

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

229

**CRM-A-781-MA-2018
Date of decision: 29.03.2022**

KAMAL NARULA

.....Appellant

Versus

NANU RAM

.....Respondent

CORAM: HON'BLE MR. JUSTICE SANT PARKASH

Present : Mr. Shiv Kumar, Advocate
for the appellant.

SANT PARKASH, J. (ORAL)

The appellant has filed the present appeal against order dated 18.01.2018 passed by the Judicial Magistrate First Class, Faridabad in Complaint case NACT-531/2016 titled as 'Kamal Vs. Nanu Ram' 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 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.327549 dated 05.12.2011 and Cheque No. 327548 dated 05.12.2011 for an amount of Rs. 3,00,000/- and Rs.1,70,000/- respectively for discharge of subsisting liability but on presentation the said cheques were dishonoured with remarks 'Funds Insufficient'. Despite service of notice the respondent/accused did not pay the amount of the cheques within the prescribed period. Vide order dated 07.12.2016, notice was served

upon the respondent to which respondent pleaded not guilty and claimed trial.

When the case was fixed for hearing on 18.01.2018, the appellant/complainant absented on which the complaint was dismissed in default for non-prosecution. The relevant part of the order reads as under :-

“ Today the case was listed for defence evidence. Accused appeared with his evidence. Affidavit of DW Rattan Lal placed on record. Case called several times since morning but none has appeared on behalf of the complainant. Case pertains to the list of Action plan for the year 2017-18. It is pertinent to mention here that the complainant as well his counsel are well aware about the pendency of the present case but neither the complainant nor his counsel appeared to check or inspect about the present case file. It appears that the complainant as well as his counsel are not interested to pursue with the present complaint. The court is of the considered opinion that keeping the present complaint linger on shall not give any fruitful purpose, therefore, the present complaint is hereby dismissed in default for want of prosecution.....”

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

I have heard learned Counsel for the parties and have perused the record.

Learned Counsel for the appellant has argued that the appellant/complainant had been regularly appearing in his complaint case and absented just on the said 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.

The instant petition has been filed, in view of the fact that

the Magistrate has no power to review his own order of dismissal of the complaint.

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)

It has been pleaded in the petition that many a times the case was adjourned for one reason or the other and at one point of time, accused filed an application for seeking personal exemption and as such the case could not be proceeded. The accused filed false and frivolous applications under Section 145(2) of the Evidence Act to examine the

complainant with a view to delay the adjudication of the case and the application filed by the respondent was allowed by the learned trial Court.

In the present case, on dated 18.01.2018, the case was fixed for defence evidence. The accused appeared with his evidence. The complainant absented himself and resultantly his complaint under the N.I. Act was dismissed in default for non prosecution.

Learned Counsel for the appellant would contend that non appearance of the appellant or his counsel on the adjourned date was neither intentional nor deliberate but on account of bonafide mistake on the part of the counsel on noting down the wrong date of hearing. The dismissal of the present complaint on account of non appearance of the complainant results in acquittal of the accused. The appellant/complainant would suffer irreparable loss if the impugned order is not set aside.

Co-ordinate Bench of this Court in case **CRM-M-15629-2017** titled as '**Satpal Vs. Harish Kumar**' decided on 27.05.2019 has held that duty of the Courts is to impart justice to the litigants and not to non-suit them on technical grounds and order passed in the complaint under Section 138 of the Negotiable Instruments Act, 1881 of dismissal on account of non-appearance of the complainant was set aside.

After giving consideration to the submissions made by learned Counsel for the appellant and the above referred judicial precedent, I deem it appropriate that in the interest of justice, the

complainant be granted another opportunity to plead his case before the trial Court in accordance with law so that he does not remain un-heard. Also, 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.

In view of the above discussion, the appeal is allowed and impugned order dated 18.01.2018 passed by learned Judicial Magistrate First Class, Faridabad 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 with the complaint of the appellant/complainant in accordance with law. The parties are directed to appear before the learned trial Court on 18.04.2022.

The instant petition stands disposed of accordingly. A copy of this order be sent to the concerned Court for information and necessary action.

29.03.2022
kavneet singh

(SANT PARKASH)
JUDGE

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