

**IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Md. Mumtaz Khan

CRR No. 613 of 2018

M/s. ACME Paints & Resin Private Limited

Vs.

M/s. Deb Paints Private Limited & Anr.

For the petitioner : Mr. Shiv Sankar Banerjee
Mr. Riya Das

For the OP nos. 1 & 2 : Mr. Tapan Dutta Gupta
Ms. Parvez Anam
Mr. Somnath Banerjee
Mr. Dipjyoti Chakraborty

Heard on : 08.08.2018 & 28.08.2018

Judgment on : 28.09.2018

Md. Mumtaz Khan, J. :

The instant revision has been preferred by the petitioner/complainant under Section 482 read with Section 401 of the Code of Criminal Procedure praying for quashing/setting aside the order dated December 9, 2016 passed by the learned Additional Chief Judicial Magistrate at Bidhan Nagar in case No. C/37 of 2015 under Section 138 of the NI Act thereby acquitting as also discharging the accused under Section 256 read with Section 204 (4) of Cr.PC.

On January 19, 2012 petitioner filed a complaint under Section 136 of NI Act against the opposite parties before the learned Chief Metropolitan Magistrate at Calcutta which was registered as C/29756/2012 but subsequently it was returned back to the complainant as per order of the Hon'ble Apex Court. Thereafter, it was filed before the learned Additional Chief Judicial Magistrate, Bidhannagar and was registered as C-37/2015. In that complaint it was alleged that the petitioner as per order of the opposite parties, supplied certain materials and raised bill and the opposite parties in discharge of their existing liabilities issued cheques. But those cheques on being presented in the bank for encashment returned back with the endorsement "funds insufficient". Accordingly, a demand notice was issued to the opposite parties but the opposite parties in spite of receipt of the same did not make any payment and thereby committed an offence punishable under Section 138 of NI Act.

Learned Magistrate after taking cognizance of the offence and after examining the complainant on S.A. found *prima facie* case under Section 138 of the NI Act against the opposite parties and accordingly, directed for issuance of process upon the opposite parties with the direction upon the petitioner (complainant) to furnish the requisites. Thereafter, when the complainant did not comply the said direction and no steps was taken, petitioner (complainant) was directed to show cause. But even then when no steps was taken by the complainant, learned Magistrate passed the impugned order.

Being aggrieved by and dissatisfied with the same the instant revision has been preferred by the petitioner/complainant.

Learned advocate appearing for the opposite parties submitted that the instant revision is not maintainable against the order of acquittal under Section 256 of the CrPC and the revisional court has no jurisdiction to go into the propriety of the order under section 256 Cr.P.C. even if it was a wrong order and only the appellate court will consider the same. He further submitted that the petitioner/complainant inspite of repeated chances given did not comply the direction of court and as such learned court was quite justified to pass the impugned order.

Learned advocate appearing for the petitioner submitted that the impugned order passed by the learned Magistrate suffers from material irregularity and illegality as the learned Magistrate wrongly invoked the provision of Section 256 of the CrPC in spite of recording of order that the accused has not yet appeared and the case was not at the stage of evidence and the instant revision is quite maintainable. He further submitted that provision of Section 256 CrPC can only be invoked after appearance of the accused persons and after recording of their plea and that too when the presence of the complainant was required. He also submitted that learned Magistrate was even not sure what provision is applicable while disposing the complaint and as such wrongly invoked both the provisions of Section 256 CrPC as also Section 204(4) CrPC and recorded the order of acquittal as well as discharge at the same time. According to him on the face of it, it was a wrong order and there was no scope to invoke the provision of Section 256 CrPC and at best Section 204 (4) CrPC could have been invoked, if at all required. He further submitted that the petitioner was very much diligent in

proceeding with the complaint but on being misled and due to practicing fraud by the advocate engaged by the petitioner, complainant to conduct the case no steps was taken and the complainant was completely kept in dark. He also submitted that due to commission of cheating and fraud by the learned advocate engaged by the complainant, complainant was compelled to start a criminal case by lodging a complaint against the complainant's own advocate and a specific case has already been started against the advocate at the Bidhan Nagar police station under Section 473/469/466/406/420 of the Indian Penal Code vide Bidhan Nagar P.S. Case No. 196/17 dated September 15, 2015. According to learned advocate for the petitioner due to committing fraud by the learned advocate for the complainant and being misled by him no steps could be taken and there was no laches or negligence on the part of the complainant.

