

Pritam Singh Vs. State

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Court : Allahabad

Decided On : Oct-16-1968

Reported in : AIR1969All513; 1969CriLJ1329

Judge : H.C.P. Tripathi and ;B.B. Misra, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 247 and 403

Appeal No. : Criminal Revn. No. 223 of 1967

Appellant : Pritam Singh

Respondent : State

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Keshav Sahai, Adv.

Disposition : Revision dismissed

Judgement :

Tripathi, J.

1. This revision has come up before us on a reference made by our learned brother Seth, J.

2. The facts of the case lie in a narrow compass:--

Applicant Pritam Singh and opposite party Raghubir Singh were employed in the railway workshop at Khanalampura in the district of Saharanpur. Applicant is a Sikh and Raghubir Singh belongs to Scheduled Caste. On 25th March, 1966, at about 9 P. M. it is alleged that the applicant while driving a trolley trampled over the foot of the complainant. When the complainant protested he was beaten by the applicant with a broken axle causing injuries on his chest and waist. Raghubir Singh lodged a report at police station Khanalampura, got himself medically examined and filed a complaint in the Court of the Judicial Magistrate, Saharanpur against the applicant on 26th of March, 1966, under Sections 323 and 504 I. P. C. The Magistrate examined the complainant under Section 200 Cr. P. C. and after taking some evidence under Section 202 of the Code summoned the applicant for 16th of May, 1966 under Section 323 I. P. C. only.

His Reader; however, by inadvertence mentioned the next date for the hearing of the case as 16th April, 1966. in the vernacular order-sheet. Accordingly the case was called on 16th April, 1966, and as the complainant was found absent the complaint was dismissed under Section 247 of the Code of Criminal Procedure. On 16th May, 1966 which was the actual date for the hearing of the case the complainant appeared before the Judicial Magistrate and came to know that his complaint had been dismissed. He thereupon filed a second complaint on the same allegations on 16th May, 1966.

3. On behalf of the applicant it was urged before the Magistrate that as the previous complaint had been dismissed under Section 247 Cr. P. C. the order of dismissal amounted to his acquittal and a fresh complaint on the same facts was barred under Section 403 of the Code,

4. The trial Magistrate repelled this contention, held his previous order as a nullity and entertained the fresh complaint on the basis of which the applicant was tried and convicted for an offence under Section 323 I. P. C. and sentenced to pay a fine of Rs. 60/- in default of which he was directed to undergo one month's simple imprisonment. The learned Civil and Sessions Judge, Saharanpur, on appeal upheld the conviction and sentence of the applicant, hence this revision.

5. Mr. Keshav Sahat learned counsel for the applicant, has argued that the order passed by the Magistrate on 16th April, 1966, amounted to an order of acquittal and the trial Magistrate had no jurisdiction to entertain a fresh complaint on the same facts and the entire proceedings based thereon stand vitiated.

6. Mr. R.K. Shukla, learned counsel for the State, on the other hand has urged that as 16th of April, 1966, was not the date appointed for the appearance of the accused or for the complainant, the Magistrate had no jurisdiction, to dismiss the complaint in default of a complainant's appearance and the order passed by him is a nullity. It is contended that in the interest of justice the Magistrate was fully competent to ignore his previous order and to proceed with the trial of the applicant on the basis of the fresh complaint instituted against him. It is contended further that in any case the order not being one under Section 247 of the Code as the essential ingredient of the aforesaid section, namely the date on which the order is passed should have been the date appointed for the appearance of the accused, being absent it cannot amount to an order of acquittal and the entertainment of a fresh complaint on the same facts by the trial Magistrate was, therefore, not barred under Section 403 of the Code of Criminal Procedure.

7. There can be no doubt that the order which was passed by mistake on a date other than the date of hearing is wholly unsustainable and cannot be supported on any ground. The only question which requires consideration is whether the Magistrate could have ignored that order himself or whether after discovering the mistake he should have referred the case through the District Judge for an order of this Court and waited its result before entertaining a fresh complaint on the same facts. There is a conflict of judicial opinion on this question.

8. The view of the Calcutta High Court is that an order of acquittal under Section 247 of the Criminal Procedure Code, passed by mistake on a date not fixed for the hearing of the case, for absence of the complainant, is a mere nullity, and does not debar the Magistrate from proceeding with the trial on the discovery of the error (*Achambit Mondal v. Mahatab Singh*, ILR 42 Cal 365 = (AIR 1915 Gal 119) by Sharfuddin & Teunon, JJ.).

9. A similar view was taken by another division Bench of the Calcutta High Court consisting of Sir Asutosh Mookerjee and Mr. Justice Sheepshanks in the case of *Etim Haji v. Hamid*, 18 Cri LJ 104 = (AIR 1917 Cal 314) wherein it was held that where the complainant is present in court with his witnesses on the date fixed for trial but being unaware that his case has been transferred to another court fails to appear in that court when the case is called on for hearing later on in the day, Section 247 of the Criminal Procedure Code does not apply.

