DELHI HIGH COURT

B.D. Sethi

Vs.

V.P. Dewan (Delhi)

Criminal Revision No. 256 of 1967.
(Mr. V. D. Misra, J.)

12.11.1970

JUDGMENT

V.S. Misra, J.

1. The short question to be decided in this case is has the Magistrate Jurisdiction to revive the complaint which has been dismissed for default of appearance of the complainant and re-summon the accused who has been discharged under section 259 of the Code of Criminal Procedure ?

2. V.P. Dewan complainant had filed a complaint under section 500, Indian Penal Code, against Banarsi Dass Sethi and Raj Kumar Sethi and the Magistrate issued process against the accused. On February 13, 1967, which was one of the dates of hearing before the Magistrate, the complainant was about with the result that the Magistrate dismissed the complaint and discharged the accused under section 259 of the Code of Criminal Procedure and passed the following short order :-

> "Accused with counsel present. Complainant has not appeared despite repeated calls. It is now 2.15 P.M. The case is under section 500, Indian Penal Code, which is compoundable and non-cognizable. The case is dismissed under section 259, Criminal Procedure Code. Accused are discharged."

Shortly after the order had been passed the complainant appeared and made an application for restoration of the case, which was accepted and the following *ex parte* order was passed:

> "The case is revived. Let the accused be summoned for 3rd March, 1967."

The accused filed a revision petition against the order reviving the complaint to the Court of Session. The learned Additional Sessions Judge made a recommendation to

this court that the said *ex parte* order reviving the complaint and summoning the accused be set aside.

3. When this matter came up before one of us it was found that there was a conflict of opinion on this question between various High Courts and it was desirable that pronouncement by a larger Bench of this question. It is in these circumstances that the matter has come up before us.

4. The contention of the learned counsel for the petitioners is that the Magistrate, after he had pronounced his judgment dismissing the complaint and discharging the accused had no jurisdiction to review the same and revive the complaint. According to the learned counsel, the Magistrate had become *functus officio* alter pronouncing the judgment and could not review the same and could correct clerical errors only. It is thus contended that the only remedy open to the complainant was to make a fresh complaint and request the Magistrate for fresh proceedings under section 200 onwards of the Code of Criminal Procedure.

5. The learned counsel for the State contends that the order of the Magistrate dismissing the complaint and discharging the accused, under section 250 of the Code of Criminal Procedure was not a 'judgment' and thus the Court had jurisdiction to revive the complaint and resummon the accused. Chapter Xxvi of the Code of Criminal Procedure deals with "judgment". Section 366 of the Code deals with the mode of delivering judgment by a Criminal Court. Section 367 of the Code deals with the language of the judgment and contents of the same. It lays down the unless otherwise expressly provided by this Cod", the judgment will contain the point or points for determination, the decision thereon and the reasons for the decision and shall also be signed and dated by the Presiding Officer in open court at the time of pronouncing it. Section 368 of the Code deals with the sentence of death. Section 369 of the Code lays down that no Court, when it has signed its judgment, shall alter or review the same except to correct a clerical error. The rest of the sections in this Chapter are not relevant for our purposes.

6. The Code of Criminal Procedure does not anywhere define what judgment is. However, section 367 of the Code lays down as to ^ what shall be the contents of a judgment. According to this section, the judgment should contain the point or points for determination in the case before the Court and the decision on those points The Court is also required to give reasons why it has reached a particular conclusion. It is only when these requirements are fulfilled that a particular order may be called a

judgment. Section 370 of the Code makes a special provision for the judgments of the Presidency Magistrate's Court and lays down in detail what has to be recorded by him These provisions show that before it can be said that a particular order amounts to a judgment of a Criminal Court, it must contain the points for determination, the decision of the Court on those points and reasons for coming to that decision. In other words, it must result in either acquittal or conviction of the accused person. In *Dr. Hori Ram Singh v. Emperor,* [1] the federal Court had an occasion to consider as to what amounts to a Judgment under the Code of Criminal Procedure. It was held that "judgment in a criminal case means a judgment of conviction or acquittal." It approved the decisions of the Madras High Court reported in *Emperor v. China Kaliappa Goundan*[2] and *Emperor v. Maheshwara Kondaya,* [3] holding that 'a judgment is intended to indicate the final order in trial terminating in either the conviction or acquittal of the accused " In *Kuppuswami Rao v. The King,*[4] the Federal Court after referring to their previous decision in Dr. Hori Ram Singh's case held-

> "In our opinion, the term judgment' itself indicates a judicial decision given on the merits of the dispute brought before the Court. In a criminal case it cannot cover a preliminary or interlocutory order".

A Full Bench of the Calcutta High Court in *Dwarka Nath Mondul v. Beni Madhab* [5] while discussing the question whether an order of discharge amounted to a judgment or not, observed as under :-

> "Nowhere I would state that in my opinion such an order is not a judgment within the terms of Chapter XXVI. Section 367 explains what constitutes 8 judgments and it clearly indicates to my mind that a judgment within that Chapter is only a judgment of acquittal or of conviction. In the case of an order of discharge, or in the case of an order dismissing a complaint, it is expressly required by the law that the Magistrate shall state his reasons, and I, therefore take it that. if it had not been so required, it would have been unnecessary for a Magistrate to state any reason for his order. Consequently in this point of view, the order would not constitute a judgment. And it seems to me also, that the expression 'judgment' itself indicates some final determination of the case which would and it once for all, such as an order of "conviction or acquittal."

