
(1998) 09 MP CK 0052

In the Madhya Pradesh High Court

Case No : Criminal R. No. 644 of 1997

Baghmal Jhadulal Jain and Others

APPELLANT

Vs

Bhaiyalal Raghuvanshi

RESPONDENT

Date of Decision : 15-09-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 244, 245(1), 245(2), 247, 258
Penal Code, 1860 (IPC) — Section 147, 148, 149, 380, 454

Citation : (1999) 2 MPLJ 293 : (2000) 3 RCR(Criminal) 53

Hon'ble Judges : R.P. Gupta, J

Bench : Single Bench

Advocate : Atul Awasthy, for the Appellant; Kiran Mehta, for the Respondent

Final Decision : Allowed

Judgement

R.P. Gupta, J.

This revision-petition is directed against the order dated 9-6-1997 of First Additional Sessions Judge, Chhindwara in Criminal Revision No. 35/93 whereby the learned Additional Sessions Judge set aside the Order dated 10-3-1993 passed in Criminal Case No. 475/91 by the Court of Judicial Magistrate First Class Chhindwara dropping the complaint proceedings against the accused (present petitioners).

The relevant facts in brief are that the present respondents filed a complaint against the 8 petitioners who are officers and employees of Central Co-operative Bank, Chhindwara, alleging the offences punishable under Sections 454 380 147 148 read with 149, Indian Penal Code.

Initially, this complainant had filed a complaint against these respondents (present petitioners) for the same offences as far back as 1st December, 1986 on the allegations that on 17-11-1981, the complainant had gone to Chhindwara from his village Seonipanmoti. His wife was at home. These accused along with 13 to 15 other persons came to his house. They came in Jeeps with a tractor.

They entered the house and broke open the room in which gram, Urad, Makka and paddy were stored and in a locked Almirah, there were ornaments. Respondent No. 1 ordered for breaking open the lock. The accused persons took away the above mentioned grains and ornaments. Details of grains were given, as worth Rs. 14,150/- and details of ornaments as worth Rs. 27,500/-. The allegations were that the accused persons committed this theft and took away the goods of the complainant in spite of objection of his wife and of his son. The complainant filed a report with the police on the same day but no action was taken by the police. The complainant filed a complaint on 13-1-1982 against these accused before the Area Magistrate. The Magistrate took cognizance vide order dated 5-9-1983 for offences punishable under Sections 454 and 380, Indian Penal Code against these accused and registered it as complaint Case No. 379/83. The respondents in the complaint case (i.e. the petitioners herein) were summoned to stand trial. They appeared in the Court and the matter was pending for pre-charge evidence on 29-11-1986. On that date, the complainant and his witnesses could not appear before the Magistrate and the complaint was dismissed, and these accused were discharged. It was asserted that the complainant suddenly became ill on 28-11-1986 and he could not come to the Court nor could bring with him his witnesses nor he could inform his counsel to appear in Court. So he filed a fresh complaint on 1-12-1986. This fresh complaint has been registered as Case No. 475/91. The respondents in the complaint were summoned and after adducing evidence, at the stage of the fresh complaint, the respondents filed an objection that the fresh complaint was barred under the provisions of Sections 245(2) 247 and 258 of the Code of Criminal Procedure and, in any case, it was an abuse of the process of the court and so the fresh complaint should be dismissed and proceedings be dropped. This plea was accepted by the learned Magistrate who dropped the proceedings vide order dated 10-3-1993 and again discharged the accused persons. The complainant approached the Sessions Court in revision-petition. The First Additional Sessions Judge vide impugned order dated 9-6-1997 set aside that order holding that the offences were cognizable and non-compoundable and so a fresh complaint about them can be filed even after the discharge of the accused persons in the earlier complaint which was in the absence of the evidence and because the witnesses could not appear and the fact that the Magistrate could not review his own order of dismissal, did not bar filing of same complaint on the fresh ground and the Magistrate can take cognizance. The cognizance had already been taken. The complaint could not be dismissed because of discharge of the accused in the prior complaint.

