

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

CRA-S-2169-SBA-2005(O&M)
Reserved on:16.03.2023
Date of Pronouncement:20.03.2023

Aman Kumar

...Appellant

VS.

Vijay Kumar

...Respondent

Coram : Hon'ble Mr. Justice N.S.Shekhawat

Present : Mr. R.S.Bajaj, Advocate
for the appellant.

Mr. Gaurav Bakshi, Advocate
for the respondent.

N.S.Shekhawat J.

The present appeal is directed against the order dated 12.04.2005, passed by the learned Chief Judicial Magistrate, Jalandhar, whereby, the complaint filed by the present appellant/complainant was ordered to be dismissed in default.

Learned counsel for the appellant contended that the appellant/complainant had filed a complaint against the respondent/accused under Section 138 of the Negotiable Instruments Act (for short 'the NIA Act') on 10.07.2004. It was stated in the complaint that in order to discharge his legal liability, the respondent had issued a cheque bearing No.004180 for a sum of Rs.91,750/- dated 03.04.2004 drawn on Andhra Bank, Jalandhar, in favour of the appellant/complainant and assured the appellant that the cheque would be

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honoured on presentation. However, as per the assurance of the respondent, when the cheque was presented for encashment, the same was returned and was dishonoured with the remarks 'Funds Insufficient'. Accordingly, a legal notice was issued to the respondent through registered as well as UPC Post. However, the respondent did not make the payment. Ultimately, the appellant was constrained to file a criminal complaint in the Court of learned Area Magistrate, Jalandhar on 10.07.2004. Learned counsel further contended that the appellant was present on each and every date of hearing with his counsel and never absented during the Court proceedings. However, on 12.04.2005, the case was listed for appearance of the accused. But due to mistake, the appellant had wrongly noted the date of hearing as 18.04.2005 instead of 12.04.2005. Due to this, when the case was taken up for hearing on 12.04.2005, the appellant could not appear before the learned Magistrate and his act of non-appearance was neither intentional nor willful. Learned counsel further contended that on the date fixed i.e. on 12.04.2005, no effective proceeding was to take place and the case was listed for appearance of the accused only. Learned counsel further submitted that it was a *bona fide* mistake on his part and the complaint was wrongly ordered to be dismissed in default by the learned Chief Judicial Magistrate, Jalandhar.

Learned counsel for the appellant has relied upon the law laid down in the matter of **“Shakti Industrial Corporation Vs. Ridaus Auto Components Private Limited and other”**, 2015(8) RCR (Criminal) 457; **“Santosh Devi Vs. Mahinder Singh”**, 2015(2) R.C.R. (Criminal) 192 and **“The Associated Cement Co. Ltd. Vs. Keshvanand”**, 1998 (1) RCR (Criminal) 309.

The submissions made by learned counsel for the appellant have been vehemently opposed by the learned counsel representing the respondent and contends that the accused had adopted dilatory tactics and the impugned order was correctly passed by the learned trial Court.

Learned counsel for the respondent has relied upon the law laid down by this Court in the matter of “**State of Haryana Vs. Virender Singh @ Goly**”, 2022 (3) R.C.R (Criminal) 860 and “**Smt. Habiba Vs. State of U.P. and 2 others**”, 2022 (2) Crimes 265.

I have heard learned counsel for the parties and with their assistance, I have perused the trial Court record carefully.

The record clearly shows that the complaint was presented before the learned trial Court on 10.07.2004 and the appellant/complainant was present with his counsel. Even on subsequent dates i.e. 30.07.2004, 13.09.2004 and 06.01.2005, the appellant/complainant was present with his counsel before the learned trial Court. On 06.01.2005, the case was adjourned to 12.04.2005 for the service of the accused and on 12.04.2005, the appellant could not appear only on one date and on the said day, the impugned order was passed by the Court of learned Chief Judicial Magistrate, Jalandhar. Even otherwise, the learned counsel for the respondent could not controvert the factual submissions made by learned counsel for the appellant.

I have considered the rival submissions made by learned counsel for the parties.

Section 256 of Criminal Procedure Code is extracted below:-

“256. Non-appearance or death of complainant- (1)
if the summons has been issued on complaint, and on the

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day appointed for the appearance of the accused, of 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.”

The aforesaid provision of law clearly lays down that the Magistrate has discretion to dismiss the complaint if on any date fixed for hearing of the complaint, the complainant fails to appear in the Court. However, if the Magistrate finds that there was some valid reason for non-appearance of the complainant or the presence of the complainant was not required during the Court proceeding, he can very well exercise his discretion to adjourn the complaint. While exercising the jurisdiction under Section 256 Cr.P.C., the Court has to take into consideration that the powers vested in it have to be exercised judiciously and in the interest of justice.

Keeping in view the aforesaid principles of law and adverting to the facts of the instant case, it is the case of the appellant that only on one date, he could not appear during the Court proceedings due to wrong noting of the date of hearing by him and as a consequence thereof, the complaint was ordered

to be dismissed in default. The record clearly establishes that the case was repeatedly taken up and effective proceedings were held before the learned trial Court. On each and every date, the complainant had appeared with his counsel and the plea taken by the appellant/complainant appears to be genuine as he would not have intentionally allowed the complaint to be dismissed in default as he had to recover the amount of cheque from the respondent as well. Even the *bona fides* of the appellant are evident from the fact that on earlier occasions, he had been regularly appearing and only on one date, he could not appear due to wrong noting of the date of hearing. Consequently, it was inappropriate for the learned trial Court to dismiss the complaint in default, especially when the case was listed for appearance of the accused before the learned trial Court and the appearance of the appellant was not so essential on the said date.

In “*The Associated Cement Co. Ltd. Vs. Keshvanand*”, 1998 (1) *RCR (Criminal)* 309, the Hon'ble Supreme Court of India has held as under:-

“14. Section 256 of the Code of Criminal Procedure, 1973 (for short 'the new Code') is the corresponding provision to Section 247 of the old Code. The main body of both provisions is identically worded, but there is a slight difference between the provisos under the two sections. The proviso to Section 256 of the new Code is reproduced here:

"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."

15. *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 a protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, court has a duty to acquit the accused in invitum.*

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*

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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.”

Even this Court has held in the matter of ***Shakti Industrial Corporation’s case (Supra)*** and ***Santosh Devi’s case (Supra)***, ***Manoj Kumar Kinha Vs. Dinesh Kumar and another; 2021(3) RCR (Criminal) 133***, and the ***Associated Cement Co. Ltd.’s case (Supra)*** that the dismissal of the complaint for non-prosecution is not justified in similar circumstances as it is always desirable that a lis should be decided on merits, rather than, non-suiting the parties on technical grounds.

Learned counsel for the respondent has relied upon the judgments of **State of Haryana's case (supra)** and **Smt. Habiba's case (supra)**, however, the said judgments are not applicable to the facts of the instant case.

In view of the above discussion, the instant appeal succeeds and the impugned order dated 12.04.2005, passed by the learned Chief Judicial Magistrate, Jalandhar is set aside and the complaint is ordered to be restored to its original number. The learned trial Magistrate is directed to proceed with the complaint from the stage, when it was dismissed in default. The Registry of this Court is directed to inform the learned trial Court in this regard.

Since it is an old case, the learned trial Court is directed to decide the main case on merits expeditiously, preferably within a period of six months from today.

Pending applications, if any, are also disposed off, accordingly.

The trial Court record be sent back.

20.03.2023
hemlata

(N.S.SHEKHAWAT)
JUDGE

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