
Before T.P.S. Mann, J.

DANVANTI MUTUAL BENEFITS LTD.,—*Petitioner*

versus

STATE OF HARYANA AND OTHERS,—*Respondents*

CRIMINAL MISC. NO. 51731/M OF 2004

20th April, 2007

Code of Criminal Procedure, 1973—S.256—Complaint u/s 138 N.I. Act fixed for recording of preliminary evidence—Complainant failing to appear—Dismissal of complaint in default for want of prosecution—Presence of complainant in two similar complaints fixed on same day before same Court—Section 256 does not operate at preliminary stage when complaint was filed and preliminary evidence yet to be recorded—Sufficient reasons for restoration of complaint—Order passed by lower Court not sustainable in law & deserves to be set aside.

Held, that Section 256 of the Code of Criminal Procedure comes into play only when the summons have been issued on a complaint for the appearance of the accused. This Section will not operate at the preliminary stage when only the complaint has been filed in the Court and the preliminary evidence yet to be recorded. In such a situation, the non-appearance of the complainant or anyone on his behalf, especially on one date and not repeatedly, would not have compelled the Magistrate to pass an order for dismissing the complaint in default.

(Para 7)

Further held, that the complainant had given sufficient reasons in his application whereby the restoration of the complaint was sought. The said application was, however, dismissed for no valid reasons. It was noted that the complainant might have appeared at the call in the other complaints filed against Surjit Singh and Prem Parkash but that did not mean that he was not interested in the prosecution of the present complaint and did not produce his preliminary evidence.

(Para 10)

A.K. Ahluwalia, Advocate, *for the petitioner.*

Y.P. Malik, Assistant Advocate General, Haryana for
respondent No. 1.

R.P. Dudeja, Advocate, *for respondent No. 2.*

JUDGMENT

T.P.S. MANN, J.

(1) The petitioner is seeking quashing of order passed by Chief Judicial Magistrate, Kaithal on 22nd October, 1999, while dismissing the complaint in default for want of prosecution and also the order passed by Additional Chief Judicial Magistrate, Kaithal on 20th September, 2004, while dismissing its application for restoration of the complaint.

(2) The complaint in question was filed on 20th September, 1999 under Section 138 of the Negotiable Instruments Act (for short 'the Act'). It was fixed before Chief Judicial Magistrate, Kaithal for 22nd October, 1999 for recording of preliminary evidence. No one appeared for the complainant. Accordingly, the said Court dismissed the complaint in default for want of prosecution.

(3) An application was then moved by the complainant for restoration of the complaint on the ground that the present complaint and two other similar complaints against Surjit Singh and Prem Parkash, filed by the complainant, were fixed before the same Court on 22nd October, 1999. The complainant was present in the Court. However, its presence was not noted in the present complaint though it was noted in the other two complaints, which were then adjourned to 22nd December, 1999. Even on the subsequent dates, the complainant had been appearing in all the three complaints. Ultimately, on 6th June, 2000, the complainant was informed by the Court Reader that the file in the present case was not available. The complainant was under an impression that all the three complaints were being taken up simultaneously on one date and thereafter being adjourned for the same date. The complainant was, accordingly,

told that the present complaint stood adjourned. On 14th September, 2000, he moved an application to trace-out the file when he learnt that the present complaint had been dismissed in default for want of prosecution on 22nd October, 1999. Accordingly, he prayed for restoration of the complaint and its decision on merits, but the same was dismissed by Additional Chief Judicial Magistrate, Kaithal on 20th September, 2004.

(4) Learned counsel for the complainant/petitioner submitted that the two other similar complaints filed under Section 138 of the Act were also pending in the Court of Chief Judicial Magistrate, Kaithal on 22nd October, 1999 and the presence of the complainant/petitioner was marked in those complaints. In fact, the complainant was informed by his counsel that all the three cases, i.e., the present complaint as well as the complaints against Surjit Singh and Prem Parkash had been adjourned on 22nd October, 1999 to 22nd December, 1999. There was, thus, no question of the complainant/petitioner of not appearing in the present complaint on 22nd October, 1999, because he was present in the same very Court in the other two complaints. Counsel for the petitioner has also drawn the attention of the Court to the various pages of the law diary maintained by his counsel in the lower Court to contend that similar notings were made thereon regarding the listing of the three complaints on 22nd October, 1999, 22nd December, 1999, 27th March, 2000 and 6th June, 2000. Moreover, in the event of non-appearance of the complainant/petitioner on 22nd October, 1999, learned Chief Judicial Magistrate should not have dismissed the complaint in default for want of prosecution as the presence of the petitioner was not required and the hearing of the complaint could have been adjourned to some other date. Therefore, the order passed on 22nd October, 1999, while dismissing the complaint in default, be set aside and so also the order dated 20th September, 2004, while dismissing the application for restoration of the complaint.