In the present revision-petition before this Court, the petitioners-accused urge that the second complaint was an abuse of the process of the Court. The first complaint had been filed in January, 1982 and the accused (respondents therein) had appeared. The complainant did not bring his witnesses and he did not come himself to the Court. The counsel also did not appear. The Court, therefore, had no option but to take the view that the complainant had no evidence to produce

and then closed the case and discharged the accused. Thereafter, filing of a fresh complaint on the same accusation would be an abuse of the process of the Court. In fact it should be taken as barred.

It may be noticed that a sum of Rs. 24,773.62 was recoverable by the Corporation Bank from the complainant as loan and interest for the loan taken by this complainant from the Bank. The recovery demand certificate had been issued against him and an order for recovery had also been passed by the authorised officer of the Corporation Bank. The demand certificate had been served on him and the demand order was received by him on 15-11- 1981.

The order dated 29-11-1986, whereby the accused were discharged, observed that no further opportunity for producing witnesses could be given to the complainant, recorded absence of complainant and his counsel and any witness and presence of the accused persons. The Magistrate noticed that no steps have been taken for service of notice. The witnesses also did not turn up to produce evidence and the opportunity was also given to produce entire evidence on 29-11-1986. The complainant had taken sufficient opportunities earlier. Since he was not present and no witness was present, it was clear that he was not interested in proceeding with the matter. So no further opportunity could be given to him. So, in the absence of evidence, the matter was closed and the accused were discharged.

After the fresh complaint, when the accused were re-summoned and appeared and raised objection vide their application dated 27-7-1989, the Magistrate accepted that plea but the Sessions Court reversed that order, resulting in re-trial of these accused-petitioners.

A perusal of the impugned order of the Sessions Court makes it clear that the Additional Sessions Judge technically considered the provisions of Sections 249 and 258, Criminal Procedure Code observing that although Section 249 deals with absence of complainant in a case being tried as warrant case, the provision could be attracted when the offences were non-cognizable or compoundable. The offences involved in this case were not compoundable and they were cognizable. Section 258 only pertains to trial of summons cases. However, it appears clear that the learned Additional Sessions Judge has not tried to construe the true nature of the order of discharge dated 29-11- 1986, pertaining to the initial complaint. Construction of true nature of that order was essential to reach a conclusion whether a fresh complaint should be allowed to continue. This apart, from the facts if a complaint is made in abuse of the process of the Court, it can be dismissed. The stage at which the Magistrate passed the order dated 10-3-1993 in the second complaint was that the accused persons had put in appearance and they objected to the fresh complaint or taking cognizance of that complaint vide their application dated 27-7-1989. The order sheet in the second complaint shows that the order for summoning the accused for the alleged offences was passed on 22-11-1988 and some of the accused appeared on 11-1-1989 and others on 27-2-1989. The application u/s 245(2) was moved by

the accused before the second complaint was fixed for pre-charge evidence.

