

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

Reserved on: 30th October, 2014

Date of Decision: 01st December, 2014

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+ CRL. M.C. 1280/2014

M/S. J.S. ENGINEERING WORKS

..... Petitioner

Through: Ms. Anjali Manish, Advocate.

versus

THE STATE & ORS.

.....Respondents

Through: Mr. Navin Sharma, APP for the State
Ms. Anurag Jha, Advocate for R-2 &
R-3.

CORAM:

HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By this petition filed under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') the petitioner has assailed order dated 07.12.2013 passed by learned Metropolitan Magistrate (North-West), Rohini, Delhi whereby CC No.269/04/13 filed by the petitioner was dismissed for non-appearance of the petitioner and non-prosecution of the case.

2. Succinctly stated the facts of the case are that the petitioner filed a complaint under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as 'NI Act') on the allegations, *inter alia*, that the petitioner had supplied goods to respondent No.2 herein. The respondent No.3 is the Proprietor of respondent No.2. The petitioner is maintaining a running account for the goods supplied and sum of Rs.6,00,000/- (Rupees Six lakhs) was due and outstanding against

respondent No.2 firm. The respondent Nos.2 and 3 in discharge of their liability, issued cheque bearing No.087222 dated 07.12.2010 drawn on Union Bank of India, Chawri Bazar, Delhi. On presentation, the said cheque was dishonoured with the remarks 'payment stopped by drawer' by drawer vide memo dated 07.02.2011 despite service of statutory notice dated 12.02.2011. The respondent No.2 failed to make the payment of the said cheque.

3. Hence, the petitioner filed a complaint for the offence under Section 138 of NI Act. After recording pre-summoning evidence, respondent Nos.2 and 3 were summoned. Notice under Section 251 Cr.P.C. was served on respondent Nos.2 and 3 on 03.04.2013. Thereafter, respondent Nos.2 and 3 moved an application under Section 145(2) of NI Act and the case was adjourned to 28.09.2013 for reply and arguments on said application. On 28.09.2013, no one appeared on behalf of petitioner and Court notice was issued to the complainant for 07.12.2013. Again nobody appeared on behalf of petitioner and the complaint was dismissed for non-appearance of complainant and non-prosecution of the matter, vide order dated 07.12.2013. Aggrieved by the said order, the petitioner has preferred the present petition.

4. Learned counsel for the petitioner urged that notice under Section 251 of Cr.P.C. was served on the respondent Nos.2 and 3 on 03.04.2013, application under Section 145(2) of NI Act was filed and the case was fixed for arguments on the said application on 03.08.2013. The case was transferred to the Court of Mr. Dharmender

Singh, learned Metropolitan Magistrate-05 (North West), New Delhi on 03.08.2013 and the case was adjourned to 28.09.2013. On 28.09.2013 when learned counsel for the petitioner reached to the transferee court, it was revealed that the matter had already been taken up and was renotified for 07.12.2013. Again on 07.12.2013 when counsel for petitioner appeared before the trial court she was informed that matter has already been taken up and orders were reserved. Learned counsel for petitioner also submitted that the petitioner had already adduced pre-summoning evidence and notice under Section 251 Cr.P.C. was served on the respondent Nos.2 and 3. The trial court could have proceeded further in accordance with law and the complaint should have been decided on merits.

5. Another submission of learned counsel for the petitioner is that the petitioner had been diligently pursuing the complaint, the personal appearance of the petitioner was not required. On 28.09.2013 Court notice was issued to the petitioner but the Court notice was not served on the petitioner. The presence of the petitioner never affected the course of trial, in fact, respondent Nos.2 and 3 appeared before the trial court only after issuance of bailable warrants against them.

6. Learned counsel for the petitioner has relied upon '**Associated Cement Co. Ltd. vs. Keshavanand**', (1998) 1 SCC 687 and '**S. Anand vs. Vasumathi Chandrasekar**', (2008) 4 SCC 67, to contend that the Court must consider whether the presence/ attendance of the complainant is essential for the progress of the case. The case was fixed for arguments on the application under Section 145(2) of NI Act

and trial court could have disposed of the said application.

7. *Per contra*, learned counsel for respondent Nos.2 and 3 submitted that the respondents were acquitted by the trial court and the present petition is not maintainable. In support of his submission learned counsel for respondent Nos.2 and 3 has relied upon judgment in '**Subhash Chand vs. State (Delhi Administration)**', (2013) 2 SCC 17.

