

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 1355 OF 2023  
ALONG WITH  
CRIMINAL APPEAL NO. 1354 OF 2023  
ALONG WITH  
CRIMINAL APPEAL NO. 1353 OF 2023**

M/s. Novateur Electrical and  
Digital Systems Pvt. Limited,  
61-62, 6<sup>th</sup> Floor, Kalpataru Square,  
Kondivita Road, Off: Andheri-Kurla Road  
Andheri [East],  
Mumbai-400059,  
And Also at  
C-203, Corporate Avenue,  
Atul Projects, Near Hotel Mirador,  
Chakala, Andheri East,  
Mumbai 400 099.  
Through its Authorized Representative  
Mr. Ganesh Desai, Dy. Manager,  
Commercial

...Applicant

**vs.**

1. M/s. Dave Shah & Co[Switchgear]Pvt. Ltd.
2. Mr. Dushyant Prahlad Dave,  
Director,  
Dave Shah & Co. [Switchgear] Pvt. Ltd.
3. Ms. Shaila Dushyant Dave,  
Director,  
Dave Shah & Co.[Switchgear] Pvt. Ltd.  
All [1] to [3] having their address at:  
13, R.C. Mama Pathpicket Cross Road,  
Lohar Chawl, Mumbai 400 002.  
And also at:

3/C-4, Sonawala Building,  
Tardeo, Mumai 400007.

4. State of Maharashtra ...Respondents

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Mr. Sunil D'souza a/w Mr. Darryl Pereira a/w Adv. Beverly Fernandes, Advocate for the Applicant.

Mr. Rakesh Kumar Singh a/w Saaya Sureshababu - Advocate for the Respondent Nos. 1 to 3.

Mr. H. J. Dedhia-APP for the Respondent-State.

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**CORAM : S. M. MODAK, J.**

**RESERVED ON : 30<sup>th</sup> JUNE, 2023**

**PRONOUNCED ON : 06<sup>th</sup> DECEMBER 2023**

**Judgment :-**

1. Heard learned Advocate for Applicant / Complainant and learned Advocate for the Respondent No.1 Company and Respondent Nos.2 and 3 directors and learned APP. Short question arises as to whether leave can be granted to prefer an appeal against the order of dismissing the complaint and if yes whether appeal can be allowed.

2. When the Complainant filed an affidavit of examination-in-chief and also filed an application for adducing secondary evidence, the learned Metropolitan Magistrate dismissed three complaints for absence of Complainant's witness. This acquittal is prior to recording the evidence. The issue is whether power

under Section 256 of the Code of Criminal Procedure is exercised properly or not. After hearing both the sides and going through documents, arguable case is made out. Hence leave to prefer an appeal is granted. All applications are disposed of.

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3. Appeals are admitted. Parties have filed relevant documents. Record is not necessary. Considering the short controversy, heard both the sides finally by consent.

4. Most of the facts are undisputed. There were three complaints filed for the offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act. The Complainant is Private Limited Company. Initially, there were four accused persons. One is private Limited Company and two, three and four are the Directors. The name of the accused no. 3 was deleted. Plea was recorded and complaint was fixed for recording of the evidence. Affidavit of the examination-in-chief was also filed and complainant filed an application for adducing secondary evidence. Then Complainant remained absent

continuously on various dates.

The details of those dates and happenings are as follows:-

|            |                                                                                                      |                                                                        |                                                                                         |
|------------|------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| 24/03/2017 | Complainant absent.<br>Advocate for Complainant present.                                             | Accused and advocate present                                           | Court was busy in time bound matter. Hence adjourned for marking of exhibits.           |
| 29/05/2017 | Complainant and his Advocate absent.                                                                 | Accused present and his Advocate absent.                               | Adjourned for marking of exhibits.                                                      |
| 03/08/2017 | Complainant and his Advocate present                                                                 | Accused No.2 and and their Advocates present.<br>Accused No. 3 absent. | Adjourned for marking of exhibits.                                                      |
| 29/09/2017 | Complaint absent                                                                                     | Accused his Advocate present                                           | Adjourned for marking of exhibits.                                                      |
| 07/12/2017 | Complainant absent his Advocate present.                                                             | Accused and his Advocate present.                                      | Adjourned for marking of exhibits.                                                      |
| 17/02/2018 | Complainant and his Advocate absent.                                                                 | Accused and his Advocate present.                                      | Order passed below Exh-1 Advocate present no steps are taken since fixed for dismissal. |
| 26/04/2018 | Complaint stand dismissed under section 256 of Criminal Procedure Code and accused stands acquitted. |                                                                        |                                                                                         |

5. Learned Magistrate dismissed all the complaints by taking recourse to the provisions of Section 256 of Criminal Procedure Code. The correctness of these orders are challenged by way of these appeals. There is no dispute that complaint can be

dismissed in case of non appearance of the Complainant on the date fixed for hearing of the complaint.

