Raghubans Prasad And Anr. vs State (Prabhu Dayal Missir) on 19 September, 1959

Equivalent citations: AIR1961PAT397, 1961CRILJ528

ORDER

Kanhaiya Singh, J.

1. This is a reference by the Sessions Judge, Muzaffarpur, under Section 438 of the Code of Criminal Procedure recommending the setting aside of the order of the Magistrate dated 2nd July, 1958, by which he recalled his previous order of discharge dated 11th June, 1958, and. summoned the accused persons afresh.

2. The facts are these : On 5th November, 1957, Prabhu Dayal Missir, the complainant, instituted a case before the Town police at Muzaffarpur for Prosecution of Raghubans Prasad, Sahdeo Singh, Baleshwar Prasad and Raghunath Pandey for the offence of theft and cheating under Ss. 379 and 420 of the Penal Code. Eventually, the police submitted charge-sheet against them, and the Sub-divisional Officer, Muzaffarpur, took cognizance of the case on 4th March, 1958, and transferred it to Mr. B. N. Missir, Judicial Magistrate, 1st class, for disposal.

After some adjournments, the case was taken by Mr. Missir On llth June, 1958. Upon a consideration of the documents before him and after hearing the parties, the Magistrate formed an opinion that the facts did not disclose commission of offences under Ss. 379 and 420. Accordingly, he discharged the accused persons under Section 251A(2). On 13th June, 1958, an application was made on behalf of the prosecution for revival of the Proceeding on the ground that certain matters had not been considered. He issued notice to the accused persons to show cause why the previous proceedings should not be revived. Cause was not shown by the accused, and on 2nd July, 1958, on fresh consideration of the record and the case diary the Magistrate was satisfied that the discharge of the accused under Section 251-A(2) was not justified and that there were sufficient materials to establish prima facie the offences under Sections 379 and 420.

He observed that the Previous order of discharge was based upon documents which did not form part of the case diary and which had since been withdrawn by the parties filing them, suggesting thereby that on the strength of those documents the accused should not have been discharged. Accordingly, he recalled the order of discharge passed by him on 11th June, 1958, and summoned the accused Persons. It is this order whose reversal the learned Sessions Judge has recommended.

3. In support of this reference Mr. Kanhaiyaji contended that the learned Magistrate was not competent to revive his own order, by which he discharged the accused on llth June, 1958. It has been urged that when the Magistrate passed the order of discharge, he became functus officio, and

therefore he was unable to rehear the case. He referred to Section 369 of the Code of Criminal Procedure which provides that no court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error, and contended that the order of discharge is a judgment, and, therefore, the Magistrate could not revive the proceedings of his own accord, because it would be tantamount to reviewing his own order which is prohibited by Section 369. I am unable to accede to this unqualified and broad proposition of law.

It is against the weight of authorities. The Code of Criminal Procedure does not define what a judgment is. Section 367, however, lays down the contents of a judgment and states what must be in a judgment. It states that it shall contain the point or points for determination, the decision thereon and the reasons for the decision. This section, however, applies to the Provincial Criminal courts. Section 370 is applicable to judgments of Presidency Magistrates. It only provides for certain particulars being mentioned in the judgment. But in all cases in which the Presidency Magistrate inflicts imprisonment or fine exceeding Rs. 200 or both, a brief statement of the reasons for the conviction has to be recorded.

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. Tevelyan, J. has described judg-ment in Damu Senapati v. Sridhar Rajwar, ILR 21 Cal 121 as "the expression of the opinion of the Judge-or Magistrate arrived at after due consideration of the evidence and of the arguments."

The same view has been expressed by a Full Bench of the Calcutta High Court in Dwarka Nath Mondul v. Beni Madhab, ILR 28 Cal 652. Referring to the order of discharge PrinseP, J., has observed as follows:

> "Now, here I would state that iu my opinion such an order is not a judgment within the terms, of Chapter XXVI. Section 367 explains what Constitutes "a judgment 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 end it once for all, such as an order of conviction or acquittal."

