

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

CRIMINAL APPLICATION NO. 133 OF 2013

Classic Steel Industries ... Applicant

VERSUS

The State of Maharashtra & Anr. ... Respondents

.....

Mr Satej S. Jadhav, Advocate for the applicant
Mr K. D. Mundhe, APP for respondent/State
Mr S. V. Munde, Advocate for respondent No. 2

.....

**ALONG WITH
CRIMINAL APPLICATION NO. 159 OF 2013**

Classic Steel Industries ... Applicant

VERSUS

The State of Maharashtra & Anr. ... Respondents

.....

Mr Satej S. Jadhav, Advocate for the applicant
Mr K. D. Mundhe, APP for respondent/State
Mr S. V. Munde, Advocate for respondent No. 2

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CORAM : V. L. ACHLIYA, J.
DATE : 9TH MARCH, 2017.

PER COURT:

1. Leave granted u/s 378(4) of Cr.P.C. to prefer appeals. Applications seeking leave to file appeals are allowed. Appeals be numbered.

2. By consent of both the sides, the appeals are heard finally at the stage of admission.

3. The appeals are preferred challenging the orders dt. 03.04.2010 separately passed in SCC No. 1717 of 2008 & SCC No. 1718 of 2008, by learned Chief Judicial Magistrate, Beed, whereby the complaints filed by the complainant/applicant u/s 138 of Negotiable Instruments Act, have been dismissed in default of complainant to appear and accused is discharged. Being aggrieved, the appellant has preferred these appeals.

4. Limited issue involved in appeals confines to correctness of orders passed by trial Court in dismissing the complaints and discharging the accused in default of complainant to appear when cases were called out.

5. Mr Satej Jadhav, learned counsel for the appellant/complainant strenuously contended that the impugned orders are not sustainable in law. By referring the provisions contained in Chapter XV & XVI of the Code of Criminal Procedure (for short "Cr.P.C."), the learned counsel submits that there was no occasion for the learned Magistrate to dismiss the complaints and discharge the accused. It is pointed out that the verification statement of the complainant was recorded on 07.10.2009 in presence of Chief Judicial Magistrate. After recording of verification, the personal appearance of the complainant was not at all required to pass further orders in the matter. It is pointed out that as per the procedure contemplated under Chapter XV & XVI of Cr.P.C. after recording of verification statement, it was expected on the part of the ld. Magistrate to have looked into the complaints, the evidence

placed in support of the complaints and then to decide further course of action i.e. either to dismiss the complaints or to issue process. Dismissal of complaints at such stage of consideration nowhere contemplated under the provisions of Chapter XV & XVI of Cr.P.C. By referring the provisions of Section 204 of Cr.P.C., the learned counsel submits that once the complaint is filed it cannot be dismissed in-default except for the reason mentioned in sub-clause 4 of Section 204 of Cr.P.C. It is pointed out that, in the instant cases, no such eventuality was occurred as the order of issuance of process was not passed. He further submits that the cases have not attained the stage of hearing so as to exercise of powers u/s 256 of Cr.P.C. In this background, learned counsel submits that impugned orders are not sustainable in law. He, therefore, urged to allow the appeals.

6. On the other hand, Mr S. V. Munde, learned counsel for respondent No. 2 supported the orders passed by trial Court. He submits that it appears from the record that the complaints were filed in the year 2008. After recording verification statement of complainant, both the cases were repeatedly adjourned for appearance of the complainant. However the complainant and the advocate failed to appear which resulted into passing of impugned orders. He, therefore, submits that orders are perfectly legal and calls for no interference.

7. In order to appreciate the submissions advanced, I have perused the record & proceedings of the trial Court. It appears that the complainant has filed two separate complaints alleging dishonour of cheques of Rs. 20,00,000/- (Rupees Twenty Lakh) each, on the part of the accused. The complaints were filed in the year 2008. Since thereafter the cases were repeatedly adjourned for the appearance of the complainant for recording of verification

statement. After adjourning the cases for a period of about one year, the verification statement of the complainant was recorded on 07.10.2009. Thereafter, the cases were repeatedly adjourned for appearance of the complainant and ultimately the cases were dismissed on 03.04.2010 by recording the absence of the complainant. In this background, the question arose for consideration is, in the facts & circumstances of case whether the orders of dismissal of complaints and discharge of accused are sustainable in law.

