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Rayappa and ors. Vs. Shivamma

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Court : Karnataka

Decided On : Feb-07-1963

Reported in : AIR1964Kant1; AIR1964Mys1; 1964CriLJ49; ILR1963KAR490; (1963)2MysLJ60

Judge : B.M. Kalagate, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 190, 200, 202, 203, 204, 236, 237, 249, 259, 273, 366, 367, 369, 403, 407, 439, 437 and 494; Indian Penal Code (IPC), 1860 - Sections 107, 406 and 494

Appeal No. : Criminal Revn. Petn. No. 428 of 1962

Appellant : Rayappa and ors.

Respondent : Shivamma

Advocate for Def. : K.A. Swami, Adv.

Advocate for Pet/Ap. : Manohar Rao Jagirdar, Adv.

Judgement :
ORDER

1. The petitioners have preferred this revision petition under Section 439 of the Code of Criminal Procedure, against the order dated 5th October 1962, made by the District and Session Judge, Raichur, in Criminal Revision Petition No. 85/6 of

62. By that order, he confirmed the order of the District Magistrate, Raichur, who restored the complaint dismissed by him to its original number.

2. The respondent made a complaint in the Court of the District Magistrate, Raichur, against the accused who are the present petitioners, complaining that they have committed an offence punishable under Sections 494 and 107 of the Indian Penal Code. This complaint came to be dismissed by the learned Magistrate on 16th July 1962 for non-appearance of the complainant, the effect of which is to discharge the accused under Section 259 of the Code of Criminal Procedure. On 21st July 1962, the respondent made an application stating therein that she, on account of difficulties, could not appear in Court in time and her lawyer was also absent.

The learned Judge accepted the application holding that he recollected that the complainant did approach the Court after the order of dismissal and relying upon the decision reported in : AIR1950 Bom10 , In re Wasudeo Narayan, restored the com-plaint to its original number. The accused took the matter in revision to the Sessions Court, Raichur, who agreed with the conclusion of the learned Magistrate and dismissed the revision. The accused therefore, have preferred this revision petition under Section 439 of the Code of Criminal Procedure, challenging the correctness of the orders of the Courts below.

3. Mr. Jagirdar appearing for the petitionershas contended that the order passed by the Courtsbelow is without jurisdiction inasmuch as there isno provision in the Code of Criminal Procedurewhich empowers a Magistrate to revive a complaintwhich has been dismissed for default. On the otherhand, Mr. K.A. Swamy, appearing for the respondent-complainant has contended that there is noprohibition contained in the Code of Criminal Procedure for entertaining such an application, and,therefore, the Magistrate had the necessary jurisdiction to revive the complaint dismissed. These rivalcontentions were sought to be supported by various-decisions.

4. Before I proceed to examine the various decisions to which my attention was drawn by the respective counsel for the petitioners and the respondent, I would in brief refer to the relevant provisions of the Code of Criminal Procedure. Now,

under Section 190 of the Code of Criminal Procedure, the Magistrate is empowered to take cognizance of any offence upon receiving a complaint of facts which constitute such an offence. Then under Section 200 of the same Code, when the Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and She witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. This is subject to the proviso mentioned below the section. Then, under Section 203,

'The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the Witnesses and the result of the investigation or enquiry if any under Section 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.'

Thus, the Magistrate before whom the complaint has been filed, if, on material placed before him is not satisfied that any offence has been committed, then, he may dismiss the complaint. But if he docs not dismiss the complaint, then he has got to issue process as required by Section 204 of the Code of Criminal Procedure.

5. Now, in this case, what has happened is, that the complaint filed by the respondent-complainant was dismissed for default, and when such a complaint is dismissed, it amounts to a discharge of the accused under Section 259 of the Cri. P. C. Then, under Section 403 of the Code of Criminal Procedure, it is provided that :

'A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been /made under Section 236, or for which he might have been convicted under Section 237.'

