

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH
Sr. No.: 218

CRM-A-1135-MA of 2015 (O & M)
Date of Decision: September 15, 2016

M/s Suman Industries Faridabad

..... Appellant

VERSUS

M/s R.B. Industries and another

..... Respondents

. . .

CORAM: **HON'BLE MR. JUSTICE JASPAL SINGH**

. . .

PRESENT: - Mr. Alok Mittal, Advocate, for the appellant.

Mr. Tanmay Gupta, Advocate for
Mr. Tejpal Singh Dhull, Advocate
for the respondents.

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Jaspal Singh, J

CRM No.21521 of 2015

This is an application under Section 5 of the Limitation Act read with Section 482 Cr.P.C. for condonation of delay of 368 days in filing the application/appeal under Section 378(4) Cr.P.C.

Heard.

It appears that due to some inadvertence or wrong advice of the counsel, an application for restoration of the complaint captioned as “*M/s Suman Industries vs. M/s. R.B. Industries and another*”, which was dismissed in default on 21.04.2014, was filed before the Magistrate which was otherwise not legally maintainable in view of the observations made by the Hon'ble Apex Court in *Adalat Prasad vs. Roop Lal Jindal, 2004(7) SCC 338*, in which it has been held that the criminal Court does not have the power to recall or review its own order. Moreover, the order of

dismissal of the complaint for want of prosecution amounts to acquittal and only an appeal lies before this Court against such an order.

Accordingly, delay of 368 days in filing the present criminal application/appeal under Section 378(4) of the Cr.P.C is condoned.

Application stands disposed of accordingly.

Crl. Misc. No.A-1135-MA of 2015

1. Through the instant appeal, the appellant has challenged the order dated 21.02.2015 passed by the Judicial Magistrate Ist Class, Faridabad, whereby, respondent has been acquitted on the dismissal of complaint in default and denial by trial court to revive the complaint titled as “*M/s Suman Industries vs. M/s. R.B. Industries and another*”, preferred by the appellant under Section 138 of Negotiable Instruments Act, 1881 (for short 'Act').
2. Undisputably, on the basis of the aforesaid complaint preferred by the appellant, respondent was summoned to face trial by the learned Magistrate vide order dated 14.08.2013. Thereafter, when the complaint was listed for securing the presence of respondent, appellant/ complainant could not appear. As a result of his absence on 21.04.2014, complaint was dismissed in default/ want of prosecution. The said order amounts to acquittal of the accused/respondent. However, instead of challenging the said order (i.e. order dated 21.04.2014) before this Court, appellant filed an application for recalling the said order and restoration of the complaint before the Magistrate and that was declined by the Magistrate vide order dated 21.02.2015. Thereafter, the appellant approached this Court.
3. Learned counsel for the respondent did not dispute that application of the petitioner before the trial Magistrate for recalling the order of dismissal of

the complaint by way of default was not maintainable. Accordingly, the said application was rightly dismissed by the learned Magistrate.

4. However, the submission made by learned counsel for the appellant is that this Court, under Section 482 Cr.P.C., 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. To buttress his contention, learned counsel for the appellant has relied upon the pronouncement of this Court made in ***Jitender Bajaj vs. State (UT Chandigarh) and others, 2005(3) RCR (Crl.) 69***, whereby, it was observed as under:-

“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, he 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.”*

5. If the facts and circumstances of the instant case are scrutinized in detail, this Court is of the considered view that it would be too harsh on the appellant to non-suit him merely for his non-appearance on one date. The very purpose and duty of the court is to advance the cause of justice and not to dispense justice with eyes-closed. In the instant case, it appears that after passing of the summoning order, the presence of respondent/accused could not be secured. It was the complainant who has been appearing on each and every date fixed in the case. On one date, he could not appear and his complaint was dismissed which stood resulted into acquittal of accused/respondent. All these facts go to show that it is the complainant/appellant who has been punished as against the respondent who has been avoiding to appear in the trial court to face trial.

6. In view of the facts and circumstances narrated above, this Court finds that non-appearance of appellant/complainant on the date fixed was neither intentional nor willful. It was on account of reason that he mistook the date. Accordingly, order dated 21.04.2016 as well as order dated 21.02.2015 are *set aside*. Resultantly, complaint filed by the appellant/complainant is ordered to be restored to its original number and to proceed with it in accordance with law. Parties through their counsel are directed to appear before the learned Magistrate on 24.10.2016 for further proceedings.

September 15, 2016
avin/m. sharma

(Jaspal Singh)
Judge

Whether Speaking/ Reasoned:

Yes/ No

Whether Reportable:

Yes/ No