

Shineshilpi Jewellers Pvt. Ltd. ...Applicant
vs.
1. Vimal PrakashJain
2. State of Maharashtra ...Respondents

1/13

to the provisions of Section 256 of the Code of Criminal Procedure. The complainant intends to prefer an Appeal, that's why leave is sought. If the leave is granted, the Appeal will be admitted. If the leave is refused, the Appeal will not be admitted. The complaint was dismissed at pre-trial stage. So the issue can be decided only on the basis of the documents which are filed before this Court.

4. It is true that for deciding the issue of grant of leave this Court is required to go through the documents, so also these documents needs to be perused, if at the Appeal is to be heard after admission. So this Court is required to do the same exercise. Considering limited controversy, the Court has directed on 3rd March 2023, to decide this matter finally. In view of that on the last date as well as today, I have heard learned Advocate Mr. Purohit for the Applicant-complainant and learned Advocate Mr. Dave for Respondent No.1-accused.

Submission on behalf of the appellant.

5. According to learned Advocate Mr. Purohit for the Applicant, non-bailable warrant was cancelled on 6th December 2021, and the plea was recorded behind his back. Then the matter was kept on 15th April 2022, but it was holiday. Thereafter the matter was kept

on 11th July 2022, and again on 17th September 2022. The complainant has not remained present on these dates and that's why the impugned order came to be passed on 17th September 2022. According to learned Advocate for the Applicant, absence on these two dates cannot be said to be persistent absence. According to him, on 11th July 2022, he wrongly noted the adjourned date as 27th September 2022, and in fact, it ought to have been 17th September 2022, and that's why on that date his client has remained absent.

6. In support of his contention for restoration of the complaint, he relied upon two orders passed by this Court. They are as follows :

(a) *Hirachand Javerchand Jain Vs. M/s. Dev Estates*¹

(b) *Dinesh Maganlal Jadhav Vs. Dhiraj Jawanmal Rawal & Ors.*²

Submission on behalf of the respondent.

7. Whereas learned Advocate Mr. Dave for Respondent No.1 strenuously argued that the cases under Section 138 of the N.I. Act needs to be disposed of within a period of six months and there is no reason for absence of the complainant on 11th July 2022, and on

1 Cri.Appeal No.221/2023 dt. 22/02/2023 High Court of Bombay

2 Cri.Appeal No.243/2023 dt. 12/06/2023 High Court of Bombay

17th September 2022. He supported the order. He has made the following submissions :

- (i) When the complainant went to the extent of praying for drastic measure of issuing non-bailable warrant against Respondent No.1-accused on 4th December 2021, he cannot blame the learned Magistrate for dismissal of the complaint due to his absence on two dates.
- (ii) The warrant was cancelled on 6th December 2021, and the plea was recorded on the same date. The complainant was negligent in getting executed the non-bailable warrant and he has kept quiet.
- (iii) The complainant ought to have seen the roznama which is uploaded on the website and on 11th July 2022, he ought to have remained present.
- (iv) The learned Magistrate has passed the order on Exhibit-1 dated 11th July 2022. Copy of the said order is on page 12.

The order reads thus :

“Steps not taken since long. Hence, kept for further orders”.

(v) After 11th July 2022, the complainant was given two months period and neither he has filed an affidavit nor he has remained present.

8. The Hon'ble Supreme Court and this Court has decided the issue about restoration of the complaint. He relied upon the following judgments :

- (a) M/s. Llyods Finance Ltd. Vs. M/s. SKG Solvex Ltd. & Ors.³
- (b) Shakri Automotive Enterprises Vs. Vasu Bhatia & Anr.⁴
- (c) Vadilal Milk Products Vs. State of Maharashtra & Ors.⁵
- (d) Smt. Prema Ramanand Hattangadi Vs. State of Maharashtra & Anr.⁶
- (e) S. Rama Krishna Vs. S. Rami Reddy & Ors.⁷
- (f) Expeditious Trial of Cases u/s 138 of N.I.Act⁸

Consideration

9. It is no doubt true that the complaint under Section 138 of the N.I. Act needs to be disposed of as early as possible. The period

