

In the High Court of Punjab and Haryana at Chandigarh

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Criminal Appeal No.AS-23 of 2017

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Date of decision:2.3.2017

M/s Ramesh Vegetables Co.

...Appellant

v.

Hari Kishan Bhatia

...Respondent

....

Coram: Hon'ble Mr. Justice Inderjit Singh

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Present: Ms. Rakhi Sharma, Advocate for the appellant.

Mr. S.K. Mahajan, Advocate for the respondent.

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Inderjit Singh, J.

This appeal has arisen out of the acceptance of Criminal Misc. No.A-1870-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 13.2.2013 passed by learned Judicial Magistrate Ist Class, Amritsar, vide which the complaint filed by M/s Ramesh Vegetables Co. through Ramesh Kumar Dhall-proprietor under Section 138 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 has been

acquitted of the allegations levelled against him.

It has been stated in the grounds of appeal that the learned trial Court vide impugned order dated 13.2.2013 had wrongly acquitted the respondent and the complaint filed by the appellant/ complainant under Section 138 of the NI Act has been dismissed in default for want of prosecution. It has been further stated that the trial Court has dismissed the complaint as the appellant failed to appear before the Lower Court on 13.2.2013. It is relevant to mention over here in this regard that the appellant/complainant had been regularly appearing in the aforesaid case and receiving part payments from the respondent as agreed between the parties and the complainant appeared before the learned trial Court lastly on 21.11.2012 and received the payment from the respondent. Thereafter, the case was adjourned to 21.12.2012, but on the said date the complainant could not appear before the learned trial Court due to some unavoidable circumstances, but in this regard he intimated his previous counsel, who assured him to manage to seek adjournment by moving an application for exemption from personal appearance. The counsel informed him about the next date of hearing i.e. 14.2.2013. On 14.2.2013, the complainant appeared before the learned trial Court in the aforesaid case, but the case was not listed in the cause list and upon being enquired, it revealed that on 21.12.2012, the case was adjourned to 13.2.2013 instead of 14.2.2013 and on 13.2.2013 the aforesaid case was dismissed in default. It has been further stated that non-appearance of the complainant before the trial Court was neither willful nor deliberate, but, due to the circumstances beyond his

control. It has been submitted that the complainant had been appearing before the learned trial Court mostly on each and every date of hearing. Therefore, the impugned order is liable to be quashed/set aside as he (complainant) was unable to attend the Court on that day due to the above facts. 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, Amritsar and on two dates 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 two dates was not intentional. Neither the appellant-complainant nor his counsel could appear before the trial Court on 13.2.2013 due to the fact that his counsel intimated wrong date i.e. 14.2.2013 instead of 13.2.2013 as the complainant could not appear on 21.12.2012 and he informed his counsel and requested to seek exemption by moving application for exemption. 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 grounds 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. In the impugned order the trial Court has mentioned that despite issuance of notice to the complainant and despite awaiting appearance of the complainant, none has turned up on his behalf. It has been mentioned that a perusal of the file shows that the complainant was not appearing for the last two consecutive hearings and even on that day none has turned up on his behalf. It has been mentioned that the parties had reached at a settlement and as per the compromise, the complainant was receiving the payment from the accused. The record of the lower Court shows that only on one date prior to the passing of the impugned order the complainant did not appear. On that day, it has been ordered that notice be issued to the complainant. From the record, I find that there is nothing to show that the complainant was served for 13.2.2013 when the complaint was dismissed. The absence of the complainant on one/two dates 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, Amritsar, 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, Amritsar, 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 31.3.2017.

March 2, 2017.

(Inderjit Singh)
Judge

hsp

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