

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

CRM-A-499 of 2023 (O&M)
in/and CRA-AS-305 of 2023
Date of Decision: 31.05.2023

Siddhi Interiors Pvt. Ltd.

...Applicant- appellant

Versus

M/s Amarpali Infrastructure Pvt. Ltd. and others

...Respondents

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Ms. Shaveta Sanghi, Advocate for the applicant- appellant.

DEEPAK GUPTA, J.

CRM No.18542 of 2023

This is an application for condonation of delay of 38 days in filing the appeal.

2. Heard.

3. For the reasons mentioned in the application, the same is allowed. Delay of 38 days in filing the appeal is condoned.

CRM-A-499 of 2023

This application for grant of leave to appeal under Section 378(4) Cr.P.C is directed against the order dated 10.01.2023 passed by learned Judicial Magistrate Ist Class, Gurugram in complaint No.NACT/4491/2018, whereby the said complaint filed under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred as 'the N.I. Act') was dismissed in default for want of prosecution.

2. Leave granted. On direction to the Registry to assign appeal number, CRA-AS-305 of 2023 has been assigned.

CRA-AS-305 of 2023

Criminal Complaint bearing No. NACT/4491/2018 for commission of offence under Section 138 of the NI Act with regard to dishonour of cheque, was pending on the Board of learned Judicial Magistrate Ist Class, Gurugram. Complaint was dismissed in default vide the order dated 10.01.2023, due to non-appearance of the complainant. The said order, dismissing the complaint in default, has been assailed by way of this appeal.

2. Perusal of paper book reveals that respondents- accused were summoned to face prosecution under Section 138 of the NI Act in the complaint in question, after recording of the preliminary evidence. However, after being allowed bail, said respondents had absented due to which their bail was canceled and bonds were forfeited. Efforts were being made to procure their presence by issuing repeated warrants of arrest. After procuring the presence, the accused were re-admitted to bail on 06.07.2018 and notice of accusation was served upon them, to which they pleaded not guilty and claimed trial. Plea of defence under Section 263(g) Cr.P.C of the accused was also recorded on the same date. Later on, it was informed to the Court that accused were in custody in some other case and so, production warrants to procure the presence of accused were being issued from time to time right from 12.04.2019 onwards.

3. It is contended by learned counsel for the appellant-complainant that unfortunately corona virus hit the entire country and the complainant or his counsel failed to make appearance after the lock-down was lifted. Complainant had been informed by his counsel that only urgent matters are being taken up and once, case is listed for effective

hearing, the same shall be communicated to him. On 09.12.2022, after getting the Court notice, complainant- appellant got in touch with his previous counsel and moved an application for exemption, which was allowed and the matter was adjourned to 10.01.2023. Since respondent No.2 to 4 – accused were in custody, so production warrants for them were directed to be issued by the Court for adjourned date i.e. 10.01.2023. Learned counsel contends that on 10.01.2023, complainant could not appear and the complaint was dismissed in default. Learned trial Court ignored that accused- respondents had earlier failed to put in appearance on more than 25 occasions; that there was lack of communication between the complainant and his counsel and nothing on the part of the complainant was to be done on 10.01.2023, as on that day, case was fixed for appearance of the accused- respondent by way of production warrants.

4. Perusal of the impugned order dated 10.01.2023 reveals that there is no reference that pursuant to the production warrants issued for the accused- respondents, they had been produced or not. Therefore, notice of this appeal is not being issued to them.

5. Heard.

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. 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.

9. 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.

10. 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.

