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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.L.P. 475/2016

KNS CERAMIC WORLD

..... Petitioner

Through: Mr. Hitesh Kumar Bhardwaj,
Advocate.

versus

STATE & ANR

..... Respondents

Through: Mr. Mukesh Kumar, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER

14.02.2017

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Though notice was directed to be issued to respondent No.2 vide order dated 07.09.2016 and the petitioner also filed the process fee, service report is awaited.

Learned counsel for the petitioner has brought to the attention of this Court a judgment of this Court in *Arun Kumar Sharma Vs. State & Others*, 2012 (4) JCC 302. Learned counsel, by placing reliance on this decision, submits that since the complaint preferred by the petitioner has been dismissed by the impugned order on account of the default of the petitioner in not appearing before the Court on 30.05.2016, even if this Court were to

find merit in this petition and allow the same by setting aside the order dated 30.05.2016, the same would not cause any prejudice to the respondent as the impugned order dated 30.05.2016 has not been passed on merits, and this Court while setting aside the order would also not be dealing with the merits of the case, and thus, it is not imperative for this Court to issue notice to the respondent in the present petition.

Learned counsel further submits that in the present case, though the respondent had been summoned by the learned Magistrate vide order dated 27.01.2016, and steps were taken for issuance of summons to the respondent on one occasion, the accused had not been served with the summons, and consequently, fresh steps were directed to be taken vide order dated 29.03.2016. However, steps were not taken on the second occasion and the complaint was dismissed in default on 30.05.2016.

In **Arun Kumar Sharma** (supra), this Court, inter alia, observed as follows:

"1. Despite a pass over; none has appeared for respondent no.2. Accordingly, this Court has no other option but to proceed ahead with the matter. It is pertinent to mention that a Division Bench of this Court in the case of Hindustan Domestic Oil and Natural Gas Co. (Bombay) Ltd. and Ors. Vs. State and Anr., Crl. M.C. 1737/2011 (reported in 2012 (4) JCC 2310) decided on 3rd August, 2012 has held that in revision notice under Section 401(2) Cr.P.C. is not mandatory to the respondent in case where revision has been filed challenging the order of dismissal on account of default and for non-prosecution. The relevant portion of Hindustan Domestic Oil and Natural Gas Co. (Bombay) Ltd. and Ors. (supra) is reproduced hereinbelow:--

21. The decision of Delhi High Court in J.K. International (supra) is clearly distinguishable. In

the said case, the complaint was dismissed in default and for non-prosecution as the complainant was not present and the process fee had not been paid. In said circumstances, it was held that Section 401(2) would not be applicable and no notice was required to be issued. An order dismissing the complaint for non-prosecution or in default, which is made the subject matter of the revision, cannot be equated with "revision petitions" that are filed on substantive grounds or touch on the merits. Courts have recognized difference between orders of this nature which are procedural and substantive orders. [See *Grindlays Hank Ltd. vs. Central Government Industrial Tribunal and Ors.* 1980 (Supp) SCC 420], which draws distinction between procedural and substantive review. The order dismissing the complaint for default or non-prosecution does not touch upon the factual or legal merits of the complaint. The said order is a reflection on or about the conduct of the complainant in the proceedings before the court and the opinion formed by the court about the said conduct. Such orders if they do not reflect and take into consideration the merits of the case or the complaint will not require notice to the opposite side when examined in a revision petition. Such orders are not prejudicial to the other side as they do not reflect and take into consideration merits and demerits of the allegations. When a revision petition is filed against an order dismissing a complaint for non-prosecution or in default, and the same is allowed, it is not an order that causes prejudice to the opposite side, if there is no application of mind or reflection on merits whatsoever. This distinction and aspect has to be kept in mind.

2. Keeping in view the aforesaid judgment, in fact, no notice is

required to be issued to respondents. However, it is pertinent to mention that in the present case respondent-company has already stand served."

Consequently, service of notice in the present petition to the respondent is dispensed with.

Leave granted.

Crl. Appeal No. /69 /2017 (to be registered and numbered) & Crl. M.A. No.13946/2016

Let the appeal be registered and numbered.

The appellant has preferred the present appeal, as noticed above, with application for condonation of delay of 6 days in filing the same vide Crl. M.A. No.13946/2016 to assail the order dated 30.05.2016 dismissing the appellant's complaint for default on 30.05.2016 passed by the learned ACMM (Shahdara) in the appellant's complaint being CC No.762/2015 preferred by the appellant under Section 138 of the NI Act. The delay of 6 days has been explained by the petitioner by stating that due to some misunderstanding, the file of the case was kept with other running files of the same petitioner and was not traceable, though the leave petition was ready for being instituted within the stipulated period. The application is supported by the affidavit of Sh. Shanti Lal Porwal, the partner of the appellant. The delay being only six days, and on account of the fact that the same has been explained satisfactorily, the same is condoned.

A perusal of the order sheets recorded by the learned Magistrate shows that the appellant was diligent in pursuing the complaint, since the appellant even took steps for issuance of summons to the respondent in terms of the order dated 27.01.2016. The explanation furnished by the

appellant for non-appearance before the learned Magistrate on 30.05.2016 is also highly plausible. It is pointed out that the appellant had preferred two complaints under Section 138 simultaneously being CC No.764/2015 and CC No.762/2015. The appellant points out that both these complaints were listed before the same Court and were taken up simultaneously on each and every date. In CC No.764/2015, when the case was taken up on 29.03.2016, the date was given as 31.05.2016. The appellant assumed that the date in CC No.762/2015 would also be the same. However, it appears that on account of a typographical error, the same was recorded as 30.05.2016. The appellant has also placed on record the photocopy of the case diary maintained by the counsel in support of this submission. The explanation furnished by the appellant appears to be completely plausible.

In view of the aforesaid, the impugned order dated 30.05.2016 dismissing the petitioner's complaint case No.762/2015 is set aside and the complaint is restored to its original number. The said complaint be listed before the Trial Court on 07.03.2017. The case shall now proceed from the stage of issuance of summons to the respondent.



VIPIN SANGHI, J

FEBRUARY 14, 2017

B.S. Rohella