

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

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CRM-A-703-2020 (O&M)
Date of decision: 15.12.2022

GURMAIL SINGH

....Appellant(s)

Versus

GURDEV SINGH

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. Shikhar Kataria, Advocate for
Mr. Harsh Chopra, Advocate
for the appellant.

Ms. Samridhi Sareen, Advocate
for the respondent (Legal-aid counsel).

AMAN CHAUDHARY. J.

CRM-12878-2020

For the reasons stated in the application, same is allowed. Delay of
139 days in filing the appeal is condoned.

CRM-A-703-2020

Challenge in the present appeal is to the order dated 19.07.2019
whereby on non-appearance of the complainant in the complaint filed under
Section 138 of the Negotiable Instruments Act, the complaint was dismissed for
non-prosecution. Learned counsel for the appellant would contend that initially
the complaint was filed in the Court of Judicial Magistrate Ist Class, Roop Nagar
but later on the same was transferred to the Court of Judicial Magistrate Ist Class,
Samrala as per the directions of Hon'ble The Supreme Court regarding
jurisdiction of the complaint cases under Section 138 of the N.I. Act, which stood
further modified by Hon'ble The Apex Court that the jurisdiction would remain as

was earlier. He further submits that the learned Judicial Magistrate Ist Class Rupnagar on 12.11.2014, Annexure A-4 had recorded that it did not have jurisdiction. The accused also did not appear on that date. On 02.01.2015, Annexure A-6, the complaint was listed before the learned JMIC, Samrala, wherein complainant examined himself and tendered documents on the basis of which the accused was summoned.

That vide order dated 20.04.2019, Annexure A-7 the complaint was again transferred to Roop Nagar, wherein the same was dismissed for non-prosecution vide impugned order dated 19.07.2019. The complainant filed a revision against the same before the Court of Additional Sessions Judge, Roop Nagar which was withdrawn by the appellant vide order dated 02.12.2019, Annexure A-8 as he wanted to challenge the order before this Court and had inadvertently filed it in the said Court. It is therefore that the impugned order came to be challenged by filing the present appeal.

The submission of the learned counsel would be that it is on account of transfer of the case from Judicial Magistrate Ist Class, Roop Nagar, where the complaint had initially been filed but was transferred to Samrala and the same was again transferred to Roop Nagar from Samrala, that the appellant was unable to appear on 19.07.2019, leading to his complaint being dismissed for non-prosecution. He submits that grave prejudice shall be caused to complainant-appellant in case the impugned order is not set aside and the complaint is not heard on merits.

Learned counsel appearing on behalf of the respondent has no objection for the restoration of the complaint and for it to be decided on its merits on account of the submissions made by learned counsel for the appellant.

Heard.

It is apposite to refer to Section 256 CrPC, which reads thus-

“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.”

This Court in the case of ***Surender Vs Deshraj, 2016 (3) RCR (Criminal) 624***, had allowed the application and remanded the case to the trial Court by observing that “It is evident from the impugned order that it is erroneous in nature as an extreme step of dismissal of complaint has been taken, whereas, the matter was pending before the trial Court and no proceedings have initiated except the allowing of the applications for exemption from personal appearance. The impugned order has been passed contrary to the provisions of Section 256 Cr.P.C and a great prejudice has been caused to the applicant-complainant as the accused has been acquitted of the charge.” The Court further held that “It is apparent from the impugned order that the complaint was dismissed because of non appearance of the complainant/his Advocate, whereas, it was incumbent upon the trial Court to examine the case in the light of the aforesaid provisions of law and to record the finding as to whether the presence of the complainant was essential on that date or not or whether the hearing of the case could have been adjourned to some other date but nothing has been mentioned in the impugned

order. Simply, it has been mentioned that none was present in spite of calling the case several times, the complaint was dismissed and the accused was acquitted of the charge.”

Hon'ble The Supreme Court in the case of *The Associate Cement Co. Ltd. Vs. Keshvanand, 1998(1) RCR (Criminal) 309*, had held that “Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice.”

It may be noticed that in the present case, after summoning order was passed,ailable warrants were issued on 19.05.2015; non-ailable warrants were issued on 22.07.2015; proclamation proceedings were initiated on 29.09.2015, whereby respondent-accused Gurdev Singh was declared proclaimed person and

on 14.01.2017 the complainant and accused had presented themselves before the Court and the presence of accused-respondent was shown as to be in custody.

It is apparent that the case was initially filed before the Court of Judicial Magistrate Ist Class, Roop Nagar and transferred to the Court of Judicial Magistrate Ist Class Samrala and vide order dated 20.04.2019, whereafter the same was retransferred to the Court of learned Chief Judicial Magistrate, Roop Nagar.

It is also apparent that the complainant was duly appearing before the Court on all dates of hearing including 12.11.2014 when the jurisdiction was with the Judicial Magistrate Ist Class, Roop Nagar and on 02.01.2015 when on transfer before the Court of Judicial Magistrate Ist Class, Samrala, the complainant was examined, preliminary evidence was led and summoning order was issued. The said order reads thus:-

“Present: Complainant with counsel Sh. Ravinder Singh, Adv.

Complainant Gurmail Singh examined himself as CW.1 in his preliminary evidence and tendered affidavit Ex.CA along with documents i.e. legal notice dated 23.05.2013 as Ex.C1, original cheque bearing No.026112 dated 12.02.2013 amounting to 15,00,000/- (Rs. Fifteen Lacs Only) drawn on HDFC Bank, Machhiwara Branch as Ex.C2, original cheque return memos dated 25.04.2013 and 13.05.2013 as Ex.C4 and Ex.C5, postal receipt dated 23.05.2013 as Ex.C5 and proclamation of accused Gurdev Singh as Ex.PX and also closed preliminary evidence.

Heard. File perused. As per the case of complainant, in order to discharge the legal liability, the accused issued the cheque in favour of complainant, which on presentation in the bank was dishonoured. Accused failed to comply with the legal notice served upon him within a stipulated period.

On perusal of the preliminary evidence so available on record, I am of the view that there are sufficient grounds to proceed against the accused person for the offence under Section 138 N.I.Act. Accordingly, the accused Gurdev Singh is hereby ordered to be summoned under Section 138 of Negotiable Instrument Act for 13.02.2015 on filing of PF/copy. Summons

be sent through RC as well as through ordinary process”

On 20.04.2019, when the complaint was retransferred to the Court of Judicial Magistrate Ist Class Roop Nagar, he was directed to appear before the said Court on 22.05.2019, however, the case file was received in the said Court on 11.07.2019 and on the very next date i.e. 19.07.2019, the impugned order was passed without affording of sufficient opportunity to the complainant-petitioner to cause his appearance.

For the reasons recorded as above, the present appeal is allowed. The impugned order dated 19.07.2019 passed by the learned Judicial Magistrate Ist Class, Roop Nagar is set aside and the matter is remanded back to the Court of learned Judicial Magistrate Ist Class, Roop Nagar to decide the complaint on merits in accordance with law.

(AMAN CHAUDHARY)
JUDGE

December 15, 2022

S.Sharma(syr)

<i>Whether speaking/reasoned</i>	:	<i>Yes/No</i>
<i>Whether reportable</i>	:	<i>Yes/No</i>