The Patna High Court in *Raghubans Parsad and another v. State,* [6] held as under:-

> "An examination of the various provisions of the Code will show that every order passed by the Magistrate under the Code is not a judgment within the meaning of section 369. in order to constitute judgment there must be an

> investigation of the merits of the case on evidence and after hearing the arguments. Where, however, the order is passed summarily without consideration of the entire evidence as in the case of the order of discharge, it will not obviously amount to a judgment."

It was also held that the order of discharge could not be regarded as the final pronouncement of the Magistrate because a fresh complaint might be made on the same facts notwithstanding the order of discharge In *Mr. Harbai v. Ray Premji and another,* [7] *Rayappa and others v. Shivamma,*[8] · and *State v. Prakash Chandra Agarwalla,* [9] the above decisions were followed and it was held that an order of discharge did not amount to judgment.

7. On behalf of the petitioners reliance has been placed on a Single Bench decision of the Punjab High Court in *Bajrang Singh v. Ram Kishan and another.*[10] The learned Judge without discussing the above- mentioned authorities and placing reliance on an earlier Single Bench decision of the same High Court reported in *Babu Ram v. Ramji Lal and others,* [11] held-

> "The view of this Court is, and has been consistent that a Magistrate has no power of reviving a complaint dismissed in default under section 259 of the Criminal Procedure Code"

In Babu Ram's case the learned Judge was dealing with proceedings under section 145 of the Code of Criminal Procedure Because of the absence of Babu Ram, his application under section 145 of the Code was dismissed Babu Ram filed another similar application which was proceeded with and decided against him. Thereafter he challenged the second order in revision on the ground that the dismissal of his previous application was illegal and the original proceedings remained pending, and so the order passed on the second application was not valid. The Learned Judge, while agreeing that the dismissal of previous application due to absence of the applicant was not valid, held that order could be set aside only if that had been challenged in revision, and that the Magistrate had no jurisdiction to review that order and set it aside. *Shakuntla Singh v. State of Uttar Pradesh,*[12] . which held that the Sessions Judge was not competent to alter or review his judgment once signed except for correcting a clerical error, was referred to. Section 366 of the Code was also quoted. There was no reference to the question whether the impugned order amounted to judgment and to the various afore-mentioned authorities This judgment also did not relate to the order passed under section 259 of the Code Another authority referred to by the learned Judge in Bajrang Singh's case is *Bhagwan Sahai v. Moti Lal.*[13] . Again

in this judgment there is no decision of the question whether the order of discharge under section 259 of the Code of Criminal Procedure amounts to a judgment or not. In *Keshav Lal v. Gaveria,* [14] there was no question of any order of discharge under section 259 of the Code of Criminal Procedure. Here a learned Single Judge of that Court had dismissed a revision petition in the absence of the petitioner and a question had arisen whether it could be restored. This case is of no help to either party.

8. The learned counsel for the petitioner has referred to an unreported judgment of this Court in Criminal Revision No. 33 of 1968 (Ava Singh v, Arijan Dass) decided on 19th February, 1968. The petitioner cannot derive any help from this decision. In this case the complaint was in respect of an offence for which the procedure laid down under Chapter Xx of the Code for the trial of summons-cases had to be followed. Section 247 of the Code, which forms part of this Chapter, lays down that if the complainant does not appear the Magistrate shall acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other day. Under these circumstances the dismissal of the complaint though expressed to be under section 259 of the Code. was in fact under section 247 and the result was that the accused stood acquitted. The observations made about section 259 of the Code of Criminal Procedure were, therefore obiter dicta.

9. As long as the order of the Magistrate does not amount to a Judgment" or a "final order" there is nothing in the Code of Criminal Procedure prohibiting the Magistrate from entertaining a fresh application asking for the same relief on the same facts or from reconsidering that order. During the course of proceedings a Magistrate has to pass various interlocutory orders and it will not be correct to say that he has no jurisdiction to re-consider them. For examine the orders exempting the presence of the accused, or refusing it are not final orders. A Full Bench of the Jammu and Kashmir High Court in *Mirza Mohd. Afzal Beg and others v. State of Jammu and Kashmir,* [15] held that it was not valid to contend that the Magistrate was absolutely bound by an order on an interlocutory matter and had no right to pass a different order unless his earlier order was set aside by a superior Court in appropriate proceedings since the principle applicable to judgment does not apply to interlocutory orders and the Magistrate was entitled to pass a different order at a later stage.

10. We are in respectful agreement with the view that the order of discharge of an accused under section 259 of the Code of Criminal Procedure does not amount to a judgment under the Code. The Magistrate thus will be competent to revive the complaint and re-summon the accused after setting aside the order of discharge.

11. The result is that the recommendations made by the learned Additional Sessions Judge are not accepted. The parties are directed to appear before the Chief Judicial Magistrate on 3Oth November, 1970.

Recommendation not accepted

Cases Referred.

1. A.I.R 1939 F.C 43.

2. , (1906) 29 Mad 126.

3. (1908) 31 Mad. 543.

4. AIR 1949 F.C. 1.

5. ILR 28 Calcutta 653

6. AIR 1961 Patna 397.

7. AIR 1939 Sind. 193.

8. A.I.R 1964 Maysore 1

9. AIR 1970 Orissa 171.

10. AIR 1967 Punjab 361.

11. AIR 1964 Punjab 444.

12. AIR 1962 Supreme Court 1208

13. AIR 1953 Allahabad 402

14. AIR 1952 Rajasthan 50.

15. AIR 1960 J & K. 1.