

IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH

227 CRM-A-2064-MA-2017  
Date of Decision : April 23, 2024

NITESH HOUSING FINANCE PVT LTD

-APPLICANT/APPELLANT

V/S

AJAY MEHRA

-RESPONDENT

CORAM: HON'BLE MR. JUSTICE KULDEEP TIWARI

Present: Mr. Suresh Kumar Arya, Advocate  
for the applicant/appellant.

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

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KULDEEP TIWARI, J. (ORAL)

1. The instant application, seeking grant of leave, is directed against the order dated 15.07.2017, rendered by learned Judicial Magistrate I<sup>st</sup> Class, Amritsar, whereby, merely owing to the complainant (applicant/appellant herein) remaining unrepresented, the complaint instituted by him under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'N.I. Act') was dismissed in default for want of prosecution, and, the accused (respondent herein) was acquitted.

2. Since the principal grievance canvassed by the applicant/appellant herein, hinges upon dismissal of his complaint, merely owing to him remaining unrepresented before the learned Magistrate concerned, therefore, this Court deems it inessential to augment this remand order

with factual matrix of the present case, and consequently, proceeds to pen down an opinion upon the grievance (supra).

3. The learned counsel for the applicant/appellant submits that, prior to the dismissal of complaint (supra) for want of prosecution, the applicant/appellant and his counsel had been regularly appearing before the learned Magistrate concerned. The defence proffered by the applicant/appellant behind him remaining unrepresented before the learned Magistrate concerned, is that, owing to some communication gap, his counsel had inadvertently noted down wrong date of hearing. Therefore, there was no *mala fide* intention on the part of the applicant/appellant for not appearing before the learned Magistrate concerned, rather his absence was *bona fide*.

4. This Court has heard the learned counsels for the contesting litigants and also perused the entire record.

5. For the sake of convenience and ready reference, the impugned order dated 15.07.2017 is reproduced hereinafter:-

*“Despite awaiting appearance of complainant none has turned up on behalf of complainant. Perusal of file shows that none on behalf of complainant had appeared on the last date of hearing and even today none has turned up on behalf of complainant. Case called several times since morning but neither complainant nor his counsel nor any person on his behalf is appearing whereas accused is present since morning. It is 3.45 P.M. As such, the present complaint is dismissed in default for want of prosecution. Accused is acquitted. His bail bonds stands discharged. File be consigned to record room.”*

6. The inference, as becomes generated from the record is that,

the applicant/appellant could have, in no way, derived any benefit from his absence in the complaint (supra), rather it would be him, whose rights would be and have indeed been adversely affected in such circumstances. The absence of the complainant or his counsel cannot be enure to the benefit of the respondent/accused. This inference garners strength from the fact that, there is nothing available on the record, which may even remotely suggest that there was any *mala fide* intention on the part of the applicant/appellant behind his absence from the proceedings. Moreover, since the applicant/appellant had remained unrepresented only on two hearings, therefore, the learned Magistrate concerned, instead of straightway adopting such a harsh approach of dismissing the complaint (supra) for want of prosecution, ought to have exercised some leniency, inasmuch as, mere absence of the complainant on two dates, cannot constitute the bedrock for dismissal of the complaint.

7. Gainful reference in the above regard can be made to ***Purushotam Mantri v. Vinod Tandon alias Hari Nath Tandon, 2008(3) Punjab Law Reporter 595 (P&H)***, wherein, it has been observed that “*..it would be too harsh on the petitioner to non-suit him merely for his non-appearance on one date....*”

8. Furthermore, reference can also be made to case titled as ***“Narender Parashar Versus Jagbir Singh”, Law Finder Doc Id # 192748***, wherein, a Co-ordinate Bench of this Court, while dealing with an identical issue, has made the hereinafter extracted observations:-

*“...The doctrine of 'audi alteram partem' too contemplates that no one should be condemned unheard. If the impugned order is allowed to hold ground without any fault of the*

*appellant, he will feel prejudiced in his right. In the words of F. Bucan "Nothing rankles more in the human heart than brooding sense of injustice." If the appellant is not afforded the opportunity to substantiate the allegations contained in complaint by leading evidence, it will go on rankling in his mind that injustice has been done to him. The Courts are here to administer justice...."*

9. Also, in case titled as ***"Nitesh Kumar Vs. Sonu alias Sunil Kumar"***, ***Criminal Appeal No. AS-88 of 2016, Decided on: 06-04-2017***, a Co-ordinate Bench of this Court has held that the cause of merit and substantial justice is to prevail over technical consideration. The relevant paragraph of this judgment is reproduced hereinafter:-

*"8. In the facts and circumstances of the present case, I find that the impugned order passed by the learned Judicial Magistrate Ist Class, Gurgaon, has caused miscarriage of justice. If this order is not set aside, the complainant/appellant will suffer irreparable loss. It is settled law that the rights of the parties should be decided on merit as far as possible. The Court should do substantial justice between the parties and should not go into the technicalities of the law. Where technical consideration and merit or cause of substantial justice are pitted against each other, the cause of merit and substantial justice is to prevail."*

10. In view of the law laid down in judgments (supra), as also taking into account the well settled proposition of law that, owing to fault of counsel, a party to litigation cannot be made to suffer, and that, the rights of the parties should be decided on merit as far as possible, therefore, this Court deems it just and appropriate to set aside the

impugned order dated 15.07.2017, and, to remand the complaint (supra) to the learned Magistrate concerned, otherwise the applicant/appellant will suffer an irreparable loss.

11.           Consequently, the impugned order dated 15.07.2017 is set aside and the complaint (supra) is ordered to be restored to its original number and its proceedings shall continue from the stage from where it was dismissed by the learned Magistrate concerned. The learned Magistrate concerned is directed to proceed further as per law, after giving notice to the parties concerned.

12.           Disposed of accordingly.

April 23, 2024  
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(KULDEEP TIWARI)

JUDGE

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No