Harington, J., in that Case made the following' observations :

> "The answer depends on whether the order of discharge is a 'judgment' or not; and thought there is no definition, that I can find, of what con-stiutes a 'judgment, there is, in Section 29 (Sic Section 19?) of the Penal Code, a definition of what constitutes a Judge, who is defined as every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive or who is one of a body of persons, which body of persons is empowered by law to give such a judgment; and amongst the illustrations it is pointed out that a Magistrate exercising jurisdiction in respect of a charge, on which he has Power to sentence to fine or imprisonment, with or without appeal, is a judge, In this case it appears to me that at the stage of the proceedings, at which this charge was dismissed, the magistrate could not be accurately described as a judge, because he had not, at that stage of the proceedings, jurisdiction to pass a sentence of fine or imprisonment All that he had jurisdiction to do was this : If no prima facie case was made out, he was entitled to discharge the accused; if, on the other hand, a prima facie case was made out, he was called uPou to determine whether, if a charge were framed on the facts disclosed, he could inflict an adequate punishment and, if he could, he was bound to frame a charge under Section 254 of the Code of Criminal Procedure, and call upon the accused to plead to that charge and then proceed to try it. In my opinion, until the charge had been framed and the accused called upon to plead to it, the magistrate could not accurately be described as a judge and any order that he made previous to the framing of the charge could not be described as a judgment. For that reason, I think, Ffiat the order of discharge was not a judgment."

Ghose, J., who delivered a dissenting judgment, however, was of the opinion that where the Magistrate investigates the merits of the complaint, either by examination of the complainant or by taking such evidence as may be produced, he is in a position to pronounce a judgment, or in other words the case has reached a stage, which entitles or requires him to pronounce a decision upon the guilt or innocence of the accused; then the order made by him either convicting the accused or discharging him, would be a judgment within the meaning of the Code. Where, however, the merits have not been considered, then, even according to the dissenting judgment, the order will not constitute a judgment.

I do not see how a distinction can be made between the discharge of an accused under Sections 251A(2), 253 and 259 and the dismissal of the complaint under Section 203 on the merits or otherwise having regard to the Explanation to Section 403. This distinction appears to be wholly without foundation. At any rate, the opinion of Ghose, J. cannot be accepted in face of the majority view in that case and, the later decisions of the same court as well as of the Federal Court and the Supreme Court. The view taken by the Full Bench was reiterated by the subsequent Full Bench of the Calcutta High Court in Mir Ahwad Hossein v. Mohammad Askari, ILR 29 Cal 726.

In the case of Dr. Hori Ram Singh v. Emperor, AIR 1939 FC 43 after a full review of the English law and the provisions of the Cr. P. C., Sulaiman, J. pointed out that in England judgment in a criminal case is equivalent to judgment of conviction or acquittal and is distinct from other orders in a

criminal case and under Criminal Procedure Code also a judgment is intended to indicate the final order in a trial terminating in either the conviction or the acquittal of the accused. In other words judgment in a criminal case means a judgment of conviction or acquittal. This view was affirmed by the Federal Court subsequently in Kuppuswami Rao v. The King, AIR 1949 FC 1 wherein their Lordships of the Federal Court have observed as follows:

> "In India, in the Criminal Procedure Code, the word 'judgment' is used to indicate the termination of the case by an order of conviction or acquittal of the accused. The word is not defined in the Criminal Procedure Code but that interpretation was put on the word in a criminal proceeding in Emperor v. Maheshwara Kondaya, ILR 31 Mad 543 at p. 545: 9 Cr LJ 80. That view appears to have been approved by Sulaiman J. in Hori Ram Singh's case, (1939) FCR 159: (AIR 1939 FC 43): 40 Cr LJ 468.
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> Our attention was called to Clause 39, Letters Patent of the High Courts of Calcutta, Bombay and Madras which provides for appeals to His Majesty-in-Council from 'any final judgment, decree or order' and it was urged that in the absence of the qualifying word, 'judgment' in Section 205(1), Constitution Act, must be held to include a preliminary Or interlocutory judgment and that the order now under appeal fell under that category. We are unable to accede to this view. 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".

In Surendra Singh v. State of U. P., AIR 1954 SC 194 their Lordships of the Supreme Court, after referring to Section 369 of the Criminal Procedure Code-have observed:

> "In our opinion, a judgment within the meaning of this section is the final decision of the court intimated to the parties and to the world at large by formal pronouncement or delivery in open court. It is a judicial act, which must be performed in a judicial way".