18. The view taken by the Calcutta High Court in *Achambit Mandal's* case was followed by Bajpai J. in *Mahadeo T. Emperor* : AIR1934 All1025 . In *Mahadeo's* case certain persons were convicted by the trial Magistrate under Section 447 Penal Code and sentenced to a small fine. The Additional Sessions Judge of Benaras made a recommendation to the High Court for quashing the conviction and sentence recorded by the trial Magistrate inter alia on the ground that as the trial court had once dismissed the complaint under Section 247 Criminal Procedure Code and 'as the dismissal amounted to an acquittal the trial Court had no power to revive the case without a reference to the Hon'ble High Court.' It appears that the complaint was first dismissed on 1st August, 1933, by the Tahasildar Magistrate on the ground that on that date neither the complainant nor the accused were present although the case before the Magistrate was not fixed for 1st August, 1933, but for 2nd August, 1933. and it was only by a clerical error that the order sheet stated that the case was to be heard on 1st August, 1933. The parties attended the court on 2nd August, 1933, and the complainant learnt with surprise that the case had been taken up a day before and dismissed. The matter was represented to the trial Magistrate and he after enquiry decided that a mistake had been committed and that the dismissal was made under a wrong impression. He, therefore, ordered on 2nd August, 1933, that the case should proceed and the order of 1st August 1933, be ignored.

On these facts it was held by Bajpai, J. that as the case was not fixed for 1st August, 1933, the parties were not bound to appear on that date. If the Magistrate under a mistake took up the case on a date for which it was not fixed and dismissed the complaint, then the dismissal of the complaint cannot be said to be one under Section 247 Criminal Procedure Code' because 'the words of the

section provide for a dismissal of the complaint in the absence of the complainant on the day for the appearance of the accused, and in order to bring into play the consequences mentioned in Section 247 Cr. P. C. the complainant should be absent on that day.' Accordingly he upheld the conviction of some of the applicants as recorded by the trial Magistrate.

11. The Madras High Court, has however, taken a contrary view in the case of Ekambara Mudali v. Alamelammal, AIR 1930 Mad 1001. In the case of Ekambara the facts were these. A case was filed before a first class Bench, Vellore, on 19th February, 1929, and posted to 26th February. On 26th February it was adjourned to 1st March, On 1st March the complainant was absent and the accused was acquitted under Section 247 Criminal Procedure Code. On the 5th March the complainant's vakil represented that the posting to the 1st was a mistake for the 5th. Thereupon the old complaint dismissed on 1st March was revived on the basis of which applicant Ekambara was tried and sentenced to a fine of Rs. 15/- under Section 352 I. P. C. On revision a Division Bench of the High Court held that 'it must be taken as the procedural law in this province that no subordinate court can sit in revision upon its own record and decide whether, upon a certain view of the facts, its proceedings should be treated as null. If it is thought that a mistake has been committed the matter must be referred to the High Court.' Accordingly the revision was allowed and the conviction and sentence of the applicant were quashed,

12. Again in the case of Kutumbayya v. Lakshminarasimha Rao, AIR 1943 Mad 6 it was held that the Magistrate by allowing the case to be revived after his predecessor had acquitted the accused and closed the case was in effect revising or reviewing his predecessor's order. Subordinate courts have no power of reviewing their own judgments. If they passed a wrong order and wished to set it right they must apply to the District Magistrate to refer the matter to the High Court for correction.

13. Thus while the Calcutta and Allahabad High Courts are of the view that a mistaken order of acquittal purporting to be under Section 247 of the Code passed on a date other than the date of hearing is no order at all but a mere nullity and

can be ignored by the court on the discovery of the mistake, the Madras High Court has taken a view that although such an order is an erroneous order the trial court has no right to rectify the mistake and review its order. In such a case it has no other option but to refer the same to the High Court for the rectification of the mistake.

14. Having given our anxious consideration to the question in issue we find ourselves in respectful agreement with the view taken by the Calcutta and Allahabad High Courts.

15. IN Our opinion there is a clear distinction between aa erroneous order and an order which is a nullity. An order which is passed under a mistake of fact or by a court which has no jurisdiction to pass the order is a nullity. On the other hand an order which is passed not because of a mistake of fact but on account of the misappreciation of facts or law is an erroneous order. In the instant case when the Magistrate passed the order dismissing the complaint under amistake of fact that that was the date for the appearance of the accused and the complainant, he had no jurisdiction to pass that order because that was not the date fixed for such an appearance. That being so, his order amounted to an order passed by a person who had no competence for the aforesaid purpose, and, if an order is passed by a person who is not competent to pass the same for whatsoever reason, the order amounts to a nullity and can be ignored. That is not the case with an order which has been passed by a person who is competent to pass the same but he has exercised his discretion in an erroneous manner. It is in the case of orders which are erroneous in the aforesaid sense that it is necessary for the subordinate court to refer the matter to the High Court for, exercising its revisional jurisdiction for rectifying the mistake. But where the order is a nullity there is no reason why the court, having discovered the mistake be not allowed to ignore it and be compelled to adopt the lengthy process of referring the case to the High Court.

16. An order under Section 247 of the Code can be passed only if the complainant fails to appear on the date appointed for the appearance of the accused or any date subsequent thereto to which the hearing may be adjourned. As 16th of April, 1966, on which date the complaint was dismissed was not the date appointed for

the appearance of the accused the order dismissing the complaint could not, in law, be under Section 247 of the Code as one of the essential ingredients of the aforesaid Section was absent. That being so, the order of 16th April, 1966, could not amount to an order of acquittal and the trial Magistrate was quite competent to entertain a fresh complaint on the same facts against the applicant.

17. No other point was urged in support of the revision.

18. In the result we are of opinion that there is no force in this revision and it is dismissed.

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