

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Before:

The Hon'ble Justice Ananda Kumar Mukherjee

C.R.R No. 188 of 2020

Supratik Ghosh

Vs.

State of West Bengal & Anr.

For the Petitioner: Mr. Tapas Dutta, Advocate

Opposite Party No. 2: Mr. Sourav Mondal, Advocate

Heard on : 08.12.2021

Judgment on: 10.01.2022.

Ananda Kumar Mukherjee, J. :-

1. Petitioner preferred this revisional application under section 482 of the code of Criminal Procedure being aggrieved and dissatisfied with order dated 16.11.2019 passed by the Learned Judicial Magistrate 2nd Court at Alipore in Case No. C/ 4108 of 2011 under section 420/ 120 B of the Indian Penal Code, filed against Opposite Party no. 2 and others, whereby Learned Magistrate has discharged the accused persons under section 245 (2) of Cr. P.C. due to absence of the complainant on the date fixed for evidence.

2. Learned Advocate for the petitioner submitted that the petitioner filed a complaint case before the Learned Chief Judicial Magistrate, Alipore which was registered as Case No. C/ 4108 of 2011 and transferred to the 2nd Court of Learned Judicial Magistrate at Alipore for disposal. The petitioner wanted to produce some documents as evidence which were seized from him by police in connection with Tollygunge P.S Case No. 52 of 2011 but were not returned. In this connection Writ petition no. 31667 (w) of 2013 was filed by the petitioner and by order dated 26.06.2018 this court permitted the petitioner to produce certified copies of those documents in the evidence. Subsequently, the petitioner filed a Criminal Revision No. 3 of 2019 before this Court for quick disposal of the complaint case. By order dated 05.03.2019 this court directed Learned Magistrate to dispose of the pending case as early as possible.

3. Further case of the petitioner/complainant is that the complaint case was fixed on 15.06.2019 for evidence, which was three months after the early date. Learned Advocate for the petitioner filed an application before the Learned Magistrate for preponing the date for hearing but the application was rejected.

4. According to the petitioner after examining the complainant as PW-1, Mr. Saroj Praharaj S.I. of police was examined as PW-2 in the case and he produced some documents including 21 bills, 18 challans, 4 cheques and 4 cheque return memos along with letter dated 21.08.2000 and 06.09.2000. Learned Magistrate collectively marked those documents as “P/4” but did not admit them in evidence by putting exhibit marks. Since PW-2 did not produce

some documents on that date, he sought for time as a result the case was adjourn to 20.07.2019.

5. According to the petitioner on 20.07.2019 the case could not be taken up for hearing as learned Magistrate was on leave and the Magistrate-in-Charge refused to take evidence. It is alleged that as the petitioner/ complainant thereafter filed writ petition no. 15422 (w) of 2019. On 25.09.2019 though the Advocate for the complainant and the witness, PW-2 were present in court, learned Magistrate refused to take evidence in the absence of the accused person. Learned Advocate for the petitioner submitted that on 15.06.2019 learned Magistrate in absence of the accused persons had recorded evidence but on 25.09.2019 he refused to take evidence despite the presence of the witness in court.

6. It is further contended that on 15.10.2019 the complainant's advocate was present in court but due to the absence of the complainant learned Magistrate issued an order directing the complainant to show-cause and recorded that no step was taken by the complainant till 12:25 p.m. The main contention of the petitioner/complainant is that on 16.11.2019, PW-2, Saroj Praharaj S.I. of Police Tollygunge P.S. who was examine in part could not appear in court due to his illness and step was taken for fixing another date for his evidence but learned Magistrate rejected the cause shown by the complainant for his absence, on the ground that it was without any verification or signature of the litigant and in the same order discharged the accused under section 245(2) of the Cr. P.C.

7. Learned Advocate for the petitioner argued that the complainant was already examined in full and his attendance was not necessary on the date of examination of PW-2 who was also partly examined. It is urged that there is no provision in the Code of Criminal Procedure requiring verification of an application showing cause and even if the same is deemed necessary, a defect in the verification of an application cannot result in discharge of the accused person. Learned Advocate contended that the impugned order passed by learned Magistrate suffers from illegality, impropriety and is liable to be set aside invoking the inherent jurisdiction of this court under section 482 of the Code of Criminal Procedure, else which there will be abuse of the process of court.

8. In support of his argument learned Advocate for the petitioner relied upon a decision of the Hon'ble Supreme Court in **Associated Cement Co. Ltd V. Keshvanand (1998) 1 SCC 687**, wherein it has been observed, "When the court notices that the complainant is absent on a particular day the court must consider whether the attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourn the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section.

The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice.

18. “When considering the situation of this case as on 24.08.1996, from the facts narrated above, we have no manner of doubt that the Magistrate should not have resorted to the axing process, particularly since the complainant was already examined as a witness in the case besides examining yet another witness for the prosecution.”

9. In another decision cited on behalf of the petitioner, in the case of **Ajay Singh and another V. State of Chhattisgarh and another, (2017) 3 Supreme Court Cases 330**, learned Advocate for the petitioner referring to the provision of section 227 of the Cr. P.C, applicable to sessions triable cases, argued that learned Magistrate has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution and at the time of assessing such fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after trial starts.

10. Learned Advocate for Opposite Party no. 2 assailing the contentions argued that there is no merit in the revisional application filed by the petitioner. It is submitted that the complaint was lodged by the petitioner in the year 2001 and he could not complete the evidence within four years. Referring to West Bengal State amendment relating to section 245 (3) of the Code of Criminal Procedure, it is contended on behalf of the Opposite Party no.

