

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

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**CRM-A-701-MA-2014 (O &M)
Date of decision: 04.04.2022**

SANJEEV HOSIERY FACTORY

.....Appellant

Versus

ASHOK JAIN

.....Respondent

CORAM: HON'BLE MR. JUSTICE SANT PARKASH

Present : Mr. Kunal Dawar, Advocate
for the applicant-appellant.

Mr. Ankush Rampal, Advocate
for Mr. Rahul Rampal, Advocate
for the respondent.

SANT PARKASH, J. (ORAL)

The appellant has filed the present appeal against order dated 08.11.2011 passed by the Judicial Magistrate First Class, Ludhiana in Complaint case titled as 'Sanjeev Hosiery Factory Vs. Ashok Jain ' 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 owed an amount of Rs.34,70,943/- and against the said amount, respondent/accused had issued various cheques for discharge of subsisting liability but on presentation the said cheques were dishonoured for the reason payment stopped by drawer. Despite service of notice the respondent/accused did not pay the amount of the cheques within the prescribed period.

After filing of the complaint, respondent/accused was summoned to face trial under Section 138 of the N.I. Act.

On 19.10.2011, an application for exemption was moved by the appellant/complainant, which was allowed and the matter was adjourned to 08.11.2011. On the said date the appellant/complainant had asked his counsel to move an application for exemption but due to inadvertence the same was not moved and the complaint was dismissed for want of proper prosecution. The relevant part of the order reads as under :-

“ Neither the complainant nor anybody on his behalf has appeared despite case been repeatedly called since morning. It is already 3.30 p.m. Even otherwise also perusal of judicial record reveals that complainant is not appearing in Court for the last three consecutive adjournment and nor any evidence is being adduced by him. As such this Court has sufficient ground to hold that the complainant is not interested in pursuing the present complaint further. Resultantly, present complaint is hereby dismissed for want of proper prosecution The accused is acquitted.....”

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 complaint has been pending for last almost 10 years before the same was dismissed in default. The appellant/complainant had been diligently pursuing his complaint and has also examined three witnesses, two of them were also cross examined and only the complainant was left to be cross examined. 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.

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 the appellant had filed two similar complaints against the respondent/accused regarding dishonor of two cheques for Rs. 6 lacs and 2 lacs. The accused/respondent was convicted in said complaints and in appeal has paid towards the amount of cheques to the complainant/appellant.

In the present case, on dated 08.11.2011, the case was fixed for complainant witness. The complainant absented himself and resultantly his complaint under the N.I. Act was dismissed in default for want of proper prosecution.

Learned Counsel for the appellant/complainant would contend that non appearance of the appellant or his counsel on the adjourned date was neither intentional nor deliberate as on the said date he had asked his counsel to move an application for exemption but because of inadvertence the same was not moved and the complaint was dismissed for want of proper prosecution. 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

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.

In view of the above discussion, the appeal is allowed and impugned order dated 08.11.2011 passed by learned Judicial Magistrate First Class, Ludhiana 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 28.04.2022.

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

04.04.2022
kavneet singh

(SANT PARKASH)
JUDGE

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