The explanation to this section is material and it states :

'The dismissal of a complaint, the stopping of proceedings under Section 249, the discharge of the accused or any entry made upon a charge under Section 273, is not an acquittal for the purposes of this section.'

Thus, if the dismissal of a complaint is not an order of acquittal, then, there will be no bar for fresh trial for the same offence. In other words, the complainant whose complaint has been dismissed for default could institute a fresh complaint and the Magistrate is required to entertain that complaint and proceed according to law as provided by the Code of Criminal Procedure. The question then arises is whether, if there is no bar for a fresh complaint to be filed and received by the Magistrate, the Magistrate is not competent to revive the complaint dismissed for default of the complainant, and on this aspect of the case, there is difference of judicial opinion.

6. Mr. Jagirdar in support of his contention that the Magistrate has no competence or jurisdiction to revive a complaint dismissed relied firstly on the decision reported in AIR 1957 Hyd 26, S.A. Irani v. P.L. Narasimha Sastry. That is a decision of the former High Court of Hyderabad in which it was held that the Magistrate has got no jurisdiction to revive the complaint dismissed. Their Lordships relied upon the decision of the Madras High Court reported in 1936 Mad WN 752(2), Sogmal v. Simhachalam, where it has been held that the Magistrate has no jurisdiction to revive the complaint dismissed for default but have given no reasons for their conclusion. The decision of the High Court of Bombay reported in : AIR1950 Bom10 was cited, but the learned Judges distinguished that decision en the facts and held that the Magistrategot no jurisdiction to revive the complaint dismissed for default, without giving any reasons of their own.

Mr. Jagirdar also relied upon the decision reported in 1933 Mad WN 1429, Ponnammal v. Sataxi Ammal. That also is a judgment of a single Judge Mr. Justice Burn. Here again, no reasons have been given for the conclusion reached by his Lordship, that the Magistrate has no jurisdiction to revive the complaint dismissed. Then reliance was placed upon the decision reported in : AIR1953 All402 , Bhagwan Sahai v. Moti Lal. That is also a decision of a single Judge wherein it has been held.

'There is no provision in the Code of Criminal Procedure for the revival of a complaint which had been dismissed under Section 259, Cri. P. C. or for the setting aside of the order of discharge by the trial Court.'

Therefore, it was held that the Magistrate was not competent to receive an application for setting aside the order of dismissal. In that case, no application seems to have been made for revival of the complaint dismissed, and when a second complaint was filed, the Magistrate proceeded as required by the relevant provisions of the Code of Criminal procedure. This decision is mainly based on the absence of specific provisions in the Code of Criminal Procedure, for revival of the complaint which has been dismissed. But no reference has been made to other provisions of the Code of Criminal Procedure, and the learned Judge agreed with the view taken by the Madras High Court, and held that the Magistrate has no jurisdiction to revive The complaint dismissed.

7. As against this, Mr. K.A. Swamy appearing for the respondent has relied firstly upon a Full Bench decision reported in ILR 28 Cal 652 (FB), Dwarakanath Mondal v. Beni Madhab Banerjee. In that case, a charge of criminal breach of trust under Section 406 of the Penal Code was alleged against the petitioner before the Presidency Magistrate of Northern Division. On 26th of May 1900 the Magistrate dismissed the complaint as the complainant was absent and subsequently an application was made for revival of the complaint to the Magistrate, and the Magistrate accepted the application and revived the complaint.

The accused then applied to the High Court to have the order of revival set aside. On the question involved there being a conflict of authority as to the competence of the Presidency Magistrate to revive a warrant case in which he has made an order of discharge, the matter was referred to the Full Bench. It was held by the Full Bench that the Presidency Magistrate is competent to re-bear the warrant case triable under Chapter XXI of the Code of Criminal Procedure in which he discharged the accused person. Mr. Ghose took the view that:

'Where a Presidency Magistrate, by reason of the absence of the complainant and without pronouncing any opinion as to the guilt or innocence of the accused, strikes off the case, his order is not a judgment within the meaning of the Code

and may be altered or reviewed by him upon application being made, but where the Magistrate after taking evidence, however incomplete that evidence may be, exercises his judgment, and makes an order of discharge, he is not competent to review or alter it, and make further inquiry, without the order of the Superior Court.'

