

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-A-1637-MA of 2015 in/and
CRA-AS-207-2023
Date of Decision: 01.05.2023

Anshul Bhatri

...Applicant- appellant

Versus

Ram Phal

...Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Krishan M. Vohra, Advocate for
the applicant- appellant.

None for the respondent.

DEEPAK GUPTA, J.

This application for grant of leave to appeal under Section 378(4) Cr.P.C is directed against the order dated 14.07.2015 passed by learned Judicial Magistrate Ist Class, Panchkula in complaint No.297/RBT of 2013, titled as “***Anshul Bharti v Ram Phal***”, whereby the said complaint filed under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred as ‘the N.I. Act’) has been dismissed in default of prosecution.

2. Leave granted. On direction to the Registry to assign appeal number, number CRA-AS-207 of 2023 has been assigned.

3. Complaint No.297/RBT of 2013, titled as “***Anshul Bhatri v Ram Phal***”, to prosecute accused Ram Phal (now respondent) under Section 138 of the N.I. Act was fixed before learned Judicial Magistrate 1st Class, Panchkula on 14.07.2015 for defence evidence and arguments,

when due to non-appearance of the complainant, the said complaint was dismissed in default, vide order dated 14.07.2015, against which this appeal has been filed.

4. It is contended by learned counsel that appellant-complainant had already lead his evidence. Even the statement of accused under Section 313 Cr.P.C. had already been recorded. The case was fixed for defence evidence, if any, otherwise for arguments, for which purpose accused had already taken as many as 9 adjournments, but on 14.07.2015, due to wrong noting of date, complainant or his counsel could not appear and the Court dismissed the complaint for want of prosecution.

5. Learned counsel has drawn attention towards the table forming part of the appeal to emphasize that how the matter was being adjourned every time at the request of defence counsel as neither any defence evidence was produced nor the arguments were being addressed. It is contended that in fact the complainant noted the next date fixed of hearing to be 03.08.2015 and it is because of this wrong noting of the date that he did not appear on 14.07.2015, which was found to be the actual date and on which complaint was dismissed in default.

6. Though counsel for the respondent was earlier appearing, but today there is no representation on his behalf.

7. Section 256 of the Code of Criminal Procedure 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 herein before 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 complainant is due to his death.'

8. It is, thus, clear that in a summons case filed by the complainant, if on the date appointed for appearance of accused, complainant does not appear, then Magistrate has the power to acquit the accused unless for some reasons, he thinks it proper to adjourn the hearing.

9. Keeping in view the effect of dismissal of complaint under Section 138 of the NI Act, Hon'ble Apex Court in case titled as ***Associated Cement Co. Ltd. versus Keshvanand (1998) 1 SCC 687***, after discussing the object and scope of Section 256 Cr.P.C, has held that though, the Section affords protection to an accused against dilatory tactics on the part of the complainant, but at the same time, it does not mean that if the complainant is absent, the Court has duty to acquit the accused in invitum. It has further been held that the discretion under Section 256 Cr.P.C. must be exercised judicially and fairly without impairing the cause of administration of criminal justice.

10. Similarly, Hon'ble Apex Court in case *Mohd. Azeem versus A. Venkatesh (2002) 7 SCC 726* has considered dismissal of the complaint on account of one singular default in appearance on the part of the complainant as a very strict and unjust attitude resulting in failure of justice.

11. In case titled *S. Anand versus Vasumathi Chandrasekar reported in, (2008) 4 SCC 67*, the complaint under Section 138 of the NI Act was dismissed by the trial Court exercising the power under Section 256 Cr.P.C. on failure of the complainant or her power of attorney or the lawyer appointed by her to appear in Court on the date of hearing fixed for examination of witnesses on behalf of the defence. The apex Court considered as to whether provisions of Section 256 Cr.P.C., providing for disposal of a complaint in default, could have been resorted to in the facts of the case, as the witnesses on behalf of the complainant have already been examined. It was held that in such a situation, particularly, when the accused had been examined under Section 313 Cr.P.C., the Court was required to pass a judgment on merits in the matter.

12. In this case, case was already fixed for defence evidence, if any, otherwise for arguments. No step was to be taken on the part of the complainant. Rather, to the contrary, it was the defence counsel, who was delaying the matter by taking repeated adjournments after the case had reached at the stage of defence evidence. In these circumstances it was harsh on the part of the Trial Court to dismiss the complaint for want of prosecution instead of sending a notice to the complainant or his counsel.

13. Considering the factual and legal position as discussed above, the impugned order can not be sustained. So, present appeal is hereby allowed. Impugned order dated 14.07.2015 is hereby set aside. Trial Court is directed to revive the complaint and proceed further in accordance with law.

 Parties are directed to appear before the trial Court on 15.05.2023 for further proceedings.

May 01, 2023
sarita

(DEEPAK GUPTA)
JUDGE

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