

(3) The matter was considered by the Lahore High Court in *Karam Singh v. Sardar Singh and others* (3). The plaintiff withdrew his first suit by requesting the Court that his suit might be filed for the time being. Exact words used were "*filhal dakhil dafter ho*" Subsequently on the same cause of action fresh suit was filed and it was held that a fresh suit for the same subject matter was not maintainable as no permission to bring a fresh suit was sought by the plaintiff when withdrawing the suit and no permission expressly or even impliedly was granted by the Court. The aforesaid decision fully covers the case in hand. Counsel for the respondent relied upon the decision of the Madras High Court in *Keesari Santamma v. Kanumatha Reddi Venkatarama Reddi and others* (4). The ratio of this decision is not applicable to the case in hand as that was a case of partition wherein every party can be treated as a plaintiff and could approach the Court for partition of the joint property. The approach of the trial Court that the suit is maintainable is not correct. The first suit having been dismissed without obtaining permission to file fresh suit on the same cause of action debars him from filing a subsequent suit on the same cause of action. Finding of the trial Court on this issue is reversed.

(4) For the reasons recorded above, this revision petition is allowed. The impugned order is set aside. The suit is held to be not maintainable and is dismissed. There will be no order as to costs.

R.N.R.

Before A. L. Bahri and S. S. Grewal, JJ

PROVIDENT FUND INSPECTOR, CHANDIGARH.—Appellant.

versus

M/S SURAJ BHAN DINESH KUMAR COTTON FACTORY AND ANOTHER.—Respondents.

Criminal Appeal No. 433-DBA of 1982.

27th March, 1991.

Code of Criminal Procedure, 1973—Ss. 249, 256—Employees Provident Fund and Miscellaneous Provisions Act, 1952—S. 14-A—Accused summoned on complaint—case adjourned for putting substance of complaint and recording his plea—Personal presence of

(3) A.I.R. 1982 Lahore 138.

(4) A.I.R. 1935 Madras 909.

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*complainant not necessary—Accused not entitled to be discharged—
Complaint not liable to be dismissed for non-appearance of the
complainant.*

Held, that on the date the case was fixed when the impugned order of discharge was passed, the Magistrate was supposed to announce the order on a question on which arguments were heard on the adjourned date i.e., substance of the complaint was required to be put to the accused to know if he was going to admit the allegations or claim trial as required under S. 251 of the Code. For such proceedings, obviously, the personal presence of the complainant was not necessary and the Magistrate was supposed to apply mind to the stage of the case before discharging the accused on the ground of non-appearance of the complainant. (Para 5)

Appeal from the order of the Court of Shri Lakhbir Singh PCS, Judicial Magistrate, 1st Class Sunam, dated 18th January, 1992, discharging and dismissing the accused.

Complaint No. 94 of 26th May, 1981.

Charges under section—14 (A) & 14 (1-A) of the Employees Provident Fund Misc. Provisions Act, 1952.

Sentence : Acquitted.

C. D. Dewan, Sr. Advocate with A. K. Kanwar, Advocate, for the Appellants.

H. R. Bansal, Advocate, for the Respondents.

JUDGMENT

A. L. Bahri, J. (Oral)

(1) *Vide* this order nine criminal appeals (Crl. Appeals Nos. 436-DBA to 444-DBA of 1982) are being disposed of as the complaints filed under section 14-A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 were dismissed on January 18, 1982 when the complainant did not put in appearance but complainant's counsel was present. In Crl. Appeals Nos. 436-DBA, 438-DBA and 439-DBA of 1982 there were two accused; Suraj Bhan and Megh Nath, out of them Suraj Bhan is stated to have died. However, that will not make any difference as the complaint against Megh Nath, co-accused, can still proceed if the appeals are allowed.

(2) Although in the impugned order it is stated that the accused were discharged while dismissing the complaint for non-appearance of the complainant, in fact it will amount to acquittal as contemplated under section 256 of the Code of Criminal Procedure (for short called 'the Code'), which provision is applicable to trial of summons cases by Magistrate (Chapter XX) and hence the appeals would be maintainable.

