

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

CRM-M-40152 of 2019 (O&M)

Date of Decision: July 21, 2023

Hardeep Singh Sandhu

...Petitioner

Versus

M/s Intex Technologies (India) Ltd.

...Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. R.K. Sharma, Advocate for the petitioner.
None for the respondent.

DEEPAK GUPTA, J.(Oral)

Petitioner is aggrieved by the order dated 24.07.2019 (Annexure P.1) passed by learned Judicial Magistrate Ist Class, Chandigarh recalling the earlier order dated 24.01.2018, in Criminal Complaint No.1843 of 2015, M/s Intex Technologies (India) Ltd Vs. Hardeep Singh Sandhu.

2. It is contended by learned counsel for the petitioner that complaint was dismissed in default for want of prosecution vide order dated 24.01.2018 in the presence of the accused- petitioner and his counsel and therefore, the dismissal of the complaint in default for want of prosecution amounted to acquittal of the accused. However, learned Court on an application moved by the complainant- respondent, restored the complaint vide impugned order dated 24.07.2019. Learned counsel contends that it is impermissible under law.

3. Learned counsel has referred to Hardev Singh Vs. Savi Enterprises, decided by a co-ordinate Bench of this Court on 05.09.2022 in CRM-M-5287 of 2021; and Atul Sood Vs. Jalandhar Transport Co-operative Society Pvt. Ltd and another in CRM-M-6678 of 2015 decided on 07.12.2017.

4. Despite service, nobody made appearance on behalf of the respondent- complainant to contest the petition.

5. Order dated 24.01.2018 whereby learned Magistrate had dismissed the complaint in default, reads as under:-

“Case file taken up again after lunch break. Case called several times but none appeared on behalf of complainant. It seems that the complainant is not interested in pursuing the present complaint. It is already 03:30 P.M. Further wait is not justified. Therefore, present complaint is hereby dismissed for want of prosecution. Accused stands discharged in this case. File be consigned to the records after due compliance.”

6. Section 256 Cr.P.C 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 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.”

7. It is clear on bare perusal of afore-said provision that following options are available to the Court, when complainant in a summons case does not appear on appointed date:-

- (i) to acquit the accused;
- (ii) if for some reasons it thinks proper, to adjourn the hearing of the case to some other date;
- (iii) to dispense with the attendance of the complainant and proceed with the case, in case personal appearance of complainant is not considered necessary.

8. In the present case, when the complainant did not appear on 24.01.2018, learned Magistrate exercised the first option i.e. to dismiss the complaint and acquit the accused, though word “discharge” has been used. Acquittal can be challenged only before this High Court under Section 378 Cr.P.C. Magistrate has no power to restore the complaint, which was dismissed in default, when accused has been acquitted, in a summons case. Even the revisional Court has no such power.

This aspect came up for consideration in Atul Sood's case (supra), whereas it was held as under:-

"Learned counsel for the petitioner inter-alia contends that the revisional Court had no jurisdiction to restore the complaint, which was dismissed in default for want of prosecution on account of non appearance of the respondent and therefore, the impugned order Annexure-P6 is illegal. In support of his contention, he has placed reliance upon the decision of the Bombay High Court in Vinay Kumar

vs. Ramesh Saboo, 2009(5) R.C.R. (Criminal) 164. The respondent- complainant had only remedy to get restored his complaint by way of filing appeal before this Court under [Section 378](#) Cr.P.C. The lower revisional Court, without any such application and having no jurisdiction to restore the complaint, has committed a grave illegality in passing the impugned order dated 21.11.2014 (Annexure-P6). After giving my anxious consideration to the submissions made, I find merit in the instant revision petition inasmuch as revisional Court had no jurisdiction to suo motu order for restoration of complaint even with or without any such application. Undisputedly, no application for restoration of complaint was filed before the revisional Court, who instead of restoration of the complaint directing the trial Court to proceed further with the same in accordance with law, ought to have dismissed the revision petition as withdrawn in view of the statement of the petitioner, without further going into the merits of the case. In view of the settled proposition of law that a complaint under [Section 138](#) of the Act, dismissed in default, amounts to acquittal of the accused and the Magistrate has no jurisdiction to restore or revive the same. The only remedy available to him is under [Section 378](#) Cr.P.C. Reference in this regard can be made to Vinay Kumar's case (supra). In view of above, the instant petition is accepted. The impugned order dated 21.11.2014 is set aside."

9. A Coordinate Bench in CRM-M-5875-2010 titled as "Mohd. [Sakil vs. Sachin Saini](#)" decided on 12.9.2013, has held in similar set of facts and circumstances that in case of complaint under [Section 138](#) NI

Act having been dismissed in default, neither revision nor petition under [Section 482](#) Cr.P.C. is maintainable and complainant only has a remedy of appeal as the dismissal of the complaint amounts to acquittal. The relevant extract reads thus:-

"It has been further contended by learned counsel for the petitioner-complainant that the present petition under [Section 482](#) Cr.P.C, is also maintainable and on the point, he has placed reliance upon Standard Corporation India Limited Vs. Kamblekar Ramesh 2011(4) R.C.R. (Criminal) 564.

However, perusal of this judgment shows that it was an appeal directed by the complainant against the judgment passed by learned trial Court vide which complaint filed by the complainant under [Section 138](#) of the Act was dismissed for non-prosecution. He also placed reliance upon another judgment passed by Co-ordinate Bench of this Court in Parle

Biscuits (P) Ltd Vs. M/s Sandeep Marketing Company and another 2011(4) R.C.R. (Criminal) 687, wherein challenge was to the order vide which application for restoration of complaint was dismissed in default.

In my view, there is force in the argument of learned counsel for the respondent-accused. Law is well settled that if a complaint under [Section 138](#) of the Act is dismissed in default due to non-appearance of complainant, the same amounts to acquittal and complainant is having right of appeal under [Section 378\(4\)](#) Cr.P.C. Hence, neither revision nor petition under [Section 482](#) Cr.P.C. is maintainable without availing statutory right of appeal as provided under [Section 378\(4\)](#) Cr.P.C. Learned counsel for respondent-accused also placed reliance on a judgment of this Court in Balbir Kaur Aujla Vs. Balraj Singh 2006(2) R.C.R. (Criminal) 650; another judgment passed by Delhi High Court in M/s Becton Dickinson India Ltd. Vs. M/s Shika Pharma (P) Ltd. And another 2010 (5) R.C.R. (Criminal) 735 and another judgment passed by Bombay High Court (Aurangabad Bench) in Vinaykumar Vs. Ramesh Saboo 2009(5) R.C.R. (Criminal) 164.

In view of the afore-mentioned legal proposition, the present petition is not sustainable and hence, the same is, hereby, dismissed being not maintainable.”

10. Similar view has been taken in Hardev Singh's case (supra).

11. In view of the legal position as above, there can be no hesitation to conclude that once the complaint in question was dismissed in default for want of prosecution, due to absence of the complainant but in the presence of the accused, the said dismissal amounted to acquittal and the only remedy for the complainant- respondent was to file the appeal. The Magistrate did not have the power to restore the complaint.

12. Consequently, the impugned order dated 24.07.2019 (Annexure P.1) passed by learned Judicial Magistrate Ist Class, Chandigarh is hereby set aside. However, the complainant- respondent will be at liberty to avail alternate remedy if available to him. Upon doing so, Court concerned will consider the same in accordance with law.

13. Disposed of.

July 21, 2023

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(DEEPAK GUPTA)
JUDGE

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