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

**CRM-M-20872-2015 (O&M)
Date of decision: 11.01.2024**

Lalit Kumar

...Petitioner(s)

Versus

State of Punjab and another

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE MAHABIR SINGH SINDHU

Present: Mr. Gurcharan Dass, Advocate,
for the petitioner.

Mr. Joginder Pal Ratra, Sr. DAG, Punjab.

Ms. Sunaina, Advocate/*Amicus curiae*,
for respondent No.2-complainant.

MAHABIR SINGH SINDHU, J.

CRM-39691-2023

Application for placing on record Annexures P-4 & P-5
and exemption from filing certified copies thereof is allowed as prayed
for, subject to all just exceptions.

Registry will do the needful.

Main case

Present petition has been filed under Section 482 of the
Code of Criminal Procedure, 1973 (for short, '*the Cr.P.C.*') for
quashing the impugned order dated 16.04.2015 (P-2), passed by learned
Additional Sessions Judge, Ludhiana (for short, 'ASJ'); whereby,
criminal revision of petitioner against the order dated 30.09.2014 (P-3),

of learned Judicial Magistrate First Class, Ludhiana (for short, 'JMIC'); thereby, restoring the complaint, was dismissed.

2. **Brief facts**

2.1 Respondent No.2-complainant, namely, Vijay Kumar, filed complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act') against petitioner on account of dishonor of cheque No.457587 dated 14.10.2011 (Union Bank of India) for an amount of Rs.2,80,000/-.

2.2 It transpires that after recording preliminary evidence, petitioner was summoned in the above complaint and ultimately, notice of accusation for an offence under Section 138 of the Act was served upon him on 26.07.2013.

2.3 Later on, due to non-appearance of parties, complaint was dismissed in default on 30.09.2014. Dissatisfied against the above order, complainant moved an application for review, which was allowed on 01.10.2014; and the complaint was restored to its original number by the same Court.

2.4 Feeling aggrieved against order dated 01.10.2014 (*supra*), petitioner filed criminal revision, but the same was dismissed by learned ASJ while passing the impugned order.

2.5 Hence, present petition.

3. **Contentions**

3.1 Sole contention raised by learned counsel for petitioner is that once the complaint was dismissed in default, learned JMIC had no jurisdiction to restore the same as dismissal of a complaint in default

amounts to acquittal of accused; therefore the only remedy available with the complainant was to file an appeal under Section 378(4) Cr.P.C. In support of the contention, reliance has been placed on ***Major General A.S. Gauraya Vs. S.N. Thakur, (SC), 1988(1) R.C.R. (Criminal) 3; Bindeshwari Prasad Singh Vs. Kali Singh, (SC), 1977(1) SCC 57; Ram Bhaj Jain Vs. M/s Brar Rice and General Mills, (P&H), 2003(1) R.C.R. (Criminal) 683; and Om Parkash Vs. Golden Forest India Ltd. (P&H), 2008(4) R.C.R. (Criminal) 445;***

4. *Per contra*, learned *Amicus Curiae* for respondent No.2 opposed the prayer on the premise that non-appearance of complainant on 30.09.2014 was not intentional, but due to the fact that learned JMIC while adjourning the matter on 29.09.2014, inadvertently mentioned the next date of hearing as 31.09.2014. Since, in the month of September, there are 30 days; therefore the matter was taken up by the Court on its own on 30.09.2014. On the very next day, i.e. 01.10.2014, an application was moved for restoration of the complaint which was allowed on the same day and complaint was restored to its original number.

She also submitted that dismissal of complaint on account of non-appearance of complainant on 30.09.2014 was due to the mistake of Court; hence, complainant should not suffer on account of act of the Court. Again submitted that even complaint was dismissed in default while exercising power under Order 9 Rule 3; hence, the order dated 30.09.2014 was *non est* in the eyes of law.

Further submitted that complaint was filed way back in the year 2011; petitioner remained unsuccessful before learned revisional Court also, and a period of more than 10 years has already elapsed; but, due to the interim stay granted by this Court on 01.07.2015, complainant is unnecessarily facing hardship; hence, the petition be dismissed with exemplary costs.

5. Heard learned counsel for the parties and perused the paper-book.

6. It is not in dispute that notice of accusation was served upon petitioner on 26.07.2013 (P-5) and relevant part of which reads as under:-

“That you above named accused in discharge of your legal liability issued cheque bearing no.457587 dated 14.10.2011 for Rs.2,80,000/- Union Bank of India, Ludhiana in favour of complainant which was dishonoured on presentation on account of no account/account closed on advice vide memo dated 18.10.2011.

Thereafter despite the service of notice by the complainant, you failed to pay the amount of cheque, within statutory period of 15 days and thereby you committed an offence punishable under section 138 of Negotiable Instruments Act, 1881 which is within my cognizance.

And I hereby direct that you the above named accused by tried by this court on the above said notice.”