8. In my view, the impugned orders are not sustainable in law for the sole reason that same are not in consonance with the procedure prescribed under the Code of Criminal Procedure to deal with the complaint filed otherwise than police report. Once the private complaint case is filed before the Court competent to take cognizance of such offence alleged in the complaints, it is expected on the part of Magistrate to follow the procedure as prescribed under Chapter XV & XVI of Cr.P.C. In the instant case, learned Chief Judicial Magistrate has recorded the verification statement of complainant on 07.10.2009. After recording verification statement, it was expected on his part to have perused the complaint, verification statement, evidence in the nature of documents, if any, relied in support of the complaints and then he should have decided to dismiss the complaint or to issue process against the accused. As per the procedure prescribed, if the Magistrate after applying its mind i.e. after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the enquiry or the investigation u/s 202 forms the opinion that no sufficient ground exists to proceed with the case, he shall dismiss the complaint by briefly recording reasons for doing so. However, if the Magistrate forms the opinion of

taking cognizance of an offence then he is expected either to issue summons or warrant as the facts of the case so warrant calling upon to appear to answer the case of the complainant. In this context, it is necessary to refer Sections 203, 204 & 256 of Cr.P.C. which read as under:

203. Dismissal of complaint.-

If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

204. Issue of process.-

- (1) *If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be -*
 - (a) *a summons-case, he shall issue his summons for the attendance of the accused, or*
 - (b) *a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.*
- (2) *No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.*
- (3) *In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.*
- (4) ***When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.***
- (5) *Nothing in this section shall be deemed to affect the provisions of section 87.*

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.*

9. Thus, the perusal of above quoted provisions spell out that sub-section (4) of Section 204 is the only enabling provision which provides for dismissal of complaint before the stage of issuance of process that too for the reason of non-payment of process fees or other fees payable in the matter. Similarly, the trial Court dealing with the complaint can take recourse to Section 256 of Cr.P.C. and dismiss the complaint only when the summons has been issued to accused and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing was adjourned, the complainant does not appear before the court. In such eventuality, the Magistrate can either adjourn the hearing of the case or acquit the accused. The recourse to Section 256 of Cr.P.C. can also be taken in the event of non-appearance of complainant due to his death. In the instant cases, neither the summons was issued by the Magistrate nor any stage has arrived to pay process fees. In fact the cases were lying at the stage of consideration of magistrate either to dismiss the complaint in exercise of powers u/s 203 of Cr.P.C. or to

issue process as contemplated under Section 204 of Cr.P.C. In this view, no eventuality was occurred on the date of dismissal of complaint i.e. 03.04.2010 either to invoke the powers u/s 204(4) or Section 256 of Cr.P.C.

9. As discussed, the recourse to sub-section (4) of Section 204 can be taken only in the event the cognizance has been taken and order to issue summons has been passed by the Court and thereafter the complainant has failed to pay the process fees or any other fees payable under law. In absence of any such stage being occurred in the present cases, the Magistrate was not justified in passing the orders of dismissal of complaints and discharge of the accused. Once the verification statement was recorded on 07.10.2009, it was expected on the part of the Magistrate to have looked into the complaint, the verification statement and evidence, if any, placed in the nature of documents in support of the complaint and then to decide either to dismiss the complaint or to issue process. If for any reason the learned Magistrate could not apply his mind and take decision in the matter on the day on which verification of complainant was recorded, then it was expected on his part to have applied his mind on subsequent date to which case adjourned and then to have taken decision either to dismiss the complaint or to issue process. It was not necessary on the part of the Magistrate to have repeatedly adjourned the cases for appearance of the complainant. In this view, the orders passed by the trial Court are not sustainable in law. Since the orders passed cannot be said to be passed in exercise of powers under Sub-section (4) to Section 204 of Cr.P.C. as well as in exercise of the powers u/s 256 of Cr.P.C., the impugned orders are not sustainable in law. In this view, the impugned orders are liable to be set aside in exercise of appellate jurisdiction.

10. In view of above, I am inclined to allow the appeals and set aside the impugned orders. Having regard to the fact that for no fault on the part of the accused they are required to face the present proceedings, I am inclined to allow the appeals subject to payment of costs of Rs. 10,000/- (Rupees Ten Thousand) in each of the appeals to be payable by appellant to respondent. In the result, I pass the following order.

ORDER

- (i) Appeals be numbered.
- (ii) Appeals are allowed.
- (iii) The impugned orders dt. 03.04.2010 passed by learned Chief Judicial Magistrate, Beed in SCC No. 1717 of 2008 & SCC No. 1718 of 2008, are hereby set aside subject to payment of costs of Rs. 10,000/- each. Both the cases are restored to its original number. Trial Court is directed to proceed with the matters from the stage subsequent to recording of verification statement.
- (iv) The costs amount be deposited in trial Court.
- (v) Parties are directed to appear before the trial Court on 03.05.2017.
- (vi) Record & Proceedings be sent back to the trial Court.
- (vii) Appeals stand disposed of in above terms.

[V. L. ACHLIYA, J.]