8. I have given my anxious thought to the submissions made by learned counsel for both the parties and have perused the material on record.

9. The first and foremost question which comes for consideration is whether the dismissal of the complaint by the trial court for non-appearance of the petitioner is justified. At this juncture it is relevant to reproduce Section 256 of Cr.P.C., which reads as under: -

“256. Non-appearance or death of complainant. - (1)
If the summons has been issued on complaint and on the day appointed for the appearance of the accused, or any day subsequent thereto to 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 it 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. On a perusal of the aforesaid provisions of Section 256 of Cr.P.C., it is manifestly clear that the Magistrate has discretionary powers to acquit the accused in the absence of the complainant unless he thinks it fit to adjourn the hearing for another day. Section 256 of Cr.P.C. affords some deterrence against dilatory tactics on the part of the complainant. This section affords protection to an accused against such dilatory tactics of the complainant. But it does not mean that if the complainant is absent the Court is bound to acquit the accused in *invitum*. If the Court considers that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. If the Magistrate considers that personal appearance of the complainant was required on that day the Magistrate has power to dispense with his attendance and proceed with the case.

11. In **S. Anand’s** case (supra) relied upon by learned counsel for petitioner, it was held that: -

“12. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined.

13. The date was fixed for examining the defence witnesses. The appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to

cross-examine the witnesses examined on behalf of the defence.

15. Presence of the complainant or lawyer would have been necessary, as indicated hereinbefore, only for the purpose of cross-examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter.”

12. In **Associated Cement Company’s** case (supra) it was held that the purpose of conferring power on the Magistrate under Section 256 of Cr.P.C. is to deter dilatory tactics on the part of the complainant, once he sets in motion criminal proceeding by instituting a complaint. The purpose being that accused is perforce required to attend Court proceedings on dates fixed by the Court and is thus put to harassment if the complainant does not turn up in the Court on dates when his presence is necessary. This provision afforded protection to the accused against such tactics being adopted by the complainant. This, however, does not mean that if the complainant is absent the Court is duty bound to acquit the accused. If the situation mandates the Magistrate has the power to adjourn the hearing. On the other hand, if the Magistrate considers that some personal appearance of the complainant is not necessary it has the power to dispense with his attendance and proceed with the case. It is for the Court to consider whether the presence of the complainant is necessary for the progress of the case on the day when the complainant is absent or the situation

is such that the case be adjourned to another date. If the situation mandates that there is no reason to adjourn the case, the Magistrate is empowered to dismiss the complaint and acquit the accused.

13. The ratio of aforesaid judgment in **Associated Cement Company's** case (supra) has been followed by the Apex Court in **S. Anand's** case (supra) and observed as under: -

“12. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined.

13. The date was fixed for examining the defence witnesses. The appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence.

15. Presence of the complainant or lawyer would have been necessary, as indicated hereinbefore, only for the purpose of cross-examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter.”

14. In the present case, the complaint was fixed for arguments on application under Section 145(2) of NI Act and the presence of petitioner was not necessary.

15. The second question which comes up for consideration is whether the complainant can file a petition under Section 482 of Cr.P.C. seeking setting aside of dismissal of complaint as the remedy of filing special leave to appeal is available.

16. It is correct that the dismissal of a complaint in a summons case results in acquittal of the accused as envisaged in Section 256 of Cr.P.C. It is also true that the complainant can challenge the order of acquittal by filing an application for special leave to appeal. A similar question came up for consideration before the Apex Court in '**Punjab State Warehousing Corporation vs. Shree Durga Ji Traders**', (2011) 4 SCC 615. In the said case the High Court had dismissed the petition under Section 482 of Cr.P.C. for setting aside of complaint in default and restoration thereof by holding that dismissal in default of complaint amounts to acquittal of accused and statutory remedy exists in Cr.P.C., a petition under Section 482 of Cr.P.C. cannot be entertained. The Hon'ble Supreme Court while considering various judgments passed from time to time observed as under: -

“9. The short question that falls for consideration is whether in the fact situation the High Court was justified in declining to exercise its jurisdiction under Section 482 of the Code?

