

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL WRIT PETITION NO. 711 OF 2019

1) Smt. Mangala Kamalkishor Mantri,
Aged about 48 years,
Occupation – Household,
R/o Kunabi, Post – Asegaon,
Tahsil – Mangrulpur, District – Washim.

2) Shankar s/o Harsukh Kabra,
Aged about 55 years,
Occupation – Business,
R/o Near Akashwani Centre, Akola,
Tq. And District Akola.

.... **PETITIONERS**

VERSUS

1) Santosh s/o Mukundlal Agrawal,
Aged about 58 years,
Occupation – Business,
R/o Devi Khadan, Akola, Tahsil
and District – Akola.

2) The State of Maharashtra,
through Office of Public Prosecutor,
High Court of Bombay, Nagpur Bench,
Nagpur.

.... **RESPONDENTS**

Mr. R.N. Ghuge, Counsel for the petitioners,
None for respondent 1,
Mr. I.J. Damle, Addl.P.P. for respondent 2/State.

CORAM : ROHIT B. DEO, J.
DATED : 7th JANUARY, 2021

ORAL JUDGMENT :

I have heard Mr. R.N. Ghuge, learned Counsel for the petitioners and Mr. I.J. Damle, learned Additional Public Prosecutor for respondent 2/State.

2. None appears on behalf of respondent 1.
3. The petitioners are assailing the order dated 01-9-2016 rendered by the Judicial Magistrate First Class (Court 7), Akola, restoring the complaint dismissed under Section 249 of the Criminal Procedure Code, 1973 (Code).
4. Facts are few and brief.
5. Respondent 1 instituted Regular Criminal Case 729/2009 under Sections 406, 420, 467 and 471 read with Section 34 of the Indian Penal Code in which the petitioners are arraigned as accused.
6. Considering the limited controversy, it would not be necessary to make a reference to the allegations.
7. It appears that respondent 1 (hereinafter referred to as the

complainant) did not take effective steps and as the order-sheet reveals did not attend the proceedings diligently.

8. The Magistrate was pleased to dismiss the complaint vide order dated 01-9-2016 which reads thus :

“Despite of specific order dated 11-8-2016, complainant utterly failed to take effective steps. The case is compoundable in nature. Therefore, the instant case is dismissed in default for want of prosecution under Section 249 of the Criminal Procedure Code. Case is disposed of accordingly.”

9. The order of dismissal was in a sense reviewed by the Magistrate vide order dated 01-9-2016 which reads thus :

“The complainant filed this complaint under sections 406, 420, 467 and 471 read with Section 34 of the Indian Penal Code. The complainant failed to appear before this Court in the morning session. Hence, the case was wrongly disposed of under Section 249 of the Code of Criminal Procedure. Section 249 of Code of Criminal Procedure apply to compoundable and non-cognizable offence. However, above mention sections 420, 467, 471 read with Section 34 of the Indian Penal Code are non-compoundable and cognizable. Hence, section 249 of Code of Criminal Procedure, 1973 is not applicable to present case. Order of disposal below Ex.1 was wrongly passed and deserve to be set aside. The case is required to restored. Hence, order.

Order

- 1) Case is restored.
- 2) Order of dismissal u/s. 249 below Ex.1 dated 01-9-2016 is set aside.”

10. Mr. R.N. Ghuge would submit, relying *inter alia* on the decision of the Apex Court in ***Maj. Genl. A.S. Gauraya and another v. S.N. Thakur and another***, AIR 1986 SC 1440, that the order of restoration suffers from jurisdictional error. The Magistrate has virtually reviewed the order of dismissal of the complaint. The order impugned militates against the bar engrafted in Section 362 of the Code, is the submission. Mr. R.N. Ghuge would emphasize that the Apex Court has held that there is no inherent power to restore a complaint which is dismissed in exercise of power under Section 249 of the Code.

11. The observations of the Apex Court in ***Maj. Genl. A.S. Gauraya and another v. S.N. Thakur and another*** read thus :

“8. The first question to be considered is whether the Magistrate could have re-called his order. It cannot be disputed that the Magistrate has powers to dismiss a complaint and discharge the accused when the complainant is absent. In [Ram Prasad Maitra v. Emperor](#), AIR 1928 Cal. 569 a Division Bench of the Calcutta High Court had to consider the question whether the Sessions Judge was justified in directing the complaint to be sent back to the Magistrate for further enquiry when the complaint was dismissed under [section 203](#) of Criminal Procedure Code. Answering the question in the negative, it was observed :

"..... In a case like this, where the complainant does not choose to be present, he cannot be heard afterwards to say that the matter should be sent back to the Magistrate for further enquiry..."

