GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

AMENDMENT OF CODE OF CRIMINAL PROCEDURE ENABLING RESTORATION OF COMPLAINTS

Report No. 233

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AMENDMENT OF CODE OF CRIMINAL PROCEDURE ENABLING RESTORATION OF COMPLAINTS

Submitted to the Union Minister of Law and Justice, Ministry of Law and Justice, Government of India by Dr. Justice AR. Lakshmanan, Chairman, Law Commission of India, on the 22nd day of August, 2009.

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D.O. No. 6(3)/177/2009-LC (LS) August 22, 2009

Dear Dr Veerappa Moily ji,

Subject: Amendment of Code of Criminal Procedure
Enabling Restoration of Complaints

I am forwarding herewith the 233rd Report of the Law Commission of India on the above subject.

2. A criminal court has no power to restore a complaint dismissed in default, as the accused stands discharged or acquitted depending on the case being a warrant-case or a summons-case. In order to get the complaint restored, a complainant, poor or rich, has to knock the door of the High Court under section 482 of the Code of Criminal Procedure 1973. If a Magistrate has the power to entertain a complaint and decide it on merits after summoning the accused, he should also have power to restore it on good or sufficient cause being shown and re-summon the accused to face the trial on merits.

3. We have recommended in this Report appropriate amendments in sections 249 and 256 of the Code of Criminal Procedure 1973 inserting provisions on the lines of Order IX of the CPC, enabling restoration of complaints.

With warm regards,

Yours sincerely,

(Dr AR. Lakshmanan)

Dr M. Veerappa Moily,
Union Minister of Law and Justice,
Shastri Bhawan, New Delhi.

AMENDMENT OF CODE OF CRIMINAL PROCEDURE ENABLING RESTORATION OF COMPLAINTS

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I. INTRODUCTION

1.1 It is a well settled law that a criminal court has no power like the one which a civil court possesses under Order IX of the Code of Civil Procedure 1908 (CPC) to restore a complaint dismissed in default, as the accused stands discharged or acquitted depending on the case being a warrant-case or a summons-case. In order to get the complaint restored, a complainant, poor or rich, has to knock the door of the High Court under section 482 of the Code of Criminal Procedure 1973 (CrPC). If a Magistrate has the power to entertain a complaint and decide it on merits after summoning the accused, he should also have power to restore it on good or sufficient cause being shown and re-summon the accused to face the trial on merits.

1.2 The relevant provisions of the CrPC are:

(i) **Section 249** relating to warrant-cases -

"*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."

(ii) **Section 256** relating to summons-cases -

"*Non-appearance or death of complainant*.- (1) If the summons has been issued on complaint, and on the day appointed for the

appearance of the accused, or any day subsequent thereto, to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where non-appearance of the complainant is due to his death."

1.3 Section 249 will not apply to a case in which the Magistrate tries an accused for offences that are non-compoundable and cognizable. This section applies only to offences that may be lawfully compounded or are non-cognizable. Therefore, the Magistrate has no discretion to discharge an accused when the offences are of serious nature. Chapter XIX of the CrPC containing the procedure for trial of warrant-cases by Magistrates prescribes two procedures, one for trial of cases instituted on police reports and the other for trial of cases instituted on private complaints. The law-makers have excluded non-compoundable and cognizable offences from the purview of section 249 because for more serious offences, the police, generally, file charge-sheets.

1.4 With regard to offences that are compoundable and non-cognizable where discretion is given to the Magistrate to discharge the accused for the

absence of complainant, the Magistrate may be vested with the power to restore the complaint on file if sufficient cause is shown by the complainant for his absence on the date of hearing.

1.5 There may be several reasons for the absence of complainant on the date of hearing. One most important cause may be total *bandh* call given by the political parties or *hartal* where transport is suspended completely, both public and private. This is a genuine cause for absence of complainant from appearing before court. Complainant on his way to court may suffer severe setback necessitating hospitalization. He may suffer (a) heartache, (b) high BP, (c) low sugar leading to coma or (d) vertigo, etc. Death of a close relation may be another sufficient cause.

1.6 So in each case if the complainant shows sufficient cause for his absence, the Magistrate may restore his complaint on file. The period may be 15 days or 30 days from the date of discharge of the accused for moving the application.

1.7 With regard to trial of summons-cases, under section 256, the Magistrate shall acquit the accused if the complainant does not appear on the date of hearing. The proviso to section 256 says that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. Here also there may be sufficient reasons for the absence of complainant, examples of which have been given in the earlier paragraphs. Under section 256, a sub-section may be added to the effect that if the complainant shows sufficient cause for his absence on the date of hearing, the Magistrate may restore the complaint on

file provided the application is filed within 15 days or 30 days from the date of acquittal of the accused.

1.8 In the CPC Order IX, Rules 4, 8 and 9 read as under:

(i) **Rule 4 -**

"*Plaintiff may bring fresh suit or Court may restore suit to file*.- Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit."

(ii) **Rule 8 -**

"*Procedure where defendant only appears*.- Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

(iii) **Rule 9 -**

"*Decree against plaintiff by default bars fresh suit*.- (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of

action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit. … ."

