

HIGH COURT OF CHHATTISGARH, BILASPUR**Order Reserved on 16.7.2021****Order Delivered on 18.08.2021****Cr.M.P. No. 727 of 2017**

Chirag Combines Through : Proprietor / Director Himanshu Batawia, Aged about 35 years, S/o. Shri Nemchand Batawia, Address: Besides H.P. Petrol Pump (Jain Petrol Pump), Amanaka, GE Road, PS.: Amanaka, Raipur, Tahsil and District : Raipur (C.G.)

---- Petitioner**Versus**

1. Mahesh Chhabra @ Baggi Aged about 34 years, S/o. Shri Lalchand Chhabra.
2. Lalchand Chhabra @ Baggi, Aged about 58 years, S/o. Not known to petitioner.
3. Golu @ Kailash Chhabra, Aged about 31 years, S/o. Shri Lalchand Chhabra. Director/Proprietor, Deep Agency,
Address : First Floor, AC Market, Ravi Bhawan, Jaistambh Chowk, PS.: Gole Bazar, Raipur, Tah. & Dist.: Raipur (C.G.).
4. R/o. Mahalaxmi Enclave, Flat No.: 202-3-BHK, Shanti Chowk, Dhamtari, Tahsil & Dist.: Dhamtari (C.G.) Current Address of Business: C/o. Shri Ganesh Mobiles, Shop No.: 14-A, First Floor, AC Market, Ravi Bhawan, Jaistambh Chowk, PS.: Gole Bazar, Raipur, Tah. & Dist.: Raipur (C.G.)

---- Respondents**Cr.M.P. No. 686 of 2017**

Chirag Combines Through : Proprietor / Director Himanshu Batawia, Aged about 35 years, S/o. Shri Nemchand Batawia, Address: Besides H.P. Petrol Pump (Jain Petrol Pump), Amanaka, GE Road, PS.: Amanaka, Raipur, Tahsil and District : Raipur (C.G.)

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Ravi Bhawan, Jaistambh Chowk, PS.: Gole Bazar, Raipur, Tah. & Dist.: Raipur (C.G.)

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Cr.M.P. No. 687 of 2017

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C/o. Shri Ganesh Mobiles, Shop No.: 14-A, First Floor, AC Market, Ravi Bhawan, Jaistambh Chowk, PS.: Gole Bazar, Raipur, Tah. & Dist.: Raipur (C.G.)

---- Respondents

AND

Cr.M.P. No. 728 of 2017

Chirag Combines Through : Proprietor/Director Himanshu Batawia, Aged about 35 years, S/o. Shri Nemchand Batawia, Address: Besides H.P. Petrol Pump (Jain Petrol Pump), Amanaka, GE Road, PS.: Amanaka, Raipur, Tahsil and District : Raipur (C.G.)

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Director/Proprietor, Deep Agency,

Address : First Floor, AC Market, Ravi Bhawan, Jaistambh Chowk, PS.: Gole Bazar, Raipur, Tah. & Dist.: Raipur (C.G.).

R/o. Mahalaxmi Enclave, Flat No.: 202-3-

Current Address of Business:

C/o. Shri Ganesh Mobiles, Shop No.: 14-A, First Floor, AC Market,
Ravi Bhawan, Jaistambh Chowk, PS.: Gole Bazar, Raipur, Tah. &
Dist.: Raipur (C.G.)

---- Respondents

For Petitioners	: Mr. N. Naha Roy, Advocate.
For Respondents	: Mr. Ashutosh Shukla, Advocate.

