

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: October 22, 2013
Judgment Pronounced on: November 18, 2013

+ (i) CRL.M.C.4260/2011 & CrI.M.A.19619/2011

INDEPENDENT NEWS SERVICE PVT LTD. & ORS.

.....Petitioners

Through: Mr. Aman Lekhi Sr. Advocate
with Mr. Rohan Garg and Mr.
Arjun Mahajan, Advocates

Versus

STATE & ANR.

....Respondents

Through: Mr. P.K. Mishra, Additional Public
Prosecutor for Respondent-State
Mr.Amit Sharma, Mr. Praveen
Nagar and Mr. Jasminder Shokand,
Advocates for respondent No.2

+ (ii) CRL.M.C.4263/2011 & CrI.M.A.19624/2011

RAJAT SHARMA

.....Petitioner

Through: Mr. Aman Lekhi Sr. Advocate
with Mr. Rohan Garg and Mr.
Arjun Mahajan, Advocates

Versus

STATE & ANR.

....Respondents

Through: Mr. P.K. Mishra, Additional Public
Prosecutor for Respondent-State
Mr.Amit Sharma, Mr. Praveen
Nagar and Mr. Jasminder Shokand,
Advocates for respondent No.2

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

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JUDGMENT

1. In the above-captioned two petitions, quashing of impugned order of 13th September, 2011 (*vide which respondent's complaint, which was dismissed in default, has been restored for hearing*) is sought. In the alternative, quashing of complaint No.1486/1 of 2007 under Sections 385/469/471/500/509/511/120-B and 34 of *IPC* and summoning order of 29th March, 2008 is sought on merits. However, during the course of hearing, aforesaid alternate prayer was not pressed and impugned order of 13th September, 2011 alone was assailed.

2. With the consent of learned counsel for parties, the above-captioned two petitions were heard together and are being disposed of by this common judgment as they are directed against the common impugned order of 13th September, 2011.

3. At the hearing, learned senior counsel for petitioners had contended that the impugned order takes note of precedents as noted in paragraph No.6 of the impugned order but fails to follow the precedents cited on strange reasoning as contained in paragraph No.13 of the impugned order, which reads as under: -

“Section 256 of Cr.P.C. deals with the non-appearance or death of the complainant. The opening word of the section 256 ‘if summons has been issued on complaint, and on day appointed for appearance of the accused’. Here in the present case, the accused persons have not appeared rather they sought exemption through their pleader Advocates. In these circumstances, instead

of dismissing the complaint on account of non-appearance of the complainant, learned Magistrate ought to have adjourned the matter for appearance of the accused persons. Therefore, application filed by the respondent stands dismissed. Order passed by the learned Magistrate requires to be recalled as it was not proper. The revision petition is allowed. Order dismissing the complaint by the learned MM is recalled and set-aside. Trial court record be sent back alongwith a copy of this order. Parties are directed to appear before the trial court on 30.09.2011. Revision file be consigned to record room.”

4. Reliance was placed by learned senior counsel for petitioners upon decisions in *Ravi Sharma v. State (NCT of Delhi)* 2009 (113) DRJ 494 and *Kalpna Tyagi v. Sneha Lata Sharma* (2003) 104 DLT 127 to contend that when in the absence of complainant, complaint is dismissed in default, then statutory appeal under Section 378 (4) of Cr.P.C. lies and not a revision petition.

5. Learned counsel for second respondent had supported the impugned order and had relied upon Apex Court's decisions in *Associated Cement Co. Ltd. V. Keshvanand* (1998) 1 SCC 687 and *Popular Muthiah v. State represented by Inspector of Police* (2006) 7 SCC 296 to contend that it is trite law that power under Section 256 of Cr.P.C. is not unhindered and must be exercised with a judicial mind. Lastly, it was submitted that the impugned order does not suffer from any infirmity and so, inherent powers of this Court are not required to be exercised and thus, dismissal of above-captioned two petitions is sought by learned counsel for second respondent.

6. It needs no reiteration that where there is abuse of the process of the court or where interference is absolutely necessary for securing the ends of justice, inherent powers under Section 482 of Cr.P.C. ought to be exercised. After having gone through the decisions cited and upon hearing learned counsel for the parties and on perusal of impugned order as well the material on record, I find from trial court's order of 14th December, 2009 (*vide which second respondent's complaint (Annexure-C) was dismissed*) that default in appearance on behalf of respondent-complainant was viewed seriously by the trial court because on the last date of hearing, personal exemption from appearance was sought on behalf of respondent-complainant and it was granted. Since none had appeared on behalf of respondent-complainant on 14th December, 2009, so complaint (*Annexure-C*) was dismissed in default and the accused i.e. petitioners were acquitted.

7. The basic question which falls for consideration in these two petitions is not whether the dismissal of second respondent's complaint (*Annexure-C*) was justified or not. The precise question, which needs to be answered, is whether trial court's order of 14th December, 2009 is appealable or is revisable. Therefore, reliance placed by learned counsel for second respondent upon decision in *Popular Muthiah (supra)* is of no avail. In *Associated Cement (supra)*, relied upon by second respondent's counsel, it was aptly reiterated by the Apex Court that the difference between appellate and revisional jurisdiction is subtle but quite real.

8. In the aforesaid decision, an appeal was preferred against dismissal of complaint in default and Apex Court in *Associated Cement (supra)* had declared as under: -

"When a trial court had acquitted an accused due to non-appearance of the complainant the appellate court has the same powers as the trial court to reach a fresh decision as to whether in the particular situation the Magistrate should have acquitted the accused. What the trial court did not then ascertain and consider could, perhaps, be known to the appellate court and a decision different from the trial court can be taken by the appellate court, whether the order of acquittal should have been passed in the particular situation."

9. The above-said observations can come to the aid of second respondent only when an appeal is filed against trial court's order of 14th December, 2009 dismissing the complaint (*Annexure-C*) of second respondent in default. Such a view is being taken in view of the pertinent observations made in *Kalpna Tyagi (supra)*, which are as under: -

"A distinction, therefore, has to be drawn in regard to the complaints dismissed prior to the summoning of an accused and those dismissed subsequent to the summoning of the accused. If a complaint is dismissed prior to the summoning of an accused the order may be challenged by way of filing a revision but once Section 256 comes into play the dismissal of a complaint has the effect of acquittal of an accused and only an appeal can be filed under Section 378 of the Code to challenge his acquittal."

10. Aforesaid view has been reiterated by a coordinate Bench of this Court in *Ravi Sharma (supra)*. In the instant case, complaint (*Annexure-C*) of second respondent has been dismissed in default after passing of summoning order of 29th March, 2008 and so, trial court's order of 14th

December, 2009 was not revisable and the learned revisional court had erroneously entertained respondent-complainant's revision petition while considering the case on merits.

11. In the aforesaid view of this matter, impugned order is quashed on jurisdictional ground alone. Whether restoration of second respondent's complaint (*Annexure-C*) was justified or not, is left open to be considered in appeal, if second respondent chooses to file an appeal against trial court's order of 14th December, 2009. Needless to say, if an appeal is preferred against trial court's order of 14th December, 2009, the period spent by second respondent in *bonafidely* pursuing revisional remedy and time spent in those proceeding would be taken into consideration while dealing with application for condonation of delay in filing the statutory appeal.

12. With aforesaid observations, both these petitions and the applications are disposed of while refraining to comment upon merits lest it may prejudice either side in appeal or at trial.

(SUNIL GAUR)
Judge

NOVEMBER 18, 2013

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