

CALCUTTA HIGH COURT

Queen-Empress

Vs

Dolegobind Dass

(F W Maclean K.C.I.E, C.J.)

18.12.1900

JUDGMENT

F.W. Maclean, K. C.I.E, C.J.

1. This is an application by the accused to have the order of commitment of the Chief Presidency Magistrate, Mr. Pearson, discharged, on the ground that he had no jurisdiction to make the commitment, as a previous order of discharge had not been set aside by any competent authority. The facts are as follows On the 23rd of July last the accused was arrested on the charge of having stolen a registered letter from the Post Office, and on the 25th July was brought up before a Bench of Presidency Magistrates, charged with offences under Section 381 of the Indian Penal Code and Section 52 of the Indian Post Office Act, 1898. He was discharged on the same day, the Bench considering that the evidence was insufficient to warrant "a conviction," by which I presume they meant a commitment. On the 6th September the accused was re-arrested on substantially the same charge, and on the 17th October he was committed for trial upon further and fresh evidence --a very salient feature in the case--to the present sessions. The point for determination is, whether the commitment is valid, and I shall confine my remarks to the case immediately before me, viz., the case of a commitment by a Presidency Magistrate.

2. It is clear that the discharge of the 25th July could in no sense operate as an acquittal of the accused, the case being a warrant-case. This has not been disputed. Consequently, when the case was brought before Mr. Pearson, he was bound to hear it under Section 252 of the Code, unless it can be shown that he had no jurisdiction to hear it until, as is contended, the order of the 25th July had been set aside by the High Court. "There is no express provision in the Code to the effect that the dismissal of a complaint shall be a bar to a fresh complaint being entertained so long as the order of dismissal remains unreversed" see per Banerjee, J., in *Nihatan Sen v. Jogesh Chundra Bhuttaeharjee*¹ I agree in that. If, then, there be no express provision in the Code, what is there to warrant us as implying or in effect introducing into the Code a provision of such serious import, a provision which, in certain cases, would render Section 252 of the Code almost nugatory. In the absence of any other provision in the Code to justify such an implication--and

my attention has not been directed to any such provision except Sections 436 and 437, which do not apply to Presidency Magistrates--I can appreciate no sound ground for the Court so acting; were it to do so it would go perilously near to legislating, instead of confining itself to construing the Acts of the Legislature.

3. Moreover, it seems contradictory to say that, whilst the order of discharge in a case such as the present does not amount to an acquittal, it is yet necessary to have it discharged by the High Court before either the same or another Magistrate of co-ordinate jurisdiction can hear the complaint under Section 252. Neither necessity nor convenience warrants such a conclusion; there is nothing in the Code which compels it: and the balance of the decided cases appears to be against it. The cases of *Hari Singh v. Dansih Mahomed*² [decided so far back as 1873], the clear dictum of Markby, J., concurred in by Prinsep, J., in *Empress v. Donnelly*³ *Queen-Empress v. Puran*⁴ and *Virankutti v. Chiyamu*⁵ support the view of the Crown. These were not cases relating to Presidency Magistrates, but in the ease of. *Opoorba Kumar Sett v. Probod Kumary Dassi*⁶ the precise point now under discussion was decided by Prinsep and Trevelyan, JJ., and decided against the contention of the present accused.

4. On the other side, reliance is placed upon the cases of *Nilratan Sen v. Jogesh Ghundra Bhattacharjee*⁷ and *Grish Chunder Roy v. Dwarka Dass Agarivallah*⁸ The former was not concerned with the case of a fresh commitment by a Presidency Magistrate and the argument therefore based upon Sections 436 and 437 of the Criminal Procedure Code, which do not apply to Presidency Magistrates, and which argument as I read the case was the foundation of that judgment (see page 988 per Banerjee, J.) can have no application to the case now before the Court. I notice that O'Kinealy, J., in that case rests his decision upon "the constant practice of this Court," as to which one might feel some doubt, having regard to the cases I have referred to. The case, however, of *Grish Chunder Roy v. Dwarka Dass Agarwalluh* (1897) 1 I.L.R. 24 Cal. 528(Supra) is distinctly in point, and I respectfully dissent both from its reasoning and its conclusion. It is fallacious to treat the second hearing as an appeal from the decision on the first hearing, and to say there is no provision in the Code for such an appeal. This argument overlooks the fact that the Magistrate is bound to hear the case under Section 252, unless the Code precludes him from so doing until the previous order of discharge has been set aside. But, as I have already pointed out, the Code does not do that either expressly or by necessary implication. Again, the learned Judges distinguish the case of *Opoorba Kumar Sett v. Probod Kumary Dassi* (1893) 1 C.W.N. 49(Supra) on the ground that there the order for the issue of fresh process was made by the same Magistrate who had discharged the accused. But what difference can that make if the real principle be that no fresh process can be issued unless and until the previous order of discharge has been set aside by the High Court. If the principle be that the previous order of discharge must be set aside by the High Court--and that is the principle contended for--before fresh process can issue, it would amount to an absurdity to say that the same Magistrate can issue such process, though the order has not been set aside, but that another Magistrate of co-ordinate jurisdiction cannot do so, but must wait till the order has been set aside.

5. There is one feature in the last two cases I have mentioned which, qua the facts but not the principle, distinguishes them from the present: in both these cases the order for issue of fresh process was made on the same evidence. That is not the case here: and, upon this point, I only desire to add that no Presidency Magistrate ought, in my opinion, to rehear a case previously dealt with by a Magistrate of co-ordinate jurisdiction upon the same evidence only, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice. Whilst fully recognizing that we must follow the law and practice as laid down in the Indian Codes, it is perhaps not wholly immaterial to mention, looking to the source from which those Code have in a great measure originated, that the view I have laid down above is consistent with that which holds in Criminal Courts in England.

6. For these reasons I refuse the application to quash the commitment.

Cases Referred.

1(1896) I.L.R. 23 Cal. 988

2(1878) 20 W.R.C.R. 46

3(1877) I.L.R. 2 Cal. p. 411

4(1886) I.L.R. 9 All. 85

5(1884) I.L.R. 7 Mad. 557

6(1893) 1 C.W.N. 49

7(1896) I.L.R. 23 Cal. 983

8(1897) 1 I.L.R. 24 Cal. 528