6.1 Thereafter, the case was adjourned on various occasions and ultimately, on 29.09.2014, learned JMJC passed the following order:-

“Present: None for the Complainant.

Accused on bail with counsel.

*Arguments not addressed. Adjournment requested.
In view of the request, case is adjourned to 31.9.2014 for arguments,
subject to opportunity.*

29.9.2014

Sd/- JMIC, Ldh.”

6.2 It seems that due to inadvertence, the date was given as 31.09.2014; therefore, the matter was taken up on 30.09.2014 and on that day, two orders were passed – one in the pre-lunch session and another after lunch dismissing the complaint in default under Order 9 Rule 3. For reference, both the orders read as under:-

“Present: None for the complainant.

Accused on bail with counsel.

Case called many times since morning but none has appeared on behalf of complainant. It is already 12.55 pm. Now the case is adjourned to after lunch for awaiting presence of complainant.

30.9.2014

Sd/- JMIC, Ldh.”

“Present : None for the parties.

Case again called several times after lunch but none has appeared on behalf of complainant. It is already 3.55 PM. It appears that the complainant is not interested to pursue with the present case as such present case is dismissed in default u/o 9 Rule 3. File be consigned to record room.

Announced

Sd/- Sachal Babbar

30.09.2014

*Judicial Magistrate Ist Class,
Ludhiana.”*

7. When the complainant came to know about the aforesaid order(s), he immediately moved an application on the very next day, i.e. 01.10.2014 and which was allowed on the same day rectifying the previous order, i.e. 30.09.2014. For reference, order dated 01.10.2014

“Present: Aman Khullar Advocate for the complainant.

File taken up to-day on the application filed by the Ld. counsel for the complainant for review of the Order dated 30.9.2014.

It has been brought to my notice by the Ld. Counsel for the complainant that inadvertently it has been typed as 31.9.2014 instead of 30.9.2014 and the applicant/complainant appeared in the Court on 1.10.2014. He came to know that the case is not enlisted in the cause list and it was ordered to be dismissed in default on 30.9.2014. The absence of the complainant in the court on 30.9.2014 is not willful but due to typographical mistake as 31.9.2014 instead of 30.9.2014. As such the said application is allowed and previous order is rectified accordingly. The complaint is ordered to be restored at its original number. Now the case is adjourned to 7.10.2014 for further proceedings. Notice be also issued to the accused for the date fixed.

Sd/- Sachal Babbar

JMIC/1.10.2014”

(Emphasis supplied by Court)

8. Aggrieved against the aforesaid order, petitioner preferred criminal revision before learned ASJ, who, after recording reasons in para 9 & 10 of the impugned judgment, set aside both the orders i.e. 30.09.2014 as well as 01.10.2014 restoring the complaint. The revision was dismissed while observing as under:-

9. *A bare perusal of the order dated 30.9.2014 shows that it was not passed in accordance with the provision of law for the reasons hereunder:-*

(A) Ld. JMIC has no jurisdiction to dismiss the complaint under order 9 rule 3 of the CPC. There is no applicability of the Code of Civil Procedure in a criminal complaint.

(B) As per the record the case was fixed for 31.9.2014. There was no occasion to list the case for 30.9.2014. Accordingly, the dismissal of the complaint in default when it was not fixed for hearing is absolutely against the spirit of natural justice.

(C) Complainant was absent on 19.9.2014 and Ld. Trial Court issued notice to complainant for 26.9.2014. On the next date of hearing i.e. on 26.9.2014 there is no reference of the notice issued to the complainant. The dismissal of the complaint without waiting for the report of summons or notice is not accordance with the law.

10. The arguments advanced by the Ld. Counsel for the complainant hinges around the proposition that Ld. Magistrate cannot order restoration of complaint after its dismissal. Revisionist/accused is drawing his strength from the order dated 30.9.2014 which was against the legal provisions and principal of natural justice as discussed above. There is no denying the proposition that Ld. Magistrate cannot review its own order, as such, order dated 1.10.2014 also suffer from the error of jurisdiction. As is evident from the above mentioned discussions, both the orders i.e 30.9.2014 and 1.10.2014 are not in accordance with the legal proposition. As such, I am of the opinion that both the orders cannot withstand the test of reasonableness and legality. Therefore, both the orders passed by the Ld. Trial Court are hereby set aside. As soon as order dated 30.9.2014 is set aside, this results into restoration of complaint.

11. For the above said reasons, the instant revision is dismissed. The order dated 30.9.2014 and 1.10.2014 are hereby set aside for the reasons as mentioned above. Complaint of the complainant is restored at its original number and Ld. Trial Court shall proceed further with the complaint in accordance with the law from the stage when the complaint was dismissed in default. Record of the court of Ld. JMIC after placing the copy of this order be sent back. Both the parties are directed to appear before the Ld. Lower Court on 23.4.2015. The revision file be consigned to the record room after due compliance.”

