

**CRR 794 of 2021
(Through Video Conference)**

In Re: - An application under Section 401 read with Section 482 of
the Code of Criminal Procedure, 1973.

And

In the matter of: The New Indian Assurance Co. Ltd.

.... Petitioner

Mr. Sandipan Ganguly,
Mr. Karan Dudhwewala,
Mr. Avirup Mondal,
Mr. Soumalya Ganguli

... For the Petitioner

Mr. Debrup Bhattacharjee

...For the Opposite Party No. 2.

The petitioner, in this revisional application, has challenged an order dated March 1, 2021, passed by the learned Chief Judge, City Sessions Court, Calcutta, in Criminal Revision No.92 of 2020.

By the said order impugned, the learned Judge upheld the order dated January 18, 2020, passed by the learned Metropolitan Magistrate, 11th Court, Calcutta in a complaint case under Sections 465/468/120B of the Indian Penal Code.

By the said order, the learned Magistrate discharged the accused invoking Section 249 of the Code of Criminal Procedure, 1973, as it was observed by the learned Magistrate that in spite of repeated opportunities, the complainant did not appear before the Court for long. The learned Magistrate was of the opinion that the process was issued against the petitioner under the compoundable

Sections of the Indian Penal Code and, therefore, he discharged the accused under Section 249 of the Code of Criminal Procedure, 1973.

Mr. Sandipan Ganguly, learned senior advocate, appearing for the petitioner submits that the precondition invoking Section 249 is that the alleged offence has to be non-cognizable and compoundable.

He further submits that the process, in this case, was issued under Sections 465/468 read with Section 120B of the Indian Penal Code, 1860. The offences committed under those aforesaid sections are non-compoundable. The offence committed under Section 468 of the Indian Penal Code is cognizable and, therefore, in this case the offence committed allegedly under Section 120B is also cognizable. The learned Magistrate in the Court below was, therefore, not justified in discharging the accused by invoking Section 249 of the Code of Criminal Procedure.

Mr. Ganguly submits that the learned Sessions Judge was not, therefore, justified in upholding the order of the learned Magistrate.

Section 249 of the Criminal Procedure Code, 1973 is quoted below:

“249. Absence of complainant.—When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.”

The section authorises the Magistrate to discharge an accused at any time before the charge is framed if, in any complaint case,

triable as a warrant case, on any day fixed for hearing, the complainant remains absent. Such power is discretionary in nature, and the learned Magistrate needs to use his discretion judiciously having regard to the overall conduct of the complainant. The power under this section should not be invoked in every case whenever the complainant fails to appear before the charge is framed.

The learned Magistrate, however, cannot use such discretion where the alleged offences are not compoundable or cognizable. In other words, Section 249 of the Code can be invoked only when the offences alleged are compoundable in terms of Section 320 of the Code or non-cognizable in terms of Section 2(l) of the Code. The alleged offence need not be compoundable as well as non-cognizable, if either of the two conditions is satisfied the Section 249 of the Code gets attracted.

In the case in hand, the petitioner was utterly negligent in conducting its case before the learned Magistrate, and such indolence prompted the learned Magistrate to invoke Section 249 of the Code, but such exercise of power cannot be sustained in law since all offences involved in the case are non-compoundable and barring offence under Section 465 of the Code, all offences are cognizable. The learned Magistrate in the Court below, therefore, could not discharge the accused under Section 249 of the Code.

In view of the discussion above, the order of the learned Magistrate as upheld by the learned Sessions Judge is liable to be set aside.

It has been submitted by the learned advocate for the opposite party no. 2 that this revisional application is not maintainable in view

of the judgement reported at **(1993) 1 SCC 435 (Dharampal Vs. Ramshri (SMT))**, wherein it has been held that second revisional application, after the dismissal of the first one by Sessions Court, cannot be entertained by the Hon'ble High Court under Section 482 of the Code of Criminal Procedure, 1973.

On the other hand, Mr. Ganguly has relied upon a judgment reported at **(1997) 4 SCC 241 (Krishnan Vs. Krishnaveni)** to urge that this application is maintainable.

It seems that the judgment reported at **(1993) 1 SCC 435 (Dharampal Vs. Ramshri (SMT))** has been expressly overruled by the judgment reported at **(1997) 4 SCC 241**. It was held that the second revisional application before the High Court under sub section (1) of Section 397 is prohibited by sub section (3) thereof, but the inherent power of the High Court is still available under Section 482 of the Code of Criminal Procedure.

In that view of the above, the revisional application being **CRR 794 of 2021** stands allowed.

Learned advocate for the opposite party no. 2, however, suggests that the accused, in this case, is liable to be discharged under Section 245 (3) of the Code of Criminal Procedure, 1973.

I need not go into that aspect in this revisional application. The opposite party no. 2 will be at liberty to approach the learned Magistrate seeking discharge under Section 245(3) of the Code, if it is so advised.

All parties shall act upon the server copy of this order duly downloaded from the official website of this Court.

(Kausik Chanda, J.)