6. Both the learned Advocates relied upon various judgments either restoring the complaints or dismissing the appeals. On reading Section 256 of Criminal Procedure Code, one may find following ingredients:-

- a) Summons is issued on the accused and Complainant does not appear on the date of hearing.
- b) Magistrate shall acquit the accused.

There are two exceptions they are as follows:-

- a) If the Magistrate feels it proper to adjourn the hearing of the case or
- b) When the personal attendance of the Complainant is not necessary.

7. In other words, the complaint cannot be dismissed even though Complainant is absent, if his personal attendance is not required or Magistrate feels it otherwise. Ultimately it is decision of the Magistrate. Though it is true that there are no parameters laid down for exercise of the discretion, this Court and the Hon'ble Supreme Court in various judgments has dealt with these issues. Predominantly, it is a question of fact. The

Complainant-Appellant's counsel relied upon the following judgments:-

Judgments relied upon by Appellants

- (i) Associated Cement Company Ltd. Vs. Keshvanand<sup>1</sup>
- (ii) Shaikh Akbar Talab Vs. A. G. Pushpakaran<sup>2</sup>
- (iii) Pratap Gopaldas Talreja Vs. Bhagwandas Jehumal Matani<sup>3</sup>
- (iv) Murlidhar Harkrishandas Manwani Vs. Sharangdhar Ramlal Lohar<sup>4</sup>
- (v) Terna Shetkari Sahakari Sarkhar Karkhana Ltd. Vs. Anant Laxman Ghorge<sup>5</sup>

8. I have perused them. In the earlier code, corresponding provisions find place in Section 247 of the Code. The purpose of incorporating this provision is to curtail the delay in conducting the trial and to provide for consequences in case the Complainant remain abscent. This Judgments relied upon by Appellants provision is also applicable in case of Complainant who is an artificial entity. Such *de jure* Complainant is to be represented by de-facto Complainant. *De jure* Complainant may even change the de-facto Complainant, if the facts warrant.

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1 1997 DGLS (SC) 1632

2 2017 DGLS (Bom) 1272

3 2011 (4) Bom. C.R. (Cri) 86

4 2011 (3) Bom. C.R. (Cri) 376

5 2011 (2) Bom. C.R. (Cri) 620

These are the observations in case of the **Associated Cement Company Ltd. (supra)**. What are constraints on the power of Magistrate are also explained in para no. 17 of the said judgment. Whereas negligence of the Advocate in spite of the instructions given by the Complainant to remain present was considered as a good ground for restoring the complaint.

9. In case of **Shaikh Akbar Talab (supra)**, there were settlement talks and believing them, the Complainant has remained absent and the complaint was dismissed. The test of bonafide of the Complainant in remaining absent is laid down in case of **Pratap Gopaldas Talreja (supra)**. Whereas accused remained absent and warrant was issued, Complainant remained absent on few dates. These were the factual aspects considered by this Court in restoring the complaint in case of **Murlidhar Harkrishandas Manwani (supra)**. The observations in case of **S. Rama Krishna Vs. S. Rami Reddy (D) by his LRS and Ors.**<sup>6</sup> by the Hon'ble Supreme Court were also considered. The said ratio was held not applicable as facts were different.

10. Whereas in case of **Terna Shetkari Sahakari Sarkhar Karkhana Ltd. (supra)** again the complaint was restored on

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6 MANU/SC/7538/2008

the basis of facts of that case.

11. Whereas learned Advocate for the Respondents relied upon the following judgments:-

Judgments relied upon by Respondents

- (i) S. Rama Krishna Vs. S. Rami Reddy (D) by his LRs and Ors.<sup>7</sup>
- (ii) Chettinad Cement Corporation Ltd. Vs. Proprietor, Rugmini Steels<sup>8</sup>
- (iii) Provident Fund Inspector, South Division Vs. A. J. Coelho<sup>9</sup>
- (iv) Champalal Kapoorchand Jain Vs. Navyug Cloth Stores and Ors.<sup>10</sup>
- (v) Indian Overseas Bank Vs. Trioka Textile Industries and Ors.<sup>11</sup>
- (vi) Karthik Gangadhar Bhat Vs. Nirmala Namdeo Wagh and Ors.<sup>12</sup>

12. In case of **Chettinad Cement Corporation Ltd.(Supra)**, the complaint was not posted for hearing and recourse to Section 256 of the Code was taken. The meaning of the word '*hearing*' was argued. The Court noted the difference in

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7 MANU/SC/7538/2008

8 MANU/KE/0792/2014

9 MANU/KA/0188/1971

10 MANU/MH/3535/2019

11 MANU/MH/1069/2006

12 MANU/MH/2605/2017



between the decision of the acquittal or conviction under Section 255 on one hand and acquittal under Section 256 of the Code for non appearance of the Complainant on other hand. Section 255 of the Code contemplates taking the evidence, whereas the power under Section 256 of the Code can be recorded at any stage of hearing. Ultimately, it is held that discretion has to be exercised judicially.