9. A perusal of the above extract reveals that learned ASJ, after examining the complete records, came to the conclusion that both the orders dated 30.09.2014 (dismissing the complaint) as well as order dated 01.10.2014 (restoring the complaint) were not in accordance with law and therefore, set aside both the orders passed by learned JMIC.

10. Learned counsel for the petitioner has cited various judgments in support of his contentions and this Court has carefully gone through the same and which are as under:-

In ***Major General A.S. Gauraya's case (supra)***, it was held by Hon'ble the Supreme Court that *"So far as accused is concerned, dismissal of a complaint for non-appearance of the complainant or his discharge or acquittal on the same ground is a final order and in the absence of any specific provision in the Code, a Magistrate cannot exercise any inherent jurisdiction"*.

In ***Bindeshwari Prasad Singh's case (supra)***, Hon'ble the Supreme Court held that *"the learned Magistrate had absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the respondent was to move the Sessions Judge or the High Court in revision. In fact after having passed the order dated 23-11-1968, the Sub Divisional Magistrate became functus officio and had no power to review or recall that order on any ground whatsoever."*

Similarly, in ***Ram Bhaj Jain's case (supra)***, this Court observed that *"The observations of the Supreme Court as well as of the High Court extracted above leave no manner of doubt that the Magistrate has no jurisdiction to restore the complaint."*

This Court in ***Golden Forest India Ltd. (supra)*** laid down that *"application for restoration of complaint under Section 138 of the Act, which was dismissed in default was not maintainable."*

There is absolutely no quarrel with the legal propositions laid down in the aforesaid judgments, but here the situation is quite

different and as such, the same would not be helpful to the petitioner, in any manner.

11. It is a matter of record that complaint was fixed for hearing on 29.09.2014; but, none appeared on behalf of the complainant and the same was adjourned to 31.09.2014. Since in the month of September, there are only 30 days; therefore, there was no occasion for learned JMIC to post the matter on 31.09.2014; thus, it was inadvertently. Learned JMIC perhaps realized the mistake and took up the matter at its own on 30.09.2014 and on that date again, none appeared on behalf of the complainant, for obvious reasons. Thus, in such a scenario, the Court, instead of penalizing the complainant for its fault, ought to have adjourned the matter for some other day.

Law is well settled that no one should suffer on account of the mistake of a Court i.e. *actus curiae neminem gravabit* and this common law principle is consistently followed in almost all the jurisdictions of the world and reference can be made to judgment passed in ***Sarah Mathew vs. Institute of Cardio Vascular Diseases by its Director Dr. K.M.Cherian and others (2014) 2 Supreme Court Cases 62*** and relevant part of Para 39 reads as under:-

“Treating date of filing of complaint or date of initiation of proceedings as the relevant date for computing limitation under Section 468 of the Code is supported by the legal maxim actus curiae neminem gravabit which means that the act of court shall prejudice no man. It bears repetition to state that the court’s inaction in taking cognizance i.e. court’s inaction in applying mind to the suspected offence should not be allowed to cause prejudice to a diligent complaint.”

In present case, it was the mistake of the Court and there was no fault of the complainant for non-appearance on 30.09.2024; therefore, he should not suffer on that count.

12. Learned ASJ in para 9(A) of the impugned order has rightly observed that “*Ld. JMIC has no jurisdiction to dismiss the complaint under order 9 rule 3 of the CPC. There is no applicability of the Code of Civil Procedure in a criminal complaint*” and there is no hesitation to endorse the aforesaid conclusion. Therefore, the order whereby complaint was dismissed in default being *non est* in law, could not be revived as the same would result into revival of an illegal order. Law is also well settled that revival or restoration of an illegal order is not heroic; hence, the same be avoided. Reference in this regard can be placed on the judgment of Hon’ble Supreme Court in ***Bhartiya Seva Samaj Trust Vs. Yogeshbhai Ambalal Patel, (2012) 9 Supreme Court Cases 310***, wherein, it has been observed as under:-

“14. It is a settled legal proposition that the court should not set aside the order which appears to be illegal, if its effect is to revive another illegal order. It is for the reason that in such an eventuality the illegality would perpetuate and it would put a premium to the undeserving party/person.”

13. In view of the above discussion, there is no hesitation to hold that in the facts & circumstances of the case, learned JMIC could not have dismissed the criminal complaint in default under Order 9 Rule 3; neither he had the power to restore the complaint; hence, learned Revisional Court has rightly set aside both the orders dated 30.09.2014 & 01.10.2014, being illegal and *non est* in the eyes of law.

14. As a sequel of the above discussion, there is no option, except to dismiss the petition.
15. Ordered accordingly
16. Pending application(s), if any, shall also stand disposed off.

11.01.2024
atulsethi

(MAHABIR SINGH SINDHU)
JUDGE

Whether speaking/reasoned :Yes/No
Whether reportable: Yes / No