In order to constitute a judgment, therefore, the decision of the Criminal Court must be final. The order of discharge cannot be regarded as the final pronouncement of the Magistrate, because, as laid down by authorities, a fresh complaint may be made on the same facts, notwithstanding the order of discharge. A final judgment in a criminal proceeding must necessarily be a judgment of either acquittal or conviction, because till then there is no final order, and the defence o£ autrefois acquit has no application. As pointed by their Lordships of the Bombay High Court in In re, Wasudeo Narayan, AIR 1950 Bom 10, a discharge not operating as an acquittal leaves the matter at large for all purposes of judicial enquiry, and there is jurisdiction still vested in all Magistrates including the one who made the previous enquiry, and while the Magistrate must exercise due judicial discretion, there is nothing in law to prevent him from enquiring into the case.

And this is exactly what is implied by Section 403 of the Code of Criminal Procedure. It provides that a person who has once been tried fay a court of competent jurisdiction for an offence and

convicted or acquitted of such offence shall, while such-conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him-might have been under Section 236, or for which he might have been convicted under Section 237.

There is, however, an Explanation to this sec-tion which states that the dismissal of a complaint, the stopping of proceedings under Section 249, the discharge of the accused or any entry made upon a charge under Section 273, is not an acquittal, for the purposes of this section under this section, there-fore, a judgment which bars a second trial must be the final order in a trial terminating either in the conviction or acquittal of the accused. It is manifest from the above that unless the order is final it is not a judgment in the true sense of the term, and it is .plain that the order of discharge is not a final order, since the accused may be prosecuted subsequently on the same facts and for the same offence, and therefore, clearly enough the order ot discharge is not a judgment and does not come within the mischief of Section 369. It follows that the Magistrate is competent to revive the original proceedings even when his order of discharge has not been set aside by the superior court.

4. This question may be looked at from another point of view. It is now settled beyond controversy that a fresh complaint on the same facts can lie when the previous complaint has been dismissed under Section 203 or when the accused persons have been discharged under Section 253 or 259 of the Code. There is no express provision in the Code to the effect that the dismissal of a complaint or the discharge of an accused shall be a bar to a fresh complaint being entertained so long as the order of dismissal or discharge remains unreversed.

After a earful and thorough review of the decisions of the different High Courts a Bench of the Bombay High Court in Hansabai v. Ananda, AIR 1949 Bom 384 has laid down that there is nothing in law against the entertainment of a second complaint on the same facts on which a person has already been discharged. The discharge of an accused person does not operate as a bar to the institution of fresh criminal proceedings against him for the same offence, and it is competent for a magistrate to entertain another complaint on the same facts and to enquire again into the case against the accused.

The only limitation that has been placed by the authorities is that the Magistrate should not ordinarily entertain a complaint unless there is some fresh material or evidence before him and unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice. This has been expressed clearly by Brown, J. in U. Shwe v. Ma Sein Bwin, AIR 1925 Rang 114 as follows:

> "It may, therefore, be taken as settled law in this Province that the Magistrate was competent to lake cognizance of the present case; but it does not necessarily follow from the mere fact that he is competent to take cognizance that he should have done so. If an accused person after enquiry and after an order of discharge has been passed, is liable to further prosecution on the same evidence, as a matter of course, it is quite clear that the way is open to grave injustice and oppression. And although the Magistrate in the present case was competent to take cognizance of a further

> complaint, it seems to me clear to have been his duty to have considered whether the circumstances were such as to justify him in doing so, or whether he should not have dismissed the complaint under the provisions of Section 203, Criminal P. C. As pointed out in Mi The Kin v. Nga E Tha, 1 U- B. Rule 19, 'It is the duty of a Magistrate, therefore, who receives a complaint in a case where there has been a previous order of dismissal or discharge, not to issue process, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice, or unless new facts are adduced which the complainant had not knowledge of or could not with reasonable diligence have brought forward in the previous proceedings".

The same view has been taken by this court in Ram Narain v. Panachand Jain, AIR 1949 Pat 256. I entirely agree with the view expressed by Brown, J. These are, however, instructions for the correct guidance of Magistrates. It is a rule of convenience and expediency and not a rule of law affecting the jurisdiction of the Magistrate to entertain a fresh complaint on the same facts. It would indeed be highly inconvenient to allow successive trials o£ complaints, based on the same allegations, by different Magistrates and different courts, after a previous complaint on the same facts by the same complainant and against the same accused has been dismissed by a Magistrate of competent jurisdiction.

