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**(1981) 08 PAT CK 0001**

**In the Patna High Court**

**Case No :** Criminal Miscellaneous No. 2457 of 1981

Chandra Kishore Choudhary and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

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**Date of Decision :** 10-08-1981

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 107, 111, 112, 113, 115

**Citation :** (1982) 30 BLJR 327 : (1982) PLJR 241

**Hon'ble Judges :** V. Mishra, J

**Bench :** Single Bench

**Final Decision :** Dismissed

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## **Judgement**

V. Mishra, J.—This is an application u/s 482 of the Code of Criminal Procedure, 1973 (hereinafter called "the Code") for quashing a proceeding u/s 107 of the Code pending against the petitioners.

2. On 6.2.1980 the Officer Incharge of Udwantangar Police Station in the district of Bhojpur submitted a report for action against the petitioners u/s 107 of the Code. On 15. 2. 80 the proceeding was started by the Sub-divisional Magistrate. On 4.3.1980 out of 11 persons 7 appeared in the Court and filed vakalatnama. They are petitioner's 5 to 11 here. The remaining 4 persons did not appear on that date as they were in custody. On 10.3.80 those 4 persons filed their vakalatnama in the Court. On this very day a show cause petition was filed on behalf of all the 11 persons. The case was transferred to the file of one Shri K. Pathak, Executive Magistrate. On 9.12.980 an application was filed by these petitioners to say that the proceeding had terminated in terms of Section 116(6) of the Code. The other side filed an application to say that the proceeding had not been terminated. An order was passed on 20.1.1981 to say that the proceeding would continue because 4 persons had not appeared till then. Against that order a criminal revision was filed in the Court of the Sessions Judge by these petitioners which was dismissed. Thereafter they have preferred this application in this Court for quashing the proceedings on the ground that in law

the proceedings have already terminated and any further proceeding would be an abuse of the process of the Court.

3. In course of hearing it has been shown with reference to the file of the lower Court that one Chandra Keshwar Choudhary who was one of those 4 persons had appeared on 12.4.1980. Another person Jagdish Choudhary who had also not appeared earlier, appeared on 25.7.1980 and Bijendra Choudhary appeared on 26. 8. 80. One of those 4, Surendra Choudhary never appeared in person. Out of these 4 only Chandra Kesh-war Choudhary had appeared before 6 months of the order which was passed on 20.1.81. The remaining 2 were within 6 months of 20.1.81 and as stated above, one has not yet appeared.

4. The question is as to when the inquiry would be deemed to have commenced. The inquiry, no doubt, is conducted u/s 116 of the Code. Sub-section (1) of which reads as follows;

When an order u/s 111 has been read or explained u/s 112 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued u/s 113, the Magistrate shall proceed to enquiry into the truth of the Information upon which action has been taken, and to take such further evidence as may appear necessary.

The learned Counsel for the petitioners has argued on the meaning of the clause "when any person appears" occurring in Sub-section (1) quoted above. According to him, appearance through vakalatnama and filing show cause should be taken as sufficient compliance of the requirement of Sub-section (1). In other words, he meant to say that if a person appears through vakalatnama he should be taken to have appeared.

5. The learned Counsel for the other side, however, contends that the appearance contemplated is physical appearance and not the appearance through vakalatnama. For examining this position the scheme of a few preceding sections would be relevant. It is u/s 107 that a Magistrate orders the persons to show cause why they should not be ordered to execute the bond required under that section. Section 111 of the Code gives the requirements of Section 107 with which there is no dispute here. Now comes Section 112 which reads as follows:

If the person in respect of whom such order is made is present in Court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him.

Obviously the above section means the physical presence of the person in Court. If the person noticed physically present, the contents of the notice have to be read over to him or the substance explained. Section 113 of the Code excluding the proviso reads as follows;

If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing

the officer in whose custody he is to bring him before the Court;

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Section 113 contemplates the position in which the person is not himself present. This absence may be because the person has no knowledge of it and also because he may be in custody. Therefore, Section 113 provides for both the contingencies. If the person is not present in Court the Magistrate has to issue a summons requiring him to appear. If the person is in custody the Magistrate has to issue a warrant directing the officer in whose custody he is to bring him before the Court.

6. It would thus appear that Section 113 of the Code requires the physical presence of the person concerned whether he is in custody or he is not In custody. The argument is that when a person is summoned to appear, then if he appears through vakalatnama that should be taken as enough, but whether the law contemplates of such an appearance or not is made clear from Section 115 of the Code itself which runs as follows;

The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace or for good behaviour and may permit him to appear by a pleader.

This clearly shows that the Magistrate has the power to dispense with the appearance of a person called. Obviously, therefore, unless the appearance is dispensed with, the presence required is the physical presence and not the presence through any vakalatnama.

7. Here itself I may also refer to Section 205(1) of the Code, which runs as follows:

Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

This section appears in Chapter XIV-Commencement of Proceedings Before Magistrates, and has, therefore, application in the inquiry under examination also. This also shows that unless personal attendance is dispensed with, the presence required is physical presence. In this context a reference to Section 116(2) of the Code giving the manner of inquiry u/s 116(1) of the Code would also be relevant, which runs as follows;

Such inquiry shall be made, as nearly as may be practicable; in the manner hereinafter prescribed for conducting trial and recording evidence in summons-cases.

The trial in a summons case is regulated by Chapter XX of the Code, and the very first section thereof (Section 251) runs as follows;

When in a summons-case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge.

This also obviously contemplated of physical presence. Of course, if physical presence is dispensed with, the position would be otherwise, but that is not the case here. It is, therefore, clear that in an inquiry u/s 116(1) of the Code, it is the physical presence of a party which is contemplated, and not presence through vakalatnama, unless, of course, the physical presence is dispensed with.

8. In the instant case, the Magistrate has said in his impugned order that 4 persons had not appeared and so the proceeding would continue. Of course, one of those 4 had appeared earlier as I have shown above and two more had also appeared though the period of 6 months had not elapsed since their appearance. About the remaining one person there is no doubt that he had not appeared. In this view of the matter the period of 6 months contemplated u/s 116(6) of the Code had not been completed; rather, the inquiry had not started in accordance with the provisions contained in Sub-section (1) of Section 116. Hence the order that the proceeding had not terminated on 20.19. 81 is quite in accordance with law. I have discussed this point because it had been left open by the Sessions Judge in the revision which had been filed before him.

9. It is thus clear that there is no merit in this application. It is accordingly dismissed. The petitioners, however, want permission to file an application for bifurcation of the proceeding in respect of those who have not appeared or who do not appear. If and when such an application is filed the Magistrate will pass orders in accordance with law.