

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

SR. No.240

CRM-A-709-2022

Date of decision:01.02.2024

M/s R.S. Creations

...Appellant

Versus

M/s Jagdish Chand & Sons HUF and another

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE N.S. SHEKHAWAT

Present: Mr. Divyam Singh, Advocate for the appellant.
None for the respondents.

N.S. SHEKHAWAT, J.

1. The present appeal has been preferred against the impugned order dated 04.05.2022 passed by the Court of Judicial Magistrate, Panipat, whereby the complaint in the present case was ordered to be dismissed for want of prosecution.

2. Learned counsel for the appellant contends that the appellant/complainant had filed a criminal complaint (Annexure A-1) on 01.06.2019 before the Court of Judicial Magistrate, 1st Class, Panipat. Vide order dated 01.06.2019 (Annexure A-2), the Court of Judicial Magistrate 1st Class, Panipat, summoned the respondents under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the NI Act'). Thereafter on 22.07.2019, the respondents did not appear and non-bailable warrants were issued against them. On 06.12.2019, the respondents appeared and a prayer was made for referring the matter to the Mediation and Conciliation Centre,

but the parties could not arrive at a compromise in the present case. The

complaint was initially filed by the complainant through J.R. Jain, who had expired on 08.01.2021 and the case was pursued before the trial Court by Bimla Devi wife of J.R. Jain, as the proprietor of M/s R.S. Creations.

3. Learned counsel has referred to the order dated 25.03.2021 (Annexure A-3) passed by the trial Court, whereby the power of attorney was taken on record in the present case on behalf of Bimla Devi widow of J.R. Jain. After that, the matter remained pending before the trial Court on different dates. Ultimately on 29.03.2022, an application was moved by the accused for exemption from personal appearance, which was allowed and the notice was issued to the appellant for 04.05.2022. On 04.05.2022, the trial Court passed the impugned order, whereby the complaint was ordered to be dismissed for want of prosecution. Learned counsel submitted that it was wrongly noted in the impugned order that the complainant had died. In fact the complaint was initially filed through J.R. Jain, proprietor of M/s R.S. Creations. However, J.R. Jain had expired on 08.01.2021 and thereafter the complaint was pursued by Bimla Devi widow of J.R. Jain as the proprietor of M/s R.S. Creations. Learned counsel further submitted that in fact his counsel had appeared before the trial Court and wrongly noted the date of hearing as 05.05.2022 instead of 04.05.2022, consequently neither the appellant nor his counsel could appear before the trial Court on 04.05.2022, when the case was called for hearing. As a consequence, due to non-appearance of the appellant/complainant, the case was dismissed for want of prosecution. Still further learned counsel submitted that it was a *bona fide* mistake on the part of his counsel and the complaint was wrongly ordered to be dismissed in default by the trial Court. Learned counsel for the

Shakti Industrial Corporation V. Ridaus Auto Components Private Limited and other, 2015 (8) RCR (CrI.) 457.

4. On the other hand, notice was issued to the respondents in the present case. The respondents were served for 03.10.2023, however neither the respondents appeared in person nor they were represented by any counsel. Still the case was adjourned to 09.11.2023. Even today there is no representation on behalf of the respondents, despite service.

5. I have heard the learned counsel for the appellant at length and with his able assistance, I have perused the case file carefully.

6. While dealing with the similar controversy, this Court in **CRA-2169-SBA of 2005 titled as ‘Aman Kumar Versus Vijay Kumar’** has observed as under:-

“9. Section 256 of Criminal Procedure Code is extracted below:-

*“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, of 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.”

10. The aforesaid provision of law clearly lays down that the Magistrate has discretion to dismiss the complaint if on any date fixed for hearing of the complaint, the complainant fails to appear in the Court. However, if the Magistrate finds that there was some valid reason for non appearance of the complainant or the presence of the complainant was not required during the Court proceeding, he can very well exercise his discretion to adjourn the complaint. While exercising the jurisdiction under Section 256 Cr.P.C., the Court has to take into consideration that the powers vested in it have to be exercised judiciously and in the interest of justice.

11. Keeping in view the aforesaid principles of law and advertng to the facts of the instant case, it is the case of the appellant that only on one date, he could not appear during the Court proceedings due to wrong noting of the date of hearing by him and as a consequence thereof, the complaint was ordered to be dismissed in default. The record clearly establishes that the case was repeatedly taken up and effective proceedings were held before the learned trial Court. On each and every date, the complainant had appeared with his counsel and the plea taken by the appellant/complainant appears to be genuine as he would not have intentionally allowed the complaint to be dismissed in default as he had to recover the amount of cheque from the respondent as well. Even the bona fides of the appellant are evident from the fact that on earlier occasions, he had been regularly appearing and only on one date, he could not appear due to wrong noting of the date of hearing. Consequently, it was inappropriate for the learned trial Court to dismiss the complaint in default, especially when the case was listed for appearance of the accused before the

learned trial Court and the appearance of the appellant was not so essential on the said date.

7. The view taken by this Court also finds support from the judgment of the Hon'ble Supreme Court rendered in '**The Associated Cement Company Ltd. Versus Keshvanand**', 1998(1) RCR (CrL.) 309, wherein it has been held as under:-

"14. Section 256 of the Code of Criminal Procedure, 1973 (for short 'the new Code') is the corresponding provision to Section 247 of the old Code. The main body of both provisions is identically worded, but there is a slight difference between the provisos under the two sections. The proviso to Section 256 of the new Code is reproduced here:

"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."

15. 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 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.

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 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 the 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.”

8. In the present case also, notice was issued to the appellant for appearance on 04.05.2022. However counsel of the appellant had wrongly noted the date of hearing to be 05.05.2022 and due to the said bona fide mistake, neither the appellant nor his counsel could appear before the trial Court, leading to dismissal of the complaint for want of prosecution. In fact, the law is well settled that a criminal complaint should not be dismissed in a hurry. It is always desirable that a *lis* should be decided on merits, rather than non suiting the parties on technical grounds.

9. In view of the above discussion and the law laid down by this Court as well as Hon’ble Supreme Court in the cases referred to hereinabove, the impugned order is set aside and the complaint is order to be restored to its original number. The learned trial Court is directed to proceed

with the complaint from the stage when it was dismissed for want of

knowledge. Since the complaint in the present case filed on 01.06.2019, the trial Court is directed to conclude the trial expeditiously, preferably within a period of eight months from today. The Registry of this Court is directed to inform the trial Court in this regard.

11. The present petition stands disposed of, accordingly.

01.02.2024
mks

(N.S. SHEKHAWAT)
JUDGE

Whether Speaking/Reasoned: YES / NO

Whether Reportable: YES / NO