

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Sr.No.114

CRA-AS-5979 of 2018
(arising out of CRM-A-2232-MA-2016)
Date of Decision:18.12.2018

Suresh Kumar

....appellant

Versus

Radhey Shyam

.....respondent

CORAM: HON'BLE MR.JUSTICE ARVIND SINGH SANGWAN

Present: Mr.Rajesh Lamba, Advocate
for the appellant

Mr.Jasmer Singh Rozera, Advocate
for the respondent

ARVIND SINGH SANGWAN, J. (ORAL):

CRM-A-2232-MA-2016

This is an application, filed under Section 378(4) of the Code of Criminal Procedure, seeking leave to appeal against the order dated 29.09.2016, passed by the Judicial Magistrate First Class, Faridabad, vide which, the respondent-accused has been acquitted of charges under Section 138 of the Negotiable Instruments Act, 1881 (*for short 'N.I. Act'*), dismissing the complaint, filed by the petitioner/complainant, for non-prosecution.

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-5979 of 2018 to the present case.

CRA-AS-5979 of 2018

Prayer in this appeal is to set aside the order dated 29.09.2016 passed by the Judicial Magistrate First Class, Faridabad, vide which the complaint filed by the appellant under Section 138 of the N.I. Act, was dismissed in default on account of non-appearance of the complainant and his counsel.

This appeal is pending since 2016 and the service is complete.

Brief facts of the case are that the appellant had filed a criminal complaint under Section 138 of N.I. Act against respondent Radhey Shyam, regarding a cheque dated 15.01.2015, amounting to Rs.50,000/-, which was issued by the respondent and was dishonoured by the bank. After the summoning of the respondent, the case was fixed for 29.09.2016, when, despite the second call, neither the appellant/complainant nor his counsel appeared and therefore, the case was dismissed for non-prosecution.

Learned counsel for the appellant submits that on account of unavoidable circumstances, both his counsel and the appellant himself could not appear before the trial Court.

This fact is not disputed by learned counsel for the respondent.

It has been held by the Hon'ble Supreme Court in **2002(7) SCC 726, Mohd.Azeem vs. A.Venkatesh and another**, that in case a complaint under Section 138 of the N.I. Act is dismissed on account of a single default of the complainant, bona fide ground given by the complainant for his non-appearance should not be disbelieved.

It is also held by this Court in **2009(1) RCR (Criminal) 442,**

Purushotam Mantri vs. Vinod Tandon @ Hari Nath Tandon, that in case of dismiss in default of a complaint under Section 138 of the N.I.Act, it will be too harsh for the complainant to non-suit him merely for his non-appearance on one date and the complaint was restored.

Learned counsel appearing for the complainant could not dispute the factual position that it was a single default on which the complainant was absent and the complaint was dismissed for non-prosecution.

After hearing learned counsel for the parties, I find merit in the present appeal. Considering the ratio of law laid down by the Hon'ble Supreme Court as well as this Court in *Mohd.Azeem' case (supra)* and *Purushotam Mantri's case (supra)*, the present appeal is allowed and the impugned order dated 29.09.2016 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 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/successor Court on 15.01.2019. The trial Court is directed to proceed with the matter from the stage where it was dismissed, in accordance with law.

(ARVIND SINGH SANGWAN)
JUDGE

18.12.2018

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Whether speaking/reasoned
Whether reportable-

Yes/No.
Yes/No