He relied upon the decisions of *M.K. Products Vs. M/s Blue Ocean Exports (P) Ltd. & Ors.* Reported in *(2017)2 C Cr LR (Cal) 202*, *Narendra Kumawat Vs. Ranjeet* reported in *2017(2) AICLR 171 (M.P.)*, and *Associated Cement Co. Ltd. Vs. Keshvanand* reported in *(1998) 1 SCC 681* in support of his submissions.

I have considered the submissions of the learned counsels appearing for the respective parties and gone through the documents relied on by the petitioner to consider the propriety of the impugned order.

There is no denying fact that revision does not lie against an order of acquittal recorded under Section 256 of the Cr.P.C. provided the same has been invoked appropriately and in a judicious manner.

Admittedly, case was at the stage of issuance of summons to the accused persons. It is evident from the impugned order that for non putting of any requisites towards issuance of summons against the accused persons/opposite parties and on account of absence of the complainant learned Magistrate passed the impugned order. No such process was issued against accused persons due to non filing of any requisites. Accused persons had neither appeared in the case nor the case was at the stage of evidence. Evidently, the case was at the stage of issuance of process. *Clause 4 of Section 204 of the Code of Criminal Procedure* provides for dismissal of the complainant on account of nonpayment of any process fee or other fees within a reasonable time. There was a direction upon the complainant to furnish requisites which included the process fee which was not complied. So, clearly the provision of Section 204(4) was applicable. There was no scope to invoke the provision of Section 256 Cr.P.C. which falls in Chapter XX of the Code of Criminal Procedure. In the given circumstances, the only option available to the Magistrate was to dismiss the complaint under section 204(4) Cr. P.C. But the learned Magistrate inappropriately invoked the provisions of both the sections 256 Cr.P.C. and 204(4) Cr.P.C. and recorded the order for acquittal as well as discharge at the same time. The order itself indicates that the learned Magistrate was not sure which provisions was actually applicable. On the face of it there appears to be irregularity and illegality in the impugned order. The order impugned can not be treated to be an order passed under section section 256 Cr.P.C. as the case was not at the evidence stage but at best can be treated as an

order under section 204(4) Cr.P.C. Accordingly, the instant revision is quite maintainable.

The impugned order, as is evident, was passed by the learned court below on account of failure on the part of the complainant in not complying the court's direction. In this regard it is the specific assertion of the petitioner that due to practicing fraud by the learned advocate engaged by the petitioner/complainant to conduct the case no steps could be taken and the complainant was kept in complete dark and after coming to know about the same complainant had to lodge a complaint at Bidhan Nagar Police Station against the advocate. From the documents annexed with the supplementary affidavit of the petition, it is evident that on September 1, 2017 a complaint was lodged on behalf of the petitioner against their advocate and as such Bidhan Nagar P.S. Case No. 196/17 dated September 15, 2015 under Section 473/469/466/ 406/420 of the Indian Penal Code was started against him. A written complaint was also made to the President, Bar Council of West Bengal against the Advocate. Documents annexed with the supplementary affidavit supports the claim of the petitioner that it was their advocate upon whom the complainant reposed faith did not take any steps keeping the complainant in dark and there was no laches or negligence on the part of the complainant/petitioner in proceeding with the case. One cannot suffer for the fault of his advocate. Thus, I find that the petitioner has been able to show the sufficient cause in not taking steps before the learned court below which resulted in passing of the impugned order.

In the result instant revision succeeds.

Consequently, the impugned order dated December 9, 2016 passed by the learned Additional Chief Judicial Magistrate at Bidhan Nagar in case No. C/37 of 2015 under Section 138 of the NI Act is quashed and set aside. The complaint is restored to its original file and number and the learned Magistrate is directed to proceed with the case from the stage of issuance of process against the accused person.

Urgent photostat certified copy of this judgement, if applied for, be given to the parties expeditiously upon compliance with the necessary formalities in this regard.

(Md. Mumtaz Khan, J.)