But there may be occasions when the Magistrate can entertain a second proceeding where in his opinion non-entertainment of the second complaint will amount to manifest injustice. Now, when on the same facts a second complaint can be entertained notwithstanding the fact that the previous order of dismissal or discharge has not been set aside by a superior court, it would amount to an absurdity to say that the Magistrate cannot revive the old proceeding and proceed with the hearing of the same, unless his previous order dismissing the complaint or discharging the accused has not been reversed by a superior court. In Emperor v. Chinna Kaliappa Gounden, ILR 29 Mad 126 at p. 130, Sir Arnold White, C. J., delivering the judgment of the Full Bench has observed as follows:

> "The question therefore is whether the fact of the dismissal of the complaint by an order made under Section 203, operates, so as to deprive the Magistrate of jurisdiction to enquire into the offence alleged in the complaint. The first matter to be considered is -- is there any provision of the Code which lays this down in express terms? There is no such provision. I do not think that, in substance, with reference to the question of jurisdiction, any distinction can be drawn between entertaining a fresh complaint and rehearing the original complaint. The argument that the Magistrate, having made the order of dismissal, is functus officio applies equally to both cases, and the formality of putting in a fresh complaint cannot be said to create a jurisdiction, which, without such formality, a Magistrate would not have possessed."

This case has been relied upon recently by a Bench of the Bombay High Court in AIR 1950 Bom 10, Their Lordships have pointed out that as a Magistrate has jurisdiction to take cognizance o£ the same offence again, when a fresh complaint is brought on the same facts, it is possible to argue that the Magistrate is not deprived of his jurisdiction when, instead of filing a new complaint, the complainant makes an application to him to revive the original complaint, and the Magistrate

revives the original complaint.

In the case of Dwarka Nath Mondial, ILR 28 Cal 652 the Full Bench of the Calcutta High Court pointed out the untenability of the proposition that while a second complaint on the same facts and for the same offence can be entertained, though the accused had been discharged previously, the Magistrate cannot himself revive the proceedings unless ithe order of discharge was set aside. Hill, J., made ithe following significant observations in the same case:

> "It would amount virtually to a reductio ad absurdum were it to be held that, if the complainant had renewed his complaint, after the order of discharge had been made, the Magistrate might have proceeded with the prosecution, notwithstanding that order, as there can be no doubt he might have done, See the judgment of the Chief Justice in the case of Queen-Empress v. Dolegobind Dass, ILR 28 Cal 211, but that he was precluded by that order, which, it is to be observed, was not made on the merits, and was an altogether illegal order, from taking further action in consequence of the circumstances that the complaint was not formally repeated by the complainant. The jurisdiction, moreover, does not rest exclusively on complaint."

It is, therefore, quite clear that in principle there is no difference at all between the entertainment of a fresh complaint and the revival of the original complaint, notwithstanding the previous order of discharge, and the inevitable conclusion is that the discharge of the accused does not bar the jurisdiction of the Magistrate to proceed with the complaint afresh by reviewing his previous order of discharge.

5. Apart from this, it is well settled by a series of decision of different High Courts that the order of discharge does not operale as a bar to the revival of the original proceeding. In ILR 28 Cal 211, the accused, who was employed in the General Post Office, was arrested on the charge of having stolen a registered letter from the Post Office and was charged with offences under Section 381 of the Penal Code and Section 52 of the Indian Post Office Act of 1898 before a Bench of Presidency Magistrates.

He was discharged on the same day, the Bench considering that the evidence was insufficient to warrant a conviction. Subsequently, he was re-arrested on substantially the same charge and was committed for trial by the Chief Presidency Magistrate upon further and fresh evidence to tile High Court. An application was made by the accused to the High Court to have the order of commitment discharged on the ground that the Chief Presidency Magistrate had no jurisdiction to make the commitment, as the previous order of discharge had not been set aside by any competent authority. Maclean, C. J., held in that case that there is no express provision in the Code of Criminal Procedure to the effect that the dismissal of a complaint shall be a bar to a fresh complaint being entertained so long as the order of dismissal remains unreversed.

