HARYANA STATE LAW COMMISSION

SECOND REPORT

Recommendation to amend Sections 249 and 256 of The Code of Criminal Procedure, 1973

Government of Haryana

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Government of Haryana

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To amend any provision of law, it is essential to go through the existing provisions which necessitated amendment. So, Section 249 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') which deals with the consequences of absence of a complainant in certain circumstances, is reproduced as under:

> ***"Section 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."***

Similarly Section 256 which deals with consequences of non-appearance or death of a complainant reads as

follows:

> ***"<u>Section 256</u> - 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 the non- appearance of the complainant is due to his death."***

2. Section 249 of the Code vests discretion in the Court (word "may" is used) to discharge the accused for absence of the complainant in cases which are lawfully compoundable or are not cognizable. Cases which are cognizable and non-compoundable, are not capable of

being dismissed for absence of the complainant. If the accused cannot be discharged for the absence of the complainant, the case has to be decided on merits by securing the presence of complainant/witness, by such coercive process as are permissible in law.

3. There is no provision in the Code empowering the trial Court with powers to restore a complaint which is dismissed for non-appearance of the complainant resulting in discharge or acquittal of the accused as the case may be. Subordinate Criminal Courts are not conferred inherent powers to meet with such situations.

4. Dealing with Sections 249 and 256 of the code, the Supreme Court has in ***Maj. Genl. A.S. Gauraya and another v/s S.N. Thakur and another*** **(AIR 1986 SC 1440)**, held in paragraphs 9 and 10 of the judgment as follows:

> ***"9. Section 249 of the Criminal P. C. enables a Magistrate to discharge the accused when the complainant is absent and when the conditions laid down in the said section are satisfied. S. 256 (1) of the Criminal P. C. 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 of 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 Supp (2) SCR 297 : (AIR 1962 SC 876) filing of a second complaint is not the same thing as reviving a dismissed complaint after recalling the earlier order of dismissal. The Criminal P. C. does not contain any provision enabling the criminal Court to exercise such an inherent power.

10. xxx xxx xxx xxxxx

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.

5. Chapter XXXVI of the Code deals with limitation of time (Section 468 to Section 473) to file complaint. In such cases second complaint generally becomes time barred. Resultantly, complainant is generally

deprived of Justice. In the circumstances, there is need for making provision for restoration of the complaint dismissed for the absence of the complainant on any given date for justifiable reasons. If the situation is not remedied by amending the relevant provisions, an otherwise merited case may fail on a mere technicality, resulting in injustice.

6. Even Code of Civil Procedure contains Section 151 vesting power in the lowest Court to pass orders by exercising the inherent power of the Court in the ends of justice. Order 9 Rule 9 of the Civil Procedure Code vests power in the Civil Court to restore suits dismissed for default, i.e., non-appearance of the plaintiff when the suit is called on for hearing. But there is no such corresponding provision in the code to restore a complaint dismissed for complainant's absence even when there is a genuine cause for his absence. Section 482 of the Code, recognizes the inherent power only in the High Court to pass such orders as may be necessary or to prevent abuse of the process of the Court or to secure the ends of justice. Court of Judicial Magistrate First Class, Court of Chief Judicial Magistrate and the Court of Sessions are not vested with inherent power to restore a case dismissed for absence of the complainant. Where a complainant is

unable to attend the Court for justifiable reasons, the Magistrate, on being satisfied of the reasons for absence be enabled to restore the case dismissed for default of appearance of the complainant in order to prevent miscarriage of justice. Hence, there is need to amend the code to remedy the situation as otherwise it would result in travesty of justice. It is in the interest of justice that the complainant should have a remedy to secure restoration of a criminal case dismissed for non-appearance, on showing sufficient cause for his absence.

7. The Law Commission of India has in its report No 141 (1991) titled "Need for amending the law as regards power of Court to restore criminal cases dismissed for default of appearance" recommended inter alia amendment of Section 256 of the Code enabling restoration of the criminal case where there was sufficient cause for non-appearance. The Law Commission, has in its 233rd report observed that subordinate Criminal Courts do not have inherent powers to meet such situations for securing the ends of justice and observed as follows in paragraphs 1.15, 1.16, 2.1, 2.2 and 3 as follows:

> ***"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 Cr.P.C 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 (1986) 2 SCC 709 specifically ruled that the Cr.P.C 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

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 Cr.P.C 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 Cr.P.C 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."

8. But the Code has not been amended as per the said recommendations. In the circumstances, we consider that so far as our State Haryana is concerned Sections 249 and 256 of the Code should be suitably amended to prevent miscarriage of justice.

RECOMMENDATIONS

9. For the reasons stated above, we recommend that Section 249 shall be amended by adding the following proviso:

> ***"Provided that the order of discharge shall be set aside if on application for restoration of the complaint made within reasonable time not more than sixty days, the Court is satisfied after hearing the accused that the complainant was prevented by sufficient cause from appearing, upon such terms as to costs or otherwise."***

We further recommend that Section 256 shall be amended by adding the following as sub-section (3) to Section 256 of the Code:-

> ***"Where proceedings are terminated under this section, the court may, if it is satisfied on the application of the complainant that he was prevented by sufficient cause from appearing, make an order setting aside the order of termination upon such terms as to costs or otherwise as it think fit and shall appoint a day for proceeding with the case.***
>
> ***Provided that such application shall be entertained within reasonable time not more than sixty days from the date on which the proceeding were terminated."***

NOTE:

Section 249 and 256 of the Code of Criminal Procedure, 1973 have been enacted under Entry 2 of Concurrent List 3 to the Constitution of India. Therefore Parliament as well as the State Legislature have concurrent power to enact laws to regulate Criminal Procedure. As the Parliament has already enacted the Code of Criminal Procedure, 1973, Article 254 of the Constitution comes into play. It provides that where the law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent list contains any provision repugnant to the provision of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for consideration of the President and has received his assent shall prevail in that State. It is therefore clear that the amendments proposed above can be passed by the Legislature and reserved for consideration of the President. After receipt of the assent of the President, the amendments can come into operation in the State of Haryana.

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