

In the High Court of Punjab and Haryana at Chandigarh

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Criminal Appeal No.AS-29 of 2017

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Date of decision:15.3.2017

M.V. Electrosystems Private Limited

...Appellant

v.

M/s Xenitis Infotech Limited and others

...Respondents

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Coram: Hon'ble Mr. Justice Inderjit Singh

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Present: Mr. Kunal Dawar, Advocate for the appellant.

Mr. Gitish Bhardwaj, Advocate for respondent No.1.

Mr. A.K. Singh Goyat, Advocate for respondents No.2 and 3.

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Inderjit Singh, J.

This appeal has arisen out of the acceptance of Criminal Misc. No.A-1540-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 3.6.2014 passed by learned Judicial Magistrate Ist Class, Faridabad, vide which the complaint filed by M.V. Electrosystems Private Limited

against M/s Xenitis Infotech Limited and others under Section 138 read with Sections 141 & 142 of the Negotiable Instruments Act, 1881 (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 while passing the order dated 3.6.2014 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 read with Sections 141 & 142 of the NI Act. It has been further stated that for not taking dasti summons the complaint could not have been dismissed for non-prosecution resulting in acquittal of respondents under Section 256(1) of Cr.P.C., reading thereof would show that if the complainant is absent the Magistrate can acquit the accused on the day appointed for appearance of the accused if summons had been issued. Thus, the proper course would have been to dismiss the complaint under Section 204(4) Cr.P.C. and not to acquit the respondents under Section 256(1) Cr.P.C. It has been 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.

It has been mentioned in the impugned order that vide order dated 17.4.2014, the complainant had been specifically directed to take dasti notice for accused. Dasti summons were not taken by the complainant.

However, notice was issued through registered cover. Mandatory period of 30 days has not expired. It was third last opportunity. It appears that no serious efforts in order to effect service upon the accused were taken by the complainant. It has been observed that no justifiable ground exists to grant any further adjournment for the said purpose and the complaint was dismissed in default for want of prosecution.

It has been stated in the grounds of appeal that the impugned order is liable to be quashed/set aside as the complaint could not have been dismissed for not taking the dasti notice for accused. 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 respondents has put in appearance and contested this appeal.

The complaint was pending before the learned Judicial Magistrate Ist Class, Faridabad, after the issuance of dasti notice to be served upon the accused, but the appellant had not taken the dasti summons, therefore, this complaint filed under Section 138 read with Sections 141 and 142 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 on account of not taking the summons, there was no mala fide intention. A perusal of the record also shows that, in no way, by not taking the dasti summons, 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 act. The complainant/appellant has given the ground in the appeal that the complainant sent notices through registered cover, but inadvertently failed to take dasti notices. However, the appellant/complainant had placed on record the postal receipts dated 17.5.2014 on 3.6.2014, but on 3.6.2014 the learned trial Court observed that no serious efforts were made for effecting service upon the respondents, hence the complaint was dismissed. It has been mentioned that there is a procedure provided under the Cr.P.C. for issuance of bailable warrants and non-bailable warrants, in case the service of accused cannot be effected through ordinary notice, which was available to the learned trial Court. There was no necessity to dismiss the complaint vide the impugned order on that day. The Court has also not considered the fact that the respondents were fully aware about the pendency of the complaint against them and on the same date when the complaint was dismissed, copy of the order was applied for by them through their Advocate.

In the facts and circumstances of the present case, I find that the impugned order passed by the learned Judicial Magistrate Ist Class, Faridabad, 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, Faridabad, 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 7.4.2017.

March 15, 2017.

(Inderjit Singh)
Judge

hsp

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