The other Judges did not consider whether the order in question amounted to a judgment. Though the Chief Justice's judgment was very short, Mr. Justice Prinsep considered the question with reference to the relevant provisions of the Code of Criminal Procedure viz., Sections 203, 204, 403 and 404 and held that the Presidency Magistrate is competent to re-hear the warrant case triable under Chapter XXI of the Code of Criminal Procedure, in which he has discharged the accused person. Mr. Justice Ghose expressed the view as stated before, that if the order of dismissal does not amount to a judgment, then, the Magistrate is competent to revive the dismissal. It is thus seen that in Mr. Justice Ghose's view if the dismissal is based on. merit then it is a judgment and if it is not based on merit, then it is not a judgment, and if it is not a judgment, then it would be competent for the Magistrate to revive the dismissal. In ILR 29 Cal 726 (FB), Mir Ahwad Hossein v. Mahomed Askari, another Full Bench of the same Court held that:

'A Magistrate in a warrant case having passed an order of discharge is competent to take fresh proceedings and issue process against the accused in respect of the same offence without an order for further enquiry being passed under Section 437 of the Criminal Procedure Code, having the effect of setting aside such order of discharge.'

Mr. Justice Ghose, who was a member of the Full Bench adhered to his former view. Thus, this Full Bench affirmed the view taken by the earlier Full Bench.

8. Mr. Swamy then relied upon the decision reported in ILR 29 Mad 126, Emperor v. Chinna Kaliappa Gounden. That is also a decision of the Full Bench of that High Court. In that case also there was dismissal of the complaint under Section 203, Cri. P. C. A reference was made by the learned Sessions Judge as to whether it was competent to a Magistrate, after dismissing a complaint under Section 203 of the Code of Criminal Procedure, to rehear the complaint, when such order of dismissal had not been set aside by a higher Court. The Full Bench held with two

Judges dissenting :

'that the dismissal of a complaint under Section 203 of the Code of Criminal Procedure does not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such order of dismissal has not been set aside by a competent authority.'

The judgment of the Full Bench was delivered by the Chief Justice Sir Arnold White, who after consideration of the relevant provisions of the Code, expressed thus:

'The case before us relates only to an order of dismissal under Section 203 and for the purposes of the case it is enough to say that in my opinion it is open to a Magistrate to rehear a complaint which he has dismissed by an order of dismissal under Section 203, although the order has not been set aside by a higher Court.....'

The dissenting view taken by the other Judges mainly relied upon the principle of 'autrefois acquit'. They took the view that if once the accused has been discharged then he should not be brought before the Court once again on the same complaint. The learned Judges seem to have taken the view that on principle there should be no distinction between a case of acquittal and a case of discharge. That seems with respect to be the extreme view which is not warranted by the explanation to Section 403 of the Code of Criminal Procedure.

9. The principal contention of the learned counsel for the petitioners, Mr. Jagirdar, is that though the order of dismissal amounts under Section 259 to a discharge of the accused, it is still a judgment and if it is a judgment, then the accused could not be called before the Court for the same offence. Now, the word 'Judgment' has not been defined in the Code of Criminal Procedure, though there are sections which mention what a judgment should contain. In a case reported in , Hori Ram Singh v. Emperor, their Lordships had to consider what a judgment is meant in criminal cases. Their Lordships referred to various sections in the Code of Criminal Procedure and thereafter stated thus:

'Judgment under the Code means a judgment of conviction or acquittal.'

Even in ILR 29 Mad 126, Chief Justice Sir Arnold White at page 131 held:

'that the order of dismissal under Section 203 is not a judgment within the meaning of Section 369.'

and this opinion was later followed by another Division Bench of the Madras High Court in ILR 31 Mad 543, Emperor v. Maheswara Kondaya.