He has observed that the Magistrate is bound to hear the case under Section 252, unless the Code precludes him from so doing until the previous order of discharge has been set aside, but the Code does not do that either expressly or by necessary implication. He held, therefore, that the commitment was legal. This view of the learned Chief Justice was approved by a majority of the Full

Bench of the same High Court in the case of Dwarka Nath Mondul, ILR 28 Cal 652. In that case it appears that a charge of Criminal breach of trust under Section 406 of the Penal Code was laid before one of the Presidency Magistrates of Calcutta.

The accused was thereupon summoned, and when the case came up for hearing the complainant was absent, and on that day the Magistrate recorded the following order: "Complainant is absent, defendant denies the charge. Dismissed. Defendant is discharged." It will be seen that the defendant was discharged without any trial. A month after this order was made the complainant came into Court and applied that the case might be restored or revived, stating that on account of illness he was unable to be punctual. Thereupon, the Magistrate passed the following order:

> "Heard both the parties at length. The complainant in this case was absent, when his name was called, by a few minutes. It is I think, fair that this case should be revived. The ruling of the High Court in the case of Opoorba Kumar Sett v. Smt. Probod Kumary Dassi, 1 Cal WN 49 gives me such power. I therefore revive the case and order the issue of summons."

The accused then applied to the High Court to have the order of revival set aside, substantially on the ground that the Magistrate had no jurisdiction to revive of his own accord the complaint. Eventually, this matter was placed before the Full Bench aforesaid, and the question referred to it was; "Whether a Presidency Magistrate is competent to revive a warrant-case, triable under Chapter XXI of the Code of Criminal Procedure, in which he has discharged the accused person".

The Full Bench answered tin's question in the affirmative and has held that a Presidency Magistrate is competent to rehear a warrant-case triable under Chapter XXI of the Code, in which he had discharged the accused person, and it is not necessary that such an order must be set aside by a superior Court before any Magistrate can proceed to hear such a complaint. Prinsep, J. observed as follows:

> "There is no bar to further proceedings under the law, and, therefore, a Magistrate to whom a complaint has been made under such circumstances, is bound to proceed in the manner set out in Section 200, that is, to examine the complainant and, unless he has reason to distrust the truth of the complaint, or for some other reason expressly recognised by law, such as, if he find that no offence had been committed, he is bound to take cognizance of the offence on a complaint, and, unless he has good reason to doubt the truth of the complaint, he is bound to do justice to the complainant, to summon his witnesses and to hear them in the presence of the accused".

In reply to the argument that such a course would involve considerable inconvenience and harassment to the accused, he observed as follows:

> "In the exercise of such a power, as well as in the exercise of many other powers, if a reasonable discretion is not exercised, an injustice to the parties may be done. That is

> a matter which may be set right by a superior court. It certainly is not a matter, which to me seems to require that the exercise of powers, which the law confers on a Judicial Officer, should be curtailed generally, and in all cases".

The aforesaid two cases dealt with the power of the Presidency Magistrates to reopen the previous proceeding concluded by the order of discharge. These cases, therefore, do not provide an authority for exercise of the same power by the Provincial Magistrates. The power of the Provincial Magistrates to revive previous proceedings directly arose in ILR 29 Cal 726 (FB). In this case the complainant laid a complaint against the accused before the Deputy Magistrate of Alipore, charging him with offences under Ss. 426, 295 and 297 of the Penal Code. On the day fixed for hearing the complainant put in a petition stating that he was willing to withdraw the case, as the accused had apologised. Thereupon the Deputy Magistrate passed the following order:

> "Under the circumstance represented, the accused is acquitted under Section 248 of the Criminal Procedure Code of the charge under Section 426 of the Penal Code. He is discharged under Section 253 of the Criminal Procedure Code in respect of the offences under Ss. 295 and 297 of the Penal Code".

The accused on the same day filed a petition stating that he had not apologised, but that the complainant had withdrawn the case, as it was groundless and frivolous. The complainant thereupon applied to the Deputy Magistrate praying that the case against the accused might be revived. The Deputy Magistrate then made the following order:

> "Summon the accused under Sections 295 and 297 of the Indian Penal Code for the ....."

