



**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

**DATED THIS THE 17<sup>TH</sup> DAY OF JANUARY, 2023**

**BEFORE**

**THE HON'BLE MR JUSTICE P.N. DESAI**

**CRIMINAL APPEAL NO. 143 OF 2017 (A)**

**BETWEEN:**

SMT. MUNIRATHNAMMA,  
AGED ABOUT 47 YEARS,  
W/O. LATE CHANNAVEERAPPA,  
R/AT IGGALURU VILLAGE,  
ATTIBELE HOBLI,  
ANEKAL TALUK,  
BENGALURU DISTRICT - 560 081.

...APPELLANT

(BY SRI. SHIVARAJU M K.,ADVOCATE)

**AND:**

H.C.DEVE GOWDA,  
AGED ABOUT 46 YEARS,  
S/O. LATE CHIKKARAMAIAH,  
R/AT HAROHALLI VILLAGE,  
ATTIBELE HOBLI,  
ANEKAL TALUK,  
BENGALURU DISTRICT- 560 081.

...RESPONDENT

(BY SRI. SAGAR G. NAHAR, ADVOCATE FOR SRI. S.F. GOUTAM  
CHAND., ADVOCATE)

THIS CRL.A. IS FILED U/S 378(4) CR.P.C BY THE ADVOCATE FOR THE APPELLANT PRAYING TO SET ASIDE THE ORDER DATED 24.12.2016 PASSED BY THE PRL. CIVIL JUDGE AND JMFC, ANEKAL, BANGALORE BY THE SAID COURT DISMISSING THE COMPLAINT OF THE APPELLANT AND CONSEQUENTLY, PLEASE RESTORE THE SAME





AND TO DISPOSE OF THE SAME ON MERITS BY AFFORDING DUE AND PROPER OPPORTUNITY TO ALL THE PARTIES, BY ALLOWING THIS CRL.A.

THIS APPEAL, COMING ON FOR HEARING, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

**JUDGMENT**

This appeal is filed challenging the dismissal of the private complaint PCR No.247/2015 by order dated 24.12.2016 by Prl. Civil Judge & JMFC, Anekal, Bangalore Rural, wherein the complaint is dismissed for non-prosecution.

2. Heard Sri. Shivaraju M.K., for the appellant and Sri. Sagar G. Nahar for Sri. S.F. Goutam Chand, learned counsel for the respondent.

3. Learned counsel for the appellant after query from Bench as to how the appeal is maintainable in view on the impugned order under challenge, he filed a memo stating that the appellant may be permitted to convert this criminal appeal into criminal petition under section 482 of The Code of Criminal Procedure, 1973( hereinafter for short 'Cr.P.C.'). Learned counsel for the appellant argued that since the complaint is dismissed for default at PCR stage, the appeal may not be maintainable and prayed to pass appropriate order.



4. Learned counsel for the appellant also relied on the judgment of the Hon'ble Supreme Court in **V.K. Bhat v. G. Ravi Kishore and Another, (2016) 13 SCC 243**, wherein, the dismissal of the complaint under section 256 Cr.P.C. amounts to acquittal and appeal lies.

5. Against this, learned counsel for the respondent argued that the appeal is not maintainable as there is no acquittal of the accused under section 256 Cr.P.C. Therefore, the provision of section 378 Cr.P.C. is not applicable. At the most, revision under section 397 Cr.P.C. could have been filed by the appellant either before the appellate court or before the High Court. In support of his arguments, he relied upon the decision of the Delhi High Court in the case of **Kalpana Tyagi v. Sneh Lata Sharma, 2003 (68) DRJ 14**, wherein the Delhi High Court considered the distinction regarding complaint dismissed prior to summoning of an accused and complaint dismissed subsequent to the summoning of the accused and it is held that if a complaint is dismissed prior to summoning of an accused, the order may be challenged by filing a revision. Hence, learned counsel argued that neither the appeal nor the



petition under section 482 Cr.P.C. are maintainable. Hence, he prayed to dismiss the appeal.

