

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRM-A-560-MA of 2014
Date of Decision: February 25, 2016**

M/s Devyani Food Industries Ltd ...Petitioner

Versus

M/s Omkar Agencies and another ...Respondents

CORAM: HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present: Mr. Munish Kumar Garg, Advocate
for the petitioner.

FATEH DEEP SINGH, J.

M/s Devyani Food Industries Limited preferred a complaint under Section 138 of Negotiable Instruments Act (for short, 'the Act') against M/s Omkar Agencies and Gopal Arun Kalamdane. The brief allegations of the complainant are that there was business transaction between the complainant and the accused/respondent regarding sale purchase of certain materials which were duly depicted in the records of their company. It is as a consequence of acknowledgement of the outstanding liability accused is alleged to have issued a cheque bearing No.585064 dated 16.10.2012 for a sum of ₹12,171/- drawn on State Bank of India, Pune, Maharashtra. On presentation of the same to its banker by the complainant it stood dishonoured due to insufficient funds. After adopting due process and upon due notice on failure of the accused the complaint was filed in the Court.

The Court examined preliminary evidence and vide orders dated 21.1.2013 accused was summoned for commission of

offence under Section 138 of the Act and when the accused failed to put in appearance on 9.9.2013 bailable warrants against the accused were issued which remained unexecuted leading to issuance of non-bailable warrants for 24.10.2013. It is on this date i.e. 24.10.2013 the impugned orders were passed by the Judicial Magistrate 1st Class, Gurgaon dismissing the complaint for non-prosecution due to absence of the complainant and the same is subject matter of challenge before this Court under Section 482 Cr.P.C.

Heard, learned counsel for the parties. In spite of notice, none has put in appearance on behalf of the respondent. The records of the Court below clearly reflect that on the date when the impugned orders were passed the Court had summoned the accused and, thus, it was the presence of the accused which was being necessitated and, therefore, to the mind of this Court, on that very day when the impugned orders were passed the complainant had no role to play in the advancement of the case. No doubt, by virtue of provisions of Section 203 Cr.P.C. the Magistrate has ample powers to dismiss a complaint for non-prosecution. However, having regard to the fact that on the day when the impugned orders dismissing the complaint in default were passed presence of the accused was necessitated and not that of the complainant and, therefore, passing of the impugned orders has certainly run into an error. Absence of the complainant has not caused any prolonging of the matter and it was the act of the accused. Taking support from the law laid down in **The Associated Cement Co. Ltd. Vs. Keshvanand 1998(1) RCR Criminal 309** since the presence of the complainant on the date when the order was passed was not necessary and that the complainant after filing of complaint on 17.12.2012 has been diligently pursuing the same for almost period of one year do not call for passing of such a harsh order which has

certainly resorted in miscarriage of justice causing immense prejudice to the case of the complainant.

Thus, in the light of these discussions, impugned orders dated 24.10.2013 dismissing the complaint in default are hereby set aside and the complaint is ordered to be restored.

Trial Court is directed to proceed ahead into the complaint at that stage in accordance with law. The present petition stands allowed in those terms.

(FATEH DEEP SINGH)
JUDGE

February 25, 2016
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