1902
APRIL 30.

FULL BENCH.

29 C. 726.

29 C. 726.

[726] FULL BENCH.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Hill and Mr. Justice Henderson.

MIR AHWAD HOSSEIN *v.* MAHOMED ASKARI.* [30th April, 1902.]

Accused, discharge of—Warrant case—Process, reissue of against accused in respect of the same offences—Magistrate, powers of Provincial or Mofussil—Whether order for further inquiry necessary before reissue of process—Judgment—Criminal Procedure Code (Act V of 1898), ss. 253, 367, 369, 403 and 437.

Held by the Full Bench (GHOSE, J. dissenting) 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 s. 437 of the Criminal Procedure Code, having the effect of setting aside such order of discharge.

Dwarka Nath Mondul v. *Beni Madhab Banerjee* (1) referred to.

GHOSE J. An order of discharge when once made by a Magistrate can only be altered and the prosecution revived by an order of a Superior Court.

The order of discharge made by the Magistrate in this case did not amount to a judgment within the meaning of s. 369 or s. 367 of the Criminal Procedure Code, as there was no judicial investigation by the Magistrate of the merits of the complaint, and therefore the order of discharge was not a bar to the revival of the same complaint.

THE complainant Mir Ahwad Hossein laid a complaint against the accused Prince Mahomed Askari before the Deputy Magistrate of Alipore, charging him with offences under ss. 426, 295, and 297 of the Penal Code. The case came on for hearing on the 27th July 1901, and the accused's personal attendance was dispensed with. On the same day the complainant put in a petition stating that he was willing to withdraw the case, as the accused had apologised.

[727] On the 29th July the Deputy Magistrate made the following order :—

" Under the circumstance represented, the accused is acquitted under s. 248 of the Criminal Procedure Code of the charge under s. 426 of the Penal Code. He is discharged under s. 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The accused on the same day filed a petition stating that he had not apologised, but that the complainant had withdrawn the case, as it was groundless and frivolous.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 on the 31st July 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 ss. 295 and 297 of the Indian Penal Code for the 15th August 1901."

The accused then obtained a Rule from the High Court to consider why the order summoning him to answer such charges should not be withdrawn upon the ground that, having regard to the earlier order of the same Magistrate of the 29th July discharging the accused in respect of charges under these very sections, the Magistrate had no authority to make the order in question.

* Full Bench Reference in Criminal Motion No. 756 of 1901.

(1) (1901) I. L. R. 28 Cal. 652.

1902
APRIL 30.

FULL BENCH.

29 C. 726.

At the hearing of the Rule, it was contended under the authority of the case of *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (1) and *Komal Chandra Pal* v. *Gour Chand Audhikari* (2) that the Magistrate was not competent to take proceedings after an order of discharge, unless an order for further inquiry had been passed under s. 437 of the Criminal Procedure Code.

The Judges composing the Criminal Bench of the High Court (PRINSEP and STEPHEN, JJ.), doubting the correctness of these decisions, referred the matter to a Full Bench on the 27th January 1902.

The order of reference was as follows:—

The Magistrate in this case on the 29th July discharged the accused of offences under ss. 295 and 297 of the Indian Penal Code. And on the 31st idem, on the representation of one of the parties that he had proceeded on a misrepresentation, he has commenced proceedings in regard to the same offences by issue of summons on the accused. A Division Bench of this [728] Court has on these facts granted a Rule to consider why the order "summoning the petitioner" to answer such charges should not be withdrawn upon the ground that, having regard to the earlier order of the same Magistrate of 29th July discharging the accused in respect of charges under these very sections, he has no authority to make the order in question."

The question raised is, in our opinion, the same as that raised in the recent Full Bench case of *Dwarka Nath Mondul* v. *Beni Madhub Banerjee* (3), in which, however, the Full Bench considered the proceedings of a Presidency Magistrate, whereas in the present case proceedings are those of another Magistrate. No doubt there is no reported case in which it has been held that a Magistrate is not competent to take proceedings after an order of discharge unless an order for further inquiry shall have been passed under s. 437 of the Code of Criminal Procedure. But this interpretation of the law has been laid down in the cases of *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (1) and *Komal Chandra Pal* v. *Gour Chand Audhikari* (2) in respect of an order dismissing a complaint, and, unless we are prepared to follow the reasons upon which those cases were decided, we feel that we should be interpreting the law in a manner opposed to that expressed by the learned Judges in those cases. We are not prepared to accept this view of the law, and we therefore refer the matter for decision by a Full Bench. The point referred is 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 s. 437 of the Code of Criminal Procedure having the effect of setting aside such order of discharge.