6. I have perused the impugned order and also the order sheet of the trial court produced in this case.

7. It is seen from the records of the Trial Court that the complainant presented the complaint on 14.07.2015 under section 200 Cr.P.C. read with sections 138 and 142 of the Negotiable Instruments Act, 1881. (hereinafter for short referred as 'N.I Act'). Learned Addl. Civil Judge & JMFC, Anekal has endorsed on the said complaint as under:-

"Compt is present.  
Perused. Cognizance taken.  
Register the PC.  
Call on for S/St.  
01.08.2015.

Sd/-  
14.07.2015

8. The above endorsement indicates that after perusing the complaint, learned JMFC has taken cognizance and ordered that the complaint be registered as a private complaint. It is also seen that the said complaint was registered as PCR



No.247/2015. Thereafter, the case is posted on several dates for recording the sworn statement of the complainant. Ultimately on 24.12.2016, the complaint came to be dismissed for non-prosecution. The order dated 24.12.2016 dismissing the complaint reads as under:-

24.12.2016 " Compt. and counsel absent.  
For Sworn Statement-call latter  
-case called out at 5.20 p.m.-complainant  
absent- counsel absent- since 01.08.2016  
neither complainant present nor  
adduced evidence - nor anybody  
represented - However, it  
appears that the complainant is  
not interest to proceed with the case -  
hence the complaint is dismissed  
for non-prosecution."

9. The above order shows that the case is at the stage of still recording the sworn statement of the complainant. Learned JMFC has not come to any conclusion, either to issue process or to dismiss the complaint on the basis of the material placed by the complainant. The complaint is dismissed as there is no representation. The trial court felt that the complainant is not interested to proceed with the case. Accordingly, it has dismissed the same for non-prosecution.



10. From the nature of order and in view of submission made at the Bar, the point that arises for consideration of this Court is:-

*"When the private complaint filed under section 200 Cr.P.C before jurisdictional magistrate is dismissed for non-appearance of the complainant prior to recording of sworn statement of the complainant, whether appeal lies under section 378 Cr.P.C or Revision lies under section 397 Cr.P.C. or Criminal Petition under 482 Cr.P.C lies to challenge such order by the complainant.*

11. In order to appreciate the same, it is useful to refer to the relevant provisions of Cr.P.C.

Chapter XV Cr.P.C deals with Complaints to Magistrates.

**Section 200- Examination of complainant:-.**

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:



Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

The first proviso states when the examination of complainant is not necessary and second proviso provides for procedure when the complaint is made over to another magistrate. The nature of the order passed by learned JMFC shows, on receiving the private complaint and perusing the same, he has taken cognisance, then he has proceeded to record the sworn statement of the complainant.

12. Section 201 Cr.P.C. deals with procedure by Magistrate not competent to take cognizance of the case. Section 202 states the postponement of issue of process.



Section 203 provides for dismissal of complaint. It reads as under:-

**203. Dismissal of complaint-** If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

13. It is evident from the above sections, that the magistrate after considering the statement on oath, if any, of the complainant and of the witnesses and the result of the inquiry or investigation under section 202 Cr.P.C., if he forms an opinion that there is no sufficient ground, he shall dismiss the complaint. In the case on hand, no sworn statement of the complainant is recorded. The case is at the stage of recording the sworn statement of the complainant. The other provision in Cr.P.C which provides for dismissal of the complaint is section 249 Cr.P.C. Chapter XIX provides procedure for Trial of Warrant-cases by Magistrates. Sub-heading 'A' - in the said Chapter deals with Cases instituted on a police report which starts from sections 238 to 243, sub-heading 'B' deals with



cases instituted otherwise than on police report which starts from sections 244 to 247 Cr.P.C. Then sub-heading 'C' states procedure for Conclusion of trial.

14. It is useful to refer Section 249 Cr.P.C. It reads as under:-

**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.

15. It is evident that, above section is applicable only in respect of trial of warrant-cases by Magistrates. Said section 249 provides for discharge of the accused, if charge has been framed and the stage is for hearing of the case. Therefore, said Chapter or Section is not applicable to the facts and nature of order challenged in this appeal as it is not a warrant case.