The accused moved the High Court in revision and asked for setting aside the order on the ground that having regard to the earlier order of discharge the Magistrate had no authority to make the order in question. In view of conflict of authorities, this question was again referred to the Full Bench consisting of five Judges, four of whom were members of the previous full Bench. The question referred to it was:

> "whether a Magistrate in a warrant case having passed an order of discharge is competent to take fresh proceedings and issue process against the accused in respect of the same offence, unless an order for further inquiry shall have been passed under Section 437 of the Code of Criminal Procedure having the effect of setting aside such order of discharge".

In the opinion of the majority of Judges there was no distinction between those two different classes of Magistrates in respect of the nature of the order passed and their jurisdiction in acting on further complaint, and the case was virtually governed by the previous Full Bench decision in the case of Dwarka Nath Mondul, ILR 28 Cal 652 to which reference has been made. Thus, it has been held by the Full Bench that a Magistrate in a warrant case having passed an order of discharge is competent to take fresh proceedings and issue process against the accused in respect of the same offence

without an order for further inquiry being passed under Section 437 of the Criminal Procedure Code, having the effect of setting aside such order of discharge.

A similar view was expressed by a Division Bench of the same High Court in Jyotindra Nath v. Hem Chandra Daw, ILR 36 Cal 415. This case is important for a different reason. There a Magistrate had dismissed a complaint under Section 203 of the Code on the ground of the absence of the complainant's witnesses. The complainant moved the District Magistrate under Section 437, and he declined to make any order in the case. There was then a petition to the Magistrate by the complainant praying for a revival of his complaint, and the Magistrate in the circumstances ordered that, as the application was made after the order of the District Magistrate who had been asked to exercise revisional powers, the matters should go to him for orders. The matter was then referred to the District Magistrate who declined to make any order stating:

> "This matter has nothing to do with me. I have already disposed of the petition of motion which was filed before me. The Deputy Magistrate must act on the petition filed before him according to his own discretion".

The Magistrate thereupon, after hearing the lawyer for the accused, issued a summons against him under Section 323 and the trial proceeded of the accused. Before the High Court it was argued that the District Magistrate having declined to exercise his revisional powers the Magistrate had no jurisdiction to proceed with the trial of the accused. But, it was held that the subordinate Magistrate was competent to revive the proceedings notwithstanding that the District Magistrate had refused to order further enquiry.

It is noteworthy that even the refusal by the revisional Court to revive the previous proceeding did not debar the Magistrate from reopening the case and proceed with the trial of the accused afresh.

Substantially, the same view has been expressed by the Calcutta High Court in Emperor v. Idoo, ILR 40 Cal 71.

6. A similar view has been consistently taken by the Madras High Court. In ILR 29 Mad 126, a Full Bench of the Madras High Court, relying upon the aforesaid two Full Bench decisions of the Calcutta High Court, has laid down that the dismissal of a complaint under Section 203 of the Code of Criminal Procedure does not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such order of dismissal has not been set aside by a competent authority. This case related to a dismissal of complaint under Section 203.

The question of competency of the Magistrate after discharge to take fresh proceedings came up for consideration by a Bench of the Madras High Court in ILR 31 Mad 543. In this case, a complaint under Section 406 of the Code was presented to the Magistrate against two persons. After taking all the evidence adduced by the prosecution the Magistrate discharged one of the accused in the following terms:

> "As there is not sufficient evidence against second accused he is discharged under Section 253, Criminal Procedure Code".

Next day, he passed the following order:

> "On careful reconsideration, I think there is still ground to presume second accused's guilt or complicity with first accused. The order of discharge is cancelled. Second accused will be re-arrested and put on his defence".

The matter was taken to the Sessions Judge under Section 435 of the Code of Criminal Procedure, mainly on the grounds that the second order was ultra vires, and the Magistrate was not entitled in law to revive the proceedings against second accused on his own motion and without notice. He referred the matter to the High Court under Section 438 of the Code. Relying upon the Full Bench decision of that Court in the case of Chinna Kaliappa Gounden, ILR 29 Mad 126 referred to above, their Lordships have laid down that it is competent to a Magistrate who has discharged an accused under Section 253 of the Code of Criminal Procedure to take fresh proceedings and issue process against the person discharged in respect of the same offence without such order being set aside by a higher Court. The ruling in the aforesaid cases is limited expressly to the case of the same Magistrate re-entertaining a complaint.