This Judgment indirectly recognises the power in a Magistrate to dismiss a complaint for default. We agree with this conclusion.

9. *Section 249 of the Criminal Procedure Code enables a Magistrate to discharge the accused when the complainant is absent and when the conditions laid down in the said section are satisfied. Section 256(1) of the Criminal Procedure Code enables a Magistrate to acquit the accused if the complainant does not appear. Thus, the order of dismissal of a complaint by a criminal court due to the absence of a complainant is a proper order. But the question remains whether a magistrate can restore a complaint to his file by revoking his earlier order dismissing it for the non- appearance of the complainant and proceed with it when an application is made by the complainant to revive it. A second complaint is permissible in law if it could be brought within the limitations imposed by this Court in [Pramatha Nath Taluqdar v. Saroj Ranjan Sarkar](#), 1962 Supp. 2 SCR 297 : (AIR 1962 SC 876) filing of a second complaint is not the same thing as reviving a dismissed complaint after recalling the earlier order of dismissal. The [Criminal Procedure Code](#) does not contain any provision enabling the criminal court to exercise such an inherent power.*

11. For our purpose, this matter is now concluded by a judgment of this Court in the case of [Bindeshwari Prasad Singh v. Kali Singh](#), (AIR) 1977 SCR 125 : (AIR 1977 SC 2432). We may usefully quote the following passage at page 126 (of SCR) : (at p. 2433 of AIR):

"..... Even if the Magistrate had any jurisdiction to re-call this order, it could have been done by another judicial order after giving reasons that he was satisfied that a case was made out for re-calling the order. We, however, need not dilate on this point because there is absolutely no provision in [the Code](#) of Criminal Procedure of 1898 (which applies to this case) empowering a Magistrate to review or re-call an order passed by him. Code of Criminal Procedure does contain a provision for inherent powers, namely, Section 561-A which, however, confers these powers on the High Court and the High Court alone. Unlike Section 151 of Civil Procedure Code, the subordinate criminal courts have no inherent powers. In these circumstances, therefore, the learned Magistrate had absolutely no jurisdiction to re-call the order dismissing the complaint. The remedy of the respondent was to move the Sessions Judge or the High Court in revision. In fact, after having passed the order dated 23.11.1968, the Sub-divisional

magistrate became functus officio and had no power to review or re-call that order on any ground whatsoever. In these circumstances, therefore, the order even if there be one, re-calling order dismissing the complaint was entirely without jurisdiction. This being the position, all subsequent proceedings following upon re-calling the said order, would fall to the ground including order dated 3.5.1972, summoning the accused which must also be treated to be a nullity and destitute of any legal effect. The High Court has not at all considered this important aspect of the matter which alone was sufficient to put an end to these proceedings. It was suggested by Mr. D. Goburdhan that the application given by him for re-calling the order of dismissal of the complaint would amount to a fresh complaint. We are, however, unable to agree with this contention because there was no fresh complaint and it is not well settled that a second complaint can lie only on fresh facts or even on the previous facts only if a special case is made out. This has been held by this Court in [Pramatha Nath Taluqdar v. Saroj Ranjan Sarkar](#) (AIR 1962 SC 876). For these reasons, therefore, the appeal is allowed. The order of the High Court maintaining the order of the Magistrate dated 3.5.1972 is set aside and the order of the Magistrate dated 3.5.1972 summoning the appellant is hereby quashed.”

12. The learned Magistrate was persuaded to restore the complaint on the premise that the offence is not compoundable. It is true that offence punishable under Sections 467 and 471 of the Indian Penal Code is not compoundable, while the offence punishable under Sections 406 and 420 of the Indian Penal Code is compoundable. However, the question is whether the learned Magistrate could have restored the complaint on the assumption that the order of dismissal falls foul of the Section 249 of the Code. I am afraid, the answer must be in the negative.

13. The learned Magistrate having exercised the jurisdiction under Section 249 of the Code was precluded from virtually reviewing the order on the assumption that the order is erroneous. The bar engrafted in Section 362 of the Code is clearly attracted and as articulated by the Apex Court, there is no inherent power which would have empowered the learned Magistrate to adopt the course which he did.

14. The order impugned is unsustainable in law and is quashed.

15. The petition is allowed in the aforestated terms.

JUDGE

adgokar