16. Chapter XX Cr.P.C states the procedure for Trial of Summons-cases by Magistrates i.e., summons case. The



Chapter starts from sections 251 and dismissal of the complaint is dealt under section 256 Cr.P.C. which reads as under:-

**256. 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.

17. On perusing above section and proviso, it is evident that said section 256 Cr.P.C. is applicable when summons has been issued on the complainant and it is also stated that such dismissal has the effect of acquittal. Except this provision, no other provision is brought to the notice of the Court, wherein a complaint can be dismissed for non-prosecution or absence of the complainant.



18. Learned counsel for the respondent contended that even under such circumstance, it amounts to dismissal of complaint under section 203 Cr.P.C. hence a revision lies. He relied on the decision of the Delhi High Court in the case of **J.K. International V. State** reported in **2002 CriLJ 2601**. At para 10, it is held that it amounts to dismissal of complaint under section 203 Cr.P.C. So revision under Section 397 Cr.P.C lies. But said decision will not help the complainant in view of nature of case and nature of order passed by trial court.

19. When complaint is dismissed under section 203 Cr.P.C., it does not debar the complainant from filing second complaint as held by the Hon'ble Supreme Court in the case of **Poonam Chand Jain v. Fazru** reported in **AIR 2010 SC 659** and if on the same set of facts, a complaint can be admitted. Same principle is earlier reiterated by the Hon'ble Supreme Court in **Mahesh Chand V. B. Janardhan Reddy**, reported in **AIR 2003 SC 702**. Here, this is a complaint filed for offence punishable under N.I. Act. It is not a private complaint on IPC sections or other laws. The offences under N.I. Act are special type of offences. They are quasi civil in nature and they are



regulatory offences. They are governed by law of limitation also. There are certain provisions which the complainant has to mandatorily comply. Particularly section 138 of N.I. Act for issuance of statutory notice, filing of complaint, there is a limitation prescribed under 138(a)(b) of N.I. Act. Therefore, the filing of second complaint at this length of time by the complainant is not permissible on the same set of facts. If the complaint is dismissed at the PCR stage, complainant cannot file a petition for restoration of the said complaint as the Magistrate has no inherent powers under Cr.P.C for restoration of the complaint. The only option left to the complainant is to challenge the same, by way of petition under section 482 Cr.P.C.

20. According to respondent's counsel, it is only by way of revision. Whether a revision under section 397 Cr.P.C is maintainable or petition under section 482 Cr.P.C is maintainable or an appeal under section 378 Cr.P.C is maintainable is to be ascertained by referring into said provisions in Cr.P.C.



21. Section 397 Cr.P.C. deals with revision. It reads as under:-

**397. Calling for records to exercise powers of revision.**

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.- All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub - section and of section 398.

(2) The powers of revision conferred by sub- section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

22. It is evident from the said section that if there is a patent defect or error of jurisdiction or law or perversity in the



order of inferior criminal court, the revision lies. The revisional court is empowered to call for record and examine the records of the trial court or Sessions Court, only to limited extent and only after satisfying itself as to the legality or regularity of any proceedings, an order may be passed. The object of the section is to set right the patent defect or error of jurisdiction of law. This power can be exercised as a suo-moto or from an application by a person. Section 397 Cr.P.C. to Section 401 Cr.P.C. deals with such powers. If there is no error, then order cannot be interfered. If the order is not perverse, then revision power cannot be exercised. The revisional court may further order enquiry if the complaint is dismissed under section 203 Cr.P.C.

23. Section 378 Cr.P.C. deals with acquittal against appeal and it reads as under:-

**378. Appeal in case of acquittal.**

(1) Save as otherwise provided in sub-section (2), and subject to the provisions of sub- sections (3) and (5),-

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed



by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, <sup>1</sup>[the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal-

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.]

(3) <sup>2</sup>[No appeal to the High Court] under sub- section (1) or sub- section (2) shall be entertained except with the leave of the High Court.

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<sup>1</sup> Subs. by Act 25 of 2005, sec.32(ii), for "the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-section(3), to the High Court from the order of acquittal"(w.e.f.23-6-2006).