In Ponnuswami Goundan, In re, ILR 55 Mad 622 : (AIR 1932 Mad 369) (FB) a doubt was expressed whether a different Magistrate on the same fact and for the same offence could entertain a fresh complaint even when the previous order o£ dismissal by the former Magistrate had not been set aside. This matter was placed before a Full Bench, and the following question was referred to it:

> "Whether, a complaint having been dismissed by a sub-divisional Magistrate under Section 203 of the Code cf Criminal Procedure, a Sub-Magistrate has jurisdiction to entertain a charge-sheet founded on a subsequent complaint, the order of dismissal not having been set aside".

7. Relying upon previous Full Bench decisions of that Court and the Calcutta High Court the Full Bench has laid down that when a complaint is dismissed under Section 203 of the Code of Criminal Procedure, .any Magistrate having co-ordinate jurisdiction can take cognizance of a subsequent complaint on the same facts, notwithstanding that the order of dismissal has not been set aside.

8. A similar view has been taken by a Full Bench of Sind Judicial Commissioner's Court in Harbai v. Raya Premji, 40 Cr. LJ 745: (AIR 1939 Sind 193), relying upon the decisions discussed above.

9. Relying upon the decision in Jyotindra Nath Daw, ILR 36 Gal 415, Bhide, J., of the Lahore High Court has held in Allah Ditta v. Karam Baksh, AIR 1930 Lah 879 that a second complaint for an alleged offence is entertainable by a Magistrate, and it is not absolutely necessary to get a previous order of dismissal under Section 203 set aside by a superior Court before lodging such complaint and further that it is entertainable even when the previous order of dismissal is confirmed by superior court in revision.

10. The Bombay High Court has virtually adopted the same view. A Bench of that Court has held in AIR 1950 Bom 10 at p. 11:

> "When a Magistrate discharges an accused person under Section 259 on account of the absence of the complainant, he does not apply his mind to the evidence in the case. The order is passed, not on a consideration of the merits of the case, but merely because the complainant was absent at the time fixed for the hearing of the case. Such an order of discharge cannot, therefore, be said to be a 'judgment' and consequently the Magistrate is not debarred from reviewing such an order. It is true that it is open to the complainant in such a case to move a superior Court to set aside the order of discharge and direct further enquiry into the case under Section 436, Criminal P. C. But as pointed out by Maclean C. J. In ILR 29 Gal 726 at p. 731: 6 Cal WN 633 (FB), this is an enabling section and does not take away the jurisdiction vested in a Magistrate to rehear the complaint. The fact that the complainant has this remedy available to him would not therefore be a sufficient ground for holding that the Magistrate is not competent to review his own order passed under Section 259, Criminal P. C. It is open to the complainant to pursue still another course, viz., to file a fresh complaint. It is now well settled that a fresh complaint on the same facts can lie when the previous complaint has been dismissed under Section 203 or when the accused person has been discharged under Section 253, or Section 259, Criminal P. C."

Their Lordships have, however, made a distinction between cases in which the order of discharge is passed after appreciation of the evidence with a view to determine the guilt or innocence of the accused and those in which the proceedings are terminated merely for some technical reason. In their view when a Magistrate has applied his mind to the facts of the case and discharged the accused because, in his opinion, the evidence does not prima facie establish the guilt of the accused, the order amounts to a judgment within the meaning of Section 369 of the Code and it is not open to a Magistrate to review it In view of the Full Bench decisions of the Calcutta High Court and those of the Federal Court and the Supreme Court, to which a reference has been made above, this distinction cannot be regarded as correct. Having regard to the provisions of Section 403 of the Code and the nature of the judgment in a Criminal proceeding, I do not think how such' a distinction can be made in respect of an order of discharge. In my opinion, the view expressed by! the majority of the Judges of the Calcutta Highi Court is correct, and irrespective of the question whether the order of discharge is passed after appreciation of evidence or not, it is not a judgment and is reviewable by the Magistrate suo motu or on] an application of the party.

