

(2013) 07 GAU CK 0020
In the Gauhati High Court
Case No : Criminal Petition No. 29 of 2013

Santosh Kumar Keyal

APPELLANT

Vs

Durga Dutta Biswanath (M/s.) and Others

RESPONDENT

Date of Decision : 20-07-2013

Acts Referred:

Citation : (2013) 4 GLT 531

Hon'ble Judges : C.R. Sarma, J

Bench : Single Bench

Advocate : K. Agarwal, for the Appellant; P.K. Sharma, for the Respondent

Judgement

C.R. Sarma, J.—This criminal petition, filed u/s 482 Cr.P.C. read with Article 227 of the constitution of India, is directed against the order, dated 07.06.2012, passed by the learned Sub-Divisional Judicial Magistrate (Sadar), Sivasagar, in CR Case No. 158/2010, whereby the learned SDJM(S), while reviewing the order, dated 29.05.2012, passed by him, u/s 256 Cr.P.C., set aside the order of acquittal passed in favour of the accused person, hereinafter called the petitioner and restored the complaint aforesaid to file.

I have heard Mr. K. Agarwal, learned Counsel, appearing for the petitioner and Mr. P.K. Sharma, learned Counsel, appearing for the respondents. The respondents, as complainant, filed a complaint case u/s 138 of the Negotiable Instrument Act, 1881 (In short, N.I. Act), against the petitioner and the learned SDJM, after taking cognizance of the offence u/s 138 of the N.I. Act, issued summons to the petitioner. On his appearance, the particulars of offence was explained on 21.01.2011, to which the petitioner pleaded not guilty and the case was posted for evidence. On 29.05.2012 i.e. the date fixed for evidence, the complainant i.e. the respondent was found absent without any steps and accordingly, the learned SDJM dismissed the complaint under 256 Cr.P.C. and acquitted the accused person. On 7.6.2012, the learned Counsel, appearing for the complainant, filed an application for restoration of the complaint to file and the learned SDJM, without issuing any notice to the petitioner, relying on the

decision, held in the case of Mohd. Azeem Vs. A. Venkatesh and Another, restored the complaint to file and issued notice to the accused person.

Aggrieved by the said order of restoration, the accused person, as petitioner, has come up with this case.

Mr. K. Agarwal, learned Counsel, appearing for the petitioner, has submitted that the learned SDJM, after passing the order of dismissal of the complaint, resulting acquittal of the accused, ceased to have any jurisdiction to review his own order and restore the complaint to file, inasmuch as he became functus officio. It is also submitted that the learned SDJM committed gross error and illegality by reviewing his own order without any authority of law and as such, the impugned order can not stand in the eye of law.

In support of his contention, the learned Counsel, appearing for the petitioner, has relied on the following cases:

- (i) Maj. Genl. A.S. Gauraya and Another Vs. S.N. Thakur and Another,
- (ii) S. Rama Krishna Vs. S. Rami Reddy (D) by his LRs. and Others, and
- (iii) Parimal Chakraborty Vs. Ranjit Debnath and Others,

2. Mr. P.K. Sharma, learned Counsel, appearing for the respondents, referring to the decision, held in the case of Mohd. Azeem (supra), has submitted that in view of the judgment and order, passed by the Supreme Court, in the said case, the learned SDJM committed no error by setting aside the order of dismissal of the complaint and restoring the same to file. It is also submitted that, as there is no provision of filing of second complaint, the respondent i.e. the complainant, had no other alternative but to approach the trial Court for restoration of the complaint to file and as such, the learned SDJM rightly restored the complaint to file.

In support of his contention, the learned Counsel, appearing for the respondents, has relied on the case of Mohd. Azeem (supra).

3. Having heard the learned Counsel, appearing for both the parties and considering the impugned orders, I find that the complaint case was fixed on 29.05.2012, for evidence. On the said date, the learned SDJM (S), Sivasagar, due to absence of the complainant, dismissed the case, u/s 256 Cr.P.C. and acquitted the complainant by passing the Mowing order:

29.05.12 Complainant absent and accused is present

Fix. 7.7.12 fix evidence.

