

**DISTRICT : BONGAIGAON
IN THE COURT OF THE SESSIONS JUDGE AT BONGAIGAON**

Criminal Revision No. 12(1)/2014

*Present : Smt. I. Barman,
Sessions Judge,
Bongaigaon.*

1. Shriram Transport Finance Co. Ltd.
.....Petitioner.

Vs.

1. Sadip Goyary
2. State of Assam
.....Respondents.

APPEARANCE :

For the Petitioner : Sri M. Rahman, Advocate.
For the Respondents : Ex-parte.

Date of Argument : 28.11.2017
Date of Judgment : 08.12.2017

J U D G M E N T

1. This revision petition is preferred by Shriram Transport Finance Co. Ltd., challenging the legality, propriety and correctness of the order dated 07.01.2014, passed by learned Judicial Magistrate, 1st Class, Bongaigaon in NICR Case No. 49/2013, U/S 138 of the Negotiable Instrument Act. It is pertinent to mention here that vide order dated 07.01.2014 the Learned Judicial Magistrate 1st Class, Bongaigaon dismissed the case for default.

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2. The factual background leading to the proceeding before the Ld. Judicial Magistrate, 1st Class, Bongaigaon and the present revision before this Court is briefly stated below:-

The petitioner as complainant has filed an NICR Case against the accused Sadip Goyari before the learned Chief Judicial Magistrate, Bongaigaon alleging that the complainant who is engaged in the business of hire-purchase, lease and loan-cum hypothecation for commercial vehicle, was approached by the accused for financial assistance for purchase of one **PIAGGIO APE PASSENGER**. Accordingly, a loan-cum-hypothecation agreement was made between the parties bearing No. BONGNO908290001. But after obtaining the loan, the accused was found to be tardy in making payment of his dues to the complainant as agreed by him in terms of the said loan-agreement which the accused was supposed to repay with interest to the complainant in 34 installments. After several approaches, the accused person issued a Cheque amounting to Rs. 1,78,336/- only in favour of Shriram Transport Finance Co. Ltd. vide Cheque No. 095107 dated 18.04.2013 in the State Bank of India, Bishnupur Branch against the loan amount. Accordingly, the complainant presented the said Cheque at Axis Bank Ltd., Bongaigaon Branch for collection through his company's account on 22.04.2013 but the State Bank of India, Bishnupur Branch dishonoured the said Cheque due to "Fund Insufficient" and return the said Cheque to Axis Bank Ltd., Bongaigaon Branch on 06.05.2013 with endorsement "Fund Insufficient". Accordingly, the Axis Bank Ltd., Bongaigaon Branch returned the said Cheque to the complainant on the same date. Thereafter, the complainant sent an advocate's notice on

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16.5.13 to the accused informing about dishonour of cheque and asked to pay the cheque amount within stipulated period of 15 days from the date of receiving the notice but the accused failed to pay the amount. Hence, the complainant filed a case against the accused U/S 138 of N.I. Act. After registering, the case was made over to the Court of the learned Judicial Magistrate, 1st Class, Bongaigaon for trial.

3. Record of NICR 49/13 reveals that on receipt of the complaint, the Ld. Trial Court after perusing the complaint, documents annexed to the complaint and deposition on affidavit U/S 200 CrPC took cognizance of the case U/S 138 N.I. Act against the accused and issued summon accordingly. But as the summon was not returned, hence vide order dated 6.11.13 the complainant was directed to issue fresh summon to the accused fixing 9.12.13. On 9.12.13 the complainant was absent with step which was accordingly allowed with direction to take steps and also passed the order that failing to take steps, the case will be dismissed for non prosecution. On next day i.e. on 7.1.14 though the complainant was present but for not taking steps, the case was dismissed for default. Being highly aggrieved by and dissatisfied with the impugned order dated 7.1.14, the complainant preferred this revision petition on the ground that the learned Trial Court has erred in law as well as in facts while passing the impugned order of dismissal and the Ld/Court below committed gross error and irregularity and failed to appreciate the matters or record in proper perspective while passing the impugned order, that the complainant was present on 7.1.14 but due to bona fide mistake the Ld/engaged advocate could not submit summon as per order dated 9.12.13 and the Ld/Court below without applying judicial mind

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dismissed the case for default which is not maintainable and liable to be set aside.

