

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Cr.M.P. No. 1527 of 2017**

Vijay Ahire S/o late Bandu Ahire, aged about 42 years, Caste Mahar, Ex. Constable Regiment No. 94633774, B.S.F. Camp Mulla, Tahsil Bhanupratappur, District Uttar Bastar Kanker C.G. present address Gadgae Baba Nagar, Pachora Plot No. 34, Post & Tahsil Pachora, District Jalgoan, Maharastra- 424201.

(The learned Court below has wrongly mentioned the surname Ahirae in place of Ahire and also wrongly mentioned the Panchora in place of Pachora).

(Complainant)**---- Petitioner****Versus**

1. Yogendra Kumar Puniya, Assistant Commandant 86 Battalion now deputy commandant, Border Security Force Akhanoor, District Jammu & Kashmir. At present posted as deputy commandant (MT) B.S. F. IRLA No. 10899755 sector head Quarter B.S.F. Silchar post Arunachal, District Silchar Cachar Assam. 788025.
2. Inspector Radheshyam 31 Battalion B.S. F. Camp Mulla, Tahsil Bhanupratappur, District Uttar Bastar Kanker C.G. at present posted as Inspector No. 050025068 sector Head Quator B.S.F. Panisagar Tripura, Post- Pekucherra, Dharam Nagar District North Tripura 799260.

---- Respondents

For Petitioners : Mr. F. S. Khare, Advocate.

For Respondents : Mr. Ramakant Mishra, Assistant Solicitor General.

Hon'ble Shri Justice Narendra Kumar Vyas**Order on Board****27.08.2021**

1. The petitioner has filed the instant petition under Section 482 of the Code of Criminal Procedure, 1973 (henceforth "the Code") assailing the order dated 12.06.2017 passed by the learned Judicial Magistrate First Class, District- Bhanupratapapur, North Bastar by which the complaint as Criminal Complaint Case No. 683/2011 filed by the petitioner against the respondents for committing an offence under Sections 323 & 324 of IPC has been dismissed as well as the revision order dated 12.06.2017 passed by Additional Sessions Judge, Bhanupratappur who vide impugned order dated 23.09.2017 has dismissed the Criminal

Revision No. 06/2017.

2. The facts of the case, as projected by the petitioner, are that the petitioner has filed complaint under Section 200 of the Code before JMFC, Bhanupratappur alleging that respondent Nos. 1 & 2 have assaulted him and have also beaten him with Butt of Rifle AK-47, as a result thereof, he sustained grievous injuries on his head and the blood was oozing out from his head. The medical examination of the petitioner was conducted on 28.01.2010 and the medical report has been submitted before Police Station on the same day i.e. 28.01.2010, but no action has been taken against the respondent/accused. Thereafter petitioner has preferred Writ Petition (Cr.) No. 2624/2010 before this Court, which was disposed off finally with a direction to file complaint before the concerned trial Magistrate. Thereafter, the petitioner has filed complaint under Section 200 of the Code before the judicial Magistrate, First Class, Bhanupratappur on 18.06.2010. Learned trial Magistrate, after considering the material on record and recording of primary evidence adduced by the complainant/petitioner has registered the complaint on 22.09.2011 under Section 323 read with Section 34 of IPC against the respondents and issued summons to them.
3. It has also been contended by learned counsel for the petitioner that issuance of summons by trial Magistrate also challenged before the trial Court by the respondents which was dismissed and thereafter, after various adjournments, the matter was listed on 22.04.2017 for recording of the statement of witness namely- Saleem Tigga. Since on 12.06.2017, neither the petitioner nor his counsel appeared before the JMFC, Bhanupratappur, therefore, the JMFC has dismissed the complaint case filed by petitioner and discharged the accused persons from the charges levelled against them. The petitioner has challenged the said order before Additional Sessions Judge, Bhanupratappur, District Uttar Bastar, Kanker by filing criminal revision being Criminal Revision No. 06/2017 and the Revisional Court vide its impugned order dated 23.09.2017 has dismissed the revision by holding that there was no justifiable reason for non-appearance of the petitioner though Revisional Court has also recorded a finding that if petitioner has

not placed any medical prescription to substantiate the stand that he was suffering from medical illness and affirmed the order passed by JMFC, therefore, both these orders are being challenged by the petitioner by filing the present CRMP under Section 482 of Cr.P.C.