3 CDJ 2002 BHC 16

4 CDJ 1998 BHC 642

5 CDJ 2007 BHC 1690

6 CDJ 2012 BHC 2295

7 CDJ 2008 BHC 798

8 Suo Motu Writ Petition (Cri.) No.2/2020 dt.16/04/2021 SC

mentioned in the section is six months. It is also true that there are thousands of cases pending in Mumbai and in the State of Maharashtra before the Courts of Magistrate. It is also true that due to these cases, hearing of other criminal cases lags behind. That's is why Hon'ble Supreme Court has taken note of this pendency and decided to examine reasons for delay in disposal of these cases. The statistics of all these cases is given in para 5. The Constitutional Bench was also formed. The directions are given in para 24. It talks about giving reasons for converting trial of complaints from summary trial to summons trial, what should be approach if the accused is residing out of limits of the concerned Court. It also deals with taking evidence on affidavit. Whereas other judgments deals with issue whether the power under Section 256 of the Code of Criminal Procedure is rightly exercised or not.

10. In all the judgments relied upon by learned Advocate Mr. Dave, the order of dismissal was upheld whereas in the two orders relied upon by learned Advocate Mr. Purohit, the order of dismissal was set aside. Basically, these orders are passed on the facts of those cases.

Provisions of Section 256 of the Code

If we read these observations and the provisions of Section 256 of the Code of Criminal Procedure, we find the following are the ingredients :

- (a) When the case is fixed for hearing, the complainant remains absent.
- (b) When the Magistrate does not feel it necessary to adjourn the case.
- (c) If the Magistrate feels it necessary to adjourn the case, he can do so by giving reasons.
- (d) Otherwise, he has to dismiss the complaint.

11. There is also one proviso which talks about considering stage of that case, that is to say, whether presence of the complainant is required or not required. If it is not required, and if the case can be proceeded, there is no need to dismiss the complaint. The Hon'ble Supreme Court in case of *Associated Cement Company Ltd. Vs. Keshvanand*⁹ has laid down what is purpose of incorporating Section 256 of the Code. The purpose is to have the check on dilatory tactics

⁹ (1998) 1 SCC 687

of the complainant.

12. It is true that in case of ***S.Rama Krishna*** (supra), the Hon'ble Supreme Court has set aside the order of restoration passed by the High Court. Learned Advocate Mr. Dave emphasized on the observations therein. Whether we can simply look at the order passed by any Court without going into factual aspects ? The answer is "No". Ultimately, we have to consider the facts and circumstances and how the law is made applicable.

13. In case of ***S.Rama Krishna*** (supra), the original complainant has expired and Application for substitution of their names was pending. The legal representative remained absent for 14 dates (para 2). On this background, **learned Magistrate** dismissed the complaint. When the matter reached the High Court, the High Court restored the complaint and took a view that it is always better if the lis between the parties is decided on merits rather than on technicalities. However, the Hon'ble Supreme Court emphasized on what is difference in between Civil cases and Criminal cases. The consideration is that while dealing with the Appeal under Section 378(4) of the Code, the High Court should keep in mind that they are dealing with correctness of the order of acquittal. There are

judgments relied upon by both sides. So on this background, I am considering the facts of this case. The relevant dates are as follows :

08/11/2019	Verification was recorded and process was issued
23/03/2020	Board was discharged
11/08/2020	National lockdown
30/03/2021	Matters were adjourned
28/09/2021	Only learned Advocate for the accused was present. Exemption Application for the accused was given and an undertaking to file the Vakalatnama was also given.
04/12/2021	Only learned Advocate for the complainant was present. Court issued non-bailable warrant against accused.
06/12/2021	Accused got non-bailable warrant canceled. The plea was also recorded. Admittedly, the complainant was not present. In fact, the case was taken on board.
15/04/2022	Holiday, matter taken on board on 16/04/2022 and board was adjourned
11/07/2022	There is much emphasis on behalf of the accused only. Learned Advocate for the accused was present. Exemption Application was filed. Court passed an order on Exhibit-1.
17/09/2022	Only learned Advocate for the accused was present. Exemption application was filed and the Court dismissed the complaint and acquitted the accused.

