not appear before the Court due to noting of wrong date. There was no necessity to dismiss the complaint vide impugned orders on that day. The Court has also not considered the fact that earlier the complainant was appearing in this case regularly. The absence of the complainant on one date in the complaint case is no ground to dismiss the complaint.

In the facts and circumstances of the present case, I find that the impugned orders passed by the learned Judicial Magistrate Ist Class, Faridabad, has caused miscarriage of justice. If the impugned order is not set aside, the complainant/ appellant will suffer irreparable loss. It is settled law that rights of the parties should be decided on merit as far as possible. The Court should do substantial justice between the parties and should not go into the technicalities of the law. Where technical consideration and merit or cause of substantial justice are pitted against each other, the cause of merit and substantial justice is to prevail.

Learned counsel for the appellant placed reliance on the judgment of Hon'ble Supreme Court in Punjab State Warehousing Corporation Faridkot v. M/s Sh. Durga Ji Traders and others, 2012 (1) R.C.R. (Cr.) 358, on the point whether petition under Section 482 Cr.P.C. is maintainable. I have gone through this judgment and in para 9 of this judgment, it has been held as under:-

“9. Bearing in mind the afore-stated legal position in regard to

the scope and width of the power of the High Court under Section 482 of the Code, we are of the opinion that the impugned decision is clearly indefensible. As noted above, the High Court has rejected the petition under Section 482 of the Code on the ground of availability of an alternative remedy without considering the seriousness of the nature of the offences and the fact that the Trial Court had dismissed the complaint on a hyper technical ground viz. since the complainant had been appearing in person, despite order dated 16th April 1999, exempting him from personal appearance, the said exemption order became redundant and the complainant should have sought a fresh exemption from personal appearance. We feel that such a view defies any logic. An order of exemption from personal appearance continues to be in force till it is revoked or recalled. We are convinced that in the instant case, rejection of appellant's petition under Section 482 of the Code has resulted in miscarriage of justice. Availability of an alternative remedy of filing an appeal is not an absolute bar in entertaining a petition under Section 482 of the Code. As aforesaid, one of the circumstances envisaged in the said Section, for exercise of jurisdiction by the High Court is to secure the ends of justice. Undoubtedly, the Trial Court had dismissed the complaint on a technical

ground and therefore, interests of justice required the High Court to exercise its jurisdiction to set aside such an order so that the Trial Court could proceed with the trial on merits.”

Learned counsel for the appellant also placed reliance on the judgment of Hon'ble Supreme Court in Mohd. Azeem v. A. Venkatesh and another, (2002) 7 SCC 726, in which it is held that one singular default in appearance on the part of complainant, dismissal of complaint is not proper. Cause shown by the complainant that he wrongly noted the date was not disbelieved and, therefore, it was a valid ground for restoration of the complaint. I have gone through this judgment, which fully applies to the facts of the present cases.

Learned counsel for the appellant also placed reliance on the judgment of Hon'ble Supreme Court in Aseem Shabanli Merchant v. Brij Mehra and another, (2005) 11 SCC 412 on the same point, where it is held that dismissal of the complaint for non-prosecution challenged to by brother of the complainant whether such orders can be recalled, it was held that having regard to the facts and circumstances, interests of justice required that the order of the Magistrate acquitting the accused for non-prosecution, as affirmed by the High Court, deserved to be recalled so that the complaints could be tried on merits. The Hon'ble Supreme Court further held in this case that there is no hard and fast rule for recalling of such orders.

On the same point, learned counsel for the appellant also placed reliance on the judgments of this Court in Narender Parashar v. Jagbir

Singh, 2009 (3) R.C.R. (Cr.) 246; Neh Pal Sharma v. Bijender Singh, 2009 (2) R.C.R. (Cr.) 751 and Purushotam Mantri v. Vinod Tandon alias Hari Nath Tandon, 2009 (1) R.C.R. (Cr.) 442; Om Parkash v. M/s Golden Forest India Ltd., 2008 (4) R.C.R. (Cr.) 445. I have gone through all these judgments, which fully apply to the facts of the present cases.

Therefore, from the above, I find merit in this appeal and the same is allowed. The impugned order passed by the learned Judicial Magistrate Ist Class, Faridabad, dismissing the complaint is set aside. As the impugned order amounts to acquittal as per section 256 Cr.P.C., therefore, appeal before Sessions Court is not maintainable as per Section 378 Cr.P.C.

This complaint is ordered to be restored at the stage from where it was dismissed by the trial Court. The trial Court is directed to proceed further as per law. The parties are directed to appear before the learned Judicial Magistrate Ist Class, Faridabad (trial Court) on 29.1.2016.

January 11, 2016.

(Inderjit Singh)
Judge

hsp