4. This Court vide its order dated 03.11.2017 has also called original record of the case and in pursuance of the order of this Court, original record of the case is made available for perusal of the Court.
5. I have heard learned counsel for the parties and perused the material available on record.
6. Perusal of the record would show that either the petitioner or his counsel had always appeared before the trial Court when the matter was called out for hearing but only on one occasion, neither the petitioner nor his counsel could appear before the trial Court and only for one single occasion for non-appearance of the petitioner, the case has been dismissed by the trial Magistrate exercising its power under Section 249 of Cr.P.C.. Even the power exercised by the Magistrate under Section 249 of Cr.P.C. is also incorrect as the offence is cognizable offence and the procedure for summary trial has to be followed, therefore, procedure applicable to warrant case should not have been applied by the trial Magistrate, as such power conferred under Section 249 of Cr.P.C. is also *prima-facie* illegal and against the provisions contained in Cr.P.C. So far as contention of the learned counsel for the petitioner is that only for one occasion of non-appearance the trial Court should not have dismissed the complaint and he would further submit that due to fever, he could not appear before the trial Court and there was substantial reason for his non appearance on the said date.
7. Before advertng to the submissions made by the parties, it would be justifiable to examine the power conferred on the Judicial Magistrate First Class to dismiss the complaint and to discharge the accused on account of absence of the accused. Section 256 of the Cr.P.C. provides power of the Magistrate to dismiss the complaint on account of absence of complainant or account of

death. Section 256 of the Cr.P.C. is extracted below:-

“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.”

8. From perusal of the provisions of Section 256 of the Cr.P.C., it is evident that Magistrate has been empowered to dismiss the complaint in absence of the complainant or on account of death of the complainant, but whether the power of Section 256 to dismiss the complaint in the present facts and circumstances of the case, is legal or justified that has to be examined by this Court. The learned counsel for the petitioner has submitted that because of one default in appearance, the learned trial Court should not exercise its power under Section 256 of the Cr.P.C. and should have not dismissed the complaint. This issue has been examined by the Hon'ble Supreme Court in **Mohd. Azeem Vs. A. Venkatesh & another**¹, and while examining the issue the Hon'ble Supreme Court has considered dismissal of the complaint on account of one default in appearance on the part of the complainant as a very strict and unjust attitude resulting in failure of justice. Hon'ble the Supreme Court has held in para 3 as under:-

“3. From the contents of the impugned order of the High Court, we have noticed that there was one singular default in appearance on the part of the complainant. The learned Judge of the High Court observes that even on earlier dates in the course of trial, the complainant failed to examine the witnesses. But that could not be a ground to dismiss his complaint for his

appearance (*sic* absence) on one single day. The cause shown by the complainant of his absence that he had wrongly noted the date, has not been disbelieved. It should have been held to be a valid ground for restoration of the complaint.”

9. In view of the above said judgment of the Supreme Court I am of the view that the trial Court has committed illegality in dismissing the complaint vide its order dated 12.06.2017 and thereafter vide order dated 23.09.2017 the Revisional Court has further committed illegality in dismissing the revision without considering the law on the subject, therefore, the orders passed by the Judicial Magistrate First Class and the Revisional Court are set aside. Now the matter is remitted back to the Judicial Magistrate First Class for deciding the case afresh in accordance with law. The Criminal Complaint Case No. 682/2011 is restored to its original number. The record of the trial Court be sent back to learned trial Court forthwith.
10. The petitioner is directed to appear before the Judicial Magistrate First Class, Bhanupratappur on **5th of October, 2021** and thereafter the trial Magistrate shall proceed further in accordance with law.
11. Looking to the long pendency of the petition, which is pending since 2011, it is directed that Magistrate shall make endeavour to conclude the trial within a period of one year & six months from the first date of appearance.
12. With the aforesaid directions/Observations the Cr.M.P. is allowed.

Sd/-

(Narendra Kumar Vyas)
Judge