

CRM-A-120-MA-2018

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-A-120-MA-2018(O&M)
Reserved on: 13.05.2024
Pronounced on: 27.05.2024

M/s Akal Consumer Electronics India Ltd.

...Appellant(s)

Versus

Ramesh Kumar

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. Vikas Mohan Gupta, Advocate
for the applicant(s).

Mr. S.S. Khaira, Advocate
for the respondent.

ANOOP CHITKARA, J.

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This is an application filed under Section 378(4) CrPC seeking leave to appeal against order dated 23.02.2016 passed by Sub Divisional Judicial Magistrate, Batala.

I have heard learned counsel for the applicant-appellant and perused the impugned order with due care and circumspection.

The application is allowed.

Leave to appeal granted.

Office is directed to assign appeal number to the case.

Main Appeal:

1. The appellant has challenged the order of acquittal of the respondent-accused dated 23.2.2016 passed by Sub Divisional Judicial Magistrate, Batala, for offence under Section 138 of the Negotiable Instruments Act, 1881, whereby the complaint filed by the complainant was dismissed in default for want of prosecution.
2. The impugned order dated 23.2.2016 passed by Sub Divisional Judicial Magistrate, Batala reads as under:-

“Today, case was fixed for awaiting the presence of complainant but neither complainant nor his counsel has come present. Case called several times since morning but nobody appeared on behalf of complainant. It appears that complainant is not interested in pursuing

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with the present complaint. As such the complaint is dismissed in default for want of prosecution. File be consigned to record room, Batala.”

3. The appellant seeks setting aside of the aforesaid order on the ground that the respondent-accused was served on various dates, but he did not appear and on one day, the complainant and his counsel were also not present without any *mala fide* intention, the Court dismissed the complaint in default, which amounts to acquittal of the respondent-accused.

4. As per paragraph no.3 of the appeal, the reason for absence of the appellant before the Court below was that the complaint was fixed for appearance of the accused and personal presence of the appellant-complainant was not required and therefore, the trial Court ought to have not dismissed the complaint for non-prosecution.

5. On the other hand, counsel for the respondent submits that the ground taken by the appellant is not sufficient to intervene and set aside the order of acquittal. He further submits that dismissal of the complaint in default amounts to acquittal and in case this Court allows the present appeal, the accused would again be put to criminal trial, which is unjust.

6. To this, counsel for the appellant submits that the accused has never put in appearance before the trial Court and was always evading service, which led to non-appearance of the appellant on one date, and consequently, there was dismissal of the complaint in default. Rather, it was the tactics on the part of the accused, which led to delay in trial and on one date, since the complainant missed the date, it led to dismissal of the complaint in default.

7. I have heard counsel for the parties and perused the impugned order.

8. An analysis of the abovesaid arguments and perusal of orders of the Court below would lead to the outcome that on the date when the matter was listed before the trial Court on 23.02.2016, there was no mention about the service of the accused. Without referring to what happened to the service of the accused, the concerned Magistrate went on to dismiss the complaint for default. The trial Court did not refer to the fact that as apparent from paragraph 3 of the appeal, on 19.11.2015, an exemption application was moved by the complainant, which was allowed and the counsel was directed to produce the complainant on next date. On next date i.e. 15.01.2016, the matter was not taken up because the concerned Court was on leave and thus, the matter had not been put up before the Court where it was supposed to have been listed. Subsequently, the matter was listed on 23.2.2016, on which date,

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neither the complainant nor his counsel were present. Thus, a reference to order dated 15.1.2016, as reproduced in paragraph 3 of the appeal as well as to impugned order dated 23.2.2016, points out that there is no reference by the concerned Magistrate of sending any message in the Bar Room or at least, informing counsel for the complainant about listing of the matter through Court’s peon. Had the concerned Magistrate sent any message to the counsel for the complainant through the Bar President or even made any effort to trace the counsel through the Court’s peon at all, then there was possibility that the counsel would have been aware of listing of the matter and there was no need for not dismissing of the complaint in default. The complainant is a corporate person and not an individual and is represented through its employees. It is not a case of a money lender receiving his cheque, but *prima facie*, a business transaction. The Court should have kept this fact in mind. Reference be made to judgment of Hon’ble Suprme Court in the case of Associated Cement Co. Ltd. Vs. Keshvanand (1998) 1 SCC 687, wherein it was held:

“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 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 a protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, court has a duty to acquit the accused in invitum.

17. Reading the Section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice.

Xx xx xx xx xx

27. However, as we have taken the view that the magistrate should not have acquitted the respondent under Section 247 of the old Code on the facts of this case we allow the appeal and set aside the order of acquittal as well as the impugned judgment of the High Court. The prosecution would now proceed from the stage where it reached before the order of acquittal was passed.”

9. In the light of judgment of Apex Court in Associated Cement Co. Ltd. Vs. Keshvanand (*supra*) and the fact that the concerned Magistrate did not send any message to the Bar Room about the presence of lawyer coupled with the fact that on

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the earlier date, the matter had been adjourned because of absence of the Judge, it is a fit case where order of dismissal of complaint in default in uncalled for and is unjust.

10. Accordingly, the present appeal is allowed and the impugned order is set aside.

11. Appellant as well as the respondent, who are represented through their counsel, may appear before the Sub Divisional Judicial Magistrate, Batala on 31.5.2024 at 10 a.m. However, it is clarified that in case the complainant fails to appear before the concerned Magistrate on the date fixed before 5 p.m, then this order shall stand recalled automatically without any further reference to this Court and this Court shall presume that the complainant intentionally evaded appearance.

(ANOOP CHITKARA)
JUDGE

May 27, 2024
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Whether speaking/reasoned	:	Yes
Whether reportable	:	No