

Sm. Shyama Devi vs Sadan Sewak on 12 November, 1951

Equivalent citations: AIR1953ALL380, AIR 1953 ALLAHABAD 380

ORDER

Brij Mohan Lall, J.

1. This is a reference under Section 438, Criminal P. C., by the learned Additional District Magistrate of Kanpur recommending that an order passed by a learned Honorary Special Magistrate Second Class of Kanpur setting aside an order of dismissal of a complaint and restoring the said complaint be set aside.

2. It appears that the learned Magistrate was hearing the complaint under Section 427, Penal Code. The case had been adjourned to 9-10-1950. On that day complainant was found absent and the learned Magistrate dismissed the complaint. Subsequently the complainant put in appearance and made an application on the same day for the complaint being restored. The learned Magistrate allowed this prayer and restored this complaint.

3. It may be pointed out that unlike the Code of Civil Procedure, the Code of Criminal Procedure contains no provision for restoration of complaints dismissed for non-appearance of the complainant. It is certainly open to a complainant to file a fresh complaint and in appropriate cases an application for restoration may be treated as a fresh complaint. But a fresh complaint can be filed only before a Magistrate empowered to take cognizance thereof under Section 190 (1), Criminal P. C. In the present case, the learned Honorary Special Magistrate was not such a person. He could not entertain a fresh complaint. He could hear such cases only as were transferred to him by other Courts competent to take cognizance of a fresh complaint. In the circumstances, it was not open to the learned Honorary Special Magistrate to treat an application for restoration as a fresh complaint.

4. In his explanation the learned Magistrate has attempted to justify his order by a reference to the provisions for review. He contends that he had, in fact reviewed his previous order. The power of review conferred by the Code of Criminal Procedure is contained in Section 369. It prohibits review except "to correct a clerical error." The learned Magistrate was certainly not correcting a clerical error by ordering the restoration of the complaint. In the circumstances, I am of the opinion that even if an order of restoration is treated as an order of review the learned Magistrate was not competent to pass that order.

5. In the circumstances I accept the reference. The order passed by the learned Magistrate is set aside.