

103 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Neutral Citation No. 2023:PHHC:063138
CRM-19892-2023 in/and CRM-A-628-2023 (O&M)
Neutral Citation No. 2023:PHHC:063917
in/and CRA-AS-228-2023
Date of Decision: May 03, 2023

Shri Nath Trading ... Applicant-appellant

Versus

Swami Construction Company ...Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Sumit Singh Bairagi, Advocate
for the applicant-appellant.

DEEPAK GUPTA, J.(Oral)

CRM-19892-2023

This is an application under Section 5 of the Limitation Act to condone the delay of 26 days in filing the application for grant of leave to appeal.

For the reasons as mentioned in the application, the same is allowed and the delay of 26 days in filing the application for grant of leave to appeal is condoned.

CRM-A-628-2023 (O&M)

This application for grant of leave to appeal is directed against the order dated 07.01.2023 passed by learned Chief Judicial Magistrate, Charkhi Dadri, whereby criminal complaint bearing No.NACT-434-2022, titled as *“Shri Nath Trading v. Swami Construction Company”*, under Section 138 of the Negotiable Instruments Act, 1881, has been dismissed in default.

Leave granted. On direction to the Registry to assign appeal number, number CRA-AS-228-2023 has been assigned.

It is submitted by the counsel for the appellant that the case

was at the initial stage and the same was fixed for the appearance of the

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respondent-accused on 07.01.2023. The appellant was under the impression that his presence was not necessary due to first appearance of the respondents. It is further pointed out that vide order dated 25.05.2022, the case was adjourned to 07.01.2023 for notice to the respondent-accused through registered post and the summons were duly given in this regard and thus nothing was required to be done on the part of the complainant.

Heard.

Although, Section 256 Cr.P.C. empowers the Magistrate to dismiss the complaint in default for want of appearance of the complainant in a summons case, but it is not mandatory for the Court to do so.

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 the complainant is due to his death.'

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.

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.

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.

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

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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.

In view of the legal and factual position as noticed above, present appeal is allowed. The impugned order dated 07.01.2023 is hereby set aside. Trial Court is directed to revive the complaint and proceed further in accordance with law.

Appellant-complainant through his counsel is directed to appear before the trial Court on 22.05.2023 for further proceedings.

May 03, 2023
sarita

(DEEPAK GUPTA)
JUDGE

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