Hon'ble Shri Justice Narendra Kumar Vyas

Order [CAV]

1. Since common question of law & facts are involved in all the petitions under Section 482 of the Cr.P.C, therefore, they are heard together analogously and are being disposed of by this common order. [For deciding these CRMPs, facts of Cr.M.P. No. 727/2017 is being considered].
2. Petitioner – Chirag Combines has filed these petitions under Section 482 of the Cr.P.C. against the order dated 21.03.2017 passed in Criminal Case Nos. 788/2013, 787/2013, 786/2013 & 789/2013, respectively whereby complaint under Section 138 of the Negotiable Instruments Act, 1881 (henceforth “NI Act”) has been dismissed for want of prosecution and discharged the respondents/accused from the offence under Section 138 of the NI Act.
3. The brief facts as projected by the petitioner are that the petitioner is a distributor of Samsung Mobile phones. During course of business, the respondents have purchased mobile phone sets from the petitioner. The respondent has issued the following cheques in favour of the petitioner payable at Dena Bank, Branch Katora Talab, Shailendra Nagar, Raipur, towards sale consideration. The details of CRMP, cheque Numbers and amount are given under table form as under :

CRMP No.	Cheque No.	Date of issuance of cheque	Amount	Bank Account number
CRMP No. 727/2017	584283	28.12.2012	Rs.1,47,200/-	130313031009
CRMP No.	584284	29.11.2012	Rs.1,29,300/-	130313031009

728/2017				
CRMP No. 686/2017	584287	03.12.2012	Rs.2,39,260/-	130313031009
CRMP No. 687/2017	583761	10.11.2012	Rs.1,38,811/-	130313031009

4. The Petitioner – Company has presented the aforesaid cheques on 08.02.2013 for clearance in HDFC Bank, GE Road, Raipur wherein the petitioner is maintaining the said accounts. The said cheques were dishonoured and the same were returned to the petitioner with an endorsement that the cheques are dishonoured on account of “**insufficient balance**” in the bank account of the drawer i.e. the respondents herein. The petitioner, on being informed by the Bank vide a note dated 8.2.2013, sent a legal notice dated 9.3.2013 to the respondents demanding the payment to the tune of Rs.1,47,200/-, Rs.1,29,300/-, Rs.2,39,260/- & Rs.1,38,811/-, respectively which were served upon the respondents on 12.03.2013 at their residential address. Even after receipt of notice, respondents/accused did not make the aforesaid payment to the petitioner – Company, therefore, as per provisions contained in Section 138 of the NI Act i.e. after service of notice upon the respondents, the petitioner filed complaint case under Section 138 of the NI Act before the Judicial Magistrate, First Class, Raipur, which were registered as Complaint Case Nos. 788/2013, 787/2013, 786/2013 & 789/2013, respectively.
5. Learned trial Magistrate, after recording of primary evidence of the petitioner, has registered the complaint and issued notices to the respondents/accused. The charges have not been framed against the respondents. The case was fixed on 21.3.2017 for appearance of the parties. On the said date neither the complainant/petitioner nor his counsel was present whereas on behalf of respondents/accused, their counsel appeared. Since the petitioner/complainant has not appeared on the date of hearing, the trial Magistrate has dismissed the aforesaid complaints for want of prosecution and discharged the respondents/accused of the offence under Section 138 of the NI Act. These orders are being challenged by the petitioner by filing four petitions under

Section 482 of the Cr.P.C.

6. Since the respondents/accused have been discharged by the learned trial Magistrate, the petitioner has an alternative remedy of filing revision petition under Section 397 of the Cr.P.C. before the concerned Sessions Judge. The petitioner has not exhausted the remedy available to him under Section 397 Cr.P.C for filing revision, therefore, the present Cr.M.Ps. as framed and filed are normally not maintainable but considering the facts these petitions have been admitted by this Court and more than four years have already been lapsed, it will not be justifiable to re-delegate the petitioner to file criminal revision before the learned District Judge, therefore, this Court while exercising the power under Section 482 of Cr.P.C. can certainly entertain the present petitions in spite of the fact that the petitioner has an alternative remedy for filing revision before the learned District & Sessions Judge. Even at the time of argument no one has raised any objection with regard to maintainability of the instant petitions, therefore, this Court is entertaining the present Cr.M.Ps and are being finally disposed of by the common order.
7. Learned counsel appearing for the petitioner would submit that the complaint was dismissed because of mistake of counsel engaged by the petitioner/complainant as he has not mentioned the date of hearing in the lawyer's diary. He further submits that on account of the mistake of the counsel, the parties concerned should not be suffered. He would further submit that the learned trial court has taken extreme steps for dismissing the complaint even on the first absence of the petitioner, therefore, order dated 21.03.2017 is liable to be quashed by the Hon'ble Court.
8. The learned counsel for the respondents vehemently argued that the impugned order is legal and justified as on earlier occasion also, the complaint filed by the petitioner was dismissed by the trial court, which has been restored by this Court by allowing CRMP No. 1173/2015 on 11.03.2016. Copy of the order has also been annexed in this petition. Learned counsel for the respondents would submit that the petitioner cannot take shelter of mistake of the counsel. It is a mischievous action on the part of

the petitioner and it is purely wastage of valuable time of the Court and he would further submit that CRMP may kindly be dismissed.

