

What to Do When a Section 138 Matter Gets Dismissed for Want of Prosecution?  
written by Abhiishek Bhaduri | November 15, 2019



As an advocate, one may encounter a situation when a Section 138 matter will be dismissed for Want of Prosecution. The idea is that no person should get unduly harassed, vexed or tormented just because an unscrupulous litigant failed to proceed diligently after filing the complaint against an accused. The Law provides for Acquittal of the accused wherein the complainant does not proceed with the complaint in full earnest.

#### Dismissal

For Want of Prosecution primarily occurs when the complainant and/or the advocate for the complainant fails to remain present on the date of hearing when the matter is called out for hearing proceedings before the Hon'ble Magistrate. Dismissal brings the complaint proceedings to an end. No further action/relief can be provided by the Hon'ble Court, once the complaint gets dismissed and the accused person stands acquitted.

The relevant legal provisions are as follows:

#### 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 100 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.*<sup>[1]</sup>

Now

in those cases wherein the complainant/ advocate for the complainant fails to remain present for genuine reasons and the Hon'ble Magistrate dismisses the complaint, for Want of Prosecution under Section 256 of The Code of Criminal Procedure, 1973 (1 of 1974) ("*the Code*"), the accused is acquitted and the proceedings are dismissed.

Quite

often, the advocates, as per usual practice, approach the Hon'ble Court during

the dying minutes of the working day and orally plead to recall the dismissal order and the case to be restored to the file. Now, as long as the Hon'ble Magistrate has not recorded the dismissal order on paper, this remedy might work. The Hon'ble Judges normally state on the record that the advocate for the

complainant appeared later in the day and the matter is adjourned till the next

date.

If

however, the Hon'ble Magistrate has already recorded an Order of Dismissal, recalling the order later, based on oral/written application made by the advocate

for the complainant, would be unlawful, illegal and beyond the powers of the Ld. Magistrate as vested upon the Chair under the Code.

An

Order of Dismissal under Section 256 of the Code is not only an order dismissing

a private complaint but also has the effect of acquitting the accused. The Forum passing the Acquittal Order, therefore, becomes a *Functus Officio*, and in the absence of any provision under the Code,

any order recalling the Order of Dismissal and restoring the matter to the Casefile of the Hon'ble Court, would be non-est.

Herein

the author would like to briefly refer to Article 20(2) of The Constitution of

India, 1950 which states:

'(2)

*No person shall be prosecuted and punished for the same offence more than once.'* <sup>[2]</sup>

Under

the established principles of Criminal Jurisprudence and the constitutional provisions, an accused once tried and acquitted of an offense cannot be prosecuted a second time for the alleged commission of the same offence.

Order

of Dismissal has the effect of an Acquittal of the Accused, and as such, the Order Dismissing a Complaint would generally record that the Accused stands acquitted of all charges.

What

to do then?

Some

Advocates would opine (and prefer) a Revision Application under Section 397 of the Code before the Hon'ble Sessions Court challenging the Impugned Order passed by the Magistrate dismissing the complaint and acquitting the accused. While some Ld.

Sessions Judges do provide relief(s) and restore the matter; the author begs to differ.

Sec.

401 (4) of the Code reads as follows:

(4)

*Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.*[3]

The

correct procedure of Law, as per the author, is provided under Section 378 of the Code and is termed as 'Appeal against Acquittal'.

Sec.

378 (4) of the code is reproduced as under:

(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.*[4]

As

the order dismissing a complaint entails the acquittal of the accused, against

which a specific Provision exists[5]

in the Code. Thus, the proper procedure is to file an appeal Under Section 378

(4) before the High Court.

The

conclusion was laid out by the Hon'ble High Court at Bombay in *Gajanan P. Chopade v. Mahatma Jyotirao Phule*

*Gramin Bigarsheti Sahakari Patsanstha Maryadit*[6],

wherein the Hon'ble Division Bench comprising of Ld. JJ. Mr. F.I. Rebello and A.A. Kumbhakoni observed:

1. *This matter has been referred by a*

*learned Single Judge for deciding the following question :-*

*"Whether a revision application under section 397 of the Criminal Procedure Code, 1973 for challenging the order of dismissal of the complaint*

*under section 256 of the said Code, 1973 is maintainable or whether the only remedy available against the said order is to prefer an appeal under section 378 of the said Code of 1973?"*

2. *The learned Single Judge has*

*referred the aforesaid question to the Division Bench as the learned Single Judge found that conflicting views were expressed by the learned Single*

Judges

of this Court in that regard.

