

In the High Court of Punjab and Haryana at Chandigarh

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Criminal Appeal No.AS-88 of 2016

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Date of decision:6.4.2017

Nitesh Kumar

...Appellant

v.

Sonu alias Sunil Kumar

...Respondent

....

Coram: Hon'ble Mr. Justice Inderjit Singh

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Present: Mr. Atul Yadav, Advocate for the appellant.

None for the respondent.

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Inderjit Singh, J.

This appeal has arisen out of the acceptance of Criminal Misc. No.A-456-MA of 2015 granting leave to file appeal vide order passed today by this Court.

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

This criminal appeal has been filed against the impugned order dated 10.11.2014 passed by learned Judicial Magistrate Ist Class, Gurgaon, vide which the complaint filed by Nitesh Kumar against Sonu alias Sunil Kumar under Section 138 of the Negotiable Instruments Act, 1881 (as amended upto date) (hereinafter referred to as 'the NI Act') has been

dismissed in default for want of prosecution.

It has been stated in the grounds of appeal that the learned trial Court has exceeded its jurisdiction not vested in it while passing the impugned order dated 10.11.2014 which is illegal and erroneous and hence liable to be set aside. It has been stated that there is no provision under the Cr.P.C. to dismiss the complaint for want of prosecution. The trial Court could have decided the matter on merit and pass appropriate orders. It has been prayed that the complaint be restored and trial Court be directed to decide the same on merit within some short stipulated period.

In this case, notice of motion was issued but no one has put in appearance on behalf of the respondent.

Learned counsel for the appellant argued that on the basis of preliminary evidence led by the complainant/appellant, the accused-respondent was summoned by the learned trial Court. Unfortunately, the Clerk of counsel for the appellant noted wrong date i.e. 18.11.2014 instead of 10.11.2014 and he also informed the appellant wrong date. Due to this reason, neither the appellant nor his counsel appeared before the trial Court on 10.11.2014 and due to non-appearance, the learned trial Court has dismissed the complaint in default for want of prosecution, vide order 10.11.2014. Learned counsel for the appellant contended that the non-appearance of the appellant or his counsel was neither intentional nor wilful but the same has occurred as the Clerk of the counsel noted wrong date.

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, 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

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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 11.5.2017.

April 6, 2017.

(Inderjit Singh)
Judge

hsp

NOTE:	Whether speaking/reasoned:	Yes
	Whether reportable:	No