<sup>2</sup> Subs. by Act 25 of 2005, sec. 32(iii), for "No appeal" 9w.e.f.23-6-2006).



(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2).

24. In view of the said section, it is evident that the appeal lies under the circumstances stated above when there is an order of acquittal passed. As in this case, neither summons is issued nor the accused appeared and this dismissal is neither under section 256 Cr.PC. or it is discharge which can amount to acquittal, therefore, the provision of section 378 Cr.P.C. which deals with appeal in case of acquittal has no application to the present case.



25. Section 482 Cr.P.C. reads as under:-

**482. Saving of inherent powers of High Court** - Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

It is evident from the said section that when there is no specific section which provides remedy to challenge the order impugned, to prevent abuse of the process of court or otherwise to secure ends of justice, the High Court is conferred with inherent power. No other section in Cr.P.C will limit the exercise of power of court in the circumstances stated in the said section.

26. Therefore, a distinction between the revision powers/ Appeal power and the inherent power of the High Court will have to be considered. Admittedly, in this case, there is no acquittal and both sides admit that no appeal lies under section 378 Cr.P.C. Therefore, question of considering maintainability under section 378 Cr.P.C. does not arise as there is no order of either



acquittal or discharge and we are only at the pre-recording of sworn statement stage.

27. The Hon'ble Supreme Court in a decision in the case of **Amit Kapoor vs Ramesh Chander & Anr** reported in **(2012) 9 SCC 460** discussed the scope of revisional power under section 397 and also inherent jurisdiction of the High Court under Cr.P.C. The nature, scope and object of these provisions are discussed in detail. Relevant paras 12, 18, 20, 21, 22, 23 and 24 are as under:-

*12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.*

*18. It may also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be*



*subject to jurisdiction of this Court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases.*

19. xxxxxxxxxxxxxxxxxxxxxxxxx

**20.** *The jurisdiction of the court under Section 397 can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression "prevent abuse of process of any court or otherwise to secure the ends of justice", the jurisdiction under Section 397 is a very limited one. The legality, propriety or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, Section 482 is based upon the maxim quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest i.e. when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The section confers very wide power on the Court to do justice and to ensure that the process of the court is not permitted to be abused.*

**21.** *It may be somewhat necessary to have a comparative examination of the powers exercisable by the court under these two provisions. There may be some overlapping between these two powers because both are aimed at securing the ends of justice and both have an element of discretion. But, at the same time, inherent power under Section 482 of the Code being an extraordinary and residuary power, it is inapplicable in regard to matters which are specifically provided for under other provisions*



*of the Code. To put it simply, normally the court may not invoke its power under Section 482 of the Code where a party could have availed of the remedy available under Section 397 of the Code itself. The inherent powers under Section 482 of the Code are of a wide magnitude and are not as limited as the power under Section 397. Section 482 can be invoked where the order in question is neither an interlocutory order within the meaning of Section 397(2) nor a final order in the strict sense. Reference in this regard can be made to Raj Kapoor v. State [(1980) 1 SCC 43 : 1980 SCC (Cri) 72 : AIR 1980 SC 258] . In that very case, this Court has observed that inherent power under Section 482 may not be exercised if the bar under Sections 397(2) and 397(3) applies, except in extraordinary situations, to prevent abuse of the process of the Court. This itself shows the fine distinction between the powers exercisable by the Court under these two provisions. In that very case, the Court also considered as to whether the inherent powers of the High Court under Section 482 stand repelled when the revisional power under Section 397 overlaps. Rejecting the argument, the Court said that the opening words of Section 482 contradict this contention because nothing in the Code, not even Section 397, can affect the amplitude of the inherent powers preserved in so many terms by the language of Section 482. There is no total ban on the exercise of inherent powers where abuse of the process of the court or any other extraordinary situation invites the court's jurisdiction. The limitation is self-restraint, nothing more. The distinction between a final and interlocutory order is well known in law. The orders which will be free from the bar of Section 397(2) would be the orders which are not purely interlocutory but, at the same time, are less than a final disposal. They should be the orders which do determine some right and still are not finally rendering the court functus officio of the lis. The provisions of Section 482 are pervasive. It should not subvert legal interdicts written into the same Code but, however, inherent powers of the Court unquestionably have to be read and construed as free of restriction.*

