

(1995) 12 BOM CK 0006

In the Bombay High Court

Case No : Criminal Writ Petition No. 1232 of 1988

Jagmohan Aggarwal and Others

APPELLANT

Vs

B.S. Hebbar, Assistant Collector of Customs and Others

RESPONDENT

Date of Decision : 14-12-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 245, 249, 482

Citation : (1996) 5 BomCR 400

Hon'ble Judges : R.G. Vaidyanatha, J

Bench : Single Bench

Advocate : D.A. Nalawade, app, Mohan Pungalua, for the Appellant; T.R. Rao, for the Respondent

Final Decision : Allowed

Judgement

R.G. Vaidyanatha, J.—This is a petition directed against the order dated 27th June, 1988 in Criminal Revision Application No. 18 of 1987 on the file of the Additional Session Judge, Greater Bombay. Heard both the sides.

2. Few facts which are necessary for the disposal of this petition are as follows:

The Assistant Collect of Customs filed a complaint in the Court of the learned Magistrate in Criminal Case No. 33/CW of 1985 against the petitioner and other accused for an offence under Customs Act. The allegation is about non-payment of customs duty on imported yarn.

The accused contested the case. The case was being posted for evidence before charge since it was a warrant case on the basis of a private complaint. On 19-8-1986 the learned Magistrate found that no witnesses were present inspite of number of opportunities and accordingly dismissed the complaint and discharged the accused.

It appears the prosecution did not challenge the said order by approaching the Sessions Judge or the High Court. It appears about two months later, a fresh

complaint was lodged before the same Magistrate which was registered as Criminal Case No. 122/CW of 1986 alleging same offence against the accused on the same set of facts which had been alleged in the earlier complaint. On the basis of the second complaint, the learned Magistrate ordered the issue of process against all the accused persons.

After receiving the process, some of the accused filed a Criminal Revision Application before the Additional Sessions Judge in Criminal Revision Application No. 18 of 1987. After hearing both the sides, the learned Sessions Judge dismissed the Revision Application. Being aggrieved by that order, these petitioners have come up with the present petition.

3. The learned Counsel for the petitioners contended that the learned Magistrate had no jurisdiction to entertain the second complaint and to issue process on the same set of facts without any additional material or without any special case being made out and therefore, order of issue of process is illegal and without jurisdiction. On the other hand, the learned Additional Public Prosecutor appearing for the Customs Department contended that the Order of the learned Magistrate in issuing the process on the second complaint is perfectly justified on the facts of this case. He further submitted that since the petitioners had already availed remedy invoking the powers of revision u/s 397(1) of the Code of Criminal Procedure, the present petition which is purported to be a second revision is barred in view of section 397(3) of the Code of Criminal Procedure.

4. A perusal of the Roznama of the learned Magistrate shows that the case came up for evidence on 14-2-1986 and the case was adjourned to 27-3-1986. Even on that day, no witness was present and the case was adjourned to 28-4-1986. Even on that day no prosecution witness was present. The case was adjourned to 26-5-1986. But since the Magistrate was on leave, the case was adjourned to 21-7-1986. On that day, the learned Magistrate again noticed that no witness was present and passed an order that the case is finally adjourned to 19-8-1986.

On 19-8-1986, the learned Magistrate observed that no witness was present inspite of the fact that case being adjourned as a final chance. Hence, he proceeded to pass an order discharging the accused u/s 245(2) of the Code of Criminal Procedure.

Admittedly, the prosecution did not challenge this order by filing a revision either before the Sessions Judge or the High Court and therefore, the Order dated 19-8-1986 discharging the accused became final.

5. Then, it appears, the complainant filed a second complaint on 29-10-1986. Short question is whether this second complaint was maintainable in law and whether the learned Magistrate was competent to take cognizance and issue process.

As has been pointed out by the Apex Court in *Pramatha Nath Taluqdar Vs. Saroj Ranjan Sarkar*, , the second complaint can be entertained only on certain

grounds. The Apex Court has pointed out that the second complaint can be entertained only in exceptional circumstances viz., where the previous order was passed on an incomplete record or it was manifestly absurd, unjust or foolish or where new facts have come into existence. The learned Sessions Judge has observed in the impugned Order that the Order of the learned Magistrate dismissing the complaint on 19-8-1986 was unjust and contrary to law. The learned Sessions Judge observed that the complaint should have been dismissed u/s 249 of the Code of Criminal Procedure and not u/s 245(2) of the Code of Criminal Procedure. He therefore, found fault with the Order of the learned Magistrate in discharging the accused. The reasoning of the learned Sessions Judge cannot be accepted. Section 249 applies when the Magistrate wants to dismiss the complaint for the absence of the complainant. In the present case, the Magistrate has not dismissed the complaint for the absence of the complainant u/s 249 of the Code of Criminal Procedure. The learned Magistrate has dismissed the complaint on the ground that inspite of number of opportunities and the case being adjourned as a last chance, no witness was present and therefore, he was discharging the accused u/s 245(2) of the Code of Criminal Procedure.