4. In this revision petition, in spite of receipt of notice the respondent No.1 did not turn up. I have heard the learned Advocate of the petitioner and also have carefully gone through the case record as well as the impugned order.

5. Mr. M. Rahman, the learned counsel for the petitioner/revisionist submitted that in the case, the complainant gave his attendance by filing hajira on 7.1.14 and as such the case could not have been dismissed for default. Ld/counsel also submitted that since the impugned order is not speaking judgment, its legality, propriety can be examined under this revisional jurisdiction.

6. I have given my opinion and thoughtful consideration as regards to the submissions raised by the ld. counsel of the petitioner. I have also perused the order dated 6.11.13, 9.12.13 and impugned order dated 07.01.2014 passed by the Ld. Judicial Magistrate, 1st Class, which are reproduced herein:-

“6.11.13 Complainant is represented.
Summon not returned. Issue
fresh summon to accused
person.
Fix. 9/12/13 for App.

9.12.13 Complainant absent with steps
which is allowed. Complainant

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to take steps failing which the case shall be dismissed for non prosecution.

Fixed on 7/1/14 for app.

7.1.14 Complainant present but has not taken steps. Case is dismissed for default.”

7. Section 256 CrPC empowers the Magistrate to adjourn the hearing, for ensuring the presence of the complainant, if sufficient causes is shown with regard to his inability to appear at the appointed date of appearance. However, failure of the complainant to appear without sufficient cause empowers a Magistrate to dismiss the complaint and to acquit the accused. But in the present case, complainant was present on the date i.e. 7.1.14. Only fact is that as per order of previous date, steps was not taken to issue summon to the accused which the Ld/advocate of the complainant clearly admitted that it is a bona fide mistake on the part of the advocate not of the complainant. Record also reveals that the accused did not appear till passing of the impugned order and even in this revision also, in spite of due service of notice, he did not appear.

8. The instant case is with regard to dishonour of cheque amounting to Rs. 1,78,336/- and the case was not dismissed on merit. Moreover, in criminal case, there is no provision of dismissal for default or non prosecution. Dismissal for default in a complain case is not in consonance as per provision of law and is not tenable. Moreover, record reveals that the complainant failed to take steps on two days for issuing summon to the accused which is admittedly for bona fide mistake of the

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7.1.14

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engaged learned advocate. It is well settled that one should not be deprived from prosecuting his grievance on merit for fault of his learned advocate.

9. In the above, in my considered view, when complainant was present on the date fixed, for not taking steps for issuing summon on one or two days, the petitioner is not made to suffer injustice and it needs interference in the revision petition.

10. Considering all above, to advance substantial justice, one opportunity should be given to the complainant for taking steps. Accordingly, this Criminal Revision stands allowed on contest. The impugned order dated 07.01.2014 passed by the Learned Judicial Magistrate, 1st Class, Bongaigaon is hereby set aside and the complaint is ordered to be restored.

11. In view of the fact that the proceeding u/s 138 N.I.Act has been dragged since 2014 in the stage of service of summon, to avoid further delay, the petitioner is directed to appear before the Learned Trial Court on 19.12.17 and to issue summon to the opposite party on the date to be fixed by the Ld/court below. The Learned Court below shall make endeavor to dispose the case expeditiously.

12. Send back the LCR with a copy of the judgment to the Court of the Ld. Judicial Magistrate, 1st Class, Bongaigaon.

13. Given under my hand and seal of this Court on this 8th day

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of *December, 2017.*

Dictated and Corrected by me,

28.12.17

(I. Barman)
Sessions Judge,
Bongaigaon.

28.12.17

(I. Barman)
Sessions Judge,
Bongaigaon.
