

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

CRMC No.250/2018

GHULAM RASOOL MUGHAL ...PETITIONER(S)

Through: - Mr. Gulzar Ahmad Sopori, Advocate.

Vs.

GH. AHMAD HAJAM ...RESPONDENT(S)

Through: - Mr. I. Sofi, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

10.05.2022

1) The petitioner has challenged the complaint filed by respondent against him alleging commission of offence under Section 138 of Negotiable Instruments Act, as also order dated 08.11.2016 passed by Judicial Magistrate 1st Class (Munsiff), Kupwara, in the said complaint.

2) It appears that respondent had filed a complaint against the petitioner alleging commission of offence under Section 138 of Negotiable Instruments Act [“the Act” for short] before the Court of Judicial Magistrate, 1st Class, Kupwara (hereinafter referred to as the trial Magistrate). In the complaint it was alleged by the complainant/respondent that the petitioner/accused had issued five cheques for a total

amount of Rs.19.50 lacs in discharge of his liability. All these cheques are stated to have been dishonoured for insufficiency of funds whereafter respondent/complainant served a notice of demand upon the petitioner and when he failed to pay the amount despite receipt of the notice, the impugned complaint came to be filed by the respondent/complainant before the trial Magistrate.

3) The record of the trial court shows that on 08.11.2016, the learned trial Magistrate has, after recording the preliminary evidence of the complainant/respondent, taken cognizance of the offence and issued process against the petitioner/accused. However, on 06.12.2017, the learned trial Magistrate dismissed the complaint for non-prosecution on account of non-appearance of the complainant/respondent. The trial court record further reveals that on 07.02.2017, the complainant/respondent filed an application before the learned trial Magistrate seeking restoration of the aforesaid complaint. The learned trial Magistrate has, vide order dated 19.04.2017, allowed the application of respondent/complainant and restored the complaint to its original number.

4) The petitioner/accused has challenged the complaint as well as the proceedings initiated thereon including the

order dated 08.11.2016 whereby cognizance of the offence has been taken by the learned trial Magistrate and process has been issued against him.

5) It has been contended by the petitioner that the impugned complaint was filed by the respondent beyond the prescribed period of limitation and that the learned trial Magistrate, has without recording any reasons for condoning the delay in filing the complaint, issued process against the petitioner. it is further contended that upon dismissal of the complaint for non-prosecution, the learned trial Magistrate had no jurisdiction to restore the complaint and, as such, the proceedings initiated against the petitioner on the impugned complaint are without jurisdiction.

6) The learned counsel for the respondent/complainant has submitted that the order dated 08.11.2016 may be set aside and the case may be remanded back to the learned trial Magistrate to pass fresh order after hearing the parties.

7) I have heard learned counsel for the parties and perused the material on record including the trial court record.

8) In the instant case, the petitioner has not only challenged order dated 08.11.2016 whereby cognizance of the offence has been taken and process has been issued against him but he has also challenged the proceedings initiated on

the complaint. These proceedings include order dated 19.04.2017 whereby the learned trial Magistrate has restored the complaint after the same had been dismissed for non-prosecution on 06.12.2016.

9) If we go to the order of dismissal of complaint passed by the learned trial Magistrate, it reveals that the learned trial Magistrate has simply dismissed the complaint for non-prosecution and without recording acquittal of the accused. Section 247 of J&K Code of Criminal Procedure, which is applicable to the instant case, provides the consequences of non-appearance of the complainant. It reads as under:

“247. Non-appearance of complainant.—(1)If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto 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 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) From a bare perusal of the aforesaid provision, it is clear that if a Magistrate chooses to dismiss a complaint because of non-appearance of the complainant, he has to acquit the accused meaning thereby that acquittal of the accused is a

necessary consequence of the dismissal of complaint in default of appearance of the complainant. Once the learned trial Magistrate had recorded the order of dismissal of complaint because of non-appearance of the complainant, the necessary consequence thereof is acquittal of the accused.

11) Section 369 of the J&K Cr. P. C clearly provides that once a judgment is signed by a Court, the same shall not be altered or reviewed except to correct a clerical error. Since the dismissal of complaint by the learned trial Magistrate for non-appearance of the complainant amounted to judgment of acquittal of the accused, therefore, it was not open to the learned learned trial Magistrate to review the said order in view of the statutory bar contained in Section 369 of the J&K Cr. P. C. Order dated 19.04.2017 is, therefore, without jurisdiction and is not sustainable in law.

12) The only course available to the respondent/complainant in these circumstances was to file an appeal against the said order after seeking leave in terms of Section 417 of the J&K Cr. P. C. Filing of an application for restoration of the complaint, which, in effect, amount to seeking review of the order of dismissal of the complaint, was not the proper course for the respondent/complainant to adopt.

13) For the foregoing reasons, the petition is allowed and the impugned order dated 19.04.2017 passed by the learned trial Magistrate, whereby complaint of the respondent/complainant has been restored, is set aside. The subsequent proceedings initiated on the complaint against the petitioner are also quashed. However, it shall be open to the respondent/complainant to avail appropriate remedy against the order of dismissal of the complaint in accordance with law and to proceed with the matter before the appropriate forum, if so advised.

Srinagar
10.05.2022
"Bhat Altaf, PS"

(Sanjay Dhar)
Judge

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No