Later on,

Heard learned advocate for accused. It is submitted that inspite of the order dated 19.12.2011, the complainant is absent today without any steps and no further adjournment need be granted.

Considering the submission so made and also in view of non-appearance of complainant the complaint is dismissed u/s 256 Cr.P.C. and accused is acquitted.

The case is, thus, disposed of.

Fix 1.2.12 for evidence.

S/d illegible 29.5.12 Sub-Divisional Judicial Magistrate (Sadar) Sivasagar

From the above order, there is no difficulty in understanding that the learned SDJM acquitted the accused person i.e. the petitioner, after dismissing the complaint for non-production of evidence, by the complainant. Subsequently, on 07.06.2012, i.e. after dismissal of the said case, the complainant filed a petition for restoration of the complaint to file and the learned SDJM, by passing the following order, restored the complaint to file:

7.6.12

The complainant side has filed hazira and heard Ld. Advocate for complainant Sri S.K. Baruah on petition No. 1991/12 filed for restoration of this complaint to file.

Considering all the relevant provisions of law. The Ld. Counsel for complainant has submitted that there is no legal bar in restoring such complaint to file and more so when the default is for one day only and it is settled that due to wrong entry of date fixed in advocate's record, steps could not be taken.

In support of his plea, Ld. Counsel has placed reliance in the case of Mohd. Azeem Vs. A. Venkatesh and Another, wherein the Hon''ble Apex Court in para 4, observed thus-

In our opinion, the Id. Magistrate and the High Court have adopted a very strict and unjust attitude resulting in failure of justice. In our opinion, the Ld. Magistrate committed an error in acquitting the accused only for absence of the complainant on one day and refusing to restore the complaint whereas sufficient cause for absence was shown by the complainant.

In view of the above observation, I am of the view that the present complaint needs to be restored to file which I accordingly do. The complaint stands restored to file. Issue notice to accused.

Fix 21.6.12 for N/O.

S/d illegible Sub-Divisional Judicial Magistrate (Sadar) Sivasagar

From the said impugned order, it is found that the learned SDJM reviewed his earlier order of dismissal of the complaint and restored the same to file, that too without hearing the accused person, who was acquitted by the earlier order of dismissal. The said order is found to be passed on the basis of the observation, made in the case of Mohd. Azeem aforesaid.

4. Admittedly, the order, which has been reviewed, was passed u/s 256 Cr.P.C.

Section 256 Cr.P.C. reads as follows:

Non-appearance or death of complainant-(1) If the summons has been issued on complaint and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the magistrate shall notwithstanding anything hereinbefore contained, acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

From the said provision, prescribed by S. 256 Cr.P.C. it is clear that the Magistrate, in the event of absence of the complainant, without any steps, on the date of appearance of the accused, or the date of hearing, has two options i.e. either to acquit the accused or to adjourn the case to some other date, if he thinks proper. However, if the complainant is represented by Advocate or any other officer conducting prosecution or where the Magistrate feels that the personal attendance is not necessary, the Magistrate may dispense with the attendance of the complainant and proceed with the case. In the present case, the complainant was neither represented nor did he take any steps for his absence. The learned Magistrate also did not dispense with the attendance of the complainant. Hence the attendance of the complainant was required. Therefore, the trial Magistrate dismissed the case and acquitted the accused person.

5. Law is well settled that a Judicial Magistrate, who passes an order u/s 256 Cr.P.C., resulting the acquittal of the accused person, has no jurisdiction to review his own order, inasmuch as after passing the order of dismissal, he ceases to have jurisdiction over the matter.

6. In the case of Maj. Genl. A.S. Gauraya (supra), the Supreme Court, referring to the observation, made in the case of Bindeshwari Prasad Singh Vs. Kali Singh, recorded the following observation made in the said case.

