

In the High Court of Punjab and Haryana at Chandigarh

.....

Criminal Appeal No.AS-49 of 2016

.....

Date of decision:25.7.2016

Ashish Pandey

...Appellant

v.

Ujjawal Goyal and another

...Respondents

....

Coram: Hon'ble Mr. Justice Inderjit Singh

.....

Present: Mr. Rakesh Dhiman, Advocate for the appellant.

None for the respondents.

.....

Inderjit Singh, J.

This criminal appeal has been filed against the impugned order dated 4.2.2013 passed by learned Judicial Magistrate Ist Class, Gurgaon, vide which the complaint filed by Ashish Pandey against Ujjawal Goyal and Bath Paradise under Sections 138/142 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the NI Act') has been dismissed in default for want of prosecution and the accused have been acquitted of the allegations levelled against them.

Notice of motion was issued in this appeal.

Despite service no one has put in appearance on behalf of the respondents to contest this appeal.

I have heard learned counsel for the appellant and have gone

through the record.

It has been stated in the grounds of appeal that the learned trial Court while passing the order dated 4.2.2013 had grossly erred in law as well as facts in dismissing the complaint for non-prosecution and acquitting the accused for the offences under Sections 138/142 of the NI Act. It has been further stated that the order passed by the learned trial Court is not sustainable in the eyes of law as the same is based upon surmises and conjectures, since on the date of the passing of the impugned order, the presence of the appellant was not at all required for further progress, as the case was fixed for the bailable warrants of the accused/respondents, who did not appear, despite bailable warrants. Thus, the same is liable to be set aside. It has been further prayed that the complaint of the appellant may be restored to its original number, in the interest of justice.

The complaint was pending before the learned Judicial Magistrate Ist Class, Gurgaon and the complainant was appearing in each and every date. On the other hand, the accused/respondents did not put in appearance despite issuance of bailable warrants against them on various dates and ultimately on 16.1.2013, the bailable warrants of the respondent did not receive back either executed or unexecuted. Consequently, the fresh bailable warrants in the sum of ₹5,000/- was issued for 2.2.2013. On 2.2.2013, the appellant went to attend the proceedings, then he came to know that Court could not be held because of instructions from the Hon'ble High Court and the government, being a Saturday. Thereafter, on Monday i.e. 4.2.2013, when the appellant visited the compound of all the Special

Courts dealing under the Act, but could not find his case in the cause list of any of the said Courts. However, next day i.e. on 5.2.2013, the appellant came to know that his complaint has been dismissed in default on account of non-prosecution vide impugned order dated 4.2.2013.

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. He visited the special Courts dealing with these cases, but could not find his case in the cause list of any of the said Courts. 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 complaint case 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. There was no necessity to dismiss the complaint vide impugned order 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 order passed by the learned Judicial Magistrate Ist Class, Gurgaon, has caused miscarriage of justice. If this order is not set aside, the complainant/appellant will suffer irreparable loss. It is settled law that the

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 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 case.

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, Gurgaon, dismissing the complaint is set aside.

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 after giving notice to the parties concerned.

The parties are directed to appear before the trial Court on 10.8.2016.

July 25, 2016.

(Inderjit Singh)
Judge

hsp