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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 15.05.2023
Pronounced on: 04.07.2023

+ **CRL.M.C. 540/2019**

RANI

..... Petitioner

Through: Mr. Gautam Khazanchi and Mr.
Vaibhav Dubey, Advocates
(DHCLSC).

versus

RAKESH

..... Respondent

Through: Respondent-in-person.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') by the petitioner seeking quashing of order dated 17.11.2018 passed by the learned Special Judge (PC Act) CBI, East, Karkardooma Courts, New Delhi in Criminal Revision No.199/18 titled "*Rani v. Rakesh*", and order dated 08.08.2018 passed by the learned CMM (East), Karkardooma Courts, New Delhi in Complaint Case No.55393/16 titled "*Rani v. Rakesh*".

2. Brief facts of the present case, as disclosed in the petition, are that the petitioner and respondent were married as per Hindu rites and customs in the year 1998, however, on 28.05.2014, the petitioner had



filed a Complaint under Section 200 Cr.P.C. alleging that the respondent had committed offence under Section 494 of Indian Penal Code, 1860 ('IPC') by marrying once again during the lifetime of the petitioner. Learned CMM *vide* order dated 31.05.2014 had taken cognizance under Section 494 IPC and the petitioner had also led pre-summoning evidence. On 30.03.2015, CW Teena had been examined as a witness in pre-summoning evidence led by the petitioner, and *vide* order dated 04.07.2015, the Court had summoned the respondent. Thereafter on 11.01.2016, the petitioner had got examined in chief in pre-charge evidence, and the cross-examination had been deferred at the request of the respondent and the matter had been adjourned to 05.03.2016. As stated, between 05.03.2016-16.04.2018, the matter was adjourned from time to time and in this period, on nine dates of hearing, the petitioner was present, and was ready for cross-examination on six dates of hearing, but could not be cross-examined due to some reason or another. On 08.08.2018, the learned CMM (East) Karkardooma Courts, New Delhi, had passed an order closing the pre-charge evidence in the absence of petitioner and discharging the accused/respondent. The relevant portion of order dated 08.08.2018 reads as under:

“...Matter is at the stage of pre charge evidence since 11.01.16, however till date the complainant has only examined in chief, cross was deferred however, she has not appeared for further cross examination.

Even on the last date of hearing none has appeared on behalf of the complainant, sufficient opportunities have been given to the complainant for leading pre charge evidence, however from her conduct it appears that she is not interested in prosecuting the present complaint.



Pre charge evidence is accordingly closed. Since there is no evidence against the accused at pre charge stage, the accused stands discharged in the present case.

Bail bond/surety bond stands cancelled and discharged...”

3. Thereafter, on 28.08.2018, the petitioner had preferred Criminal Revision No. 199/18 before the learned District and Sessions Judge (East), Karkardooma Courts, New Delhi seeking setting aside of order dated 08.08.2018 passed by the learned CMM. By virtue of order dated 17.11.2018, the learned Special Judge (PC Act) CBI, East, Karkardooma Courts, New Delhi had dismissed the said revision petition on the ground that the petition was not maintainable. The relevant portion of order dated 17.11.2018 reads as under:

“7. Aforesaid case laws make it amply clear that irrespective of language used by Id. CMM (East) in the impugned order, effect of dismissal of complaint was statutory acquittal of the accused. In the present case, in effect, complaint was dismissed on account of non-appearance of complainant and thereby, closing her opportunity to lead pre charge evidence. The effect of such order remains dismissal of complaint and consequent acquittal of the accused. Therefore, I find that this revision, petition is not maintainable. Hence, petition is dismissed...”

