

**(2008) 04 GAU CK 0036**

**Gauhati High Court**

**Case No:** None

Raju Prasad Sarma

APPELLANT

Vs

Haladhar Sarma

RESPONDENT

---

**Date of Decision:** April 11, 2008

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 244, 245, 246, 247, 248
- Penal Code, 1860 (IPC) - Section 379, 403, 406, 420, 424

**Citation:** (2008) 2 GLT 933

**Hon'ble Judges:** H.N. Sharma, J

**Bench:** Single Bench

**Final Decision:** Allowed

---

### **Judgement**

H.N. Sarma, J.

This Criminal Revision has been filed challenging the order dated 16.12.2006 passed by the learned Additional Chief Judicial Magistrate, Kamrup, Guwahati, whereby and whereunder the Complaint Case No. 1970 C/96 filed by the complainant has been dismissed for default.

2. I have heard Mr. G Baishya, learned Counsel for the petitioner and Mr. M. Sarma, learned Counsel for the respondent.

3. A complaint was filed by the petitioner in the Court of the learned Chief Judicial Magistrate, Kamrup, alleging commission of offences under Sections 403/420/424/477(A), IPC, by the respondents. The learned Chief Judicial Magistrate took cognizance of the case on 14.10.96 and issued necessary process against the respondent. During the course of the proceeding, the complainant along with other witnesses were examined by the learned Trial Court before framing of charges. The case was taken up on 16.08.2001 on which date, the learned Trial Court on the basis of the evidence and material on records was of the view that there is reasonable ground to believe that there are materials under Sections 406/424/477A, IPC,

against the accused and accordingly, the case was fixed on 22.08.2001 for framing of charges and the respondent was directed to appear on that date. On 22.08.2001, the charges were framed against the accused. Challenging the said order, the respondent filed Criminal revision No. 23/2002 before this Court on 09.01.2002 which was admitted on 11.09.2002 staying further proceeding. The said revision petition was dismissed on withdrawal on 26.08.2005. Upon receipt of the records back from this Court, the learned Trial Court vide order dated 18.03.2006 directed to issue summon to the respondent fixing the case on 28.04.2006 for appearance of the complainant. In the meantime, the Presiding Officer of the learned Trial Court was transferred and the Court remained vacant for about 8 months. No summon was issued to the petitioner/complainant in terms of the order dated 18.03.2006. On 16.12.2006, after joining as successor the learned Trial Court, noted down that the accused is present through his learned Counsel, but the complainant is absent without steps, and the complainant is also stated to be absent on earlier dates without steps and accordingly, the complaint was dismissed for default recording that the complainant was not interested to proceed with the case further. Challenging the said order dated 16.12.2006, the complainant has filed this revision petition.

4. Upon hearing the learned Counsel for the parties, the issues crept up for decision in this revision petitioner are--(1) whether the learned Trial Court vide order dated 18.03.2006 directing to issue summon to the complainant for appearance after remand of the case from the High Court was justified in law to dismiss the case for default of the complainant without service of summon? (2) Whether after framing of charges in a case under Sections 403/420/424/477A, IPC, the case could be dismissed for default ?

5. In the instant case, the charges framed against the respondent were under Sections 403/420/424/477A, IPC.

As provided in the first Schedule of the Criminal Procedure Code the offence u/s 403, IPC, is non-cognizable and bailable, whereas the offence u/s 420, IPC, is cognizable and non-bailable. Offence u/s 424, IPC, is non-cognizable and bailable offence and the offence u/s 477A, IPC, is non-cognizable and bailable. Further the procedure for trial of the offence under Sections 403 420 and 424, IPC, is of warrant procedure. Whereas the offence u/s 477A, IPC, is warrant procedure and non-compoundable one. In such a case, the provisions for trial under Sections 244 to 249 falling in Chapter- XIX of the Criminal Procedure Code is to be attracted.

6. Section 245, CrPC, provides that if upon taking all the evidence mentioned in Section 244, CrPC, the Magistrate considers for reasons to be recorded that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him. Subsection (2) of Section 245, CrPC, recognizes the power of a Magistrate to enable him to discharge an accused at any previous stage of the case, if for reasons to be recorded by such Magistrate, he

considers the charge to be groundless. In a situation where the accused is not discharged in the manner stated above, the Magistrate is to proceed to the provisions of Section 246, CrPC, and frame charges in writing. After framing of the charges, at the desire of the accused persons, the Magistrate shall recall any witness for cross-examination and/or re-examination (if any), the evidence of the remaining prosecution witnesses shall thereafter be taken and such witnesses shall be discharged after cross-examination or re-examination (if any). Thereafter the accused would be given opportunity to enter upon his defense and produce his defence as per Section 247, CrPC.