(3) Since the present complaints related to commission of offences for which sentence is six months, Chapter XX of the Code would be applicable which applies to trial of summons cases by Magistrate. During arguments reference was made to section 249 of the Code in Chapter XIX, which is applicable to trial of warrant cases by Magistrate. Section 249 provides for discharge of the accused in the absence of the complainant before the frame of the charge. Since in the impugned order the accused was stated to have been discharged, it was argued that section 249 of the Code would be applicable and in support of this contention reference was made to the decision of this Court in *Daulat Ram v. Ram Kishan and others*, 1958 CrL. L.J. 1096. On perusal of the facts of the case dealt with it is noticed that the same related to commission of offences under sections 417, 506 and 454 of the Indian Penal Code. To such a case, obviously, provisions of section 249 of the Code were applicable and the aforesaid decision is not helpful in deciding the case in hand.

(4) Section 256 of the Code which is applicable to summons cases is reproduced as under:—

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

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- (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".

Under section 256(1) of the Code, as reproduced above, no doubt, power is given to the Magistrate to acquit the accused where the complainant had not put in appearance after summons had been issued for appearance of the accused on the day appointed or any day subsequent thereto, but this power is controlled by the proviso added thereto. In three categories mentioned therein the Magistrate has been given power to dispense with the attendance of the complainant which are as under:—

- (i) where the complainant is represented by a pleader; or
- (ii) where the complainant is represented by officer conducting the prosecution; or
- (iii) where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary.

In order to apply proviso to Section 256 of the Code to the facts of the case a brief history of the case is required to be noticed prior to the passing of the impugned order.

(5) At the initial stage of the complaint a point was raised regarding payment of court-fee but subsequently the accused were ordered to be summoned. One of the accused was served and put in appearance whereas the case was adjourned for appearance of the other accused. On November 25, 1981 both the accused had put in appearance and the case was adjourned to December 8, 1981. On that day counsel for the accused wanted to argue on notice and the case was adjourned to December 22, 1981. At this stage it may be clarified that this notice contemplated was only to put substance of the complaint to the accused. On the adjourned date i.e. December 22, 1981 arguments were heard and for orders the case was adjourned to January 4, 1982. On that day the presence of the complainant was exempted on an application filed by the counsel as father of the complainant was seriously ill, and the case was adjourned. On the adjourned date the case was taken up at about noon-time and adjourned to be taken up later to await the presence of the complainant. It was at about 3.15 p.m. that the

impugned order was passed when the complainant had not come and the counsel for the complainant had requested for adjournment which was declined. From the narration of the facts as aforesaid, it is quite clear that on the date the case was fixed when the impugned order was passed the Magistrate was supposed only to announce the order on a question on which arguments were heard on 22nd December, 1981, i.e., substance of the complaint was required to be put to the accused to know if he was going to admit the allegations or claim trial as required under section 251 of the Code. In such proceedings, obviously, the personal presence of the complainant was not necessary and the Magistrate was supposed to apply mind to the stage of the case before discharging the accused on the ground of non-appearance of the complainant. In this context reference may be made to decision of this Court in *The State v. Gurdial Singh Gill and others*, (1). This was a case relating to applicability of section 247 of the Old Code equivalent to which is the New Code section 256. It was observed in para 7 as under:—

“The object of this provision of law is to prevent the complainant being dilatory in the prosecution of his case, but it nowhere lays down that in all cases, where the complainant is found to be absent on the date of hearing the case has to be dismissed. On the other hand, it vests discretion in the Magistrate to adjourn the hearing of the case to some other date, or to proceed with the case even if the complainant is not present at the trial of a summons case.”

The ratio of the aforesaid decision was followed by the Kerala High Court in *Bhageerathi Ramamani v. Radhamma*, 1971, Cri. L.J. 115. we have not been persuaded to take a different view in this case.

(6) For the reasons recorded above, these appeals are allowed. The impugned orders are set aside and the cases are remanded to the trial Court for decision according to law. Parties through their counsel are directed to appear in the trial Court on May 1, 1991. Records be sent to the trial Court promptly.

R.N.R.

(1) A.I.R. 1961, Punjab 77.