

In the High Court of Punjab and Haryana at Chandigarh

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Criminal Appeal No.AS-61 of 2017

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Date of decision:5.5.2017

Sandeep

...Appellant

v.

Rajinder Kumar

...Respondent

....

Coram: Hon'ble Mr. Justice Inderjit Singh

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Present: Mr. Sanjiv Gupta, Advocate for the appellant.

Ms. Divya Godara, Advocate for the respondent.

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Inderjit Singh, J.

This appeal has arisen out of the acceptance of Criminal Misc. No.A-670-MA of 2013 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 16.7.2013 passed by learned Judicial Magistrate Ist Class, Sirsa, vide which the complaint filed by Rai Singh against Rajinder Kumar under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the NI Act') has been dismissed in default.

It has been stated in the grounds of appeal that the impugned

order dated 16.7.2013 passed by learned Judicial Magistrate Ist Class, Sirsa, vide which the complaint was dismissed in default, is liable to be set aside as it is result of manifest illegalities and irregularities and as such, impugned order is liable to be set aside. It has been mentioned that unfortunately, father of the appellant – Rai Singh-complainant, died on 11.7.2013, copy of death certificate is annexed with the appeal as Annexure-A.2. The complaint was dismissed in default because nobody apprized the Court regarding the death of the complainant-Rai Singh. It is worthwhile to mention here that Smt. Sukirti, learned Judicial Magistrate Ist Class, Sirsa, was on maternity leave from 22.4.2013 to 18.10.2013. In that background, file was put up before the learned District & Sessions Judge, Sirsa and was entrusted to Judicial Magistrate Ist Class, Sirsa and on 16.7.2013, complaint was dismissed as nobody was present on behalf of the complainant, due to his death. As the complainant died on 11.7.2013, the complaint could not have been dismissed in default. Therefore, the impugned order is liable to be quashed/set aside as the appellant being legal representative of deceased Rai Singh 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, Sirsa and on one date for the non-appearance of the complainant/his legal representative, this complaint filed under Section 138

of the NI Act has been dismissed in default vide the impugned order.

The learned counsel for the appellant argued that the father of the appellant (main complainant) was appearing in this complaint case and the absence of the appellant, as his father died during the pendency of the complaint, on one of the dates, was not intentional. Neither the appellant nor his counsel could appear before the trial Court on 16.7.2013 due to the fact that the father of the appellant died.

A perusal of the record also shows that, in no way, by the absence, the 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 appellant for his absence from the proceedings. The 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, Sirsa, 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, Sirsa, 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 26.5.2017.

May 5, 2017.

(Inderjit Singh)
Judge

hsp

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