7. In a proceeding instituted by the complainant, if on the date of hearing of the case, the complainant is absent and the case may be lawfully compounded and if the case is not cognizable one, the Magistrate may at his discretion discharge the accused person, as provided in Section 249, CrPC.

8. The sequence of facts of the prosecution case disclose that in the instant case, the Magistrate in exercise of power u/s 249, CrPC, dismissed the complaint case resulting discharge of the accused person. The learned Counsels at the Bar appearing for the parties are in unanimity in this point.

9. Now let us see whether the learned Magistrate could have dismissed the complaint in the absence of the complainant by passing the impugned order and in the manner as has been done in the instant case.

The order dated 18.03.2006 disclose that the case was fixed and appearance of the complainant upon receipt of the records on remand from this Court. Again the order dated 18.11.2006 does not disclose for what purpose the case was fixed on that day. From earlier order it is to be interpreted that the case was fixed on that day, i.e., on 16.12.2006 for appearance of the complainant and it was not fixed for hearing.

10. Analysis of Section 249, CrPC, disclose that in order to invoke the power reserved under that provision, the following ingredients should be fulfilled--

- (i) The proceeding must have been instituted upon complaint;
- (ii) the case is fixed for hearing;
- (iii) the offence charged is lawfully compoundable, and
- (iv) the offence is not cognizable offence.

11. Upon satisfaction of the aforesaid ingredients only an accused can be discharged by invoking the power u/s 249, CrPC. There is no express provision in the Code for dismissing a complaint for default but in such a situation upon fulfilling the necessary condition an accused can be discharged.

12. In the instant case, as observed above, the offence under Sections 403/424 and 477A, IPC, are not cognizable offence. The offence under Sections 403/420/424, IPC,

is compoundable whereas the offence u/s 477A, IPC, is a non-compoundable offence. In a non-cognizable and non-compoundable offence, the Magistrate is not empowered to discharge an accused in exercise of power u/s 249, CrPC and the Court is to proceed with a case of that nature even in the absence of the complainant. (Ref: Nobi Bakhsh A. v. King Emperor AIR 1924 Lah 627).

13. Such a matter came up for consideration before a Division Bench of this Court in the case of Kanakeswar Bora v. Asatu Kalita reported in AIR 1950 Gau 211. In that case after framing charges under Sections 379 and 426, IPC, against the accused, the learned Trial Court acquitted the accused due to absence of the complainant and his witnesses and acquitted the accused u/s 258(1) of the Old CrPC (1898). Disapproving the action, the Division Court held that after framing of charges, if the complainant and his witnesses were absent, the learned Magistrate should have secured their presence by coercive process and their absence was not a ground for acquitting the accused.

14. As discussed above, in the instant case, the ingredients of exercising discretionary power u/s 249, CrPC, were not to have existed. The case was not fixed for hearing on that day. That apart, when the learned Magistrate thought it fit in the case appearance of the accused without service of summon and such a drastic step to dismiss the complaint for default was unwarranted. Once the Magistrate having passed an order to cause appearance of the complainant issuing summon for appearance, the learned Magistrate was not justified to dismiss the case without service of such summon. The order is silent about the compliance of the said order earlier passed by the learned Court. The language of Section 249, CrPC, leaves no manner of doubt that the said power is a discretionary power. In exercising discretion, the learned court is to take an objective view of the entire matter. In the matter of fulfillment of procedural matter, the Court is to observe the mandate of law. When the procedure prescribed by law is not followed and/or complied with then the order loses its legal sanctity. (Ref: AIR 1945 18 (Privy Council) ).

15. In the back ground of the aforesaid discussions, I have no hesitation to hold that the impugned order dated 16.12.2006 dismissing the complaint for default was passed in excess or without having jurisdiction to pass such an order. Consequently, the same stands set aside and quashed and the matter is remanded to the learned Trial Court for disposal afresh in accordance with law. Both the parties are directed to appear before the learned Trial Court on 06.05.2006 to receive further instruction from the learned Trial Court. With the aforesaid observations and directions, this revision petition stands allowed.