

(2008) 05 P&H CK 0172

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Miscellaneous No. 50059-M of 2004

M/s Parasol Laboratories (I) Pvt.
Ltd

APPELLANT

Vs

Unknown person and another

RESPONDENT

Date of Decision: May 28, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 256, 482, 93
- Negotiable Instruments Act, 1881 (NI) - Section 138
- Trade and Merchandise Marks Act, 1958 - Section 77, 78, 79

Citation: (2009) 4 RCR(Criminal) 615

Hon'ble Judges: Rajesh Bindal, J

Bench: Single Bench

Advocate: Satinder Khanna, for the Appellant; R.S. Dhiman, for the Respondent

Judgement

Rajesh Bindal, J.

Prayer in the present petition is for quashing of order dated 14.10.2003 passed by Chief Judicial Magistrate, Chandigarh dismissing the complaint filed by the petitioner u/s 77/78/79 of the Trade Mark and Merchandise Marks Act, 1958 (for short 'the Act') and also the order passed by the learned Additional Sessions Judge, Chandigarh dated 1.6.2004 dismissing the revision filed by the petitioner against the order passed by the learned Chief Judicial Magistrate as not maintainable as well as on merits.

2. Briefly the facts are that the petitioner filed a complaint against the respondents under Sections 77, 78 and 79 of the Act. Respondent no. 2 -accused was summoned vide order dated 03.11.2001. In view of search warrants issued by the court u/s 93 Cr.P.C. the premises of Respondent No. 2 were raided where some medicines bearing brand name Alloric which were manufactured by respondent no. 2 were recovered. On 14.10.2003 when the case was fixed for evidence, on account of

nonappearance of the counsel for the petitioner the same was dismissed in default. In the revision filed against the order, dismissing the complaint in default the learned Additional Sessions Judge dismissed the same as not maintainable and on merits as well.

3. Learned counsel for the petitioner submitted that the nonappearance of the counsel for the petitioner on the date fixed before the learned Chief Judicial Magistrate on 14.10.2003 was for the reason that on 13.10.2003 another case of the petitioner company was listed in the court of Sh. Phalit Sharma, Judicial Magistrate Ist Class, Chandigarh which was adjourned to 13.12.2003. The clerk of the counsel for the petitioner/complainant misunderstood that the present case pending for 14.10.2003 had been adjourned to 13.12.2003 and made entry in the diary accordingly. The submission is that the non-appearance of the counsel for the Petitioner on the date fixed was not willful, accordingly the impugned order passed by the Chief Judicial Magistrate be set aside and the compliant be restored to its original number. As regards the order passed by the learned Additional Sessions Judge in revision filed by the petitioner is concerned, the submission is that once the Court had opined that the revision was not maintainable, thereafter the court below was not required to pass any order on merits thereof.

4. On the other hand, learned counsel for respondent No. 2 submits that the learned Chief Judicial Magistrate did not have any choice but to dismiss the complaint in default as the petitioner had failed to put in appearance on the date fixed. The cause set up by the petitioner is not bona fide. The present petition u/s 482 Cr.P.C. for setting aside the impugned order is not maintainable as the petitioner has remedy of filing application for leave to appeal before this Court, the respondent No. 2 having been acquitted.

5. The 1958 Act was replaced by Trade Marks Act, 1999 which came into force on 15.9.2003. Meaning thereby the same was applicable before the coming into force of Trade Marks Act, 1999 and in fact the complaint in the present case was filed in the year 1999. The punishment for the offences under which the complaint was filed was maximum two years imprisonment. This court in Criminal Misc. No. 4671-M of 2005 titled as Vinod Kumar v. Gaje Singh decided on 24.4.2008, while considering an issue where a complaint filed u/s 138 of the Negotiable Instruments Act, 1881 was dismissed in default by the Magistrate, has opined as under:

"The Judicial Magistrate while acting u/s 256 of the Code of Criminal Procedure has to take into consideration that the powers vested therein have to be exercised in the interest of justice. It is envisaged under the provision that in a given situation the Magistrate is even entitled to dispense with the attendance of the complainant and proceed with the case. The effort of the Magistrate should be to dispose of the cases on merits instead of dismissing them in default. Dismissal of a case in default unnecessarily delays the disposal of the same on merits as application for restoration of a petition challenging order of dismissal in default consumes more

time than simply adjourning the case for a date. However, in case the absence is repeated, the court is not required to wait for a litigant. Repeated absence of the complainant cannot be ignored. If the absence is only on one date of hearing and prior thereto the complainant had been perusing his case diligently, the court can consider adjourning the case for a date recording the reason therefor. Effort should not be to punish the complainant only on account of his non-appearance on one date. There should be application of mind before order of dismissal of complaint is passed merely on account of non-appearance on one date of hearing. The conduct of parties in totality is to be considered. Similar view has been expressed by this Court in Punjab State Civil Supplies Corporation Ltd. v. Mangat Rai 2002 (4) RCR (Crl.) 458. In the present case the complainant was pursuing the complaint ever since the same was filed on November 29, 1996, till the same was dismissed for nonappearance on October 23, 1998. Though the application for restoration was not maintainable, however, the filing thereof immediately does show the bona fide of the petitioner and makes out a case of his bona fide absence at the time when the case was called for hearing."

As to what course is to be adopted when the complaint has been dismissed for non-prosecution and the application for restoration thereof is not maintainable, has already been considered by this Court in Criminal Misc. No. 36522-M of 2006 titled as Purushotam Mantri v. Vinod Tandon 2009 (2) AICLR 442 decided on 30.1.2008. While relying upon an earlier judgment of this Court in [Jitender Bajaj Vs. State \(U.T. Chandigarh\) and Another](#), it was held that the application for restoration of complaint filed u/s 138 of the Act was not maintainable, however, in case sufficient cause is shown for non-appearance, this Court can certainly exercise the power u/s 482 Cr.P.C. for setting aside the order of dismissal of the complaint and discharge of the accused. The relevant para of judgment in Purushotam Mantri's case (supra) is extracted below:

"Learned counsel for the petitioner did not dispute that application filed by the Petitioner before the Court below for recalling the order was not maintainable and accordingly the same was rightly dismissed by the Court below. However, submission is that this Court u/s 482 of the Code can certainly direct restoration of the complaint, which was dismissed in default if sufficient reason is found for his non-appearance on the date fixed. For the purpose he has relied upon the observations made by this Court in [Jitender Bajaj Vs. State \(U.T. Chandigarh\) and Another](#), which are reproduced below:-

".... When the Magistrate, in a summon case, has dismissed the complaint and acquitted the accused due to absence of the complainant on the day of hearing, he cannot later on restore the complaint and set aside the order of acquittal, even if the complainant shows very good reasons for his failure to be present on the day of dismissal of the complaint. In such situation, the only remedy available with the complainant is to file appeal or revision against such order or petition u/s 482 of the

Code before this Court for setting aside the said order of dismissal of the complaint and acquittal of the accused on the ground that in the given facts and circumstances, the dismissal of the complaint and acquittal of the accused was not justified or there were sufficient reasons for non-appearance of the complainant before the Court on the date fixed, or the Magistrate has not properly exercised his discretion while not adjourning the complaint and dismissing the same."

The same was followed by this Court in Criminal Misc. No. 67626-M of 2006, *Om Parkash v. M/s Golden Forest India Ltd. And others*, 2008 (4) RCR (Cri) 445 : 2008 (4) RCR (Civil) 817, decided on 19.2.2008."

6. If the cause set up by the petitioner justifying his nonappearance on date fixed, when the complaint was dismissed in default is considered, this Court finds the same to be bona fide. It is not a case that repeatedly such default had occurred. The complainant had been appearing before the court regularly ever since the complaint was filed.

7. For the reasons mentioned above the impugned order passed by learned courts below dated 14.10.2003 dismissing the complaint filed by the petitioner in default and also the order passed by learned Additional Sessions Judge dated 1.6.2004, are set aside. The complaint filed by the petitioner is restored to its original number. Parties through their counsels are directed to appear before the learned Chief Judicial Magistrate on 02.07.2008 for further proceedings.