4. The present petition has been preferred by the petitioner, assailing the aforesaid orders.

5. The case set out by the petitioner is that it is settled law that an order framing charge or discharging an accused person, whether under Section 227, 239 or 245 Cr.P.C., is amenable to the revisional jurisdiction under Section 397 Cr.P.C., having substantially determined the rights of the parties to the litigation and not being an interlocutory order. It was argued on behalf of petitioner that the respondent had



been ‘discharged’ by the learned CMM under Section 245 Cr.P.C. and not ‘acquitted’ under Section 248 Cr.P.C. It was stated by learned counsel for the petitioner that learned Revisionist Court erred in placing reliance on *Kalpana Tyagi v. Sneh Lata Sharma* 2003 104 DLT 127 and *Ravi Sharma v. State (NCT) of Delhi* ILR 2010 I Delhi 167 as both these cases relate to proceedings under Section 138 of NI Act which is governed by ‘Trial of Summons Cases by Magistrates’ under Sections 251-259 Cr.P.C., whereas the present case falls under ‘Trial of Warrant Cases by Magistrates (Cases instituted otherwise than on police report)’ under Sections 244-247 Cr.P.C. It was, thus, argued that learned Revisionist Court failed to appreciate and correctly invoke the revisional jurisdiction since the learned CMM had discharged the respondent under Section 245 Cr.P.C. As regards the order dated 08.08.2018 passed by learned CMM, it was argued that the petitioner had been present on various dates prior to the passing of impugned order and was ready to be cross-examined and the cross-examination was deferred at the request of the respondent at least three times. It was also stated that non-appearance of the petitioner on the day when the impugned order was passed was neither deliberate nor intentional. Thus, it was prayed that both the impugned orders be set aside.

6. During the course of arguments, learned counsel for the petitioner also stated that even if accused was discharged under Section 249 Cr.P.C. i.e. due to ‘absence of complainant’, a revision petition would be maintainable against such an order since the word used in the said provision is also ‘discharge’, and not ‘acquittal’.



7. Respondent appeared in person, and stated that the impugned orders do not suffer from any infirmity or illegality and the learned Revisionist Court had rightly dismissed the petition filed by the petitioner on grounds of maintainability. It was also stated that learned CMM had rightly discharged him since the petitioner had failed to lead evidence, sufficient for framing of any charge against him.

8. This Court has heard arguments and has perused the material placed on record.

9. In the present case, the petitioner herein had filed a complaint under Section 200 Cr.P.C. against her husband (respondent) for offence punishable under Section 494 IPC. The learned CMM, after examining the complainant had taken cognizance of the alleged offence and had summoned the accused and thereafter the proceedings were conducted to record pre-charge evidence. It is relevant to note that the proceedings initiated by the complainant/petitioner against the respondent were proceedings under 'Trial of Warrant Cases by Magistrates (Cases instituted otherwise than on police report)' which are governed by Sections 244-247 Cr.P.C. The evidence was led by the complainant/prosecution under Section 244 Cr.P.C., which reads as under:

“...244. Evidence for prosecution.—(1) When, in any warrant-case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. (2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing...”



10. Thereafter, the learned CMM was of the view that since petitioner had failed to appear before the Court on the date fixed for the purpose of cross-examination, she was not interested in pursuing her complaint, and because there was no evidence against the accused/respondent, he was accordingly discharged *vide* order dated 08.08.2018. After going through the said order, this Court is of the opinion that the learned CMM, in its impugned order, did not pass any order regarding dismissal of the complaint for non-prosecution, but only mentioned that since the complainant is not present and does not have interest to pursue the complaint, the evidence was closed and the accused was discharged. It is also unclear as to whether the accused was discharged under Section 245 Cr.P.C. due to lack of evidence or under Section 249 Cr.P.C. due to absence of complainant. For the sake of reference, these provisions are reproduced herein-under:

“...245. When accused shall be discharged.—(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him. (2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

249. Absence of complainant.—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....”



11. A perusal of Section 249 Cr.P.C. reveals that in proceedings instituted upon complaint, the Magistrate is empowered to discharge an accused in case the complainant is absent any time before the charge has been framed, if the offence alleged to have been committed is compoundable or non-cognizable in nature. As far as the present complaint is concerned, the same was filed for offence under Section 494 IPC i.e. 'marrying again during lifetime of husband or wife' which is a non-cognizable offence as well as compoundable with the permission of the court. Thus, the Magistrate was empowered to pass an order, discharging the accused upon non-appearance of complainant, under Section 249 Cr.P.C.