Any way, even on the view taken by the Bombay High Court in that case the present order of discharge is not a judgment as it is not based upon the appreciation of evidence with a view to determine the guilt or innocence of the accused, and, therefore, the previous proceedings could be revived without having the order of discharge set aside by the superior Court.

11. Relying upon the decision in the case of Jyotindra Nath Daw, ILR 36 Cal 415, a Bench of this Court has laid down in Janakdhari Singh v. Emperor, AIR 1929 Pat 469 that apart from any order of

the revisional Court for further enquiry a Magistrate has jurisdiction to issue summons against the accused person in spite of the fact that he has already dismissed the complaint under Section 203 of the Code. This view was affirmed subsequently by Das, J. (as he then was), and Narayan, J., in AIR 1949 Pat 256. Relying upon the Full Bench decision of the Madras High Court in the case of China Kali-appa Gounden, ILR 29 Mad 126 they have laid down that a Magistrate has jurisdiction to revive the old complaint dismissed under Section 203, and the jurisdiction of the Magistrate does not necessarily depend on the filing of a fresh complaint. In view of these rulings, the decision of the learned Single Judge in the case of Gajo Chaudhry v. Debi Chaudhry, AIR 1923 Pat 532 relied upon by the learned advocate, cannot be regarded as good law.

12. The Allahabad High Court has also laid down a similar ruling. In Ishwardin v. State, 1954 All LJ 401, a Bench of that Court has expressed itself in the following terms:

> "In the Code of Criminal Procedure, there is no provision which bars the trial of a second complaint when the first one has been dismissed for want of prosecution and the accused have been discharged. There is also no specific provision in the Code of Criminal Procedure which bars the trial of a second complaint by a Magistrate other than the one who had dismissed the first complaint, whether that Magistrate be a Magistrate of higher or lower jurisdiction. On the provisions of the Code of Criminal Procedure, a second complaint was triable by any Magistrate who was otherwise competent to try the second complaint. The bar in respect of a second complaint was to be found in Section 403 of the Code of Criminal Procedure. It cannot be contended however that Section 403, Cr. P. C. applies, in terms, to orders of discharge made by a Magistrate under the provisions of, say, Section 259 of the Code ..... To let a man escape trial because at one stage a complainant happened to be negligent or happened to fail to appear at the trial and his failure led to a dismissal of his complaint, cannot be said to confer on the accused a right to plead a bar to a subsequent trial, for, if he were permitted to do so, then accidents of events may lead to miscarriage of justice."

Bennet, J., sitting singly, had, however, taken a contrary view in Phonsia v. Emperor, AIR 1935 All 59. In that case on a previous complaint the Magistrate summoned the accused, and after hearing the evidence of the complainant discharged the accused. After that the complainant made an application to the Magistrate to review his order of discharge. This was refused by the Magistrate, whereupon the complainant filed another complaint on the same facts in the same Court and applied for transfer of the case. Bennet, J., held that the application for review was clearly against the provision laid down in Section 369 of the Code.

He has expressed the view that the correct course for the complainant to adopt would have been to make an application under Section 439 of the Code to the Sessions Judge or the District Magistrate asking for the order of discharge to be set aside and further enquiry to be made. Relying upon this decision of the learned Single Judge the learned Sessions Judge has made the present reference to this Court. But, he overlooked the later Bench decision of that Court and other decision of different High Courts referred to above. Now, in face of those decisions, the decision of the learned Single

Judge has no binding force.

13. It is manifest from the above that there is unanimity of judicial opinion that the order of discharge does not constitute a judgment within the meaning of Section 369 of the Code, and the Magistrate is competent to revive the old proceeding and rehear the case, even when his order of discharge has not been set aside by a competent Court. The ratio of the aforesaid decisions is that where a Magistrate dismisses a complaint under Section 203, or discharges an accused under Section 251-A(2) or Section 253 or Section 259 of the Code of Criminal Procedure, whether on the merits or not, it is competent for that Magistrate or his successor-in-office or another Magistrate of co-ordinate jurisdiction to entertain a second complaint on the same facts and for the same offence or, to revive the previous proceeding, even when the order cf dismissal or discharge, as the case may be, has not been set aside by a superior Court.

14. It follows from the above that the order of the Magistrate was perfectly legal and the reference by the learned Sessions Judge is wholly misconceived and against the established principle of law. Accordingly, the reference is discharged.