Even if the magistrate had any jurisdiction to recall this order, it could have been done by another judicial order after giving reasons that he was satisfied that a case was made out for recalling the order. We, however, need not dilate on this point because there is absolutely no provision in the code of Criminal Procedure of 1898 (which applies to this case) empowering a magistrate to review or recall an order passed by him. Code of Criminal Procedure does not contain a provision for inherent powers, namely, Section 561-A which, however, confers these powers on the High Court and the High Court alone. Unlike Section 151 of Civil Procedure Code, the subordinate criminal courts have no inherent powers. In these circumstances, therefore, the learned magistrate had absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the respondent was to move the Sessions Judge or the High court in revision. In fact,

after having passed the order dated November 23, 1968, the Sub-divisional Magistrate became functus officio and had no power to review or recall that order on any ground whatsoever. In these circumstances, therefore, the order even if there be one, recalling order dismissing the complaint, was entirely without jurisdiction. This being the position, all subsequent proceedings following upon recalling the said order, would fall to the ground including order dated May 3, 1972, summoning the accused which must also be treated to be a nullity and destitute of any legal effect. The High Court has not at all considered this important aspect of the matter which alone was sufficient to put an end to these proceedings. It was suggested by Mr. D. Goburdhan that the application given by him for recalling the order of dismissal of the complaint would amount to a fresh complaint. We are, however, unable to agree with this contention because there was no fresh complaint and it is now well settled that a second complaint can lie only on fresh facts or even on the previous facts only if a special case is made out. This has been held by this Court in *Pramatha Nath Taluqdar V. Saroj Ranjan Sarkar*. For these reasons, therefore, the appeal is allowed. The order of the High court maintaining the order of the magistrate dated May 3, 1972 is set aside and the order of the magistrate dated May 3, 1972 summoning the appellant is hereby quashed.

7. As held by the Supreme Court, so far as the accused is concerned, dismissal of a complaint for non-appearance of the complainant or his discharge or acquittal on the same ground is a final order and in absence of any specific provision in the code, the Magistrate can not exercise any inherent jurisdiction. The inherent jurisdiction, provided by Section 482 Cr.P.C., can be exercised by the High Court to prevent abuse of the process of any Court or to secure ends of justice. The revisional power is vested with the Sessions Judge or the High Court and the code i.e. the statute has not provided any inherent jurisdiction or power on the Magistrate to review his own order.

8. In the case of *S. Rama Krishna (supra)*, the learned Magistrate passed the order of acquittal u/s 256(1) Cr.P.C. due to non-appearance of the complainant. An appeal being preferred against the said order of acquittal, the High Court set aside the order of acquittal and interfered with the said order, passed by the trial Court. The Supreme Court setting aside the order, passed by the High Court, observed that the order passed by the Magistrate under S. 256(1) being an order of acquittal the High Court is to exercise its jurisdiction keeping in view the limited role it had to play in the matter.

9. In the case of *Parimal Chakraborty (supra)*, a complaint was instituted against the petitioner u/s 420 /406 IPC and the learned Magistrate issued process u/s 420 /468 IPC. Due to absence of the complainant on two consecutive dates, when the case was pending for appearance of the accused persons, the learned Magistrate dismissed the complaint. Thereafter, the complainant appeared and filed an application for restoration of the complaint and the learned Magistrate, by the order dated 22.1.1998 restored the complaint to file. Aggrieved by the

said order of restoration, the accused person, as petitioner, preferred a revision before the High Court. A learned Single Judge of this Court observed that in the absence of any inherent power, the learned Magistrate had no jurisdiction to recall the order of dismissal and as such, the order of recalling/restoration was without jurisdiction.

10. In the present case, while restoring the case to file, the learned Magistrate referred to the following observation made by the Supreme Court, in the case of Mohd. Azeem (supra):

In our opinion, the learned Magistrate and the High Court have adopted a very strict and unjust attitude resulting in failure of justice. In our opinion, the learned magistrate committed an error in acquitting the accused only for absence of the complainant on one day and refusing to restore the complaint when sufficient cause for the absence was shown by the complainant.

