

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

105

**CRA-AS-119-2017
Date of decision: 03.12.2019**

Vikram Singh

.....Petitioner

Versus

Naveen Siwatch

.....Respondent

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present : Mr. Divay Sarup, Advocate for the appellant.

Mr. Jintender Sehrawat, Advocate for the respondent.

ARUN KUMAR TYAGI, J (ORAL)

The appellant has filed the present appeal against order dated 13.10.2016 passed by the Judicial Magistrate Ist Class, Hisar in Complaint Case No.1808-II of 2015 titled 'Vikram Singh Vs. Naveen Siwatch' filed under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the N.I. Act') whereby the above-said complaint was dismissed due to non-appearance of the appellant/complainant under Section 256 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') and the respondent-accused was acquitted.

Briefly stated the facts giving rise to the filing of the appeal are that appellant/complainant filed above-said complaint on the averments that the respondent/accused issued Cheque No.031411 dated 17.04.2013 for Rs.6,50,000/- drawn on HDFC Bank, Gurugram in discharge of subsisting liability under the friendly loan taken in February, 2013 but on presentation the said cheque was dishonoured with remarks 'Funds Insufficient' and 'Account Closed'. Despite service

of notice the respondent/accused did not pay the amount of the cheque within the prescribed period. Preliminary evidence of the complainant was recorded and thereupon respondent/accused was summoned. Notice of acquisition was given and evidence of the appellant/complainant was recorded. Thereafter, statement of the respondent/accused under Section 313 of the Cr.P.C. was recorded wherein the accused denied the commission of alleged offence. Respondent/accused filed application for comparison of his handwriting. Reply to the application was filed by the appellant/complainant. While the case was fixed for arguments on the above-said application, the appellant/complainant absented on which the complaint was dismissed for non-prosecution as mentioned above.

Feeling aggrieved from the same, the complainant has filed present appeal.

I have heard learned Counsel for the parties and have perused the requisitioned Lower Court Record.

Learned Counsel for the appellant has argued that the appellant/complainant had been regularly appearing in his complaint case and absented just on one date due to noting down of wrong date of hearing. Dismissal of his complaint and acquittal of the respondent/accused was not proper and justified. Therefore, the appeal may be allowed and the impugned order may be set aside.

On the other hand, learned Counsel for the respondent has submitted that the complaint was rightly dismissed on non-appearance of the appellant/complainant which was willful/deliberate. The impugned order does not suffer from any illegality. Therefore, the

appeal may be dismissed.

Section 256 of the Cr.P.C., which provides for the consequence of non-appearance or death of complainant, reads as under:-

“256. Non-appearance or death of complainant.—

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may, dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.”

(emphasis supplied)

In ***M/S Steel Strips Ltd. Chandigarh Vs. M/S Jyoti Mechanical Movements : 2000 (1) RCR (Criminal) 271*** where complaint under Section 138 of the N.I. Act was dismissed in default for non-appearance of the complainant, the Coordinate Bench of this Court interpreted Section 256 of the Cr.P.C. and held that it was imperative upon Magistrate to form his opinion by taking care of the matter as to whether it was appropriate to dismiss the complaint. In that

case the accused had not appeared inspite of summons issued by the Court and nothing was required to be done by the complainant and therefore, the order of dismissal of complaint was set aside. In that Judgment Coordinate Bench of this Court observed as under:-

“4. Proviso added to Section 256 Criminal Procedure Code, 1973 further provides that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of the opinion that personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. It is, therefore, clear that when the summons had been issued in the complaint, then it is obvious that the Magistrate has to take care as to whether in the facts it would be appropriate to dismiss the complaint or to acquit the accused or to adjourn the case to some other date. The real test in such like matters is always good faith. It would necessarily imply as to whether the complainant was absent for any good reason or not.”

In ***Monika Jindal and others vs. Paradeep Khanna and others : 2006 (1) Recent Criminal Report 938*** where complaint under Section 138 of the Negotiable Instruments Act, 1881 fixed for arguments was dismissed in default, it was held by the Coordinate Bench of this Court that dismissal in default was unjustified.

The Judicial Magistrate while acting under Section 256 of the Cr.P.C has to take into account that the powers vested have to be exercised in the interest of justice. The Magistrate has been specifically empowered to dispense with the personal attendance of the complaint and proceed with the case and the efforts of the trial Magistrate should

be to dispose of cases on merits and substantial criminal justice should be preferred, as against technical justice of default orders. For absence of complainant on one occasion, the complaint should not be dismissed unless, the Court is of the opinion that the complainant has been trying to protract the matter to harass the accused, unnecessarily or deliberately, mala fide or with ulterior motive and the like. It may be added here that after the complaint is dismissed in default, the court becomes "functus officio" and the Judicial Magistrate has no jurisdiction to recall his order and restore the complaint. The prosecution of a private complaint for an offence under section 138 of the N.I. Act also differs from the prosecution of private complaint in respect of other offences under the Indian Penal Code, 1860 and other enactments as in case of complaint for an offence under Section 138 of the N.I. Act there is no remedy available to the complainant to file a second complaint when the first complaint is dismissed in default in view of the limitations prescribed and the only remedy available to the complainant is to file a revision or appeal, as the case may be.

In the present case, evidence of the appellant/complainant had been recorded and even statement of respondent/accused under Section 133 of the Cr.P.C. had been recorded. The case was fixed for arguments on application filed by respondent/accused for examination of hand-writing on the cheque by Fingerprint and Hand-Writing Expert. Absence of the complainant was not absolute essential for hearing of the arguments and passing of appropriate order on the above-said application. The Judicial Magistrate Ist Class, Hisar did not consider this aspect and mechanically passed the order without recording any

opinion as to whether personal attendance of the complainant was necessary or could be dispensed with and whether in his absence the case could be further proceeded with. The impugned order suffers from material illegality and is liable to be set aside.

In view of the above discussion, the appeal is allowed and impugned order dated 13.10.2016 dismissing the complaint due to non-appearance of the appellant/complainant and acquitting the respondent/accused is set aside. The complaint stands restored to its original number and the trial Court is directed to proceed further from the stage of hearing arguments on the application. The parties are directed to appear before the Judicial Magistrate Ist Class, Hisar on 08.01.2020.

(ARUN KUMAR TYAGI)
JUDGE

03.12.2019
kothiyal

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