Prakash Ramnath Adurkar Vs. Ganesh Waman Athawale

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Court : Mumbai

Decided On : Sep-24-1975

Reported in : (1976)78BOMLR328

Judge : Deshmukh and; Joshi, JJ.

Appeal No. : Criminal Application No. 1074 of 1975

Appellant : Prakash Ramnath Adurkar

Respondent : Ganesh Waman Athawale

Disposition : Appeal dismissed

Judgement :

Deshmukh, J.

1. This is an application by the original accused persona under Article 227 of the Constitution in circumstances which are rather peculiar.

2. The facts that are apparent from the record are that respondent No. 1 Ganesh Waman Athawale filed Criminal case No 235/S of 1974 in the Court of the Metropolitan Magistrate, 26th Court, Borivli, Bombay, on May 28, 1974. Process was issued in the complaint and the case was being adjourned from time to time. On February 7, 1975, which was admittedly the date for hearing of that complaint, both the parties appeared. The casa was not heard but was adjourned. There is some dispute as to the next date of adjournment and this question will be discussed by us a little later.

3. The case of the complainant is that the next date given was February 19, 1975. On that day, viz. February 19, 1975, the complainant as well as the accused persons appeared. However, it was discovered by the complainant that the rojnama maintained by the Court mentioned the date February 18, 1975 as the next date for hearing and the rojnama of February 18, 1975 further read, 'Parties are absent. The accused 'are acquitted.' Some oral application was tried to be made to the presiding Magistrate, but he directed the complainant to go to the higher Court, if there was a remedy. The complainant, therefore, applied for a certified copy of the order of acquittal and obtained a copy on March 8, 1975. While he was preparing to take up further proceedings before the higher Court, he was advised that the order of acquittal passed on February 18, 1975, which was not the date appointed for hearing of the criminal case, is a nullity in law and he can ignore it and can file a fresh complaint and induce the Magistrate to issue process against the accused. On this advice on April 19, 1975, the present case was filed by him and in the penultimate

paragraph of that complaint he did bring these facts to the notice of the Magistrate. That paragraph says that the earlier complaint No. 235/S was adjourned to February 7, 1975. On that day again the case was adjourned to February 19, 1975. But in view of the date having been mentioned as February 18, 1975 on the rojnama the accused came to be acquitted. Both the parties were present in the Court on February 19, 1975. On has sworn an affidavit to that effect. In the circumstances he again charged the accused under sections mentioned in the last paragraph and requested the Court to issue process.

4. Having noticed these facts, the learned Magistrate did not issue process but issued merely a notice for inquiry and it was marked No.: 257/ N of 1975. Both the parties appeared in Court in pursuance of this notice on August 5, 1975.

5. The learned presiding officer who passed the earlier order was transferred in the meanwhile and it appears his successor heard and disposed of this notice on August 5, 1975. We are told that the notice of inquiry was also issued bythe new Magistrate who had assumed office by the time the second complaint came to, be filed. His order is as follows :

ORDER

Heard both the side. The accused persons admit that they had come to the Court on 19-2-1975 as the case was fixed on that date.

It is thus obvious that the hearting of the ease was posted on 19-2-1975 and not on 18-2-1975. So 19-2-1975 was the appointed date for the hearing of the case and the complainant and accused were present on that date. The case was thus erroneously dismissed on 18-2-1975.

Hence I order that under the above peculiar circumstances process be reissued against the accused nos. 1, 2, 8. Process Under Section 328, 504 and 506 and 114 of I.P.C. and Under Section 447, 504 against accused No. 4.

Sd/-S.P. Ghogare. 5-8-1975.

It is against this above order of issue of process afresh that the accused parsons have filed this application under Article 227 of the Constitution.