Babu *Bunkim Chunder Sen* for the petitioner. In this case the accused was discharged by a Mofussil Magistrate on the 29th July, but on the 31st July without any order for a further inquiry being passed, the Magistrate revived the case on the same complaint and for the same offences, and has issued summons on the accused to appear before him. The accused thereupon obtained a Rule from the High Court to consider why the order summoning him to answer such charges should not be withdrawn upon the ground that, having regard to the earlier order of the same Magistrate of the 29th July discharging the accused in respect of charges under these very sections, the Magistrate had no authority to make the order in question.

The matter has been referred to the Full Bench, and I submit that without an order under s. 437 of the Criminal Procedure Code, directing a further inquiry, the Magistrate had no jurisdiction to revive the case. In the case of *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (1) it was held where the original com[729]plaint had been dismissed under s. 203 of the Criminal Procedure Code that a fresh complaint on the same facts could not be entertained so long as the order of dismissal was not set

(1) (1896) I. L. R. 23 Cal. 988.
(2) (1897) I. L. R. 24 Cal. 286.
(3) (1901) I. L. R. 28 Cal. 652.

1902 APRIL 30. FULL BENCH. 29 C. 726.

aside by a competent authority. That case was followed in the case of *Komal Chandra Pal* v. *Gour Chand Audhikari* (1). Both those cases are in favour of my contention. In the Full Bench case of *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* (2) there is a distinction drawn between Presidency Magistrates and Mofussil Superior Courts. That was due to the omission of the words " Presidency Magistrate " from s. 437 of the Code. That section provided a special remedy, and it is significant that while it gave the Superior Courts in the mofussil, such as Sessions Courts and Courts of District Magistrates, powers of revision, it excluded from it Presidency Magistrates. S. 437, so far as Mofussil Courts are concerned, was clearly intended by the Legislature as a means of dealing with orders of the description now before your Lordships. When the Code distinctly lays down a procedure for having an order dismissing a complaint, or discharging the accused under s. 203 set aside, it must be taken that the Legislature intended that such an order should only be interfered with in the manner provided.

I rely on the remarks made by the learned Chief Justice in *Queen-Empress* v. *Dolegobind Dass* (3) at page 216 with reference to " implication," and I submit that s. 437 of the Code by implication indicates that Mofussil Magistrates should not have the powers mentioned therein.

The Code makes no distinction with reference to the discharge. Whether it be on a preliminary point or after taking evidence the discharge must be under s. 203 of the Code, and a Magistrate of co-ordinate jurisdiction cannot take cognizance of the case, until the order of discharge is set aside.

The case of *Opoorba Kumar Sett* v. *Sreemutty Probod Kumari Dassi* (4) supports my proposition that s. 437 is a disqualification with reference to Provincial Magistrates: by that section the powers of revision are confined to the Sessions Judge and District [730] Magistrate. That shows a distinction was made between Courts having a co-ordinate jurisdiction and Superior Courts giving the latter wider powers.

It would entail great hardship if Mofussil Magistrates of Original Courts were invested with such powers. The intervention of Superior Courts is to supervise the irregularities of Subordinate Magistrates. The subordination of Presidency Magistrates is very different from the subordination of other Subordinate Magistrates.

It was suggested that because the High Court had supervision over Presidency Magistrates as the Superior Courts had over Mofussil Magistrates, therfore the Mofussil and Presidency Magistrates should have equal powers in this respect. But it must be remembered that the High Court has very wide powers under the Code and also under the Charter—powers much greater than the Superior Courts in the mofussil have over their Subordinate Court; the powers of the Superior Courts in the mofussil are regulated by the Criminal Procedure Code, and then s. 437 intervenes, and there should be a reference to the Sessions Judge or District Magistrate before the Subordinate Courts can interfere.

The word " discharge " under s. 437 includes discharges of all kinds.

In the matter of Hari Dass Sanyal v. *Saritulla* (5) the Full Bench assumed that the powers of re-opening matters rested solely with the Superior Courts under s. 437 and not with the Original Courts.

