

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

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CRM-M-12362-2019 (O&M)
Date of decision: 07.07.2023

Nandini Acharya

...Petitioner

Versus

Mahesh Sharma

...Respondent

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. Rajesh Sethi, Advocate and
Mr. Paramdeep Singh, Advocate for the petitioner

Dr. Anand Bishnoi, Advocate for the respondent

AMAN CHAUDHARY. J.**CRM-5562-2023**

For the reasons mentioned in the application, the same is allowed and reply on behalf of the respondent is taken on record subject to all just exceptions.

CRM-M-12362-2019

1. The present petition has been filed under Section 482 Cr.P.C. for setting aside the impugned order dated 01.06.2018, Annexure P-4, passed by the Additional Sessions Judge, Gurugram.

2. The facts in brief as emerge from the complaint are that the petitioner-accused is a designated partner of the firm, namely M/s Coral Travel Party Saga LLP., which took an amount of Rs. 17 lac from the respondent-complainant. In order to discharge its liability, a cheque amounting Rs. 15 lac was issued, which on presentation was dishonoured, leading to filing of the complaint under Section 138 of the Negotiable Instruments Act, 1881 against three persons

including the petitioner.

3. Learned counsel for the petitioner submits that the trial Court had passed the summoning order only qua accused No.1 and 2, while the complaint qua the petitioner was dismissed. The said order having been taken up in revision wherein without the petitioner being heard, was set aside and modified to the effect that she be summoned to face the criminal process under Section 138 NI Act, 1881, Annexure P-4. In this regard, reliance is placed on **Chhatradhari Ram vs. State of Jharkhand and another**, 2016 (2) AICLR 673.

4. Learned counsel for the respondent vehemently opposes the prayer made, however is unable to distinguish the judgment relied upon by the learned counsel for the petitioner.

5. Heard the learned counsel for the parties.

6. For the adjudication of the case at hand, it would be apposite to refer to relevant provision of Section 401(2) Cr.P.C., which reads thus:

“(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.”

7. Hon’ble The Supreme Court in **Chhatradhari Ram** (supra) has held thus:

“Law on the point stands settled by a judgment of three-Judge Bench of this Court in the case of Manharibhai Muljibhai Kakadia & Anr. v. Shaileshbhai Mohanbhai Patel & Ors., (2012) 10 SCC 517. Relevant paras 46, 48 and 53 of the same are quoted hereunder:

“46. The legal position is fairly well-settled that in the proceedings under Section 202 of the Code the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, up to the stage of issuance of process, the accused cannot claim any

right of hearing. Section 202 contemplates postponement of issue of process where the Magistrate is of an opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry or directs an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under Section 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until issuance of process under Section 204, yet in Section 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence.

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48. In a case where the complaint has been dismissed by the Magistrate under Section 203 of the Code either at the stage of Section 200 itself or on completion of inquiry by the Magistrate under Section 202 or on receipt of the report from the police or from any person to whom the direction was issued by the Magistrate to investigate into the allegations in the complaint, the effect of such dismissal is termination of complaint proceedings. On a plain reading of sub-section (2) of Section 401, it cannot be said that the person against whom the allegations of having committed offence have been made in the complaint and the complaint has been dismissed by the Magistrate under Section 203, has no right to be heard because no process has been issued. The dismissal of complaint by the Magistrate under Section 203 – although it is at preliminary stage – nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed crime. Once a challenge is laid to such order at the instance of the complainant in a revision petition before the High Court or Sessions Judge, by virtue of Section 401(2) of the Code, the suspects get the right of hearing before the Revisional Court although such order was passed without their participation. The right given to “accused” or “the other person” under Section 401(2) of being heard before the Revisional Court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under

Section 200, 202, 203 and 204. In the revision petition before the High Court or the Sessions Judge at the instance of complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of express provision contained in Section 401(2) of the Code. The stage is not important whether it is pre-process stage or post process stage.

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53. We are in complete agreement with the view expressed by this Court in *P. Sundarrajan v. R. Vidhya Sekar*, (2004) 13 SCC 472, *Raghu Raj Singh Rousha v. Shivam Sundaram Promoters (P) Ltd.*, (2009) 2 SCC 363 and *A. N. Santhanam v. K. Elangovam*, (2012) 12 SCC 321. We hold, as it must be, that in a revision petition preferred by complainant before the High Court or the Sessions Judge challenging an order of the Magistrate dismissing the complaint under Section 203 of the Code at the stage under Section 200 or after following the process contemplated under Section 202 of the Code, the accused or a person who is suspected to have committed the crime is entitled to hearing by the Revisional Court. In other words, where complaint has been dismissed by the Magistrate under Section 203 of the Code, upon challenge to the legality of the said order being laid by the complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of Section 401(2) of the Code. If the Revisional Court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate and it is sent back for fresh consideration, the persons who are alleged in the complaint to have committed the crime have, however, no right to participate in the proceedings nor are they entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process. We answer the question accordingly. The judgments of the High Courts to the contrary are overruled.” In the light of the principle as laid down by this Court, the persons who are arrayed as accused in a complaint, have a right to be heard in a revision petition preferred by the complainant challenging the legality of the order of dismissal passed by the Magistrate under Section 203 of Cr.PC. It is an admitted fact in the instant appeal that the accused was neither made a party nor any notice was issued to him. The order passed by the revisional court was completely in the absence of the accused and as such, the order needs to be set aside.”

8. A gainful reference can be made to the judgment of in **Prime Impex Ltd. vs. PEC Ltd.**, (2014) 13 SCC 591, a case wherein the complaint was dismissed, against which revision petition was filed by the complainant, however, the Revisional Court allowed the same without grant of opportunity of hearing to accused/suspect, which was set aside by Hon'ble The Supreme Court by observing that, "In view of the dictum laid down by this Court in the aforesaid decision in Manharibhai case [Manharibhai Muljibhai Kakadia v. Shaileshbhai Mohanbhai Patel, (2012) 10 SCC 517 : (2013) 1 SCC (Cri) 218], we are of the opinion that the High Court was not justified in passing the order without affording opportunity of hearing to the appellants. In the result, we allow this appeal, set aside the judgment and order [PEC Ltd. v. Prime Impex Ltd., Criminal Revision Petition No. 456 of 2011, decided on 13-10-2011 (Del)] passed by the High Court and remand the matter back to the High Court for fresh disposal in accordance with law, after affording opportunity of hearing to the appellants."

9. It is apparent from the order passed by the trial Court that the petitioner arraigned in the complaint as an accused, was not summoned finding no prima facie case having been made out against her. Be that as it may, the Revisional Court found that there was no specific reason assigned for not summoning her, despite evidence of she being the partner in the firm, modified the order by summoning her. Notably the said order was passed behind the back of the petitioner.

10. Taking into consideration the peculiarity of facts and circumstances of the present case, the law explicated in the referred pronouncement and to strike a

balance so that no prejudice is caused to any of the parties, this Court finds that ends of justice would be adequately met, in case the matter is remitted to the revisional Court for decision afresh, after granting an opportunity of being heard to the petitioner. Ordered accordingly.

11. The order dated 01.06.2018, Annexure P-4, is hereby set aside. As such, the present petition is disposed of with a direction to both the parties to appear before the Revisional Court on 31.07.2023.

12. Nothing herein shall be treated as an expression on the merits of the case and the Court shall proceed and decide the matter, independent of any observation made herein, which was only for the purpose of the present petition.

07.07.2023
Mehak

(AMAN CHAUDHARY)
JUDGE

Whether speaking/reasoned : Yes / No
Whether reportable : Yes / No