6. The learned advocate Shri Sabnis for the petitioners-accused says that the order of issue of process on the same facts and circumstances on the basis of a second complaint is clearly unlawful. The Magistrate had no authority or jurisdiction to issue process in the manner he did. His main argument is that the order of acquittal passed on February 18, 1975 is one under Section 256 of the new Criminal Procedure Code. When such an order of acquittal is passed and it is still in force a second prosecution of the accused is not possible in view of the provisions of Section 800 of the new Code. According to him the provisions of Section 256 of the new Code are identical with the provisions of Section 247 of the old Code and the provisions of Section 300 of the new Code are identical to the provisions of Section 403 of the old Code. A Division Bench of this Court has already taken a view that where an order of acquittal has been passed under Section 247 of the old Code and that is in force, a second trial of the accused on the same facts and circumstances, may be on the basis of a second complaint, is not lawful and cannot be undertaken. Mr. Sabnis relies on the judgment

in the case of Shankar v. Dattatraya A.I.R. [1920] Bom. 408 : 81 Bom. L.R. 795 S.C.. It is a Division Bench decision. The facts of that case were that a complaint was filed on April 11, 1927 against the accused under Section 102 of the Presidency Towns Insolvency Act for he being an undischarged insolvent had obtained credit from the complainant. Summons was issued but was not yet served but the date for the appearance of the accused notified in the summons was April 28, 1927. As the summons was not yet served, it was natural that the accused would not remain present, but on that day the complainant was also absent. The moment the complainant was found absent the complaint was dismissed and the accused was acquitted under Section 247 of the old Code. On April 29, the complainant appeared before the Court and requested the Court to set aside the order on the ground that he was unable to remain present on April 28, when the application of the complainant was rejected. After waiting for the whole year on May 2, 1928 the complainant filed again a fresh complaint before another Magistrate who issued process. The question was whether such a process could be issued in the facts and circumstances of the case when the earlier complaint resulted in an acquittal by the order under Section 247 and that order of acquittal was still in force.

7. The learned Judges point out that the bar is to a second 'trial' and the word 'tried' used in Section 403 under the Code does not necessarily mean tried on merits. It includes an acquittal when the complainant remains absent after once the process is directed to be issued. The language of Section 247 of the old Code as well as Section 256 of the new Code is clear. The very first sentence of that section says 'If the summons has been issued on complaint, and on the day appointed for the appearance of the accused,...' the further consequences in that section which must follow are that in the absence of the complainant on the day of appearance of the accused, the Magistrate shall notwithstanding anything contained in the old Code, acquit the accused unless of course for some reasons he thinks it proper to adjourn it and appoint a further day for the appearance of the accused. In view of the undisputed facts of that case, the learned Judges of the Division Bench found that process was issued in that case. The date was fixed for appearance of the accused and on the date so fixed the complainant remained absent and the Magistrate passed an order of acquittal under Section 247. Not only that but the Magistrate refused to review his own order.

8. We need not consider here the question whether the Magistrate has or has no right to review his own order. In fact that question never arose before the earlier Bench. Having waited for one year, the complainant found another Magistrate but perhaps without disclosing facts obtained an order of issuance of process. In the circumstances the Division Bench clearly lays down that second issue of process was clearly unlawful as there was already a 'trial' and a second trial on the same facts and circumstances for the commission of the same offence was clearly barred by the provisions of Section 408 of the old Code.

9. Mr. Rane appearing for respondent No. 1-complainant does not dispute at all the legal position laid down by the earlier Bench. His only argument is that on facts of the present case which are entirely different, the ratio of that judgment is not at all attracted to the facts and circumstances as found by the trial Magistrate in this case. Mr. Rane pointed out that when the notice of inquiry was called out for hearing on April 5, 1975 the parties appeared before the new Magistrate. They were heard and the order which is already quoted above was passed by the Magistrate. That order shows that the accused as well as the complainant were both under the impression

that February 19, 1975 was the date appointed for the hearing of the case and they both appeared on that day. The conclusion drawn therefore is that February 18, 1975 was not the date fixed for hearing or the date appointed by the Magistrate and the complaint was erroneously dismissed and the order of acquittal was thus erroneously passed by the Magistrate. In the circumstances the learned Magistrate issued process as is obvious.

