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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-A-728-MA-2017
Date of decision : 28.05.2024

BALRAJ SINGH
Versus
....Applicant

AMIT DIWAN
....Respondent

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Ashwani Bakshi, Advocate
for the applicant.

Mr. Akshit Pathania, Advocate Amicus Curiae
for the respondent.

PANKAJ JAIN, J. (ORAL)

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Applicant seeks leave to appeal against order dated 12.01.2017
passed by JMIC, Gurgaon, whereby the complaint preferred by him stands
dismissed for non-prosecution.

Leave granted.

Registry is directed to assign the number to the instant appeal
forthwith.

Main case

Present appeal is arising out of a complaint filed at the behest of
the applicant against the respondent for offence punishable under Section

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138 of the Negotiable Instruments Act, 1881.

2. Counsel for the appellant has drawn attention of this Court to the impugned order to submit that the Trial Court erred in invoking Section 256 Cr.P.C. to dismiss the complaint for non-prosecution while the same was fixed for defence evidence/arguments. He relies upon order dated 21.02.2007 passed in **CRM-M-35250 of 2005**, titled as **Dilawar Singh vs. Pankaj Joshi and anr.** and **‘The Associated Cement Co. Ltd. vs. Keshvanand**, reported as **1998(1) SCC 687**’ to support his contention.

3. Ld. Amicus on the other hand submits that from the impugned order, it is evident that the Trial Court resorted to Section 256 of the Code only after waiting for the complainant till 2.00 p.m. There being no justification for his absence, no fault can be found in the impugned order.

4. Having heard counsel for the parties and after going through the record of the case, this Court finds that law with respect to invoking provisions of Section 256 of the Code already stands settled by Apex Court in the case of **‘The Associated Cement Co. Ltd. vs. Keshvanand’**, (1998) **1 SCC 687** observed that :-

“16. 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

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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.”

(emphasis supplied)

5. Similarly in the case of **S. Anand vs. Vasumathi Chandrasekar, (2008) 4 SCC 67**, it has been held that :-

“12. The accused was entitled to file an application under Section 311 of the Code of Criminal Procedure. Such an application was required to be considered and disposed of by the learned Magistrate. We have noticed hereinbefore that the complainant did not examine herself as a witness. She was sought to be summoned again for cross-examination. The said prayer has not yet been allowed. But, that would not mean that on that ground the court would exercise its discretionary jurisdiction under Section 256 of the Code of Criminal Procedure at that stage or the defence would not examine his witnesses.”

6. Aforesaid two precedents have further been followed in **BLS Infrastructure Limited vs. M/s. Rajwant Singh and others 2023 (4) SCC 326**, wherein it has been held as under:-

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"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, 1973 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

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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.”

7. Keeping in view that it is not disputed that the Trial was fixed for defence evidence, if any, and arguments, the Trial Court erred in invoking Section 256 of the Code.
8. Resultantly, the impugned order dated 12.01.2017 cannot be sustained and is hereby set aside. Parties are thus directed to appear before the Trial Court on **17.07.2024**.
9. Keeping in view that the complaint is of the year 2013, this Court is sanguine that the Trial Court shall make an endeavour to decide the same within a period of **one year** from the date of receipt of certified copy of the order.
10. Disposed off, accordingly.

May 28, 2024
Dpr

(Pankaj Jain)
Judge

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No