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**(1975) 05 CAL CK 0021**

**Calcutta High Court**

**Case No:** Criminal A. No. 214 of 1974

Radhakishan Bhakat

APPELLANT

Vs

Ramnath Bhakat and  
Others

RESPONDENT

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**Date of Decision:** May 27, 1975

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 203, 247, 403, 438
- Penal Code, 1860 (IPC) - Section 247, 323, 426

**Citation:** 79 CWN 701

**Hon'ble Judges:** A.N. Banerjee, J

**Bench:** Single Bench

**Advocate:** Samarendra Kumar Dutta and Sujit Kumar Laik, for the Appellant; Jyotirmoyee Nag, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

A.N. Banerjee, J.

This appeal is directed against an order of acquittal dated 7.3.74 passed by a learned judicial magistrate, Rampurhat, in C.R. Case No. 634 of 1973. Facts leading on to the issue of the present appeal are shortly as follows :-

On 25.11.72, the petitioner filed a complaint u/s 323 I.P.C. stating inter-alia that similar complaint filed in case No. C.R. 115 of 71 was dismissed though the complainant had applied for adjournment. The learned sub-divisional judicial magistrate called for the records of the earlier case and fixed 10.1.73 for hearing and order. On that day some of the accused/respondents filed an application for dismissing the petition of complaint. That application was rejected by the learned magistrate on a finding that they had no locus standi. On 2.5.73, the learned magistrate held that there was no bar u/s 403 Cr. P.C. for entertaining the fresh complaint and summoned the accused persons u/s 323 I.P.C. After appearance of the accused, the case was transferred to the file of another judicial

magistrate for disposal. Before the transferee court, an application was filed on behalf of the accused challenging the maintainability of the pre-sent complaint. After hearing both the parties, the learned magistrate by the impugned order dated 7.3.74, acquitted the accused. Thereafter, the complainant filed this appeal after obtaining special leave of the court.

Mr. Samarendra Kumar Dutt, learned advocate with Mr. Surjit Kumar Laik, appearing for the appellant contended that the impugned order of the learned judicial magistrate was illegal and without jurisdiction. His first submission was that in the earlier case, the learned magistrate acted without jurisdiction in acquitting the accused persons u/s 247 Cr. P.C. 1898 inasmuch as the complainant was present in court. Accordingly, such an order without jurisdiction was a nullity and as such the learned sub-divisional judicial magistrate was perfectly justified in ignoring such a null and void order and entertaining a fresh complaint. His second contention was that at the time of issue of the process after taking cognizance the learned sub-divisional judicial magistrate did take into consideration the fact of acquittal in the earlier case and came to a finding that section 403 Cr. P.C. was not a bar to the present complaint. Upon such finding, he ordered issue of the process u/s 323 I.P.C. against the accused persons. Mr. Dutta submitted) that the transferee court sat in judgment over such finding of the learned sub-divisional judicial magistrate when he found that section 403 Cr. P.C. was a bar to the present proceeding. The transferee court as per contention of Mr. Dutta have had no such power of revision of the previous order and as such the impugned order passed by him is also without jurisdiction.

2. Mrs. Joytirmoyee Nag, learned advocate appearing for the respondents contended that the fact of an order of acquittal u/s 247 Cr. P.C. passed rightly or wrongly had the same effect as that of an order of acquittal after trial and that as such it was not within the competence of the learned magistrate (latter sub-divisional judicial magistrate) to ignore such order of acquittal and to issue process u/s 323 I.P.C. against the respondents. Mrs. Nag submitted that the remedy against such order of acquittal even if unjust or wrong lay in moving the higher court for setting aside such order. It was also contended by Mrs. Nag that the transferee magistrate was justified in dismissing the second petition of complaint inasmuch as the continuance of such proceeding would have amounted to an abuse of the process.

3. Having heard the learned advocates of the respective parties and on consideration of the material before me I find much force in the contention of Mr. Dutta. It may be that an order of acquittal u/s 247 Cr. P.C. has the same force of an order of acquittal passed after regular trial. So long such an order of acquittal remains in force, fresh complaint on the self same facts would be barred u/s 403 Cr. P.C. But where it is found that an order of acquittal purported to be u/s 247 I.P.C. is not in accordance with the terms of the said section it is a nullity and without jurisdiction. Such a null and void order is nonest in the eye of law and it does not under all circumstances require to be set aside by a higher court. Such an order can be ignored in lodging a fresh complaint on the self same facts