10. The main argument is that the provisions of Section 256 of the new Code or Section 247 of the old Code would be attracted only when the Magistrate acts upon a date which is given to the parties to appear before him. If the date given as in the present case was February 19, 1975 and the record was erroneously maintained by the Court clerk, so far as the parties are concerned and in the eyes of law February 18, 1975 was not a day appointed for hearing of the case at all. On that day the Magistrate had no jurisdiction to call out the earlier case and to pass an order which would affect the rights of the complainant. In other words he says that the order of acquittal passed on February 18, 1975 is a nullity in law and could be safely ignored by the Magistrate who entertained the second complaint and issued process. For the application of Section 256 of the new Code two circumstances must exist. A summons must have been issued on complainant, and on the day appointed for the appearance of the accused or any data subsequent thereto to which the hearing must have been adjourned, the complainant must remain absent. Unless both these things co-exist the Magistrate's order even though it purports to be one under Section 256(2) cannot be one under that section. It is an unlawful order, a nullity and could be ignored.

11. He draws support for this reasoning from a judgment of the Allahabad High Court which in turn draws again reliance from the judgment of the earlier Bench of that Court as well as the Calcutta High Court. In Pritam Singh v. State : AIR1969All513 a Division Bench of the Allahabad High Court has taken the view that an order of acquittal under Section 247 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. Where the date on which the complaint is dismissed is not the date appointed for the appearance of the accused the order dismissing the complaint cannot, in law, be under Section 247 as one of the essential ingredients of the section is absent. That being so, the order cannot amount to an order of acquittal and in such a case the Magistrate is quite competent to entertain a fresh complaint on the same facts against the accused.. The learned Judges point out two judgments of the Calcutta High Court. They are Achambit v. Mahaiab : AIR1915Cal119 . and Elim Haji v. Hamid A.I.R. [1917] Cal. 314 where similar view has been taken. There are also earlier judgments of the Allahabad High Court itself. The learned Judges after considering those judgments agreed with the view of the Allahabad High Court as well as the Calcutta High Court and held that the order purporting to be one under Section 247 of the old Code but passed on a date not appointed for the appearance of the accused is not in law an order under Section 247 of the old Code and is a nullity and could be ignored by the same Magistrate or by his successor. The issuance of process on a subsequently filed complaint was accepted as proper.

12. We are in respectful agreement with that view. A contrary view appears to have been taken by the Madras High Court in Kutumbayya v. Lakahminarasimha Rao A.I.R. [1943] Mad. 6. The Madras High Court took a view that the subsequent Magistrate has no right to issue process even though the earlier order of acquittal may be wrong. Unless it is revised by the High Court, the same Court cannot re-issue process and as

if review its own order.

13. Looking at the propositions on the first principles and bearing in mind that the procedural law has been enacted for the purpose of doing justice between the parties, we are satisfied that the view taken by the Allahabad High Court and the Calcutta High Court is better. If it were to be held that an order which purports to be one under Section 247 of the old Code or Section 256 of the new Code, as the case may be, has got to be first revived by the High Court and set aside before which another complaint cannot be entertained, it will amount to the conclusion that the order is a good one until it is set aside. When the case was never fixed before the Court for orders, can the Court call out the case at all much less pass order thereon? If a Magistrate were to pass orders in this manner in his chamber on several matters not on the board, will it be obligatory for the parties to first approach higher Courts, get the orders set aside and then revive the old complaint or file a new one? In other words will it be fair to ask parties to under-take proceedings for the purpose of approaching higher Courts when an obvious mistake has been committed by the trial Magistrate on passing an order on a date when the matter was never fixed for hearing at all before him? Such mistakes can occur some times bona fide and on rare occasions by the mischief played by the Court staff. In either case the better view is to treat such an order as a nullity and if the Magistrate is satisfied that the complainant requires to be heard as prima fade an offence appears to be committed, he may issue process and dispose of the matter on merits. The earlier Bench dealing with Shankar's case was never called upon to consider a situation of the present type. That judgment undoubtedly contains a good law but the factual situation in the present case being entirely different the ratio of that judgment is not attracted by the facts and circumstances of the case before us. Where the facts are what we found, on which the order of the learned Magistrate is based and which findings we accept, the better course is to treat the earlier order as nullity and entertain the old complaint or the new one, as the case may be. A prayer under Section 300 of the new Code for entertaining a fresh complaint would arise only if there is a valid order under Section 256 and not otherwise. Whatever the nature of the earlier order it is not one in law under Section 256 and therefore the bar of Section 403 does not arise.

14. This being our view, we think that the order passed by the Magistrate on August 5, 1975 issuing process is quite lawful and need not be interfered with. We therefore reject this application and discharge the rule.