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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-37892 of 2012

Date of Decision: October 28, 2015

Ramdia and others

.....Petitioners

Versus

Naresh Kumar and another

.....Respondents

CORAM: HON'BLE MRS. JUSTICE SABINA

Present: Mr. N.S. Shekhawat, Advocate
for the petitioners.

Mr. Kamal Mor, Advocate for
Mr. Saurabh Dalal, Advocate
for respondent No.1.

Ms. Mahima, AAG Haryana.

SABINA, J.

Petitioners have filed this petition challenging the order dated 21.01.2012 (Annexure P-5), whereby, complaint filed by respondent No.1 was ordered to be restored.

Learned counsel for the petitioners has submitted that respondent No.1 had filed the complaint against the petitioners and vide order dated 19.01.2011 (Annexure P-2), petitioners were ordered to be summoned to face the trial qua commission of offence punishable under Sections 323, 379, 506/34 of Indian Penal Code, 1860 ('IPC' for short). Vide order dated 28.09.2011, complaint was ordered to be dismissed in default. The

complaint was later restored to its original number vide the impugned order dated 21.01.2012 (Annexure P-5). The Magistrate had no power to review its earlier order. In support of his arguments, learned counsel has placed reliance on ***Daya Kishan and another*** versus ***Banarsi Dass***, 2010 (2) R.C.R. (Criminal) 451, which reads as under:-

"I have heard counsel for the parties and have gone through the records of the case as also the judgments relied upon by the counsel for the parties. There can be no dispute with regard to the proposition that the inherent powers under Section 482 Cr.P.C. are only available with the High Court. The Courts below, therefore, do not have the powers under Section 482 Cr.P.C. which, therefore, they cannot exercise at any stage. The Courts below, therefore, are bound by the powers as have been made available to them under the Code of Criminal Procedure. There is no provision under the Code of Criminal Procedure which empowers the Magistrate to recall or review his order, once passed by him, except in cases where they are all interim in nature. Dismissal of a complaint cannot be termed as an order which is not final whether it is due to default on the part of the complainant to appear before the Court or due to want of prosecution. Once a power vested in the Magistrate under the Code of Criminal Procedure has been exercised, the same cannot be modified, changed or recalled by the Magistrate unless such power is conferred upon the Magistrate under the Code of Criminal

Procedure. There being no provision under the Criminal Procedure Code empowering the Magistrate to review or recall his earlier order dismissing the complaint in default and for want of prosecution, the order passed by the Magistrate attains finality which can only be set aside or modified by a superior Court in accordance with law. The other option available to the complainant in case the complaint has been dismissed for non-prosecution is to prefer another complaint on the same facts if permissible under the law.

The Hon'ble Supreme Court in Bindeshwari Prasad Singh's case (supra) in para 4 of the judgment has held as follows:-

"4. We might mention that the order dated 23rd November, 1968 was a judicial order by which the Magistrate had given full reasons for dismissing the complaint. Even if the Magistrate had any jurisdiction to recall this order, it could have been done by another judicial order after giving reasons that he was satisfied that a case was made out for recalling the order. We, however, need not dilate on this point because there is absolutely no provision in the Code of Criminal Procedure of 1898 (which applies to this case) empowering a Magistrate to review or recall an order passed by him. Code of Criminal Procedure does contain a provision for inherent powers, namely, Section 561-A which, however, confers these powers on the High Court and the High Court alone. Unlike

Section 151 of Civil Procedure Code, the subordinate criminal courts have no inherent powers. In these circumstances, therefore, the learned Magistrate had absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the respondent was to move the Sessions Judge or the High Court in revision. In fact after having passed the order dated 23-11-1968, the Sub Divisional Magistrate became functus officio and had no power to review or recall that order on any ground whatsoever. In these circumstances, therefore, the order even if there be one, recalling order dismissing the complaint, was entirely without jurisdiction. This being the position, all subsequent proceedings following upon recalling the said order, would fall to the ground including order dated 3-5-1972 summoning the accused which must also be treated to be a nullity and destitute of any legal effect. The High Court has not at all considered this important aspect of the matter which alone was sufficient to put an end to these proceedings. It was suggested by Mr.D.Goburdhan that the application given by him for recalling the order of dismissal of the complaint would amount to a fresh complaint. We are, however, unable to agree with this contention because there was no fresh complaint and it is now well settled that a second complaint can lie only on fresh facts or even on the previous facts

only if a special case is made out. This has been held by this Court in 1962 Supp (2) SCR 297 : (AIR 1962 SC 876). For these reasons, therefore, the appeal is allowed. The Order of the High Court maintaining the order of the Magistrate dated 3-5-1972 is set aside and the order of the Magistrate dated 3-5-1972 summoning the appellant is hereby quashed."

Relying upon this proposition, the Hon'ble Supreme Court in the case of Major General A.S.Gauraya's case (supra) wherein the facts of the case were similar to the case in hand has held that the Magistrate could not recall his order once the complaint has been dismissed for nonprosecution. It has been further held that no criminal Court has any inherent jurisdiction, being not provided for in the Criminal Procedure Code."

Learned counsel for respondent No.1, on the other hand, has opposed the petition.

Facts in the present case are not in dispute. In a complaint filed by respondent No.1, petitioners were ordered to be summoned to face the trial qua commission of offence punishable under Section 323, 379, 506/34 IPC vide order Annexure P-2. However, complaint was dismissed for want of prosecution vide order Annexure P-3. Thereafter, respondent No.1 moved an application to consider second criminal complaint on the same facts as given in the earlier complaint. However, vide the

impugned order (Annexure P-5), the complaint was ordered to be restored to its original number. The Magistrate had no power to review its earlier order Annexure P-3. Once the complaint filed by respondent No.1 was ordered to be dismissed for want of prosecution, the complainant could have filed a second complaint on the same facts, if maintainable as per law or could have approached superior Court challenging the order Annexure P-3. However, the order Annexure P-3 could not have been reviewed by the Magistrate as there is no power in this regard with the Magistrate under the Code of Criminal Procedure, 1973.

Accordingly, this petition is allowed. Impugned order dated 21.01.2012 (Annexure P-5), is set aside.

(SABINA)
JUDGE

October 28, 2015
mahavir