2 that if the evidence referred to in section 244 are not produced in support of the prosecution within four years from the appearance of the accused, the Magistrate shall discharge the accused unless the prosecution satisfied the Magistrate that upon the evidence already produced and for special reasons there is ground for presuming that it was not be in the interest just to discharge the accused. It is urged by learned Advocate for Opposite Party No 2 that the Petitioner/ Complainant has resorted to dilatory tactics for which he has not been able to adduce any material evidence till date for which the accused person has been discharged. It is submitted that the present petition is also liable to be dismissed.

11. I have considered the arguments advanced by learned Advocate for both parties in the backdrop of the facts and circumstances of this case and the relevant provisions of law. It appears from the certified copy of the impugned order passed in case no. C/ 4108 of 2011 that the allegations against the accused/Opposite Party no. 2 is under section 420/ 120 B of the I.P.C. The alleged offence is a cognizable one but compoundable in nature. Section 249 of the code of Criminal Procedure has laid down, *“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.”* Accordingly in a warrant proceeding case arising out of a compliant, absence of a complainant may result in discharge of the accused

person before a charge has been framed, if the offence is lawfully compoundable and it is not a cognizable offence. Therefore, it is clear that an accused may be discharged if the offence is not a cognizable one but in the instant case the offence being a cognizable one, the provisions of section 249 of the Code of Criminal Procedure would not be attracted.

12. The impugned order has been passed by the learned Magistrate resorting to the fact that the application filed on behalf of the complainant showing cause, did not bear any verification or signature of the complainant. It is true that an application which contain some assertion should be verified by the person making the statements for holding such person responsible regarding its genuineness. However, there is no provision which makes such verification essential. In the instant case it is undisputed that the complainant has already been examined and PW-2 S.I. Saroj Praharaj having been examined in part, appeared on another date for his evidence but he was not examined by the learned Magistrate on the ground that the accused person was absent. On the subsequent date the witness was not present and sought for time for his evidence but learned Magistrate had directed the complainant to show-cause for not appearing in person. Though order dated 15.10.2019 has not been produced by the petitioner, it appears from order dated 16.11.2019 that on 15.10.2019 the complainant was absent without steps and nobody represented him despite repeated calls and only at 12:25 p.m. the complainant was directed to show-cause. Non-production of order dated 15.10.2019 on the part of the petitioner does not extend any assistance to this court to observe whether the

petitioner had at all been represented on that date or not and whether learned Magistrate was justified in issuing an order directing him to show-cause. This conduct of the petitioner of playing truant and blaming the court is indeed depreciable.

13. The crux of the issue before this court is whether learned Magistrate was justified in discharging the accused person under section 245(2) of the Cr. P.C for the failure on the part of the complainant to show-cause with verification and signature on the application. In my considered view it would be a legal necessity on the part of learned Magistrate under section 245 (2) of the Cr. P.C to consider and record reasons that no case against the accused has been made out which, if unrebutted would warrant his conviction. In absence of such evidence the accused may be discharged. I do not find any such finding or observation made by the learned Magistrate in the impugned order. It appears that learned Magistrate has been swayed by the sole reason that he did not find the cause shown by the complainant to be in proper form. In this context it needs to be mentioned that an accused person could be discharged under section 245 (2) of Cr. P.C if the Magistrate for reasons recorded found that the charge was groundless. Learned Magistrate has discharged the accused under section 245(2) of Cr. P.C. without considering the evidence of PW-1 and PW-2 before charge and before arriving at any finding that the charge levelled against the accused was groundless, and not tenable.

14. Learned Advocate for the Opposite Party no. 2 has drawn my attention to the West Bengal state amendment incorporating section 245(3) of Cr. P.C,

whereby an accused could be discharge if prosecution evidence was not completed within four years. In the instant case no such reason has been assigned nor had there been any direction to the complainant to adduce evidence within any specified period. To the contrary, it has been noticed that even after a direction passed by this court to dispose of the case at the earliest, proceeding in that regard was conspicuously absent.

15. Learned Advocate for the petitioner, relied on the ratio of the decision reported in **(1998) 1 SCC page 687 at paragraph 17 and 18**, wherein Hon'ble Supreme Court while dealing with the scope of section 247 of Cr. P.C (of old Code corresponding to SCC 256 of the new code) observed that if the presence of the complainant on that date was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. On careful reading of the above decision it appears that the same relates to summons cases and would not apply to the present case. Here we are not concerned with the provisions of section 249 of Cr. P.C, which could have resulted in discharge of the accused due to absence of the complainant if the offence was a non cognizable and compoundable one. The provision under section 245 of the Criminal Procedure Code however does not foresee a situation where the absence of the complainant can be a ground for discharging of the accused without considering the evidence already adduced by the complainant witnesses before charge. The other decision reported in **(2017) 3 SCC page 330**, which discussed the scope of section 227 of the Cr.

P.C related sessions trial also does not apply to warrant proceeding cases instituted otherwise than on police report.

16. In the light of my above discussion I hold that the impugned order dated 16.11.2019 passed by learned Judicial Magistrate 2nd Court at Alipore in case no. C/4108 of 2011 suffers from illegality and impropriety and the same is liable to be set aside.

17. The revisional application under section 482 of the Code of Criminal Procedure is allowed on contest against Opposite Party no. 2. Complaint Case No C-4108 of 2011 is resorted to its original number and file. Learned Judicial Magistrate is directed to give opportunity to the petitioner/ complainant to adduce evidence within a reasonable period from the date of communication of the order, preferably within six months. In view of my above finding I.A No. CRAN/1/2020(old I.A. CRAN/1203/2020 also stands disposed of.

18. Criminal Section is directed to send a copy of the judgment to learned Judicial Magistrate, 2nd court at Alipore for information and necessary action.

19. Urgent Photostat certified copy of this judgment, be supplied to the parties if applied for maintaining all formalities.

(Ananda Kumar Mukherjee, J.)