(5) It has been submitted on behalf of respondent No. 2 that the order passed under Section 256 Cr.P.C., while dismissing the complaint in default for want of prosecution was a final order and therefore, revisable. In the absence of a revision, the inherent powers

under Section 482 of the Code of Criminal Procedure should not be exercised for quashing the aforementioned orders.

(6) I have heard learned counsel for the parties and gone through the material placed before me.

(7) Complaint under Section 138 of the Act involves trial of the same by a Magistrate as a summons case. Section 256 of the Criminal Procedure Code (for short 'the Code') states that in case the complainant does not appear, the Magistrate shall acquit the accused unless for some reasons he thinks it proper to adjourn the hearing of the case to some other day. Proviso to Section 256(1) of the Code bestows upon the Magistrate the power to dispense with the appearance of the complainant in case the complainant is represented by a pleader and the Magistrate is of the opinion that the personal attendance of the complainant is not necessary. It may also be noticed that Section 256 of the Code comes into play only when the summons have been issued on a complaint for the appearance of the accused. This Section will not operate at the preliminary stage when only the complaint has been filed in the Court and the preliminary evidence yet to be recorded. In such a situation, the non-appearance of the complainant or anyone on his behalf, especially on one date and not repeatedly, would not have compelled the Magistrate to pass an order for dismissing the complaint in default.

(8) It is the admitted case that the complaint was filed only on 22nd September, 1999 and thereafter adjourned to 22nd October, 1999 for recording of preliminary evidence. On 22nd October, 1999, no one appeared on behalf of the complainant. In such a situation, the Magistrate ought to have adjourned the complaint to another date instead of dismissing the same.

(9) As is clear from the notings maintained in the diary of the trial Court counsel, the three complaints filed by the complainant, one against Surjit Singh, second against Prem Parkash and the third against Madan Lal Khanna, were noted on 22nd October, 1999 to have been adjourned for 22nd December, 1999. It is not in dispute that the presence of the complainant/petitioner was marked in the

complaints against Surjit Singh and Prem Parkash. It would not be believed that the complainant/petitioner himself did not appear in the present complaint against Madan Lal Khanna nor also his counsel. It appears that due to oversight, the presence of the complainant/petitioner or his counsel could not be noted in the present complaint on 22nd October, 1999 and accordingly, the complaint was dismissed in default.

(10) The complainant/petitioner had given sufficient reasons in his application Annexure P.5, whereby the restoration of the complaint was sought. The said application was, however, dismissed for no valid reasons. It was noted that the complainant might have appeared at the call in the other complaints filed against Surjit Singh and Prem Parkash but that did not mean that he was not interested in the prosecution of the present complaint and did not produce his preliminary evidence.

(11) Regarding the objection of respondent No. 2 it may be noted that the complainant/petitioner came to know about the passing of the order dated 22nd October, 1999 by Chief Judicial Magistrate when he was told by the concerned Clerk of the Court on 14th September, 2000. He immediately filed an application on 29th September, 2000 for restoration of the complaint. This application was dismissed by Additional Chief Judicial Magistrate, Kaithal on 20th September, 2004. The aforementioned orders were challenged by filing the present petition on 1st November, 2004. Thus, even if the objection of respondent No. 2 is taken to be valid, the present petition could be treated as a revision, the same having been filed within the period of limitation from the date when the impugned order dated 22nd October, 1999 came to the knowledge of the complainant. Even otherwise, this Court may not go into all these technicalities as the impugned orders passed by the lower Court are unsustainable in law and deserves to be set aside.

(12) Accordingly, the petition is accepted. Impugned orders passed by Chief Judicial Magistrate, Kaithal on 22nd October, 1999 and by Additional Chief Judicial Magistrate on 20th September, 2004 are quashed. A direction is issued to Chief Judicial Magistrate, Kaithal to revive the complaint in question and proceed with the same in accordance with law.

R.N.R.