The Sessions Court in passing the impugned order, has proceeded as if in the earlier proceedings the accused were discharged even before any opportunity was given to them or the complaint was dismissed before the accused could appear. The Sessions Court failed to take notice of the fact that the order-sheets in the previous complaint-proceedings show that a number of opportunities had already been given to the complainant to produce his witnesses but he had not produced them. He had not even examined himself. Hence, it appeared clear that he was duly interested in the appearance of the accused time and again before the Magistrate. His attitude thus was an attitude of misusing the process of the Court to persecute the accused and not to prosecute them. It should be considered that in a complaint case, which is tribal as a warrant case trial starts, after the accused have appeared, with the pre-charge evidence. Pre-charge evidence is a part of the trial. If pre-charge evidence is completed and the accused are charge-sheeted firmly, the trial proceeds further with an opportunity of cross-examination of the already recorded witnesses, given to the accused, and the complainant to examine any further witness he may desire to do and then the statement of the accused and the opportunity of defence and then the arguments and judgment. The first stage in such a trial is pre-charge evidence. If a charge is framed after pre-charge evidence and the complainant failed to produce any witness, even for cross-examination, and fails to produce himself, is the court only a silent spectator and has to call the public prosecutor to take charge of the case and then to issue warrants for the witnesses including the complainant and then to decide which other witnesses to summon or to ask the public prosecutor to decide. This could be in a very rare case of a grave offence where the complainant may collude with the accused with grave injury to public purpose. But in every case the Magistrate is not required to take that course. The complainant came to the Magistrate. He got the accused summoned by producing preliminary evidence. He still is in charge of the case and had a responsibility to the Court to bring his witnesses to the trial court or take steps to bring his witnesses. If he does not bring them, he does so at his peril. It is common knowledge that the complaint, after summoning the accused persons are being used as weapons of persecution. The trial Magistrate has a duty to see that such thing does not happen in his Court. Of course, he (the complainant) may give reasons for his inability to produce the witnesses or may say that he will produce the witnesses on a particular date, in spite of steps having not been taken. The complainant will get a reasonable opportunity, but when he has already got opportunities, he cannot be allowed to approach the Court again to say that he got diarrhea a day before. He did not say whom he wanted to bring with him and why they did not come on the date fixed. In the case in hand, at the time of the first complaint, on 29-11-1986, the Magistrate was confronted with the fact as to what he should do when, even after the opportunities to the complainant, he was neither appearing nor bringing his witnesses nor taking any steps for the same. It is in such a situation that Section 245(2), Criminal

Procedure Code becomes applicable. This section may be quoted here :

"245. When accused shall be discharged - If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

We are not concerned with clause (1) but we are concerned with clause (2). It was independent of Clause (1). In fact, it could be an independent provision in this type of warrant trial. The words "Nothing in this section shall be deemed to prevent" means only this that the procedure which is to be gone through for clause (1), need not be gone through for an order passed in Clause (2). The stage has to be after taking of evidence as referred u/s 344, Criminal Procedure Code. So after the evidence, if the Magistrate may find that no case against the accused is made out, then, he will discharge them. Clause (2) of Section 245, Criminal Procedure Code however provides that even when the evidence is not taken, as referred to in Section 244, Criminal Procedure Code, the Magistrate is empowered to discharge the accused at any period or stage, for reasons to be recorded. If the complainant is preventing the trial to proceed by not bringing his witnesses or evidence and not taking any steps for the same and not appearing himself at all as a witness and his counsel is not appearing in spite of affording opportunities, that will be a reason covered by Clause (2). The reasons are recorded by the Magistrate in his order dated 29-11-1986 which would be covered by this clause. So, it was discharge u/s 245(2), Criminal Procedure Code in the first complaint.

Alternately in this case, we can also say that when an opportunity has been given to the complainant to produce the evidence and he fails totally, it will be a case covered by first clause also. Section 244, Criminal Procedure Code directs the Magistrate to proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. This only means that opportunity has to be given to the complainant to produce evidence for that purpose. The Magistrate, under Clause (2) of Section 244, Criminal Procedure Code issues summons to witnesses directing them to appear. The complainant has to take steps for this. The Magistrate does not become the prosecutor. So, if opportunity is given and is not availed of, it will fall within the scope of "evidence" referred to in Section 244, Criminal Procedure Code. It will be "nil evidence".

In any case, the order in the earlier complaint, discharging the accused, was an order u/s 245(2), Criminal Procedure Code. The net result had to be in the absence of the evidence, that the charge was groundless. No other conclusion could be reached. The mere fact that the word "charge is groundless" is not used, in the 1st Order, does not mean that the order was not u/s 245(2),

Criminal Procedure Code. In fact the proper construction of the words "would be that" in the absence of the evidence in spite of the opportunities, charge was groundless.