12. However, when this order was impugned before the learned Revisionist Court, the Court came to the conclusion that revision was not maintainable before it since irrespective of language used by learned CMM i.e. 'discharge', the effect of dismissal of complaint was statutory acquittal of the accused as the complaint was dismissed on account of non-appearance of complainant thereby closing her opportunity to lead pre-charge evidence thereby resulting in acquittal of accused. A bare perusal of the reasoning offered by the learned ASJ reveals that instead of appreciating that the order impugned therein was passed under Section 249 Cr.P.C. and the proceedings were being conducted as per 'Trial of Warrant Cases by Magistrates (Cases instituted otherwise than on police report)', learned ASJ had placed reliance upon the decisions of this Court in **Kalpna Tyagi** (*supra*) and **Ravi Sharma** (*supra*) which were rendered in cases involving proceedings instituted under 'Trial of Summons-Cases by Magistrates'



(Sections 251-259 Cr.P.C.). It is important to take note of the fact that under Section 256 Cr.P.C., the absence of complainant results in ‘acquittal’ of the accused, whereas under Section 249 Cr.P.C., such absence leads to ‘discharge’ of the accused. In this regard, learned counsel for the petitioner had relied upon the decision of Hon’ble Apex Court in *Maj. Genl. A.S. Gauraya v. S.N. Thakur* (1986) 2 SCC 709 wherein it was held as under:

“...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....

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] Suppl. 2 S.C.R. 297. 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.

10. In *B.D. Sethi v. V.P. Dewan*, a division bench of the Delhi High Court held that a Magistrate could revive a dismissed complaint since the order dismissing the complaint was not a Judgment or a final order. In paragraph 9, the Court observes as follows:

"9. As long as the order of the Magistrate does not amount to a Judgment or a final order there is nothing in the Code of Criminal Procedure prohibiting the Magistrate from



entertaining a fresh application asking for the same relief on the same facts or from re-considering that order. During the course of the proceedings, a Magistrate has to pass various interlocutory orders and it will not be correct to say that he has no jurisdiction to re-consider them.."

We would like to point out that this approach is wrong. What the Court has to see is not whether the Code of Criminal procedure contains any provision prohibiting a Magistrate from entertaining an application to restore a dismissed complaint, but the task should be to find out whether the said Code contains any provision enabling a Magistrate to exercise an inherent jurisdiction which he otherwise does not have. It was relying upon this decision that the Delhi High Court in this case directed the Magistrate to re-call the order of dismissal of the complaint. The Delhi High Court referred to various decisions dealing with section 367 (old code) of the Criminal Procedure Code as to what should be the contents of a Judgment. In our view, the entire discussion is misplaced. **So far as the accused is concerned, dismissal of a complaint for non-appearance of the complainant or his discharge or acquittal on the same ground is a final order** and in the absence of any specific provision in the Code, a Magistrate cannot exercise any inherent jurisdiction.

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, [1977] 1 S.C.R. 125. We may usefully quote the following passage at page 126:

"..... 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 1908 (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, recalling 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 recalling 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* (supra). 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. When the matter went before the High Court, the decision of this Court referred above must have been brought to its notice, since the order by the Additional Sessions Judge refers to it. We would have been happy if the High Court had considered the matter in some detail especially when its attention was drawn to this decision instead of dismissing the revision in limine...”

13. Thus, since the accused was discharged under Section 249 Cr.P.C. by the learned CMM owing to the absence of the complainant, which is a final order as held by the Hon’ble Apex Court, the correct remedy available to the petitioner was to file revision petition challenging such an order before the learned Sessions Court. Therefore, this Court is of the opinion that learned Revisionist Court committed an



error by holding that revision petition was not maintainable before it and dismissing the petition.

