

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

CRM-M-38059-2015

Date of decision : 29.09.2022

M/s Daya Nand and Sons

....Petitioner

vs.

Madan Gopal Ishunyani

...Respondent

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. G.S. Madaan, Advocate
for the petitioner.

Mr. Tarun K. Dhingra, Advocate
for the respondent.

PANKAJ JAIN, J. (ORAL)

Complainant has approached this Court against the order passed by Sessions Judge dated 8th of September, 2015 whereby order passed by the Trial Court restoring the complaint of the petitioner, has been set aside.

2. Complainant filed the complaint u/s 138 of the Negotiable Instruments Act, 1881 which was ordered to be dismissed in default vide order dated 18th of November, 2014. On application filed by the complainant the same was ordered to be restored vide order dated 2nd of February, 2015. The accused/respondent preferred revision which has been allowed vide order dated 8th of September, 2015 holding that

the Magistrate had no power to review its own order and, thus, order dated 2nd of February, 2015 was bad. Ld. Counsel for the petitioner is not in position to point out any infirmity in order passed by revisional Court. However, he submits that the Magistrate ought not have resorted to Section 256 of the Code of Criminal Procedure (for short, 'the Code') at the first instance and, thus, order dated 18th of November, 2014 itself was bad. Surprisingly, the Trial Court has recorded in the order dated 18th of November, 2014 that the case is fixed for preliminary evidence of the complainant despite the fact that the accused had already been summoned and was present. Nevertheless it is always in the interest of justice that the *lis* should be adjudicated on the merits and not on hyper-technicalities. Ld. Counsel for the petitioner submits that before resorting to Section 256 of the Code Trial Court is required to record that the presence of the complainant was necessary. He having failed to do so order dated 18.11.2014 cannot be sustained.

3. Ld. Counsel for the respondent emphatically argues that the complainant as per the procedure laid down in the Code was required to be present on the date the matter was listed. However, he is not in position to dispute the fact that no requirement w.r.t. the

necessity of the presence of complainant is recorded in the order dated 18th of November, 2014.

4. I have heard Ld. Counsel for the parties and have gone through the records of the case.

5. In '**S. Rama Krishna vs. S. Rami Reddy (D) by His Lrs. & Ors., 2008(5) SCC 535**, Apex Court held that :-

“7. Section 256 of the Code of Criminal Procedure empowers a Magistrate to pass an order of acquittal on non-appearance or death of the complainant.

The ingredients of Section 256(1) are: (i) that summons must have been issued on a complaint, (ii) the Magistrate should be of the opinion that for some reasons, it is not proper to adjourn the hearing of the case to some other date; and (iii) the date on which the order under Section 256(1) can be passed is the day appointed for appearance of the accused or any day subsequent thereto, to which the hearing of the case has been adjourned.

6. From bare perusal of order dated 18th of November, 2014, no satisfaction has been recorded by the Trial Court to meet requirement of Section 256 Cr.P.C. as contemplated under law. Thus, Section 256 ought not have been invoked to dismiss the complaint as laid down in **S. Rama Krishna's** case *ibid*. Though no fault can be

found with the impugned order dated 08.09.2015, yet order dated 18.11.2014 is found to be unsustainable in law . Illegality has crept in the proceedings of present complaint in consequence to order dated 18.11.2014. Thus, in order to weed out the same, order dated 18.11.2014 and all proceedings subsequent thereto are hereby quashed.

7. Consequently, the present petition is allowed. Complaint bearing No.17559 of 2013 dated 08.04.2013 titled as '*M/s Daya Nand and sons Vs. Madan Gopal Ishunyani*' is restored to its original number. Parties are directed to appear before trial Court on 17.10.2022.

September 29, 2022
Dpr

(PANKAJ JAIN)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No