The Bombay High Court in the case of 1984 Cri.L.J. 513, Luis v. Mahadev and Kerala High Court in the case of Manmohan Malhotra Vs. P.M. Abdul Salam and Another, titled Manmohan v. P. M. Abdul Salam, held that the Magistrate has power to discharge the accused under Clause (2) of Section 245, Criminal Procedure Code even if no witnesses are examined u/s 244, Criminal Procedure Code. Same conclusion was reached in 1987 Cri.L.J. 555, Agadhu v. Baban (Orissa High Court) as also in Nabaghan Malla and Others Vs. Brundaban Malla, .

The question is as to what is the effect of this order passed in the previous complaint? The complainant has come forward in the second complaint with a case that he became ill. The ailment is dysentery. A medical certificate was filed by the complainant along with the second complaint. It was issued by one Dr. S. K. Bindra, a Private Practitioner of Chhindwara. It is dated 30-11-1986 and records that this complainant was under his treatment from 28-11-1986 to 30-11-1986 and has fully recovered on 30-11-1986. The ailment was D.V.D. the prescription slip is also attached, purported to be dated 28-11-1986. The symptoms were given as loose motion and vomiting. The medicine prescribed are Inj. Otcira and Siquil, Tab. Enteroquaradine and Cap. Enterostrep. So this complainant was with the Doctor at Chhindwara on 28-11-1986 and on 30-11-1986. He was able to come to the Doctor but why not able to come to the trial Court, inasmuch as, the trial Court was also at Chhindwara is a strange factor. He could not come to the trial Court on 29- 11-1986. The trial Magistrate in the second case did not critically examine these aspects of this medical certificate. The only statement of the complainant was that he was suffering from vomiting and dysentery, from 28- 11-1986. But he could come to the Doctor on that date from his village Seonipranmoti. The Doctor was not examined to prove the ailment. The complainant in summoning the accused in the second complaint, appears to have made simple statement that he was ill with dysentery. This was hardly a ground to be accepted for non-producing the witnesses in the earlier complaint. So it was not a very special case which could show that injustice to the complainant was done and fresh complaint was not permitted.

The effect of discharge of the accused u/s 245(2), Criminal Procedure Code in the previous complaint, was in fact a discharge after trial. The question is what is the legal effect. It could not be called an acquittal but could the complainant be permitted, in the interest of justice to start a case afresh on one pretext or the other. The fresh complaint was certainly an abuse of the process of the Court. It may be noticed that the Additional Sessions Judge had noticed that the accused persons were executing an attachment order in respect of the recovery of the dues of the Co-operative Central Bank, Chhindwara of which they were officers and employees. This background also adds to the inference that the second

complaint was an abuse of the process of the Court. The complainant would be debarred, by the Court in the interest of justice, from proceeding with such a fresh complaint or lead evidence therein. Such a discharge earlier would be a sufficient ground to discharge these accused in the fresh complaint, if at all cognizance was taken. So even the second order of discharge u/s 245(2), Criminal Procedure Code could not be faulted with in law. The earlier order was not u/s 247 or 258, Criminal Procedure Code. The learned Additional Sessions Judge has gone wrong on that aspect. The impugned order cannot be sustained. It may not be strictly held, in law, that the fresh complaint is barred by Section 300, Criminal Procedure Code as in strict sense, we may not call the order of discharge as an acquittal but in practical effect, the trial had taken place, the complainant was given opportunity, he did not avail of it, further opportunity was refused and at the stage of the consideration of the stage, the only option for the Court was to discharge the accused u/s 245(2), Criminal Procedure Code. Even in such cases, the complainant cannot be allowed to re-agitate the matter against those very accused. In any case, this Court would look into that fact that there was no sufficient case for not producing the evidence in the earlier complaint before the trial Court. Therefore, the fresh complaint is by way of an abuse of the process of the Court. The trial Magistrate was right in preventing such an abuse. The impugned order cannot be sustained.

Revision is allowed. The impugned order of the learned Additional Sessions Judge is set aside and the order of the Magistrate is restored, although for slightly different and detailed reasons as noted above.