11. In the case of Mohd. Azeem (supra), the petitioner filed a criminal complaint for an alleged offence u/s 138 of the N.I. Act, against the respondent in the Court of Metropolitan Magistrate, Secunderabad. The petitioner was prosecuting the complaint diligently and had been attending the Court on all dates excepting one because according to him he had wrongly noted the date for hearing. Due to his absence on the date fixed for trial, the learned Magistrate dismissed the complaint and acquitted the accused person. Aggrieved by the order of dismissal, the petitioner preferred an appeal u/s 378(4) Cr.P.C. before the High Court and the High Court, by the impugned order, dated 24.07.2001, dismissed the appeal, for which the petitioner approached the Supreme Court.

The Hon"ble Supreme Court observed that there was one singular default on the part of the complaint and the cause shown by the complainant of his absence that he had wrongly noted the date should have been held to be a valid ground for restoration of the complaint. With the said observation, the Supreme Court set aside the order, dated 22.06.2001, passed by the learned Metropolitan Magistrate and the order, dated 24.07.2001, passed by the High Court and directed restoration of the complaint to its file.

The Supreme Court observed that the learned Magistrate and the High Court adopted very strict and unjust attitude resulting in failure of justice and that the learned Magistrate committed error in acquitting the accused only for absence of the complainant on one day and refusing to restore the complaint when sufficient cause was shown.

12. In the said judgment, the Supreme Court did not lay down the law that a Judicial Magistrate, after passing an order u/s 256 Cr.P.C. i.e. the order of acquittal, has the power of review of his own order. No doubt the High Court and the Sessions Court as revisional Court and the High Court in exercise of jurisdiction u/s 482 Cr.P.C. are vested with jurisdiction to interfere with such orders passed u/s 256 Cr.P.C.

Therefore, in my considered opinion, the Supreme Court, while observing that the learned Magistrate committed error in acquitting the accused for absence of the complainant only on one day, indicated that the learned Magistrate committed error by dismissing the complaint for absence of the complainant on one day only and that High Court committed error by refusing to restore the complaint. As revealed from the facts, indicated in the said case, no petition for restoration of the complaint was preferred before the learned Magistrate. The complainant, against the order of dismissal of the complaint and the acquittal of the accused, preferred an appeal before the High Court. As no application for restoration was filed before the Magistrate, there was no question of restoration of the complaint by the learned Magistrate.

13. A Careful reading of the above stated judgment passed in Mohd. Azeem (supra), clearly indicates that no observation was made against the Magistrate with regard to the refusal to restore the complaint. The said observation regarding refusal to restore the complaint was made in respect of the order passed by the High Court. Therefore, in my considered opinion, the learned SDJM, in the present case, misread the said part of the observation, made by the Supreme Court.

14. In the Case of Bindeshwari Prasad Singh (supra), the Supreme Court observed that after having passed the order of dismissal of the complaint, the SDJM became functus officio and had no power to review or recall the order. The said ratio of law was reiterated by the Supreme Court in the case of Maj. Genl. A.S. Gauraya and Another (supra).

15. In the absence of any statutory provision for restoration of a complaint, dismissed for default of the complainant resulting acquittal of the accused person u/s 256 Cr.P.C., the Magistrate can not recall his own order, inasmuch as he has no inherent power. In the absence of anything contrary, a Court, unless vested with inherent jurisdiction or such statutory power, becomes functus officio, and as such can't review its own order.

16. Therefore, in view of what has been discussed above and in the light of the ratio, laid down in the case of Maj. Genl. A.S. Gauraya and Another (supra), the impugned order, dated 07.06.2012, passed by the learned SDJM(S), Sivasagar, is found to be unlawful and as such, the same can not be maintained. That apart, the learned SDJM, after recording the order of acquittal, u/s 256 Cr.P.C., committed gross illegality resulting violation of principle of natural justice by restoring the complaint, without giving any opportunity of being heard to the accused person.

17. In view of the above, we hold that the impugned order, dated 07.06.2012, restoring the complaint petition, which was dismissed on 29.05.2012, was without jurisdiction and bad in law. Accordingly, we allow the revision petition and set aside the impugned order dated 07.06.2012.