

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

(256)

CRM-M-44244 of 2015
DATE OF DECISION:-18.04.2023

M/s HP SHRIPAL OMPARKASH JAIN

...Petitioner

vs.

SUBHASH

...Respondent

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present: Mr. Nitish Sharma, Advocate, for
Mr. T. K. Yadav, Advocate, for the petitioner.

None for the respondent.

HARKESH MANUJA, J.

(1) By way of present petition filed under Sections 482 Cr.P.C., prayer has been made for quashing of the order dated 11.06.2015 passed by learned Sub Divisional Judicial Magistrate, Pataudi, District Gurgaon, whereby, a criminal complaint bearing No.99 dated 19.12.2014 filed at the instance of petitioner was ordered to be dismissed in default.

(2) On account of dishonour of cheque No.394258 dated 26.08.2014, amounting to Rs.2,47,900/-, the petitioner filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act'), wherein, the respondent was summoned under Section 138 of the Act vide order dated 19.12.2014 for 12.03.2015 on filing of process fee along with copy of complaint. On 12.03.2015, notice was received back unserved and fresh notice was issued for 11.06.2015. On the said date i.e. 11.06.2015, on account of non-appearance from the side of complainant/petitioner, the complaint was dismissed in default. Though, a revision petition was filed challenging the order dated 11.06.2015 passed by the Court of Sub Divisional Judicial Magistrate, Gurgaon, however, the same was withdrawn

vide order dated 28.07.2015, perhaps for the purpose of invoking the jurisdiction of this Court under Section 482 Cr.P.C.

(3) In view of the aforesaid fact, learned counsel for the petitioner submits that non-appearance of the petitioner or its counsel on the date fixed on 11.06.2015 was neither intentional nor willfull but for *bona fide* reasons. He further contends that the passing of the impugned order has caused serious prejudice to the rights of the petitioner.

(4) Despite having been served, no one has chosen to appear on behalf of respondent.

(5) I have heard learned counsel for the petitioner and gone through the paper book. I find substance in the submissions made on behalf of the petitioner.

(6) A perusal of the paper book shows that the summoning order in the present case was passed against the respondent on 19.12.2014 for appearance on 12.03.2015 and on the said date notice issued to respondent was received back unserved and fresh notice was issued for 11.06.2015. On the said date, none appeared before the trial Court on behalf of petitioner/complainant and thereby complaint was dismissed in default. The orders dated 12.03.2015 and 11.06.2015 passed by the trial Court are reproduced hereunder for reference:

“Present: Complainant in person with counsel.

Notice to accused received back unserved. Let notice to accused be issued for 11.06.2015.

sd/-
(Tarun Singla)
SDJM/P/12.03.2015

“Case called several times since morning but none has appeared on behalf of complainant. It is already 2.30 PM. No

further wait is justified. Hence complaint of complainant is dismissed in default for non-appearance of complainant. File be consigned to record room after due compliance.

*sd/-
(Tarun Singla)
SDJM/P/11.06.2015”*

(7) A perusal of the aforementioned orders show that the complaint was dismissed in default on account of non-appearance when the same was merely fixed for service of respondent and the appearance of the complainant was not at all indispensable for the date fixed and as such the amazing swiftness shown by the trial Court while dismissing the complaint in default was wholly uncalled for. Rather than showing haste in dismissal of the complaint and compelling the petitioner to approach this Court, the trial Court could have adjourned the hearing in the complaint for awaiting the report of summons or for appearance of respondent. The passing of the impugned order in fact caused serious prejudice to the rights of the petitioner as his statutory remedy was foreclosed in a mechanical manner and in the absence of any repeated or persistent default on its part. The trial Court even failed to exercise the discretion vested in it under proviso to sub-Section (1) to Section 256 Cr.P.C. which enables it to dispose of with the attendance of the complainant in case it was not necessary. Reference in this regard can be made to a latest decision rendered by the Hon’ble Supreme Court in case of **M/s BLS Infrastructure Ltd. Vs. M/s Rajwant Singh and others, 2023 (2) RCR (Criminal) 49**. The relevant para No.10 thereof is reproduced hereunder:

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.”

In the facts and circumstances of the present case and considering the fact that on the date of passing of impugned order, the complaint was fixed merely for appearance of respondent, the personal attendance of the complainant was not necessary and thus could have been dispensed with.

In view of the discussion made hereinabove, the petition is allowed. Impugned order dated 11.06.2015 (Annexure P-3) passed by the Sub Divisional Judicial Magistrate, Gurgaon, resulting into dismissal of the complaint is hereby quashed and the complaint i.e. C.No.99/14 filed at the instance of petitioner is ordered to be restored to its original number. The trial Court shall proceed further in accordance with law by issuing fresh

notice to respondent about the proceedings pending against him from the stage it was dismissed in default.

18.04.2023

anil

whether speaking/reasoned:

whether reportable:

Yes/No

Yes/No

(HARKESH MANUJA)

JUDGE