14. The plea was recorded on 6th December 2021. The learned Magistrate thought it fit to cancel the warrant even though the complainant was not present. It was the discretion of learned

Magistrate. No doubt, the complainant could have seen the roznama on website also. No doubt, it is true that from 6th December 2021, the complainant got time upto 11th July 2022. On 11th July 2022, the complainant neither remained present nor filed an affidavit of examination in chief. Even thereafter the complainant got two months from 11th September 2022, but the complainant did nothing as such the complainant got time from 6th December 2021 upto 17th September 2021. This was sufficient time for him to file the affidavit of examination in chief. The emphasis is that there is no error committed by learned Magistrate. That's why Mr. Dave emphasized on early disposal of the cases under the N.I.Act and the observations of the Hon'ble Supreme Court in Suo Motu Writ Petition (Cri.) No.2 of 2020.

Stage of the case.

15. Now, the question is what was the stage of the case on 11th July 2022 and 17th September 2022. It is for filing of an affidavit. The presence of the complainant was very much required. On the set of these facts, discretion exercised by the Magistrate of not adjourning the matter but dismissing the complaint, whether was proper or not. No doubt when the complainant was not present on

11th July 2022, learned Magistrate was conscious of his responsibility and that's why on that date he observed that :--

“Steps not taken since long. Hence, kept for further order”.

Learned Magistrate emphasized on ‘since long’. What is the meaning of the word “since long”. Whether he was of the view that the complaint is pending since 2019 and that's why he considers that steps are not taken since long? But when these dates are considered, what I find is that the complainant has remained absent

(a) on 11th July 2022 and

(b) 17th September 2022.

So what I feel is that learned Magistrate cannot simply say that the steps are not taken since long. Now, whether two day's absence is sufficient for dismissal ?. There is no straitjacket formula. It depends upon the facts. In particular case even six dates or more than that can be presumed to be sufficient for not dismissing the complaint. It is pure question of fact.

16. Learned Advocate Mr. Dave is right that now-a-days you can see roznama online. He is right that the accused is not required to attend the Court and to reproduce record. However, what I feel is that two days absence cannot be said to be justifiable

ground for dismissing the complaint. It is not job of the Court to see that the matters are dismissed just because either of party is not remaining present. The job of the Court is to see that justice is done by giving sufficient opportunities to the parties. Always there is rule of *audi alteram partem*. In this case what I feel is that the learned Magistrate has hastily dismissed the complaint. In fact, one option was available to learned Magistrate that is to say, while adjourning the matter he could have regulated conduct of the complainant, even by passing certain strict orders, that is to say, even by imposing cost. Learned Magistrate has simply considered absence of complainant only on two dates and dismissed the complaint.

17. The Respondent is justified in opposing the Appeal, on the basis of facts and circumstances. When the rights of both parties are balanced, I think that the matter needs to be restored. At the same time, I feel that Respondent No.1-accused needs to be compensated with certain cost. Hence, the following order is passed :

ORDER

- (a) Leave to prefer an Appeal is granted.
- (b) Appeal is admitted.

- (c) Appeal is allowed.
 - (d) The order passed by the learned Metropolitan Magistrate, 28th Court, Esplanade, Mumbai on 17th September 2022, thereby dismissing the complaint is set aside subject to payment of cost of Rs.5,000/- to be paid to Respondent No.1-accused.
 - (e) The parties are directed to appear before the Court of Metropolitan Magistrate, 28th Court, Esplanade, Mumbai on 1st August 2023, at 11 am.
 - (f) The Appellant to deposit the cost of Rs.5,000/- before the trial Court on or before 1/8/ 2023, and then only the matter be listed for hearing. Now, the complaint is restored at the stage of filing of an affidavit of the complainant.
 - (g) The Complainant has to appear before the Court along with affidavit in examination-in-chief and then learned Magistrate to proceed as per law. It is made clear that the complainant will not get time to file an affidavit of examination in chief.
18. Appeal is disposed of in the aforesaid terms.

[S. M. MODAK, J.]