

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

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CRM-A-6-MA-2014(O&M)
Date of decision: 18.01.2023

Hardeep Singh

....Appellant(s)

Versus

Anil Kumar

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. Vijay Lath, Advocate and
Mr. Naveen Sharma (Moudgil), Advocate for the appellant.

Mr. Ajay Singla, Advocate for the respondent.

AMAN CHAUDHARY. J.

CRM-32-2014

For the reasons mentioned in the application, same is allowed subject to just exceptions and delay of 299 days in filing the present appeal is hereby condoned.

Main Case

Briefly put, in discharge of legally enforceable debt, the respondent-accused had issued a cheque in question on 28.06.2007 for an amount of Rs.34,00,000/- to the complainant-appellant, which was dishonoured, whereafter demand notice was served, however, the respondent-accused failed to pay the cheque amount, leading to filing of the complaint. Considering the preliminary evidence led by the complainant, summoning order was passed and on notice of accusation being served to the accused, he claimed trial.

Learned counsel would submit that the appellant had been diligently appearing in the case all along after the summoning order had been issued on 09.05.2011 for which reference has been made to zimni orders reproduced in para 4 of the present petition. On 09.10.2012, the proxy counsel for the complainant had appeared and prayed for adjournment on the ground that the regular counsel had gone to Canada. On the next date of hearing i.e. on 21.12.2012, the complaint was dismissed in default for want of prosecution. On the said date, the petitioner was informed by his counsel that the next date of hearing is 31.01.2013 and thereafter, on 22.12.2013 and on all these dates, the petitioner was accompanying his counsel to the Court. On 22.12.2013, learned counsel told the petitioner that the file was not traceable, as such, an application was got drafted by learned counsel to trace the file, copy of which is Annexure P-1. The appellant was attending the dates in the above case upto 25.09.2013 whereafter an application was filed on 22.02.2013 requesting the Court to grant another date as the case file was not traceable upon which the the Ahlmad of the Court had reported the case having been decided on 21.12.2012 and consigned to the record room. Thereafter, an application was filed on the same date (Annexure P-2) for restoration of the case which was listed on 22.12.2012, wherein notice was issued to the respondent and to which reply was filed by the respondent and the same was dismissed on 25.09.2013, Annexure P-3, on the ground that the Court had no power to review or recall its own order in terms of provisions under Section 362 Cr.P.C. Therefore, the petitioner during the entire period was not aware of the case, having been dismissed in default way back on 21.12.2012 and he being illiterate

rustic villager completely dependent on his counsel, kept visiting the Court and had also seen the brief of the learned counsel showing the dates of hearing, which made him believe that the case was going on but the file was not traceable for which the application which was dismissed.

Learned counsel for the respondent submits that the learned trial Court has rightly dismissed the complaint and the said order requires no intervention.

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.”

The trial Court ought not to have dismissed the complaint for want of 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, besides the petitioner being an illiterate person was dependent on his counsel, who had informed him the next date of hearing being 31.01.2013 and so on. The trial Court ought to also have taken into consideration whether the presence of the complainant was deemed necessary on that particular day to proceed with the case. However, no such finding has been given in the impugned order.

Hon'ble the Supreme Court in the case of **Rafiq and another vs. Munshilal and another**, AIR 1981 SC 140, held thus:

“What is the fault of the party who having done everything in his power expected of him, would suffer 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.”

Fairness of trial being a virtue that is sacrosanct in the judicial system and the dismissal of the complaint for want of prosecution would amount to denial of justice.

In view of the peculiarity of facts and circumstances of this case and the enunciation of law, this Court finds that in order to secure ends of justice, the petition deserves to be allowed.

Consequently, the order dated 21.12.2012 passed by learned Judicial Magistrate 1st Class, SAS Nagar, Mohali is hereby set aside. The complaint is ordered to be restored to its original number. The trial Court is directed to decide the same on merits, granting effective opportunities to the parties in accordance with law.

(AMAN CHAUDHARY)
JUDGE

January 18, 2023

Mehak

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