22. xxxxxxxxxxxxxxxx



**23.** *In Janata Dal v. H.S. Chowdhary [(1992) 4 SCC 305 : 1993 SCC (Cri) 36 : AIR 1993 SC 892] the Court, while referring to the inherent powers to make orders as may be necessary for the ends of justice, clarified that such power has to be exercised in appropriate cases ex debito justitiae i.e. to do real and substantial justice for administration of which alone, the courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the powers requires a great caution in its exercise. The High Court, as the highest court exercising criminal jurisdiction in a State, has inherent powers to make any order for the purposes of securing the ends of justice. Being an extraordinary power, it will, however, not be pressed in aid except for remedying a flagrant abuse by a subordinate court of its powers.*

**24.** *If one looks at the development of law in relation to exercise of inherent powers under the Code, it will be useful to refer to the following details : as far back as in 1926, a Division Bench of the Bombay High Court in Llewelyn Evans, In re [AIR 1926 Bom 551], took the view that the provisions of Section 561-A (equivalent to present Section 482) extend to cases not only of a person accused of an offence in a criminal court, but to the cases of any person against whom proceedings are instituted under the Code in any court. Explaining the word "process", the Court said that it was a general word, meaning in effect anything done by the court. Explaining the limitations and scope of Section 561-A, the Court referred to "inherent jurisdiction", "to prevent abuse of process" and "to secure the ends of justice" which are terms incapable of having a precise definition or enumeration, and capable, at the most, of test, according to well-established principles of criminal jurisprudence. The ends of justice are to be understood by ascertainment of the truth as to the facts on balance of evidence on each side. With reference to the facts of the case, the Court held that in the absence of any other method, it has no choice left in the application of the section except, such tests subject to the caution to be exercised in the use of inherent jurisdiction and the avoidance of interference in details and directed providing of a legal practitioner.*



28. It is evident from the said paragraphs that the jurisdiction of the revisional Court under section 397 Cr.P.C. can be exercised so as to examine the correctness, legality or propriety of the order passed by the trial court or inferior court, as the case may be. Secondly, it has not specifically used the expression 'prevent the abuse of process of any court or otherwise' to secure the ends of justice. The jurisdiction under section 397 Cr.P.C. is very limited one. It is only confined to the legality, propriety or correctness of the order passed by the Court, may be where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, section 482 Cr.P.C. confers wide power on the Court to do justice. Though on comparing those provisions, there may be some overlapping between these powers, though both have got element of discretion, the power of section 482 Cr.P.C. is extraordinary and residuary and can be used to secure the ends of justice irrespective of whether there is illegality or correctness of the order is interfered or not. The Hon'ble



Supreme Court has referred to its earlier decisions regarding exercise of power under section 482 Cr.P.C.

29. If the order of the learned magistrate is considered in the light of these provisions, there is nothing to show that the order passed by the Magistrate is either illegal or it is opposed to any law or there is any illegality. If the complainant do not appear and after giving some time, if nobody represented, the magistrate has dismissed the said complaint thinking that complainant is not interested. So it cannot be said that the order of the magistrate is either illegal or perverse or it is not in accordance with law. Ofcourse, there is no specific provision for dismissal of the complaint at PCR stage, i.e., pre-recording of sworn statement of the complainant stage. It is like an intimation given to the court regarding filing of FIR in the charge sheet case. Section 258 Cr.P.C. deals with stopping of proceedings at any stage without pronouncing any judgment and when stoppage order is passed after the evidence, the magistrate has to record judgment of acquittal and in any other case release the accused. So again said provision is also not applicable, because the nature of the order passed by the



magistrate does not fall under any of such proceedings. As already stated above, in a normal course, if the complaint is dismissed after recording the sworn statement under section 203 Cr.P.C. a second complaint can be filed, but here, it is a complaint under section 138 of N.I. Act. The records disclose the complaint is for dishonour of the cheque amount of Rs.25.00 lakhs. It is contended by the appellant in the appeal that as the complainant was not well, he could not contact the counsel and the complaint came to be dismissed. Therefore, in this type of cases, if the complaint is dismissed, the magistrate has no inherent power to restore it. The revision, in my considered opinion, also does not lie as the order of the Magistrate cannot be said as illegal or not correct. Therefore, only remedy available to the complainant in such circumstance is to approach High Court invoking inherent power under section 482 Cr.P.C.