The reference order dated 1st August

2008 refers to the following judgements delivered by the learned Single Judges

of this Court viz.:

.....

12. For the aforesaid reasons and

considering sections 256 and 378 of the said Code of 1973, we are clearly of the opinion that when an order of acquittal is passed under section 256, the only remedy that the complainant would have is to file an appeal. No revision is maintainable. In our view, the view taken by the learned Single Judge in Mahendra Indermal Borana vs. Anil Shankar Joshi and another, reported in (2004

(1)-Bombay Cases Reporter (Cri)-805) is not the correct view and hence overruled. [7]

The Hon'ble High Court at Bombay has

categorically stated that the only remedy available to a Complainant aggrieved

from an Order of Dismissal of Complaint and Acquittal of the Accused is an appeal, not a revision.

The Hon'ble High Court has in the past

restored matters to the Casefile of the Magistrate wherein plausible reasons were stated justifying the absence of the complainant or the advocate for the complainant

when the matter was called out.

Considering the landmark judgment in

this particular field of Law being Mohd.

Azeem v. A. Venkatesh & Anr.: [8]

3. From the contents of the impugned

order of the High Court, we have noticed that there was one singular default in

appearance on the part of the complainant. The learned Judge of the High Court

observes that even on earlier dates in the course of the trial, the complainant

failed to examine the witnesses. But that could not be a ground to dismiss his

complaint for his appearance (sic absence) on one single day. The cause shown by the complainant of his absence that he had wrongly noted the date, has not been disbelieved. It should have been held to be a valid ground for restoration

of the complaint.

4. In our opinion, the learned Magistrate

and the High Court have adopted a very strict and unjust attitude resulting in

failure of justice. In our opinion, the learned Magistrate committed an error in acquitting the accused only for the absence of the complainant on one day and refusing to restore the complaint when sufficient cause for the absence was

shown by the Complainant. [9]

Wrong noting of date and genuine mistakes on part of the advocate and the Complainant are valid reasons in which the High Court would generally restore the matter.

#### A Word of Caution

The author would like to add that advocates should be wary in trying to move restoration applications before the Ld. Magistrates once the Dismissal Order has been passed.

As discussed above, there is no provision under which a valid restoration of the matter can be passed and trial be continued after an Acquittal order has already been made. Thus, even if a Magistrate restores a matter after dismissal, the same restoration order would be challenged under Revision Under S. 397[10] and be set aside as having been passed sans proper authority.

#### To Summarise

1. If and when Section 138 is dismissed for Want of Prosecution, the same can be validly restored upon oral requests as long as the Ld. Magistrate has not recorded the order on paper.
    - Once the order is recorded, the accused stands acquitted and thus proper challenge would lie under Section 378 (4) before the Hon'ble High Court and not Under Section 397 before the Hon'ble Sessions Court.
    - Do not get a dismissed matter, in which the order has already been recorded, restored by making oral requests. A recorded order for dismissal amounts to an acquittal of the accused and any order of restoration after acquittal would be then challenged under Sec. 397, revision before Hon'ble Sessions Court and set aside as having been passed without authority.
    - Wrong Noting of the date on part of the advocate and/ or the complainant and genuine reasons for not being present on one occasion are valid cases wherein the complaint needs to be restored to the case file of the Magistrate.
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- [1] S. 256, The Code of Criminal Procedure, 1973 (1 of 1974)
  - [2] Art. 20(2), The Constitution of India, 1950
  - [3] S. 401 (4), The Code of Criminal Procedure, 1973 (1 of 1974)
  - [4] S. 378 (4), The Code of Criminal Procedure, 1973 (1 of 1974)
  - [5] *ibid*
  - [6] Cr. W.P. 1930 of 2007, Hon'ble High Court at Bombay, 10.10.2008
  - [7] *ibid*
  - [8] (2002) 7 SCC 726, Mohd. Azeem v. A. Venkatesh and Anr, Para 3 & 4
  - [9] *ibid*
  - [10] S.397, The Code of Criminal Procedure, 1973 (1 of 1974)

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