14. With regard to the order dated 08.08.2018 *vide* which the evidence was closed and the accused was discharged at pre charge stage, a perusal of order sheets would point out that on 10.01.2016, the complainant was present and her examination in chief in pre-charge evidence was recorded and cross-examination was deferred, at the request of accused as his counsel was unavailable, to 05.03.2016. On 10.01.2016, cross-examination of the complainant was deferred at the request of counsel for accused as he was not available, though the complainant had adopted the same pre-charge evidence as recorded by the Court. The complainant was present on 05.03.2016, however, the cross-examination was again deferred. On 05.07.2016 also, the complainant was present. On 01.10.2016, neither the complainant nor the accused was present and exemption application of the accused was allowed. On 11.01.2017, both parties were present, however, matter was adjourned. On 03.04.2017, it was stated that the counsel for accused was recently engaged and therefore, matter was adjourned. The accused was engaging a new counsel on every date of hearing and on the next date of hearing i.e. 02.06.2017, he again stated that the counsel had been recently engaged and therefore, the adjournment had been sought. On 19.09.2017, complainant was not present. On 19.01.2018, complainant was present however, the matter was adjourned. On 16.04.2018, complainant was not present and no adverse orders were passed. On 08.08.2018, the complainant was not present, and learned CMM did not pass any order for dismissing the complaint for non-



prosecution, however, the Court closed pre-charge evidence and discharged the present accused. The order was challenged before the learned ASJ on the ground that on the date when the complainant was absent, she was unable to contact her counsel and therefore, no one could appear before the Court, though she was regularly appearing before the learned Trial Court since the year 2016.

15. Thus, in this case, the complainant was pursuing the case since the year 2016. The accused, on the other hand, on every date of hearing was engaging a new counsel and adjournment was being granted on this ground that his counsel was recently engaged. The complainant, however, was consistently and regularly appearing before the learned Trial Court and was ready to be cross-examined on several dates but the matter was adjourned, and on the date when she was absent i.e. 08.08.2018, she states that due to some miscommunication with her counsel, no one could appear on her behalf. Further, this Court also takes note of the conduct of the accused before this Court. He appeared in this Court on 12.12.2019 and sought time to file reply thereof. Thereafter, he again appeared before this Court on 05.12.2022, however, he did not file reply. He appeared in person in this Court and states that order passed by the learned Trial Court did not suffer from an infirmity. Even before this Court on two occasions, his argument was that he had recently engaged a counsel and adjournments had been sought.

16. When the impugned order dated 08.08.2018 is examined in light of the aforesaid, this Court is of the view that though Section 249 Cr.P.C. vests discretion with the Magistrate to discharge an accused



any time before the charge is framed, such discretion being judicial in nature, is to be exercised reasonably and with utmost caution.

17. The inclusion of the term "absent" in Section 249 Cr.P.C suggests that the complainant's non-appearance is a deliberate act, displaying a culpable negligence to attend the court proceedings. The court should not automatically discharge the accused whenever the complainant fails to appear. Not every minor instance of the complainant's absence should lead to the dismissal of the complaint and the discharge of the accused. A fair criterion for the court to consider in favour of the complainant is whether they have actively pursued the case with dedication or if they have been casually attending the proceedings. It is evident that the discretion granted to the Magistrate under Section 249 Cr.P.C. is a judicious discretion. The Magistrate must exercise this discretion with wisdom and not arbitrarily. The decision to discharge the accused should not be made automatically. Instead, before pursuing with the discharge, the Magistrate must thoroughly examine the facts of the case.

18. Thus, in view of the observations made in the preceding paragraphs, this Court is of the opinion that the learned CMM committed an error by discharging the accused upon non-appearance of the complainant, in the given set of facts and circumstances.

19. Hence, the order dated 08.08.2018 discharging the accused/respondent as well as the order dated 17.11.2018 dismissing the revision petition filed by the complainant/petitioner is set aside. The complaint filed by the complainant/petitioner is restored to its original



position. Learned Trial Court is also requested to expedite the recording of evidence and subsequent proceedings, as per law.

20. Accordingly, the present petition stands disposed of in above terms.

21. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

JULY 4, 2023/zp