9. 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.”

10. 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 has to be examined by this Court. The learned counsel for the petitioner has submitted that because of one absent, 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,

1 (2002) 7 SCC 726

and while examining the issue the Hon'ble Supreme Court has considered dismissal of the complaint on account of one similar 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.”

11. In view of the judgment of Hon'ble the Supreme Court, I am of the view that the Judicial Magistrate has committed illegality in dismissing the complaint vide its order dated 31.03.2017, therefore, the order dated 31.03.2017 challenging in all the four CRMPs is illegal and deserves to be quashed by this Court.
12. Before parting with the judgment, it has to be seen that Hon'ble the Supreme Court in *Suo Motu Writ Petition (Crl.) No. 2 of 2020* has considered the steps to be taken for expeditious trial of cases under Section 138 of the NI Act, 1881 and Hon'ble the Supreme Court vide its order dated 16.04.2021 has taken following conclusion, which are extracted below:-

“24. The upshot of the above discussion leads us to the following conclusions:

- 1) The High Courts are requested to issue practice directions to the Magistrate to record reasons before converting trial of complaints under Section 138 of the Act summary trial to summons trial.
- 2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the court.
- 3) For the conduct of inquiry under Section 202 of the Code, evidence of witness on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can

restrict the inquiry to examination of documents without insisting for examination of witnesses.

4) We recommend that suitable amendments be made to the Act for provision of one trial against a person for multiple offences under Section 138 of the Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code.

5) The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.

6) Judgments of this Court in **Adalat Prasad v. Rooplal Jindal and others**² and **Subramaniam Sethuraman v. State of Maharashtra & Anr.**³ have interpreted the law correctly and we reiterate that there is no inherent power of Trial Courts to review or recall the issue of summons. This does not affect the power of the Trial Court under Section 322 of the Code to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint.

7) Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in **Meters and Instruments Private Limited and Another v. Kanchan Mehta**⁴ do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider/recall summons in respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10.03.2021.

8) All other points, which have been raised by the Amici Curiae in their preliminary report and written submissions and not considered herein, shall be the subject matter of deliberation by the aforementioned Committee. Any other issue relating to expeditious disposal of complaints under Section 138 of the Act shall also be considered by the Committee.”

13. In compliance of order of Hon'ble the Supreme Court, the High Court of Chhattisgarh has issued Practice Directions on 02.07.2021, therefore, the trial Court is directed to follow the Practice Direction issued by this Court and considering the facts of the case that the case has been filed before learned Judicial

² (2004) 7 SCC 338

³ (2004) 13 SCC 324

⁴ (2018) 1 SCC 560

Magistrate First Class in the year 2013. It is directed that the learned trial Court shall made endeavour to complete the trial within one year from the date of appearance of the parties. The parties are directed to appear before the learned trial court on 21.09.2021. No fresh notice is required to be issued for appearance of the parties.

14. With the aforesaid observations and directions, all the CRMPs are allowed. Order dated 21.03.2017 passed in CRMP No. 727 of 2017 (Criminal Case No. 788/2013), in CRMP No. 728 of 2017 (Criminal Case No. 787/2013), in CRMP No. 686 of 2017 (Criminal Case No. 786/2013) & in CRMP No. 687 of 2017 (Criminal Case No. 789/2013) are quashed. The Criminal Case No. 788/2013, Criminal Case No. 787/2013, Criminal Case No. 786/2013 & Criminal Case No. 789/2013 are directed to be restored to their original numbers.

Sd/-

(Narendra Kumar Vyas)
Judge

Amita