(1) (1897) I. L. R. 24 Cal. 286.
(2) (1901) I. L. R. 28 Cal. 652.
(3) (1900) I. L. R. 28 Cal. 211.
(4) (1893) 1 C. W. N. 49.
(5) (1888) I. L. R. 15 Cal. 608.

1902 APRIL 30. FULL BENCH 29 C. 726.

Babu *Srish Chunder Chowdhry* for the Crown. The question in this case has been practically decided by the Full Bench in the case of *Dwarka Nath Mondal* v. *Beni Madhab Banerjee* (1). S. 403 of the Code lays down that a discharge is not an acquittal, and the Full Bench held that an order of discharge was not a "judgment" under s. 367. Therefore s. 369 has no application to the present case, and there can be a rehearing. S. 437 has no application. It relates to the revisional powers of Superior Courts, and does not refer to proceedings in original Courts. That section does not deal with the setting aside of orders of discharge, but only states that a further inquiry may be directed.

[731] Moulvi *Shamsul Huda* for the complainant. Even if an order of discharge is a judgment, it is not a bar. S. 403 of the Code refers only to judgments of acquittal of discharge, and this would not be a judgment of such a description.

Babu *Bunkim Chunder Sen* in reply. S. 403 does not stand in my way. It must be read with other sections of the Code, and your Lordships must conform with the procedure which is provided by the other sections of the Code. Whether the order of discharge is a judgment or not is immaterial: it is a discharge and s. 437 applies.

MACLEAN C.J. In my opinion this case is virtually governed by the Full Bench decision to which reference has been made, *viz.*, the case of *Dwarka Nath Mondal* v. *Beni Madhab Banerjee* (1). The only distinction between that case and the present is whether, as the case before us deals with that of a Mofussil and not of a Presidency Magistrate, s. 437 of the Code makes any difference. That section, it will be remembered, does not touch Presidency Magistrates. I expressed in my judgment in the above Full Bench case a doubt as to whether there is any such difference, and after having had the advantage of hearing the case argued by the learned vakils, who have appeared, I do not think that s. 437, which is an enabling section, by implication, takes away the jurisdiction which, I think, is vested in the Magistrate in a case of this class to hear the complaint again. That to my mind disposes of the point referred.

But there is one point to which I should like to make a brief reference. It will be noticed that in my judgment in the Full Bench case, I confined myself to adopting what I had previously said in the case in the Sessions Court here—*Queen-Empress* v. *Dolegobind Dass* (2). In that case it was not argued before me that the decision of the Magistrate amounted to a "judgment" within the meaning of the Code, and I consequently, in that case, said nothing upon that point. In the above Full Bench case it was contended that it is a "judgment" within the meaning of s. 369. I only desire to add, with all respect to those who take a contrary view, that I do not think it is. That point has not **[732]** been suggested in the case now before us: in fact the learned vakil, who obtained the Rule and appeared in support of it, did not contend that in this case the order of discharge constituted a judgment within the meaning of the Code. I, therefore, think that the question submitted to us should be answered in the affirmative, namely, that the 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 under s. 437 of the Code of Criminal Procedure.

(1) (1901) I. L. R. 28 Cal. 652. (2) (1900) I. L. R. 28 Cal. 211.

1902
APRIL 30.

FULL BENCH.

29 C. 726.

PRINSEP J. I am of the same opinion. I have already expressed myself fully on the point raised before us now in respect of the proceedings before a Magistrate outside of Calcutta in the case heard by the Full Bench which related to the proceedings before a Presidency Magistrate. I can see no distinction between these two different classes of Magistrates in respect of the nature of the order passed and their jurisdiction in acting on further complaint.

On the other point I need say no more, as I have already expressed my opinion that an order of discharge is not a judgment within the meaning of that expression in Chapter XXVI of the Code of Criminal Procedure.

