

234 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-A-402-2023 (O&M) now treated as
CRA-AS-425-2023 (O&M)
Date of Decision: September 14, 2023

Rajesh Jain

... Applicant-appellant

Versus

Ajay Singh

...Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Applicant-appellant, Rajesh Jain in person.

Mr. Vishwajeet Mehla, Advocate for the respondent.

DEEPAK GUPTA, J.

Prayer in this appeal under Section 378(4) Cr.P.C. read with Sections 482 and 357(3) Cr.P.C. is for setting aside the order/judgment dated 28.02.2023 passed by learned Judicial Magistrate 1st Class, Jind, whereby complaint bearing CIS No. NACT/429/2018 titled as "*Rajesh Jain v. Ajay Singh*" under Section 138 of the Negotiable Instruments Act, 1881, was dismissed for want of prosecution.

Leave to appeal is granted.

Registry is directed to assign the number of appeal.

CRA-AS-425-2023

2. It is contended by the appellant, who is appearing in person that after being dragged for a period of 04 years, the complaint in question reached at the stage of defence evidence. The case was fixed on 28.02.2023 for recording the defence evidence but on that day, applicant-appellant was required to appear before Hon'ble Supreme Court in SLP No.12802 of 2022, instituted by the appellant against the same vary respondent, in respect of two other cheques, due to which the appellant

could not appear before the Trial Court on 28.02.2023 and that without serving any notice to the appellant, the complaint was dismissed for want of prosecution.

3. The appellant contends that as the case had reached at the stage of defence evidence, nothing was required to be done by the appellant on that date i.e. 28.02.2023 and so the impugned order dismissing the complaint for want of prosecution, is illegal and contrary to the provision of Section 256 Cr.P.C. and the settled position of law. Appellant has referred to *“M/s. BLS Infrastructure Limited v. M/s. Rajwant Singh and others”* (Criminal Appeal Nos.657-664 of 2023, arising out of SLP (Criminal) Nos.867-874 of 2020, decided by the Hon’ble Supreme Court on 01.03.2023.

4. Upon notice, appearance has been made by the respondent through his counsel. Learned counsel for the respondent could not refute the contentions as raised by the appellant. It is admitted by him that on 28.02.2023, when the complaint was dismissed for want of prosecution, it was fixed for defence evidence, which position otherwise also is evident from the impugned order placed on record.

5. In *M/s. BLS Infrastructure Limited’s case (supra)*, the Hon’ble Supreme Court considered the question as to whether the Magistrate was justified in dismissing the criminal complaint for non-appearance of the complainant, even though the statement of the complainant had been recorded, the complainant’s evidence was closed and the matter was listed for recording of the defence evidence.

6. The Hon’ble Supreme Court then referred to Section 256

Cr.P.C., which 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.”

7. Hon’ble Supreme Court then held as under:

“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.

*11. In the case of **S. Anand (supra)**, addressing a situation where the complainant was absent but had already examined his witnesses, this Court observed as follows:*

“12. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined.

13. The date was fixed for examining the defence witnesses. The appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence.”

After observing as above, in paragraph 15, it was held thus:

“15. ... when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of

Criminal Procedure, the Court was required to pass a judgment on merit of the matter.”

12. In Associated Cement Co. Ltd. (supra), the purpose of inserting a provision like Section 256 of the Code was discussed and in light thereof, in paragraph 16, it was observed as under:

“16. What was the purpose of including a provision like Section 247 in the old Code (or Section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The section, therefore, affords protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, the court has a duty to acquit the accused in invitum.”

After observing as above, it was held that where the complainant had already been examined as a witness in the case, it would not be appropriate for the Court to pass an order of acquittal merely on non-appearance of the complainant. Thus, the order of acquittal was set-aside and it was directed that the prosecution would proceed from the stage where it reached before the order of acquittal was passed.”

8. In view of the aforesaid legal position, which is fully applicable to the facts and circumstances of the present case, the present appeal is hereby allowed. The impugned order dated 28.02.2023 is hereby set aside. The Trial Court is directed to restore the complaint at its original number and further directed to proceed in the case from the stage it had reached before the impugned order of dismissal was passed. Both the parties are directed to appear before the Trial Court concerned on 03.10.2023.

September 14, 2023
sarita

(DEEPAK GUPTA)
JUDGE

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