1.9 When provisions have been provided to restore a suit which has been dismissed on the ground of absence of plaintiff, similar provisions need be provided under the CrPC also.

1.10 In the absence of such provisions under sections 249 and 256, the complainants have to move the High Court under criminal revision where the accused has been discharged or in appeal against acquittal where the accused has been acquitted. By adding provisions for restoration of complaints, the burden on the High Courts will be lessened.

Inherent power of subordinate courts

1.11 The subordinate criminal courts have no inherent powers.[1] The formula "interest of justice" is not available to the subordinate criminal judiciary beyond the frontiers of the statutory provisions and does not enable entry into the corridor of investigation.[2] However, courts exist for dispensation of justice and not for its denial for technical reasons when law and justice otherwise demand. Even though inherent power saved under section 482, CrPC is only in favour of High Courts, the subordinate criminal courts are also not powerless to do what is absolutely necessary for dispensation of justice in the absence of a specific enabling provision

[1] ***Tulsamma v. Jagannath***, 2004 Cri. L. J. 4272
[2] ***State of Kerala v. Vijayan***, 1985(1) CRIMES 261

provided there is no prohibition and no illegality or miscarriage of justice is involved. All the criminal courts are having such an auxiliary power subject to restriction which justice, equity, good conscience and legal provisions demand provided it will not unnecessarily prejudice somebody else.[3] A Division Bench of the Kerala High Court has in ***In the matter of State Prosecutor***[4] held that the subordinate courts have the inherent power to act *ex debito justitiae* (in accordance with the requirement of justice) to do the real and substantial justice for which alone they exist. The absence of any reference to any other criminal court in the said provision does not necessarily imply that such courts can in no circumstances exercise inherent power. Courts may act on the principle that every procedure should be understood as permissible till it is shown to be prohibited by law.

1.12 Section 482 of the CrPC closely resembles Section 151 of the CPC. In order to seek interference under the said section three conditions should be fulfilled: (1) the injustice which comes to light should be of a grave character and not of a trivial character; (2) it should be clear and palpable and not doubtful; and (3) there exists no other provision of law by which the party aggrieved could have sought relief.[5]

1.13 In ***Raj Narain v. State***[6] and ***In re, Biyamma***[7], it was held that a High Court can revoke, review, recall or alter its own earlier decision in a criminal revision and rehear the same by virtue of its inherent power reserved under the said section**.**

[3] ***Madhavi v. Thupran***, 1987 (1) KLT 488
[4] 1973 Cri. L. J. 1288
[5] ***Ram Narain v. Mool Chand***, AIR 1960 All. 296; ***Janata Dal v. H. S. Chowdhary***, AIR 1993 SC 892
[6] AIR 1959 All. 315 (FB)
[7] AIR 1963 Mysore 326

1.14 The word 'process' is a general word meaning in effect anything done by the court. It includes criminal proceedings in a subordinate court. Therefore, power should be vested in the subordinate criminal courts to restore the complaint which was dismissed by default with a view to secure justice. Whenever the Magistrate is satisfied that it is necessary in order to secure the ends of justice, he should be able to interfere with his earlier order. The court which has the power to entertain a case and order notice and decide the case on merits should also have the power to correct an obvious error.

1.15 If a court finds that it delivered a judgment without hearing the party who was entitled to be heard himself or through his counsel which was necessary in the interest of justice, the court should be empowered to set aside the judgement and grant rehearing of the matter. It is true that there is no provision in the CrPC to the said effect. Nevertheless, in the interest of justice and the independence of the Judiciary, judges and magistrates should be at full liberty to discuss the conduct of persons before them either as parties or as witnesses. While exercising this power, courts should bear in mind that no person should be condemned without being heard.

1.16 However, the Supreme Court in ***A. S. Gauraya v. S. N. Thakur***[8] specifically ruled that the CrPC does not contain any provision enabling a Magistrate to exercise inherent power to restore a complaint by revoking his earlier order dismissing it for the non-appearance of the complainant.

II. LAW COMMISSION'S 141st REPORT

[8] (1986) 2 SCC 709

2.1 The 12th Law Commission of India in its 141st Report titled "*Need for Amending the Law as regards Power of Courts to Restore Criminal Revisional Applications and Criminal Cases Dismissed for Default in Appearance*" [1991] recommended, *inter alia*, amendment of section 256 of the CrPC enabling restoration of a criminal case wherein the accused has been acquitted for non-appearance of the complainant where there was sufficient cause for the non-appearance. A meritorious complaint cannot be allowed to be thwarted only on the ground that the complainant was unable to remain present, even though there existed good and sufficient cause for such absence.

2.2 The Law Commission in its aforesaid Report further recommended amendment of section 482 of the CrPC for conferment of inherent powers also on all subordinate criminal courts other than the High Court.

III. RECOMMENDATION

3. We hereby recommend appropriate amendments in sections 249 and 256 of the Code of Criminal Procedure 1973 inserting provisions on the lines of Order IX of the CPC, enabling restoration of complaints.

(Dr Justice AR. Lakshmanan)
Chairman

(Prof. Dr Tahir Mahmood)
Member

(Dr Brahm A Agrawal)
Member-Secretary