11. In ***M/s Chettinad Cement Corporation Ltd. represented by its Senior Marketing Manager v/s The Proprietor M/s. Rugmini Steels & Another, 2014 (2) KHC 537***, Kerala High Court noticed the practice of trial Magistrates dismissing the complaints in default, totally disregarding the injustice that may be caused to the complainant. It was observed as under:-

“28. As has been observed in the various decisions on the point, the learned Magistrates are to be reminded of the fact that while exercising the discretion they should not forget that their very existence is for dispensation of justice but within the frame work of the statutes governing particular cases. A complainant usually approaches the court with a case because the accused committed wrong to him. Though there may be cases where the complaints

are filed only to cause harassment to the accused, that can only be stated as an exception. Magistrate cannot proceed on the premise that complaints are filed only to cause harassment to the accused. While maintaining the presumption of innocence of the accused, the court should not be harsh or hasty in disposing such complaints availing of the provision under Section 256 (1) Cr.P.C. totally disregarding the injustice that may be caused to the complainant. The endeavour of the court should be to advance justice and not to deny it. It cannot be forgotten that there may be host of reasons for the absence of the complainant when the case is called. Either he might have been held up due to heavy traffic block or because the vehicle was held up at a level - cross (Railway gate). The fact that there used to be a huge crowd in the veranda and at the entrance door of the court which prevents the complainant from entering the court on time are not matters which the Magistrate can lose sight of. The court should be cautious of such situations as well. The fact that the complainant was absent on an earlier date also may not in all cases be a reason to invoke the provision under Sec. 256 (1) Cr.P.C. If the case is posted for recording the evidence, the better course would be to pass over the matter and not to immediately invoke Sec. 256 (1) Cr.P.C. solely for the reason that the complainant could not enter the court hall when the case is called. There may be variety of reasons for his inability to enter the court hall or to reach the court on time. There may also be cases where the counsel appearing for the complainant could not be present in court either because he was engaged in another court or because of other

*reasons. True that the counsel is expected to make arrangements to represent the matter in court. But for the fault or lapses on the part of the counsel, a genuine complaint cannot be thrown out. There is a propensity to see that the pendency is reduced by adopting such shortcut disposal resorting to Sec. 256(1) Cr.P.C. It cannot be justified. But at the same time, the view that under no circumstance, Sec. 256 can be applied if the case is posted for evidence and that only if the case is posted for 'hearing' and if only on that day the complainant is absent, the case can be disposed of under Sec. 256 (1) Cr.P.C. is something which is not discernible from the provision. **Therefore, the pragmatic view would be that though the Magistrates can invoke the provision under Sec. 256 (1) Cr.P.C. to acquit the accused for the absence of the complainant on the day the case is posted for recording evidence or on the day when the actual presence of the complainant is essential for the due prosecution of the matter, a case cannot be simply disposed of under Sec. 256 (1) Cr.P.C. unless the court is satisfied that the absence of the complainant was deliberate and that his absence was only to protract the proceedings to cause harassment to the accused.***

12. Recently, in ***M/S. BLS Infrastructure Ltd. vs M/S. Rajwant Singh*** in Criminal Appeal Nos.657-664 of 2023 decided by Hon'ble Supreme Court on 01.03.2023, after noticing the observations made in ***Associated Cement Co. Ltd. versus Keshvanand's case (supra)***; and ***S. Anand versus Vasumathi Chandrasekar's case (supra)***, it was held that learned Magistrate was not justified in straightway dismissing the

complaint and ordering the acquittal of the accused on mere non-appearance of the complainant.

13. In the present case, the facts as noticed earlier, reveal that on 10.01.2023, when the complaint was dismissed in default, nothing was required to be done on the part of the complainant- appellant, as the case had been adjourned on the previous date of 09.12.2022 for production of the accused by issuance of production warrants against them. The notice of accusation had already been served upon the accused and their defence under Section 263(g) had already been recorded. In such circumstances, having regard to the legal position explained above, learned Magistrate was not at all justified in dismissing the complaint by way of the impugned order, which appears to be quite harsh, causing grave injustice to the complainant.

14. In view of the above, the appeal is allowed and the impugned order dated 10.01.2023 is hereby set aside.

15. Complainant- appellant through its counsel has been directed to appear before the trial Court on 12.06.2023 for further proceedings. Ld. Trial court shall revive the complaint by restoring it to its original number and proceed further in accordance with law.

May 31, 2023
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(DEEPAK GUPTA)
JUDGE

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