10. It is trite law that the inherent power of the High Court ought to be exercised to prevent miscarriage of justice or to prevent the abuse of the process of the court or to otherwise secure the ends of justice. The Court possesses wide discretionary powers under the section to secure these ends. In this behalf it would be profitable to refer to the decision of this Court in *Jeffrey J. Diermeier v. State of W.B.* [(2010) 6 SCC 243 : (2010) 2

SCC (Civ) 656 : (2010) 3 SCC (Cri) 138] wherein one of us (D.K. Jain, J.), speaking for the Bench, explained the scope and ambit of inherent powers of the High Court under Section 482 of the Code as follows: (SCC p. 251, paras 20 & 22)

20. ... The section itself envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code; (ii) to prevent abuse of the process of court; and (iii) to otherwise secure the ends of justice. Nevertheless, it is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. Undoubtedly, the power possessed by the High Court under the said provision is very wide but is not unlimited. It has to be exercised sparingly, carefully and cautiously, *ex debito justitiae* to do real and substantial justice for which alone the court exists. It needs little emphasis that the inherent jurisdiction does not confer an arbitrary power on the High Court to act according to whim or caprice. The power exists to prevent abuse of authority and not to produce injustice.

22. In *Dinesh Dutt Joshi v. State of Rajasthan* [(2001) 8 SCC 570: 2002 SCC (Cri) 24] , while dealing with the inherent powers of the High Court, this Court has observed thus: (SCC p. 573, para 6)

‘6. ... The principle embodied in the section is based upon the maxim: *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest* i.e. when the

law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable. The section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in the section. As lacunae are sometimes found in procedural law, the section has been embodied to cover such lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this section are however required to be reserved, as far as possible, for extraordinary cases.’

12. We are convinced that in the instant case, rejection of the appellant's petition under Section 482 of the Code has resulted in miscarriage of justice. Availability of an alternative remedy of filing an appeal is not an absolute bar in entertaining a petition under Section 482 of the Code. As aforesaid, one of the circumstances envisaged in the said section, for exercise of jurisdiction by the High Court is to secure the ends of justice. Undoubtedly, the trial court had dismissed the complaint on a technical ground and therefore, interests of justice required the High Court to exercise its jurisdiction to set aside such an order so that the trial court could proceed with the trial on merits.”

17. In **Subhash Chand’s** case (supra) relied upon by learned counsel for respondent, Hon’ble Supreme Court has not considered the question of maintainability of a petition under Section 482 of Cr.P.C.

against an order dismissing the complaint in default resulting in acquittal of the accused.

18. In the instant case, the complaint was filed in the year 2011, after recording pre-summoning evidence and respondent Nos.2 and 3 were summoned. The respondent Nos.2 and 3 failed to appear on 07.10.2011 on which bailable warrants were issued against them. Thereafter, respondent Nos.2 and 3 appeared on 24.03.2012. Notice under Section 251 of Cr.P.C. was served on respondent Nos.2 and 3 on 03.04.2013. An application under Section 145(2) of NI Act was filed and the case was adjourned to 03.08.2013 for reply and arguments on the said application. On 03.08.2013 the complaint was transferred and the transferee court adjourned the complaint to 28.09.2013. The petitioner/ complainant did not appear on 28.09.2013 and Court notice was issued to complainant for 07.12.2013. Again the complainant was absent on 07.12.2013 and the complaint was dismissed for non-appearance of the complainant and non-prosecution of the matter. It is not clear whether the Court notice issued to the complainant on 28.09.2013 was served or not.

19. Taking into account the aforesaid facts and circumstances of the case, this Court is of the opinion that it is a fit case whether the Court should exercise its discretion under Section 482 of Cr.P.C. instead of relegating the petitioner to avail his alternative remedy of filing an application for special leave to appeal.

20. In view of the aforesaid observations the petition is allowed. Consequently, the order dated 07.12.2013 passed by learned

Metropolitan Magistrate (North West), Rohini, Delhi is set aside and the complaint is restored to its original number and stage.

21. Both the parties are directed to appear before learned Chief Metropolitan Magistrate (North West), Rohini, Delhi who will assign the case to the concerned Metropolitan Magistrate (North West), Rohini, Delhi on 10.12.2014 at 10:00 a.m.

(VED PRAKASH VAISH)
JUDGE

DECEMBER 1st, 2014
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