30. In the light of the facts and circumstances of this case, the revision does not lie, the appeal also does not lie, as there is no acquittal of the accused. In meeting such a situation, looking into the cheque amount involved as complainant cannot



file second complaint on same set of facts, it is only under section 482 Cr.P.C. which is applicable to this type of cases or situations, to seek remedy if a case is made out. The power under section 482 Cr.P.C. has to be exercised when there is no other provision provided for restoration of such complaint. Such power has to be exercised carefully and only to do complete justice to the parties. If the appellant is permitted to file such petition, then it is for the Court to consider his application under section 482 Cr.P.C. and grant relief if appellant/petitioner has made out a case.

31. The decision of Delhi High Court is under section 203 Cr.P.C. In **J.K. International vs. State**, referred supra though it is stated that under section 398 Cr.P.C., the court can direct the subordinate court to make further enquiry, but in my considered view, such course cannot be taken as there is no enquiry at all before the trial court, therefore the question of directing the trial court to proceed further enquiry does not arise. Neither the accused is discharged nor the accused is acquitted nor the complaint is dismissed under section 203 after considering the statement and records. Therefore, when the



complaint is dismissed at the stage i.e., before recording of sworn statement for non appearance or non representation of behalf of the complainant, the remedy for complainant is only under section 482 Cr.P.C.

32. The decision relied on by the appellant's counsel in V.K. Bhat v. G. Ravi Kishore and Another reported in (2016) 13 SCC 243 has also no application as it is dismissal of compliant under section 256 Cr.P.C.

33. The coordinate Bench of this Court in **Mohammad Ilyas Ahamed V. Abdul Subhan in Crl.P.Nos.3508/2000 to 3509/2000** dated 05.03.2001 while considering the dismissal of the complaint at PCR stage has observed that since the nature of the complaint is under N.I. Act which involved money and as the second complaint because of its technicality is not maintainable, the only course left to the complainant is to approach the High Court under section 482 Cr.P.C. Further, another coordinate Bench of this Court in the case of **Smt. R. Rajeshwari V. H.N. Jagadish and another** (in Crl.P.No.2784/2000 dated 05.03.2001) reported in **2001 SC**



**Online Kar 166** and in the case of **Mohammad Ilyas Ahamed v. Abdul Subhan**(in CrI.P.Nos.3508 and 3509/2000) reported **2001 SCC Online Kar 746** has held that once the complaint is dismissed for default, the Court becomes functus officio and Court has no inherent power to restore the complaint dismissed for default. The prosecution of a private complaint for an offence under section 138 of Negotiable Instruments Act, largely differs from the prosecution of a private complaint in respect of other IPC offences. For an offence under section 138 of Negotiable Instruments Act, there is no remedy available for the complainant to file a second complaint when dismissed for default in view of the limitations prescribed.

34. So in view of the discussion made and the distinction between the provision of section 397 and 482 Cr.P.C., it is evident that the remedy of the appellant is by way of petition under section 482 Cr.P.C. but not by way of appeal/ or Revision. Therefore, considering the nature of the impugned order and the nature of the complaint, the memo filed by the appellant in Court dated 12.01.2023 deserves to be allowed.



Accordingly, I pass the following:

O R D E R

1. The memo filed in Court 12.01.2023 by the appellant to convert criminal appeal into criminal petition is allowed.
2. Office is directed to register this appeal as a criminal petition under section 482 Cr.P.C. and post the case before bench having roster of 482 Cr.P.C.
3. This appeal is closed for statistical purpose.
4. Accordingly, the appeal stands disposed of.

**Sd/-  
JUDGE**

MN  
List No.: 1 SI No.: 30