



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-A-240-2022
Decided On: 20.05.2024

VIJAY

.....APPELLANT(s)

Versus

BABU LAL SAINI

.....RESPONDENT(s)

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Ashwani Bhardwaj, Advocate
for the appellant.

PANKAJ JAIN, J.(Oral)

1 Present appeal has been filed assailing the order dated 02.04.2021 passed by learned Judicial Magistrate Ist Class, Hisar, whereby the complaint under Section 138 of NI Act was dismissed in default on account of non-appearance.

2 Counsel for the appellant has drawn the attention of this Court to the order dated 02.03.2020 to submit that the testimony of the appellant including cross-examination was completed on 02.03.2020 and the matter was adjourned to 20.03.2020 and thereafter, the matter was adjourned due to COVID-19. Thereafter an application was moved under Section 311 Cr.P.C., by the complainant and reply was filed by the accused as is evident from the orders dated 17.02.2021, 03.03.2021 and 02.04.2021. The trial Court invoked Section 256 of the Code of Criminal Procedure to dismiss the complaint for want of prosecution. He further submits that since the matter was not fixed for such proceedings, wherein the presence of the complainant was necessary, trial Court erred in invoking the provision of Section 256 of the Code of Criminal Procedure for dismissing the complaint for want of



prosecution.

3. Having heard counsel for the parties and 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 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 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.”

4. 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.”

5. 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:-

“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 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."

6. Thus, the test to invoke Section 256 of the Code is whether the proceedings were such for which the presence of the complainant was necessary. In the considered opinion of this Court, the trial Court failed to make itself alive of the situation that the matter was indeed fixed for filing reply to the application under Section 311 Cr.P.C. and thus, was not justified in dismissing the complaint on mere non-appearance of the complainant.
7. Consequently, the impugned order dated 02.04.2021 is set aside. Complaint is ordered to be restored to its original number.
8. Parties are directed to appear before the Trial Court on 08.07.2024.
9. Appeal stands disposed off.

20.05.2024
Aman Dua

(PANKAJ JAIN)
JUDGE

Whether speaking/reasoned?
Whether reportable?

Yes/No
Yes/No