

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

CRA-AS-86-2018(O&M)

Date of Decision:-04.09.2023

Vinod Kumar.

.....Appellant.

Vs.

Jitender @ Tinku.

.....Respondent.

CORAM:- HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present:- Mr. Anil Kumar Gahlawat, Advocate for the Appellant.

None for the respondent.

JASJIT SINGH BEDI, J.(ORAL)

A complaint no.83 dated 26.10.2013 titled as Vinod Kumar Vs. Jitender @ Tinku came to be dismissed in default by the court of Sub Divisional Judicial Magistrate, Bahadurgarh vide order dated 26.10.2013 against which the instant appeal has been filed. The impugned order reads as under:-

“ Present:- None.

File taken up. None has appeared. Now to come up on after lunch.

*Sd/-
(Lokesh Gupta)
SDJM
Bahadurgarh
26.10.2013 (12.40 AM)*

Present:- None.

File taken up after lunch. None has appeared on behalf of the complainant. It is already 3.10 PM. No more wait is justified. Hence, the present complaint is hereby

dismissed in default. Accused is discharged. His bail bond and surety bond are also discharged. File be consigned to the record room after due compliance.

*Sd/-
(Lokesh Gupta)
SDJM
Bahadurgarh
26.10.2013 ”*

The Counsel for the applicant/appellant contends that the applicant/appellant consistently appeared on every date starting from 08.04.2013 onwards till the passing of the summoning order on 27.04.2013 and thereafter on 25.5.2013 and 21.09.2013 and the impugned order came to be passed on 26.10.2013 on account of the noting down of a wrong date by the counsel for the applicant/appellant (complainant) as 06.11.2013 despite the fact that even the accused had not put in appearance on the said date and the court could very well have adjourned the matter. He contends that the impugned order may be set aside and the complaint be restored to its original number for an adjudication on merits. Reliance is placed on ***The Associated Cement Co. Ltd. Vs. Keshvanand 1998(1) SCC 687, M/s BLS Infrastructure Limited Vs. M/s Rajwant Singh & Ors. 2023(2) RCR (Criminal) 49 and Sunil Kumar Vs. Sameer Mansuri CRM-A-279-2023 in/& CRA-AS-253-2023 Decided on 10.05.2023.***

None has appeared for the respondent despite service being effected twice over.

I have heard Counsel for the applicant/appellant.

The Hon'ble Supreme Court in ***The Associated Cement Co. Ltd.'s case (supra)*** has held as under:-

“ 16. *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.”

The Hon’ble Supreme Court in In **M/s BLS Infrastructure**

Limited’s case (supra) has held as under:-

“ 10. Having noticed the rival submissions, before we proceed further, it would be useful to notice the provisions of Section 256 of the Code, which are reproduced below:

"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."

A plain reading of the proviso to sub-section (1) of Section 256 would indicate that where the Magistrate is satisfied that the personal attendance of the complainant is not necessary, he can dispense with the attendance of the complainant and proceed with the case. Such a situation may arise where complainant's/prosecution's evidence has been recorded and to decide the case on merits, complainant's presence is not necessary.

11. In the case of S. Anand (supra), addressing a situation where the complainant was absent but had already examined his witnesses, this Court observed as follows:

"12. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined.

13. The date was fixed for examining the defence witnesses. The appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence."

After observing as above, in paragraph 15, it was held thus:

"15. ... when the prosecution has closed its case and the accused has been examined under section 311 of the Code of Criminal Procedure, 1973 the Court was required to pass a judgment on merit of the matter."

12. In Associated Cement Co. Ltd. (supra), the purpose of inserting a provision like Section 256 of the Code was discussed and in light thereof, in paragraph 16, it was observed as under:

"16. What was the purpose of including a provision like Section 247 in the old Code (or Section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The section, therefore, affords protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, the court has a duty to acquit the accused in invitum."

After observing as above, it was held that where the complainant had already been examined as a witness in the case, it would not be appropriate for the Court to pass an order of acquittal merely on non-appearance of the complainant. Thus, the order of acquittal was set-aside and it was directed that the

prosecution would proceed from the stage where it reached before the order of acquittal was passed.”

A perusal of the judgments of the Hon’ble Supreme Court in **The Associated Cement Co. Ltd.’s case (supra)** & **M/s BLS Infrastructure Limited’s case (supra)** would reveal that a complaint under Section 138 of the Negotiable Instruments Act ought to be dismissed in default for want of prosecution in those circumstances where the proceedings could not be continued in the absence of the complainant. In the instant case a perusal of the impugned order would show that even the accused had not put in appearance on that date and, therefore, the absence of the complainant could very well have been dispensed with and the case could have been adjourned. However, the Court chose to dismiss the case in default for want of prosecution. This was an unduly harsh measure adopted by the court and an opportunity must be granted to the appellant/complainant to pursue his case on merits.

In view of the above, the present appeal is allowed and the impugned order dated 26.10.2013 is set aside. The Trial Court is directed to restore the complaint to its original number and proceed further in accordance with law. The parties are directed to appear before the Trial Court on 03.10.2023 for further proceedings.

(JASJIT SINGH BEDI)
JUDGE

September 04, 2023
Vinay

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