

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

CRA-AS-60-2018
(arising out of CRM-A-273-MA-2016)
Date of decision: 08.08.2018

Ravinder Singh

...Applicant/Appellant

Versus

Abhey Kumar Singh

...Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present:- Mr. Manish Soni, Advocate
for the applicant-appellant.

None for the respondent.

ARVIND SINGH SANGWAN, J. (Oral)

CRM-A-273-MA-2016

This is an application, filed under Section 378(4) of the Code of Criminal Procedure, seeking leave to appeal against the judgment dated 22.09.2015, passed by the Judicial Magistrate First Class, Gurugram, vide which, the respondent-accused has been acquitted of charges under Sections 138, 141 and 142 of the Negotiable Instruments Act, 1881 (*for short 'N.I. Act'*), dismissing the complaint, filed by the petitioner-complainant, for non-prosecution.

As per Office report, service upon the respondent-accused has been effected by way of publication in a Hindi newspaper, namely *Jyoti Darpan* dated 07.07.2018. However, there is no representation on his behalf.

For the reasons stated in the application, the same is allowed.

Leave to appeal granted.

On the direction of the Court, Office has assigned appeal number CRA-AS-60-2018 to the present case.

CRA-AS-60-2016

Brief facts of the case are that the appellant had filed a criminal complaint under Sections 138, 141 and 142 of the N.I. Act against respondent Abhey Kumar Singh with the allegations that he had obtained a loan of ₹11,50,000/- in the month of October, 2009 for his business and personal use and to discharge his liabilities, respondent-accused issued two cheques; one amounting to ₹6,00,000/- and the another amounting to ₹5,50,000/-; both dated 11.11.2009. However, on presentation of the said cheques to the bank, the same were returned with the remarks '*insufficient funds*', vide return memo dated 21.01.2010. The appellant, thereafter, served a legal notice upon respondent-accused and having failed to respond to the legal notice, the appellant filed the aforesaid complaint before the trial Court.

Learned counsel for the appellant has submitted that vide order dated 17.02.2010, the respondent-accused was summoned by the trial Court, however, he failed to appear before the trial Court and consequently, he was declared a proclaimed offender. Thereafter, the respondent-accused appeared before the trial Court on 05.12.2012 and while the case was fixed for the evidence of the appellant-complainant on 22.09.2015, the same was dismissed for non-prosecution as the appellant or his counsel could not appear on that date.

Learned counsel for the appellant has further submitted that on the said date, even the respondent-accused was not present and only counsel for the respondent-accused was present at the time when the case was taken

up by the trial Court as an application seeking exemption of personal appearance of the respondent-accused was filed on that date and no substantive proceedings were to take place before the trial Court on that date. Learned counsel for the appellant has relied upon a judgment rendered in ***Purshotam Mantri vs. Vinod Tandon alias Hari Nath Tandon, 2009 (1) R.C.R. (Criminal) 442***, wherein, in similar circumstances, a co-ordinate Bench of this Court has held as under:

“6. Learned counsel for the petitioner did not dispute the application filed by the petitioner before the Court below for recalling the order was not maintainable and accordingly the same was rightly dismissed by the Court below. However, submission is this Court under Section 482 of the Code can certainly direct restoration of the complaint, which was dismissed in default if sufficient reason is found for his non-appearance on the date fixed. For the purpose he has relied upon the observations made by this Court in ***Jitender Bajaj v. State (U.T. Chandigarh) and others, 2005 (3) RCR (Cri.) 69: 2005 CrL.L.J. 3136 (P&H)***, which are reproduced below:

“.....When the Magistrate, in a summon case, has dismissed the complaint and acquitted the accused due to absence of the complainant on the day of hearing, he cannot later on restore the complaint and set aside the order of acquittal, even if the complainant shows very good reasons for his failure to be present on the day of dismissal of the complaint. In such situation, the only remedy available with the complainant is to file appeal or revision against such order or petition under Section 482 of the Code before this Court for setting aside the said order of dismissal of the complaint and acquittal of the accused on the ground that in the given facts and circumstances, the dismissal of the complaint and

acquittal of the accused was not justified or there were sufficient reasons for non-appearance of the complainant before the Court on the date fixed, or the Magistrate has not properly exercised his discretion while not adjourning the complaint and dismissing the same.

7. If the facts of the present case are examined, it would be too harsh on the petitioner to non-suit him merely for his non-appearance on one date. The Courts are not to dispense justice with closed eyes. Here is a case where the petitioner filed three complaints against respondent but was not able to serve him as he is based in Kolkata. He could not even find details of his property after the respondent was declared as proclaimed offender. However, merely because of his non-appearance on one date, his complaints were dismissed. The net effect of the entire proceedings is that it is the petitioner/complainant who has been punished as against respondent, who had been successfully evading service of summons and appearance before the Court to face trial.

8. In the above factual matrix, I find that the non-appearance of the petitioner/complainant on the date fixed was not intentional accordingly the order dated January 23, 2002 passed by Additional Chief Judicial Magistrate, Sirsa is set aside and the complaint filed by the petitioner is restored to its original number. The petitioner is directed to appear before the Court below on February 29, 2008 for further proceedings.

9. Accordingly, the petitions are allowed.”

Learned counsel for the appellant has further submitted that even in the present case, for a single default of the appellant-complainant, the complaint was dismissed by the trial Court for non-prosecution despite the fact that on the said date, no evidence could be recorded as the respondent-accused had moved an application for exemption of his personal

appearance before the Court.

The respondent-accused has failed to appear before this Court despite issuance of notice to the respondent as well as publication made in a Hindi newspaper, namely *Jyoti Darpan*, dated 07.07.2018.

Since there is no representation on behalf of the respondent-accused and a perusal of the record shows that the trial Court, before passing the impugned order, has neither issued any notice to the counsel for the appellant nor has it taken into consideration the fact that on account an application, having been moved by the respondent-accused seeking exemption of his personal appearance, the evidence of the appellant-complainant could not have been recorded on that date.

In view of the above, the present appeal is allowed and the impugned judgment dated 22.09.2015, passed by the trial Court dismissing the complaint of the appellant for non-prosecution, is set aside. Consequently, the complaint filed by the appellant under Sections 138, 141 and 142 of the N. I. Act is restored back to its original number for its decision on merits. The appellant-complainant is directed to appear before the trial Court on 07.09.2018.

The trial Court is directed to proceed with the matter from the stage where it was dismissed, in accordance with law.

August 08, 2018

Waseem Ansari

**(ARVIND SINGH SANGWAN)
JUDGE**

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No