

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

Sr. No.204

CRM-M-5287-2021

Date of decision : 5.9.2022

Hardev Singh

.....Petitioner(s)

VERSUS

Savi Enterprises through its Proprietor Satinder Singh

..... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present: Mr.RK Sharma, Advocate for the petitioner

Mr.Amardeep Singh Walia, Advocate for the respondent

AMAN CHAUDHARY, J.

The prayer in the present petition filed under Section 482 Cr.P.C. read with Section 401 Cr.P.C. is for quashing of order dated 4.5.2018 (Annexure P-2) passed by learned Judicial Magistrate, 1st Class, Chandigarh, recalling the order dated 9.1.2018 vide which the complaint filed by the respondent was dismissed for non-prosecution.

The complainant-respondent filed a compliant against the petitioner before the Court of learned JMIC, Chandigarh. Vide order dated 9.1.2018. The same was dismissed for non-prosecution by the learned JMIC vide order dated 9.1.2018, on account of non-appearance of the complainant-respondent or his counsel. However, subsequently, on an application moved by the complainant-respondent, the same was restored to

Learned counsel for the petitioner has argued that in the case of dismissal of the compliant in default, the Magistrate has no jurisdiction to restore or revive the same. He further submits that the only remedy to get restored the complaint is by filing an appeal before this Court under Section 378 Cr.P.C. as the dismissal of the compliant results in acquittal of the accused. Therefore, he prays that the present petition be allowed and the impugned order dated 4.5.2018 be set aside.

I have heard the learned counsel for the parties.

378(4). Appeal in case of acquittal.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

In the case in hand, vide order dated 9.1.2018, learned JMFC, Chandigarh dismissed the complaint of the complainant-respondent for want of prosecution. The said order is reproduced as under:

“Present: None

Accused on bail with counsel.

Case file taken up again after lunch break. Case called several times but none appeared on behalf of the complainant. It seems that the complainant is not interested in pursuing the present complaint. It is already 04.00 P.M. Further wait is not justified. Therefore, the present complaint is hereby dismissed for want of prosecution. Accused stands discharged in this case. File be consigned to the records after due compliance.”

In similar set of facts, a Coordinate Bench of this Court in CRM-M-6678-2015 titled as **“Atul Sood vs. Jalandhar Transport Cooperative Society Pvt. Ltd and another”**, decided on 7.12.2017 has held as under:

“Learned counsel for the petitioner inter-alia contends that the revisional Court had no jurisdiction to restore the complaint, which was dismissed in default for want of prosecution on account of non appearance of the respondent and therefore, the impugned order Annexure-P6 is illegal. In support of his contention, he has placed reliance upon the decision of the Bombay High Court in Vinay Kumar vs. Ramesh Saboo, 2009(5) R.C.R. (Criminal) 164. The respondent-complainant had only remedy to get restored his complaint by way of filing appeal before this Court under Section 378 Cr.P.C. The lower revisional Court, without any such application and having no jurisdiction to restore the complaint, has committed a grave illegality in passing the impugned order dated 21.11.2014 (Annexure-P6). After giving my anxious consideration to the submissions made, I find merit in the instant revision petition inasmuch as revisional Court had no jurisdiction to suo motu order for restoration of complaint even with or without any such application. Undisputedly, no application for restoration of complaint was filed before the revisional Court, who instead of restoration of the complaint directing the trial Court to proceed further with the same in accordance with law, ought to have dismissed the revision petition as

withdrawn in view of the statement of the petitioner, without further going into the merits of the case. In view of the settled proposition of law that a complaint under Section 138 of the Act, dismissed in default, amounts to acquittal of the accused and the Magistrate has no jurisdiction to restore or revive the same. The only remedy available to him is under Section 378 Cr.P.C. Reference in this regard can be made to Vinay Kumar's case (supra). In view of above, the instant petition is accepted. The impugned order dated 21.11.2014 is set aside.”

A Coordinate Bench in CRM-M-5875-2010 titled as “**Mohd. Sakil vs. Sachin Saini**” decided on 12.9.2013, has held in similar set of facts and circumstances that in case of complaint under Section 138 NI Act having been dismissed in default, neither revision nor petition under Section 482 Cr.P.C. is maintainable and complainant only has a remedy of appeal as the dismissal of the complaint amounts to acquittal. The relevant extract reads thus:-

“It has been further contended by learned counsel for the petitioner-complainant that the present petition under Section 482 Cr.P.C, is also maintainable and on the point, he has placed reliance upon Standard Corporation India Limited Vs. Kamblekar Ramesh 2011(4) R.C.R. (Criminal) 564.

However, perusal of this judgment shows that it was an appeal directed by the complainant against the judgment passed by learned trial Court vide which complaint filed by the complainant under Section 138 of the Act was dismissed for non-prosecution. He also placed reliance upon another judgment passed by Co-ordinate Bench of this Court in Parle Biscuits (P) Ltd Vs. M/s Sandeep Marketing Company and another 2011(4) R.C.R. (Criminal) 687, wherein challenge was to the order vide which application for restoration of complaint was dismissed in default.

In my view, there is force in the argument of learned counsel for the respondent-accused. Law is well settled that if a complaint under Section 138 of the Act is dismissed in default due to non-appearance of complainant, the same amounts to acquittal and complainant is having right of appeal under Section 378(4) Cr.P.C. Hence, neither revision nor petition under Section 482 Cr.P.C. is maintainable without availing statutory right of appeal as provided under Section 378(4) Cr.P.C. Learned counsel for respondent-accused also placed reliance on a judgment of this Court in Balbir Kaur Aujla Vs. Balraj Singh 2006(2) R.C.R. (Criminal) 650; another judgment passed by Delhi High Court in M/s Becton Dickinson India Ltd. Vs. M/s Shika Pharma (P) Ltd. And another 2010 (5) R.C.R. (Criminal) 735 and another judgment passed by Bombay High Court (Aurangabad Bench) in Vinaykumar Vs. Ramesh Saboo 2009(5) R.C.R. (Criminal) 164.

In view of the afore-mentioned legal proposition, the present petition is not sustainable and hence, the same is, hereby, dismissed being not maintainable.

Faced with the aforesaid proposition of law, learned counsel for the complainant-respondent prays that as the complaint was filed by the complainant-respondent in the year 2015; it was dismissed for non-prosecution on 09.01.2018 but it was restored on 04.05.2018; it has not proceeded on account of the interim order dated 22.02.2021 passed in favour of the petitioner by this Court. He has thus submitted that the complainant-respondent, who is about 70 years of age, has still not received the amount payable to him. He submits that the complainant-respondent will avail appropriate remedy available to him in the event of setting aside of the impugned order dated 4.5.2018, however, the delay in filing the appeal may not come in his way, particularly in view of the fact

that even the petitioner in this case had challenged the order of learned trial Court on 19.1.2021, even though the same had passed on 4.5.2018.

Keeping in view of the provision, the law laid down in the cases of **Atul Sood** and **Mohd. Sakil** (supra) and the facts and circumstances of the case, the present petition is allowed. Consequently, the impugned order dated 4.5.2018 passed by learned JMIC, Chandigarh is hereby set aside.

However, the complainant-respondent is at liberty to avail of alternative remedy available to him. Upon so doing, the Court concerned may, in accordance with law, consider the submissions made hereinabove on behalf of the complainant-respondent, with regard to the delay in filing the appeal.

5.9.2022
gsv

(**AMAN CHAUDHARY**)
JUDGE

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