In order to hold that an order of discharge is not a judgment, their Lordships stated at p. 545 thus:

'The word 'judgment' is not defined in the Criminal Procedure Code, but it is sufficiently clear from Sections 366 and 367 that it is intended to indicate the final, order in a trial terminating in either the conviction or acquittal of the accused.' Thus, their Lordships approved the view expressed by Chief Justice White in the Full Bench decision to which I have made reference. Therefore, it is apparent from these decisions that the order of dismissal is not a judgment. To the same effect is the decision reported in : AIR1950 Bom10 .

Mr. Jagirdar, however has brought to my notice a decision reported in : 1957 CriLJ567 , Mahesh Desai v. Ram Naresh Pandey, for the proposition that the order of dismissal is a judgment, and in particular reliance was placed on the observations appearing at page 395 para 7 of the judgment. In that case, the Public Prosecutor made an application for withdrawal from the prosecution of an accused person before the committal Court, and the committal Court permitted the prosecutor to withdraw the prosecution. And it was contended relying upon the provisions of Section 494 that the committing Magistrate has no jurisdiction to permit the withdrawal. It was with reference to this, their Lordships stated as follows:

'An argument has also been advanced by the learned counsel for the respondents before us by referring to the word 'judgment' in the phrase 'in other cases before the judgment is pronounced' in Section 494, Criminal P. C. as indicating that the phrase 'in other cases' can refer only to proceedings which end in a regular

judgment and not in any interim order like commitment. Here again the difficulty in the way of the contention of the learned counsel being accepted, is that the word 'judgment' is not defined. It is a word of general import and means only 'judicial determination or decision of a Court.' (See Wharton's Law Lexicon, 14th Edn., p. 645). There is no reason to think in the context of this section that it is not applicable to an order of committal which terminates the proceeding so far as the inquiring: Court is concerned. It may be, that in the context of Chap. XXVI of the Code 'Judgment' may have a limited meaning. In any view, even if 'judgment' in this context is to be understood in a limited sense, it does not follow that an application during preliminary inquiry--which is necessarily prior to judgment in the trial -- is excluded.'

10. Emphasis has been laid on the words

'that there is no reason to think in the context of this section that it is not applicable to an order of committal which terminates the proceeding so far as the inquiring Court is concerned',

and it is contended that the dismissal of the complaint terminates the proceedings and that would amount to a judgment. To my mind, their Lordships had no occasion to decide whether the order of dismissal under Section 203 or an order under Section 259 of the Code of Criminal Procedure amounts to a judgment. But we have got an authority of their Lordships of the Federal Court holding that an order of dismissal under Section 203 Criminal Procedure Code is not a judgment, and an order of dismissal under Section 259 amounts to a discharge.

11. Thus, it would appear that the High Court of Bombay, Calcutta and Madras have taken the view that the order of dismissal is not a judgment which view has been approved by their Lordships of the Federal Court. Thus, the majority of the High Courts favours the view that the Magistrate has jurisdiction to revive the complaint dismissed for default under Section 259 of the Code of Criminal Procedure. I am with great respect in agreement with the view taken by the High Court of Calcutta. Bombay and Madras. I have already discussed the relevant provisions of the Criminal Procedure Code leading to the conclusion that under Explanation to Section 403 there is no bar to file a fresh complaint. Further, there

is no prohibition in the Criminal Procedure Code to revive the complaint dismissed for the complainant's default and the majority judicial opinion supports the view.

I, therefore, hold that the Magistrate has jurisdiction to revive the complaint dismissed for default under Section 259 of the Code of Criminal Procedure. In that view of the matter, the other points urged for the respondent do not survive for consideration.

12. Therefore, I hold for the reasons stated above, that the order passed by the Court below is correct and the same is confirmed. This revision petition is consequently dismissed.

13. Revision dismissed.

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