

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

275

CRA-AS-18-2023 (O&M)
Date of decision: 25.01.2023

DAVINDER SINGH RAWAT

....Appellant(s)

Versus

BARJINDER SINGH

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. Arjunveer Sharma, Advocate
for the appellant.

None for the respondent.

AMAN CHAUDHARY. J.

Present appeal has been filed against the impugned judgment dated 14.12.2015 passed by learned Judicial Magistrate 1st Class, Ludhiana, vide which the respondent has been discharged in a complaint under Section 138 of the Negotiable Instruments Act filed by the appellant.

Learned counsel contends that the appellant has filed a complaint under Section 138 of Negotiable Instrument Act on 20.09.2013 against the respondent. He further submits that on 20.11.2015, the appellant had met with an accident and sustained injuries, thus he could not come present before the Court on that date and could not even communicate with his counsel, leading to the dismissal of the complaint in default vide order dated 14.12.2015. The copy of medical certificate dated 06.12.2015 issued by the doctor is also annexed as Annexure A-1, whereby the appellant was advised to take bed rest for 28 days from 06.12.2015 to 03.01.2016. It is his further submission that non-appearance

of the appellant was on account of the aforesaid fact and that his complaint ought not to have been dismissed in default but should have been heard on merits by granting him and his counsel one opportunity to appear, keeping in view the reasons assigned, on account of which the appellant and his counsel had absented.

Learned counsel submits that the respondent was summoned and bailable as well as non-bailable warrants were issued against the respondent from time to time. On 19.01.2015, respondent surrendered before the trial Court, thereafter the matter remained pending for defence evidence. On 01.06.2015, the respondent filed an application under Section 145(2) of the N.I. Act and the complaint remained pending for cross-examination. Thereafter, the respondent remained absented from the Court and on 30.07.2015 again bailable as well as non-bailable warrants and proceedings to declare the respondent as proclaimed offender were initiated. However, on 15.10.2015, the respondent again appeared and his bail/surety bonds were restored.

Despite service none has appeared on behalf of the respondent.

Heard and perused.

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, bailable as well as non-bailable warrants were issued and proclamation proceedings were initiated on 30.07.2015 and on 15.10.2015 the accused-respondent had presented himself before the Court and the accused was granted bail.

Adverting to the facts of the present case inasmuch as that the appellant-complainant, who had met with an accident and sustained injuries, thus he could not appear before the Court.

Insofar as the non-appearance of the counsel for the accused-petitioner is concerned Hon’ble The Supreme Court of India in the case of **‘Rafiq and another vs Munshilal and another** reported as AIR 1981 SC 140, held, “What is the fault of the party who having done everything in his power expected of him, would because of his advocate. The problem that agitates us is whether it

is proper that a party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. We cannot be a party to an innocent party suffering injustice merely because of his chosen advocate defaulted.” Reiterating the aforesaid view, Hon'ble The Supreme Court in the case of **Shaikh Mukthar and another vs. State of Andhra Pradesh**, (2020) 19 SCC 178, has observed that “we find from the judgment of the High Court that the appellants were not heard in the High Court. The appellants' advocate remained absent on the date of hearing. The appellants should not have been penalised for the same.”

The trial Court ought not to have dismissed the complaint for non-prosecution but should have rather proceeded as per the law laid down, as referred to above. At times, the appellant-complainant or his counsel can be prevented by sufficient reasons to put an appearance before the Court on a given date and every such absence cannot necessarily be construed as deliberate and willful. Further, the fact that the appellant-complainant would have gained nothing by not appearing before the Court in the complaint filed by him, more so in the present case sufficient reason for non-appearance has been furnished, inasmuch as that the appellant-complainant had met with an accident and sustained injuries and was bedridden. The copy of medical certificate issued by the doctor attending upon the appellant is also annexed (Annexure A-1).

In the case of **K. Muruganandam and others Vs. State Rep. by the Deputy Superintendent of Police and another** SLP(Criminal) 8150 of 2021 decided on 12.08.2021, Hon'ble The Supreme Court of India held that, “It is well settled that if the accused does not appear through counsel appointed by him/her, the Court is obliged to proceed with the hearing of the case only after appointing an amicus curiae, but cannot dismiss the appeal merely because of non-

representation or default of the advocate for the accused (see Kabira vs. State of Uttar Pradesh 1981 (Supp) SCC 76 and Mohd. Sukur Ali vs. State of Assam (2011) 4 SCC 729),” noted the Division Bench.

In view of the peculiarity of facts and circumstances of this case, judgments referred to hereinabove and to secure the ends of justice, this Court finds that the petition deserves to be allowed.

Consequently, the order dated 14.12.2015 passed by learned Judicial Magistrate 1st Class, Ludhiana is hereby set aside. The complaint be restored to its original number. The trial Court is directed to decide the complaint on merits, granting effective opportunities to the parties in accordance with law.

(AMAN CHAUDHARY)
JUDGE

January 25, 2023
S.Sharma(syr)

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