

In the High Court of Punjab and Haryana at Chandigarh

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Criminal Appeal No.AS-18 of 2016

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Date of decision:2.2.2016

Shri Om

...Appellant

v.

Baljinder Singh

...Respondent

....

Coram: Hon'ble Mr. Justice Inderjit Singh

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Present: Mr. Prashant Bansal, Advocate for the appellant.

Mr. Aftab Singh Khara, Legal Aid Counsel for the respondent.

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Inderjit Singh, J.

This appeal has arisen out of the acceptance of Criminal Misc. No.A-1568-MA of 2014 granting leave to file appeal vide order passed today by this Court.

Learned counsel for the parties agree that the appeal may be heard today itself. I have heard learned counsel for the parties in the appeal.

This criminal appeal has been filed against the impugned order dated 22.07.2014 passed by learned Judicial Magistrate Ist Class, Patiala, vide which the complaint filed by Shri Om against Baljinder Sood under Section 138 of the Negotiable Instruments (Misc. Provision and Amendment) Act, 2002 (hereinafter referred to as 'the NI Act') has been dismissed in default for want of prosecution and the accused has been

acquitted of the allegations levelled against him.

It has been stated in the grounds of appeal that the learned trial Court while passing the order dated 22.07.2014 had grossly erred in law as well as facts in dismissing the complaint for non-prosecution and acquitting the accused for the offence under Section 138 of the NI Act. It has been further stated that while dismissing the complaint for non-prosecution and acquitting the accused, the learned trial Court recorded the findings contrary to the material on record, hence the order is not sustainable both in law as well as on facts. It has been submitted that the complainant had been appearing before the learned trial Court mostly on each and every date of hearing. The complaint was fixed on 5.7.2014 for cross-examination of CW-1. The respondent through his counsel on the said date had sought the adjournment on lame excuse and the learned trial Court had adjourned the complaint for 22.7.2014 for cross-examination of CW-1 and for complainant's evidence, which was dismissed on that day for non-prosecution as the complainant could not appear as he was suffering from vomiting and other disease and was admitted in the hospital from 20.7.2014 to 24.7.2014 and remained under the treatment of Dr. Sudip Singh, Amar Hospital, Patiala. Therefore, the impugned order is liable to be quashed/set aside as he (complainant) was unable to attend the Court on that day. It has been further prayed that the complaint of the appellant may be restored to its original number, in the interest of justice.

In this case, notice of motion was issued and the learned counsel for the respondent has put in appearance and contested this appeal.

The complaint was pending before the learned Judicial Magistrate Ist Class, Patiala for cross-examination of CW-1 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 order.

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-complainant nor his counsel could appear before the trial Court on 22.7.2014 due to the fact that he was admitted in the hospital due to his ill health. 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 that the complainant and his counsel could not appear before the Court. 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, Patiala, 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 all this appeal and the same is allowed. The impugned order passed by the learned Judicial Magistrate Ist Class, Patiala, 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 26.2.2016.

February 2, 2016.

(Inderjit Singh)
Judge

hsp