

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

CRM-M-36793-2019

Date of decision : 31.08.2022

Pardeep Pal Singh

....Petitioner

Versus

Dilawar Singh and another

...Respondents

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Avtar S. Khinda, Advocate
for the petitioner.

Mr. Prateek Pandit, Advocate
for respondent No.1.

Mr. Madhur Sharma, AAG, Punjab
for respondent No.2/State.

PANKAJ JAIN, J. (ORAL)

Challenge in the present petition filed under Section 482 Cr.P.C. is to the order dated 25th of July, 2018 (Annexure P-2) and order dated 19th July, 2019 (Annexure P-6), whereby the complaint u/s 138 of the Negotiable Instruments Act, 1881 as well as application u/s 5 of the Indian Limitation Act, have been dismissed.

2. At the outset, Ld. Counsel for respondent No.1 objects to the maintainability of the present petition claiming that the present petition filed under Section 482 Cr.P.C. will not be maintainable as the complaint has been dismissed on account of default of the complainant vide impugned order.

3. Faced with this situation, Ld. Counsel for the petitioner prays for the conversion of the present petition into leave to appeal.

4. On the prayer made by counsel for the petitioner, the present petition is converted into leave to appeal and the same is ordered to be treated as such.

5. Registry is directed to number the same as leave to appeal.

6. Vide impugned order dated 25th of July, 2018 (Annexure P-2) the Trial Court dismissed the complaint by passing the following orders :-

“Case again called several times but none has appeared on behalf of complainant. It is already 4.15 p.m. No further wait seems to be justified. As such, present complaint of the complainant is hereby dismissed in default. File be consigned to Judicial Record Room, after due compliance.”

7. The matter was taken to Revisional Court. However, the same was dismissed as not maintainable vide order, dated 19th of July, 2019 (Annexure P-6).

8. By way of present petition challenge has been laid to both the orders i.e. order dated 25th July, 2018 and that dated 19th of July 2019.

9. It is trite law that it is in the interest of both the parties that the *lis* ought to have been decided on merits instead of dismissing the same for non-prosecution. There is another aspect to this. Section 256 Cr.P.C. 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.

10. Section 256 Cr.P.C. provides for dismissal of the complaint in default. The same shall entail an acquittal. However, the Magistrate has to record reason that the presence of the complainant was necessary otherwise the Magistrate has a power to dispense with the attendance of the complainant and proceed with the case as per proviso appended to Section 256(1) Cr.P.C.. It has been pleaded in the revision petition that the lapse on part of the complainant was on account of his ill health. The relevant pleadings in the revision petition read as under :-

3. That the respondent No.3 appeared in the complaint and was released on bail. The petitioner was regularly appearing before the ld. Trial Court but on 25.07.2018 the petitioner could not appear before the ld. Trial Court as the petitioner was not feeling well and the petitioner informed his

counsel Mr. Navdeep Sethi but the counsel also did not appear on the fixed date and the complaint was ordered to be dismissed in default vide order dated 25.07.2018. A copy of the same is annexed herewith as Annexure P-2.

11. Plea raised by the petitioner appears to be genuine as there is no reason why the complainant will not pursue the complaint wherein a cheque of Rs.2,25,000/- has been dishonoured. He is not going to gain from dismissal of the complaint. The matter was not listed for cross-examination of any witness but was listed only for the presence of respondent/accused. Apex Court while dealing with the provisions contained in Section 256 Cr.P.C. in the case of **S. Anand vs. Vasumathi Chandrasekar, 2008(4) SCC 67**, held that :-

“12. The accused was entitled to file an application under Section 311 of the Code of Criminal Procedure. Such an application was required to be considered and disposed of by the learned Magistrate. We have noticed hereinbefore that the complainant did not examine herself as a witness. She was sought to be summoned again for cross-examination. The said prayer has not yet been allowed. But, that would not mean that on that ground the court would exercise its discretionary jurisdiction under Section 256 of the Code of Criminal Procedure at that stage or the defence would not examine his witnesses.”

12. Similarly, Apex Court in the case of '**Associated Cement Co. Ltd. vs. Keshvanand', (1998) 1 SCC 687** observed 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 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.”

(emphasis supplied)

13. Mr. Prateek Pandit, Advocate appearing for respondent No.1 is not in position to deny the fact that the matter on the given date was listed for the presence of accused and not for cross-examination of any witness.
14. Consequently, the present petition is allowed. The impugned order dated 25th of July, 2018 (Annexure P-2) is set aside.
15. The complaint filed by the petitioner is ordered to be restored on its original number and stage. Trial Court is directed to proceed with the

trial the stage as on 25.07.2018.

16. The parties shall appear before the Trial Court on 29th of September, 2022.

17. The complainant/petitioner shall pay an amount of Rs.15,000/- to respondent No.1/accused, as condition precedent.

August 31, 2022
Dpr

(PANKAJ JAIN)
JUDGE

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