13. Whereas in case of **Provident Fund Inspector, South Division (supra)**, the High Court of Mysore refused to interfere in the Order of the acquittal passed under Section 247 of the earlier code for the reason that no reason was shown by the Complainant to remain absent.

14. Whereas in case of **Champalal Kapoorchand Jain (supra)** this Court refused to interfere in the order of the acquittal and observed that discretion under Section 256 of the Code is wide. However it has to be exercised properly. The Complainant was absent for 11 dates.

### **FACTS**

15. In this case, the affidavit of the evidence was filed on 07/01/2017. On the same date, the application for adducing the secondary evidence was filed alongwith supporting affidavits. The dates mentioned in above table shows that Complainant

was absent and stage of the case noted down in the roznama is for '*marking of Exhibits*'. So question is whether the presence of the Complainant's representative is required on those dates. No doubt the documents can be marked as an exhibits through complainant's witness only. But here there was one more contingency.

16. According to the counsel for the Appellant unless the trial magistrate could have decided the application for adducing the secondary evidence, further evidence of the Complainant's witnesses could not have been recorded. Whereas Respondent's counsel submits that in fact there was no need to file an application for adducing the secondary evidence.

17. To buttress his submission, he relied upon the following two judgments:-

a) Indian Overseas Bank Vs. Trioka Textile Industries and Ors.<sup>13</sup>

b) Kartik Gangadhar Bhat Vs. Nirmala Namdeo Wagh and Ors.<sup>14</sup>

18. It is true that this Court has held that there is no need to file an application and insistence on filing of an application is deprecated. Even though, it may be true that this Court has interpreted filing of an application for secondary evidence is

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<sup>13</sup> AIR 2007 Bom 24

<sup>14</sup> AIR 2018 Bom 32

not required, fact remains that the application for adducing secondary evidence was filed. It was not filed just for delaying the conduct of the trial. It was filed alongwith affidavit of the evidence. It is undisputed fact that while passing the impugned order the learned Magistrate has neither decided that application nor even referred it in the impugned order.

19. I have read those applications. There are four documents of which secondary evidence is sought to be adduced. Out of them, two are copies of order passed by this Court, whereas others are printout of the track record downloaded from the postal website and copy of the statement of the account of the accused maintained by the Complainant in the regular course of the business. It is true that Complainant was expecting the trial court to permit him to adduce secondary evidence. The trial Court may allow the application or may reject the application. If it is allowed then those documents could have been marked as an Exhibit and then further examination-in-chief of the Complainant witnesses could have been recorded.

20. For hearing those applications, I do not think that the presence of the Complainant's representative is required. So I feel that learned Magistrate has not exercised the discretion properly. He was oblivious to the pendency of the application

for leading secondary evidence. Mechanically, he has dismissed complaints. So even though two ingredients about '*absence of the Complainant*' and '*stage of the matter for hearing*' are fulfilled, learned Magistrate overlooked the fact that the application for adducing secondary evidence was pending. So the impugned Orders cannot be said to be legal.

21. This is not a case wherein two views are possible, such contingency arises when question of appreciation of evidence is there. In the case of **S. Rama Krishna (supra)**, the facts were different. The original Complainant has expired and legal representative who sought for substitution were continuously absent.

22. So I am inclined to allow the appeals. However, the Respondent needs to be compensated to a certain extent by imposing cost. Hence the Order:-

### **ORDER**

- (i) The appeals are allowed.
- (ii) The Order dated 26/04/2018 passed by the Court of Metropolitan Magistrate, 33<sup>rd</sup> Court, Ballard Pier, Mumbai in C.C. No. 11801/SS/2015, in C.C. No.11802/SS/2015 and in C.C. No. 11806/SS/2015 are set aside subject to payment of cost of Rs. 5,000/- to be paid by the Complainant to the Respondents in every case. The cost to be paid

within two weeks.

- (iii) All complaints are restored.
- (iv) Parties are directed to appear before the concerned Court on 18/12/2023.
- (v) The Court of Metropolitan Magistrate, 33<sup>rd</sup> Court, Ballard Pier, Mumbai is directed to decide the applications for leading secondary evidence within 6 weeks from today.
- (vi) Respondent is at liberty to file replies to those applications if not filed earlier within two weeks from today.
- (vii) Thereafter, the trial Court to proceed with the matter as per merits and to give priority for early disposal.
- (viii) The conduct of dilatory party be regulated by the Trial Court by exercising powers granted under the Code of Criminal Procedure, including power to impose costs not ordinary but exemplary to the minimum of Rs. 5,000/-.

**[S. M. MODAK, J.]**