

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

CRR-402-2017 (O&M)

Reserved on : January 11, 2023

Date of Decision: January 13, 2023

Parkash Singh

...Petitioner

Versus

Harpal Singh

...Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Atul Jain, Advocate for the petitioner.

None for the respondent.

DEEPAK GUPTA, J.(Oral)

Accused of the criminal complaint No.76 of 2012 titled as ***“Harpal Singh vs Parkash Singh”*** (Annexure P-1) pending in the Court of learned Judicial Magistrate 1st Class, Patiala, is in this revision against the order dated 15.12.2016 passes in criminal revision N: CRR 545 of 2016, whereby the said complaint dismissed in default by learned Magistrate, was allowed to be restored by the learned Additional Sessions Judge, Patiala.

2. Brief facts for disposal of the present revision are that complaint in question was filed on 01.06.2015 regarding the dishonour of the cheque dated 06.04.2015 for an amount of ₹2,40,000/- issued by the accused in favour of the complainant. Said complaint was filed after making all the statutory compliances. After recording preliminary evidence, summoning order was passed on 22.07.2015. On 23.09.2015, the case was fixed for appearance of the accused, when nobody appeared for the complainant and so, the complaint was dismissed in default for want of prosecution. Application for restoration moved on the very next day i.e. 24.09.2015 was dismissed by the learned Magistrate on

23.12.2015, which led the complainant to file a revision. Said revision has been allowed by the learned Additional Sessions Judge, Patiala vide impugned order dated 15.12.2016, against which this revision is filed.

3. It is contended by learned counsel for the petitioner that dismissal of the complaint for want of prosecution, amounted to acquittal of the accused-petitioner as per Section 256 of the Code of Criminal Procedure, against which only the appeal could lie and therefore, the revision petition filed before the learned Additional Sessions Judge, Patiala, was not maintainable. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court of India in case of **“V.K. Bhat vs G. Ravi Kishore and another”** reported as 2016(2) R.C.R.(Criminal) 793, wherein it has been held that when the complainant is not appearing in a complaint case under Section 138 of the Negotiable Instruments Act, 1881 and the complaint is dismissed in default, it amounts to acquittal of the accused under Section 256 of the Code of Criminal Procedure.

4. Notice of motion was issued to the respondent. However, there is no representation.

5. I have considered the submissions of learned counsel for the petitioner and have also perused the record.

6. Section 256 of the Code of Criminal Procedure reads as under:-

“256. Non-appearance or death of complainant - (I) 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.'

7. 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.

8. In present case, on 23.09.2015, the case was fixed for appearance of the accused. As complainant had not appeared, so complaint was dismissed in default for want of prosecution. Said order amounts to acquittal of the accused in view of Section 256 Cr.P.C. as held in ***V.K. Bhat's case (supra)***. A Full Bench of this High Court in ***M/s Tata Steel Limited Vs M/s Atma Tube Products Ltd. 2013 (2) RCR (Criminal) 1005*** has held that the remedy for a complainant, in a complaint case, against the order of acquittal is to file appeal under Section 378 (4) Cr.P.C only.

9. However, at the same time, it is important to notice that 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. Himachal Pradesh High Court in ***N.K. Sharma versus M/s Accord Plantations Pvt. Ltd. (2008) 2 Latest HLJ 1249*** by relying upon

Associated Cement Co. Ltd.'s case (supra) has held that when the Court notices that complainant is absent on a particular day, the Court must consider whether the 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 and if the situation does not justify the case being adjourned, then only Court is free to dismiss the complaint and acquit the accused, but if the presence of complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of power envisaged under Section 256 Cr.P.C.

13. In the present case, on 23.09.2015, the case was fixed for furnishing the complete particulars of the accused. Summoning order had already been passed. Accused had not put in appearance even once by that time. Therefore, in these facts and circumstances, resorting to the step of axing down the complaint by dismissing it in default can not be held to be a proper exercise of power envisaged under Section 256 Cr.P.C.

14. As far as *V.K. Bhat's case (supra)*, relied by the learned counsel for petitioner is concerned, in that case revision against the dismissed in default of the complaint, was dismissed by learned Metropolitan Sessions Judge on 10.08.2010 on the ground of absence of the complainant. However, subsequent revision was filed and this time the same was accepted by the Metropolitan Sessions Judge, by setting aside the order of dismissal of the complaint and direction was given to restore the complaint. In these facts, it was held by the Hon'ble Supreme Court that second revision petition was not maintainable before the

learned Sessions Judge.

The facts of the present case are quiet distinguishable as in this case no second revision was filed before the Sessions Judge.

15. As far as maintainability of the revision before Ld. Sessions Court is concerned, since the summoning order had already been passed and the presence of the accused had not been secured by the date of dismissal of complaint in default, as he had not been served by that time, and the discretion was not exercised by the Magistrate judiciously, fairly and without impairing the cause of administration of criminal justice in dismissing the complaint, therefore, this court is of the view that revision in the facts and circumstances of the present case, was maintainable.

16. Consequent to above discussion, present revision is held to be devoid of any merits.

Dismissed.

January 13, 2023
sarita

(DEEPAK GUPTA)
JUDGE

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