6. Section 245(1) of the Code of Criminal Procedure provides for discharging the accused after recording evidence. But section 245(2) of the Code of Criminal Procedure provides that even at an earlier stage, the Magistrate can discharge an accused if he considers that the charge is groundless. In a warrant case on a private complaint evidence must be produced for framing charge. If no evidence is produced inspite of number of opportunities and the case being adjourned as a last chance, there is nothing wrong in the learned Magistrate discharging the accused u/s 245(2) of the Code of Criminal Procedure. When there was no evidence before the Magistrate it clearly amounts to the charge being groundless.

7. The reasoning of the learned Sessions Judge attacking the order of the learned Magistrate does not appeal to me. Further no appeal or revision was filed before the learned Sessions Judge regarding the order dated 19-8-1986. The learned Sessions Judge was not sitting in Appeal or Revisions against that order while passing present order. In fact, the order dated 19-8-1986 had become final since no appeal or revision was filed against that order. The learned Sessions Judge disposed of the Revision Application on 27-8-1988, nearly two years after the order dated 19-8-1986, which had become final. Hence, it was not open to the learned Sessions Judge to sit in Judgment over the correctness or otherwise of the order dated 19-8-1986 when the prosecution had not challenged that order.

8. It is not a case where the learned Magistrate himself felt that his earlier order dated 19-8-1986 was bad or foolish and he therefore entertains the second complaint. The learned Sessions Judge could not add anything to the order of the learned Magistrate. The order of the learned Magistrate is cryptic and a one sentence order on the second complaint ordered issue of summons without giving any reasons. Hence it is not open to the learned Sessions Judge to

surmise as to on what ground the learned Magistrate has issued process on the second complaint.

9. Admittedly, there is no provision in the Code of Criminal Procedure for restoration of a complaint which is dismissed for default. The Apex Court has made it clear in two decisions reported in Maj. Genl. A.S. Gauraya and Another Vs. S.N. Thakur and Another, and Bindeshwari Prasad Singh Vs. Kali Singh, .

In the first case the Apex Court has clearly observed that when the complaint has been dismissed for non-appearance of the complainant or there is an order discharging the accused, it is a final order and the Magistrate cannot exercise any inherent jurisdiction to restore the case. It is further observed that the second complaint is permissible if it could be brought within the limitations imposed by the Apex Court in Pramatha Nath Taluqdar Vs. Saroj Ranjan Sarkar, .

In the second case, the Apex Court has again reiterated the position that the second complaint can lie only on new facts or on previous facts only if a special case is made out.

In the present case, no new facts are mentioned in the second complaint. Further, no special case is made out in the second complaint seeking process for the second time on the same set of facts.

10. Now coming to the merits of the case, we have already seen that the prosecution had taken 4/5 adjournments for producing witnesses and the case was adjourned as a last chance and no witness was also produced and the case ended in discharge in 1986. We may also take notice of the fact that the incident of evasion of duty was of the year 1981-82. Now we are at the end of 1995. 13 years have elapsed after the incident in question. During 1986 itself, when the incident was four years old, the prosecution was not able to produce even a single witness though number of opportunities were given. Now after 13 years, it may not be possible for the prosecution to produce witnesses. Many of the witnesses must have been retired and again many of them may not even be alive. Hence, having regard to the distance of time this is not a fit case where retrial should be ordered on a second complaint. If the second complaint is allowed to continue, it would be sheer humiliation and harassment to the accused and it would be sheer abuse of the process of the Court.

11. The learned Public Prosecutor for the Customs is right in his submission that a second revision is not maintainable when the party has availed the right of revision by approaching the Sessions Judge in view of the Statutory bar under it when the earlier complaint came to be dismissed. Hence, in my view, in order to prevent the abuse of the process of the Court and in the interest of justice interference of this Court is necessary u/s 482 of the Code of Criminal Procedure.

12. In the result, the petition is allowed. The order of the learned Sessions Judge and also the order of the learned Magistrate issuing process in the second complaint against the accused are hereby quashed. Rule made absolute.