and in entertaining it by the court. There is fundamental difference between a wrong and unjust order and an order without jurisdiction amounting to nullity. In order to attract an order of acquittal u/s 247 Cr. P.C. the condition precedent is that the complainant must be absent either on the date fixed for appearance of the accused after issue of the process or any date subsequent thereto to which hearing may be adjourned. Again the magistrate exercises a discretionary power u/s 247 Cr. P.C., no doubt, it is obligatory on his part to acquit an accused on the happening of the aforesaid contingency but he may on some proper reason adjourn the hearing of the case to some other day. Unless the required condition viz. the absence of the complainant (On a summon case) exists the magistrate, has no power to acquit an accused u/s 247 Cr. P.C. If he does so he acts without jurisdiction and is not in accordance with the procedure established by law and as such the order of acquittal passed by him is a nullity. In this connection, I may refer to three decisions of this Court. In the case of Etimhaji vs. Hamid what happened was that on the date fixed for hearing of the case both the complainant and the accused appeared before the court dealing it. After recording such presence of the parties and their witnesses the learned deputy magistrate transferred it to Sadar Bench for favour of disposal. The case was taken up later on in the day by the said bench of magistrate. The complainant and his lawyer were called for several times but were not found. The magistrate accordingly, recorded the following order:-

The accused present, the complainant absent, the accused acquitted u/s 247 Cr. P.C.

4. Shortly after this, the complainant appeared before the said Bench and prayed that the case may be revived as he was not aware of the order of the transfer and was waiting with his witnesses in the court of the deputy magistrate on the belief that his case would be tried there. On a reference u/s 438 Cr. P.C. the Division Bench of this Court laid down that section 247 had not been rightly applied in the case and that as such the order u/s 247 must be set aside. In the case of Achambit Mandol vs. Mohatab Singh, XVIII C.W.N. 1180, a case was called on by mistake on a date not fixed for hearing and the magistrate recorded an Order of acquittal u/s 247 Cr. P.C. on the ground of the absence of the complainant. On the date fixed for hearing the mistake was discovered and the magistrate ignored the order passed by him u/s 247 Cr. P.C. and went on with the case which ended in conviction. It was held by this Court that an order passed on a date which was not fixed for hearing of the case and on which date the complainant was necessarily absent, was no order at all and the trying magistrate had jurisdiction to ignore it and go on with the case and came to a finding which he did. Their lordships observed, "On the above facts the first question that arises is whether the order of acquittal passed by the sub-divisional Officer professedly u/s 247 Cr. P.C., on the 10th January 1914 was a legal order or a mere nullity. If it was a mere nullity, then the trying Magistrate could ignore that order, and ignoring that order could go on with the case which was fixed originally for the 16th and which was also called on for hearing on the 16th when the parties were present. If it was a nullity, then the order of the learned Sessions Judge dated the 31st March 1914 cannot stand, because the learned Sessions Judge seems to be of opinion that so

long as the order of acquittal passed by the sub divisional Magistrate on the 10th January is not set aside, it is a bar against the re-opening of the case by the Sub-Divisional Magistrate". In another Division Bench judgment in this case reported in the same volume at page 1211 (Madho Chowdhury vs. Turab Mian and Ors.) what happened was that a servant on behalf of his master tiled a complaint u/s 426 I.P.C. On the date fixed for disposal of the case, the learned magistrate finding that the complainant was dead acquitted the accused u/s 247 Cr. P.C. Thereupon another servant complained to the Sub-Divisional Magistrate of the same offence. But Sub-Divisional Officer dismissed the complaint u/s 203 Cr. P.C. on the ground that the previous acquittal was a bar to his taking cognizance of it. It was held in that case that the previous acquittal was wholly without jurisdiction and was no bar to the magistrate's taking cognizance of the second complaint.

In the present instance, it appears that on the date fixed for hearing in the earlier case the complainant was present in court but he filed an application for adjournment. The learned magistrate rejected his petition for adjournment but thereafter, straight-way acquitted the accused u/s 247 Cr. P.C. In the presence of the complainant in court on the date fixed the learned magistrate have had no jurisdiction to pass such an order of acquittal after rejecting the petition for adjournment. Such an order of acquittal was without jurisdiction and nullity and as such fresh complaint on the same facts was not barred u/s 403 Cr. P.C. The learned Sub-Divisional Judicial Magistrate who took cognizance of the offence did take into consideration the factum of the order of acquittal in the earlier case and the circumstances under which such order was passed and came to a positive finding that there was no bar to the issue of the process on the basis of the fresh complaint. The learned transferee magistrate was wrong, in my view, in ignoring such order of learned Sub-Divisional Judicial Magistrate and in revising the order passed by him. The remedy if any of the accused persons was to move the higher court for quashing the proceeding. They were not justified in filing an application before the transfer court for quashing the proceedings and the transferee court was also not correct in entertaining such an application. Moreover, the order as passed by the learned Transferee Court is also unwarranted. He ordered, "That the accused are acquitted and the present proceedings is dropped for taking up invalid cognizance." Such an order of acquittal after cognizance has been taken and process has been issued is not in accordance with the provision of law. I, therefore, hold that the impugned order must be set aside and the case be sent back to the trying magistrate for fresh disposal in accordance with the provision of law from the stage it reached prior to the date of passing the impugned order.

In the result, the appeal is allowed and the order of acquittal is set aside and the case is sent back for fresh disposal in the light of observation and direction as made above. The Records may go down as early as possible.