GHOSE J. So far as the question referred to the Full Bench is concerned, I should answer it in the negative; and in doing so I need only refer to my observations in the case of *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* (1). Though, no doubt, the order of discharge made in that case was by a Presidency Magistrate, yet in dealing with the question then raised, I had to consider the various sections of the Code, including s. 437, which relate to a similar order made by a Provincial Magistrate; and I do not think I can usefully add anything to what I then said, upon the present occasion. I would, however, refer to the observations of Mr. Justice Banerjee in the case referred to in the referring order as very pertinent upon the questions now before us. He says: "When the Code therefore distinctly **[733]** lays down a procedure for having an order dismissing a complaint under s. 203, or discharging an accused person set aside and a further inquiry directed, it seems to me reasonable to conclude that the Legislature intends that an order of dismissal of a complaint or discharge of an accused person should be interfered with only in the manner provided." Mr. Justice Banerjee had in view the provisions of s. 437 of the Code, and I think that the existence of that section in the present Code sufficiently indicates what the Legislature had in view in this connection. S. 403 of the Code in the explanation attached to it says: "The dismissal of a complaint, the stopping of proceedings under s. 249, the discharge of the accused, or any entry made upon a charge under s. 273 is not an acquittal for the purpose of this section." No doubt read by itself it might be, as it has been said, that an order of discharge is no bar to a fresh inquiry or trial by a Magistrate either upon the same facts or upon additional facts; but if we compare the language of this explanation with the provisions of s. 215, explanation 2 of the old Code, Act X of 1872, it will be seen that, while the Legislature had laid down in the old Code that "a discharge is not equivalent to an acquittal and does not bar the revival of a prosecution for the same offence," they have omitted in the new Code the last few words of the said explanation 2, *viz.*, "does not bar the revival of a prosecution for the same offence." This fact, coupled with the provisions of ss. 435 to 439 of the Code, indicates to my mind that they intended that an order of discharge, when once made by a Magistrate, can only be altered, and the prosecution revived, by an order of a Superior Court. As I have already said, I discussed the matter fully in my judgment in the case of *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* (1), and it is not necessary that I should go over the same grounds again. I feel, however, bound to say, at the same time, that the order of discharge made by the Magistrate in the present

(1) (1901) I. L. R. 28 Cal. 652.

1902 APRIL 30. FULL BENCH. 29 C. 726.

case does not amount to a judgment within the meaning of s. 369 or 367 of the Code of Criminal Procedure. There was no judicial investigation by the Magistrate of the merits of the complaint, [734] and therefore, as explained in my judgment in the case of *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* (1), the order of discharge would be no bar to the revival of the same complaint.

HILL J. I agree in the answer to this reference proposed by my Lord, and for the reasons generally which he has mentioned. But I wish to add that I feel some difficulty as to the materiality of the question whether an order of discharge is or is not a judgment in the sense of s. 369 of the Code, for even assuming it to be a judgment in that sense, it could not, I think, be set up as a bar to a rehearing under the provisions of s. 403.

HENDERSON J. In the case of *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* (1), a Full Bench of this Court has held that a Presidency Magistrate is competent to rehear a warrant case, in which the accused has been discharged. In the case now before us the question is wider. It is whether any Magistrate, whether Presidency or Provincial, 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 s. 437 of the Code of Criminal Procedure.

Upon principle I am unable to distinguish between the case of a Provincial Magistrate and that of a Presidency Magistrate. There is no provision in the Code which specifically makes any difference between the position of these two classes of Magistrates in this connection. If, therefore, we must take it on the strength of the Full Bench case to which I have referred, that a Presidency Magistrate is competent to rehear a warrant case in which an order discharging the accused still subsists, it seems to me to follow that a Provincial Magistrate must have the same power. The only possible difference in the law relating to matters of discharge in the Code of Criminal Procedure is that made by s. 437. That section, which has no application to Presidency Magistrates, enables the High Court to direct the District Magistrate by himself or by any Magistrate subordinate to him to make [735] a further inquiry into the case of any accused person, who has been discharged by a Provincial Magistrate, and in effect to set aside the order of discharge. I am unable, however, to see how the insertion of this section, 437, in the Code should take away any powers which a Provincial Magistrate might have had if that section had not been inserted. In this view I would answer the question in the affirmative.

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29 C. 735.

CIVIL RULE.

Before Mr. Justice Pratt and Mr. Justice Mitra.

RAM SARUP LAL *v.* SHAH LATAFAT HOSSEIN.* [12th, 18th June, 1902.]

Minor—Suit on behalf of minor by next friend—Gross negligence of next friend—Review—Right of minor to have suit restored—Minor consenting party to petition for withdrawal—Civil Procedure Code (Act XIV of 1882) s. 462.

* Civil Rule No. 475 of 1902.

(1) (1901) I. L. R. 28 Cal. 652.