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Pawan Kumar Vs. S. Harcharan Singh

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SooperKanoon Citation : sooperkanoon.com/901759

Court : Jammu and Kashmir

Decided On : Jul-27-2004

Reported in : 2005(2)JKJ208

Judge : S.K. Gupta, J.

Acts : Negotiable Instruments Act, 1881 - Section 138; ;Code of Criminal Procedure (CrPC)

Appeal No. : Cri. Rev. No. 34/2004

Appellant : Pawan Kumar

Respondent : S. Harcharan Singh

Advocate for Def. : Rupinder Singh, Adv.

Advocate for Pet/Ap. : K.L. Sharma, Adv.

Disposition : Petition allowed

Judgement :

S.K. Gupta, J.

1. This criminal revision has been filed challenging the order dated 19/12/2003 of the 3rd Additional Judicial Magistrate, 1st Class, Jammu whereby the application of the respondent, accused, seeking dropping of the proceedings initiated on a

complaint under Section 138 of the Negotiable Instruments Act has been allowed on the ground that the earlier complaint on the same cause of action instituted by the complainant against the accused in which the cognizance was taken by the Court has been dismissed in default of the appearance of the complainant and dismissed the complaint.

2. The sole controversy in this case centers around the narrow compass that whether a complaint once dismissed by a Magistrate for default can be refiled. It appears from the record that earlier complaint filed by the complainant under Section 138 of the Negotiable Instruments Act stood dismissed in default on 14/08/2001. The application seeking restoration of the dismissed complaint was filed before the Court. The complainant, however, filed a second complaint on the same facts /allegations on 05/09/2001 before the learned Chief Judicial Magistrate, Jammu, who in turn transferred the same to the Ist Additional Munsiff Forest Magistrate) Jammu, and thereafter vide order dated 06/03/2002, it came to be transferred to the Court of 3rd Addl. Judicial Magistrate, Ist Class, Jammu for disposal under law and, got the application seeking restoration of the earlier complaint dismissed as not pressed on 03/12/2001.

3. It is not in dispute that dismissal of the first complaint was not on merit but on default of appearance of the complainant. It, therefore, follows that if the dismissal of the complaint was not on merit but on default of the complainant, there is no bar for the complainant to move the Magistrate again with a second complaint on the same facts. But if the dismissal is on merits, the position could be different. The contention cannot be countenanced that the complainant lacks bona fides as he has suppressed the fact of the pendency of the application seeking restoration of the earlier complaint. More so, when the second complaint has been filed, nothing would turn out even otherwise from the mere fact that the complaint did not contain the averments about the pendency of the application seeking restoration of the earlier complaint which, of course, has been disposed of by the Magistrate as not pressed.

4. It may further be pointed out that once the complaint has been dismissed in default, the Magistrate becomes functus officio and he has no inherent power to

restore the complaint dismissed in default. There is no express provision either in the Code of Criminal Procedure or any other Statute which debars the complainant for preferring second complaint on the same allegations when earlier complaint is dismissed in default. I do not find any merit in the contention raised by Mr. Rupinder Singh, learned counsel appearing for the respondent that the complainant lacks bona fide as he has suppressed the fact of having filed and pendency of the restoration application, in the second complaint. The second complaint has been filed by the respondent-complainant on 05/09/2001 when the earlier complaint was dismissed in default on 14/08/2001 and that too was done within a short interval. Further submission of Mr. Rupinder Singh, is that provisions of Code of Criminal Procedure are not applicable to the complaint under Section 138 of the N.I. Act being a special Act. This submission is also without any legal force as the procedure followed even in case of complaint under Section 138 by the Magistrate, by taking cognizance and proceeding with the trial as under the Code of Criminal Procedure, the Magistrate has not considered any of these legal aspects of the matter which render his order factually frail and legally infirm, and is thus unsustainable.

5. From the detailed discussion made above, it becomes clear that the impugned order cannot be allowed to stand. The revision is, therefore, allowed and the impugned order dated 19-12-2003 passed by the 3rd Additional Judicial Magistrate, Ist Class, Jammu, is set aside. The complaint is, accordingly, restored and the Magistrate is directed to proceed in accordance with the law.

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