

7 SCOB [2016] AD 50**APPELLATE DIVISION****PRESENT:**

Mr. Justice Surendra Kumar Sinha,
Chief Justice
Mrs. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CRIMINAL APPEAL NO.01 OF 2015

(From the judgment and order dated 31.01.2013 passed by the High Court Division in Criminal Miscellaneous Case No.4918 of 2007.)

Bo-Sun Park : Petitioner.

=Versus=

The State and another : Respondents.

For the Petitioner : Mr. Abdul Baset Majumder, Senior Advocate, instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.

For Respondent No.1 : Mr. M.A. Azim, Advocate, instructed by Mr. Haridas Paul, Advocate-on-Record.

Respondent No.2 : Ko. Kyung Oh (in person)

Date of hearing and judgment : 26-01-2016

Code of Criminal Procedure, 1898**Section 247 read with section 403:**

Since the order passed under section 247 of the Code of Criminal Procedure is one of acquittal the second complaint on the same allegation is not maintainable. At whatever stage of the proceeding the acquittal order section 247 is ordered, such order will operate as a bar the fresh trial, in the same way as are acquittal after trial on merits.

...(Para 11)

J U D G M E N T**Hasan Foez Siddique, J:**

1. This appeal is directed against the judgment and order dated 31.01.2013 passed by the High Court Division in Criminal Miscellaneous Case No.4918 of 2007 discharging the Rule.

2. The appellant filed an application under section 561A of the Code of Criminal Procedure challenging the proceeding of Petition Case No.421 of 2006 under sections 323/324/ 321/ 342/ 343/606 of the Penal Code pending in the Court of Magistrate, Gazipur and obtained Rule.

3. The relevant facts, for the disposal of this appeal, in short, are that the respondent No.2 Ms. Ok Kyung Oh, filed a petition of complaint on 09.01.2005 against the appellant under sections 323/324/341/342/343/506 of Penal Code alleging that the appellant fraudulently excluded her from the post of Managing Director by forging her signatures and managed to get registration of the company changed with the Registrar, Joint Stock Companies and Firms showing her forged resignation letter during her absence in the country. On 28.12.2004, when the complaint asked about the same to the appellant, he became furious and started to abuse her with filthy language. At one stage, the appellant dragged her to the room and threw on the floor making her naked and started assaulting with private parts of her body. Over the said incident, the respondent No.2 at first initiated a complaint case before the Nari-O-Shishu Nirjatan Daman Tribunal under section 10 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 along with sections 323/343/506 of the Penal Code, which was registered as Petition Case No.18 of 2005 as the police did not receive allegation. Ultimately, the said case was dismissed and Criminal Appeal against the order of dismissal was also dismissed with an observation that no offence was committed under section 10 Nari-O-Shishu Nirjatan Daman Ain but for other offences under the Penal Code, separate criminal case may be initiated, if the complainant is so advised. In pursuance of the said observation passed in the Criminal Appeal No.1756 of 2005, the complainant respondent No.2 filed C.R. Case No.143 of 2006 under sections 323/324/341/342/343/506 of the Penal Code against the accused petitioner for the same occurrence showing the dates of occurrence from 21.12.2004 to 29.12.2004. The said C.R. Case was filed (*ওবিএফসিও*) under section 247 of the Code of Criminal Procedure by an order dated 30.11.2006. Subsequently, on 14.12.2006, the complainant respondent No.2 again filed another petition of complaint which is registered as C.R. Case No.421 of 2006 on the same facts of the previous case. On the basis of the said second complaint, cognizance was taken on 20.12.2006 under sections 323/324/341/342/343/506 of the Penal Code and the learned Magistrate, First Class, Gazipur issued summon upon the accused appellant. Thereafter, the accused appellant appeared before the Court below and obtained bail on 19.02.2007 and then he approached this Court for quashing the second criminal proceeding under section 561A of the Code of Criminal Procedure and obtained the instant Rule.

4. The High Court Division by the impugned judgment and order discharged the Rule. Thus, the appellant filed the instant appeal after getting leave.

5. Mr. Abdul Baset Majumder, learned Senior Counsel appearing on behalf of the appellant, submits that there is a clear provision of law under section 417 of the Code of Criminal Procedure to prefer appeal against the order of acquittal of the appellant passed by the learned Magistrate on 30.11.2006 in petition Case No.143 of 2005 but the complainant without resorting the opportunity of said provision filed second petition complaint which is barred under section 403 of the Code of Criminal Procedure, the High Court Division erred in law in not quashing the instant proceeding.

6. The learned Counsel for the respondent No.2 supported judgment and order of the High Court Division.

7. Admittedly, the complainant-respondent No.2 instituted Criminal Petition Case No.143 of 2005 against the appellant under sections 323/324/341/342/343/506 of Penal Code bringing the allegations which have been brought in this case again. It further appears from the order sheet of the said case that the same was disposed of under the provision of section 247 of the Code of Criminal Procedure since the complainant could not appear in the case.

8. The contents of the said order were as follows:

“Df q c¶| uebr Z`exti Mo nmiRi | mxb|er`x c¶| `j| avh®Zmi tL Av`vj tZ Mo nmiRi | mmeR me tePbvq GUVB Av`vj tZi KvQ cZxqgvb th, er`x c¶| Avi G gvgj v Pj v tZ P tnb bv| Brv m, Avi gvgj v| GgZve`nvq er`xi Abxw`wZ tZ I gvgj v cmi Pj bvi Abxvi Kv t b gvgj v m, Avi, w, m, 247 avivq bw`fZ Kiv ntjv|”

9. The order shows that the complainant, before passing the said order, was found absent in the Court in two consecutive dates. That is, it was third time she was found absent. No adjournment was sought on her behalf. Though earlier the complainant was found absent twice but the Court did not dismiss the case rather it adjourned the case which clearly indicates that the presence of the complainant before the Court was insisted on but she could not appear before it third time. Section 247 affords some deterrence against dilatory tactics on the part of the complainant who set the law in motion through his complaint. In the case of Obaidur Rahman Vs. The State reported in 19 BLD (AD) page 128 this Division has observed;

“The language of section 247 thus having clearly empowered the concerned Magistrate to acquit the accused for the failure of the complainant to appear in the case on the date fixed for the appearance of the accused, it cannot be said that only the order of acquittal passed upon holding full trial can create a bar under Section 403 Cr.P.C. from entertaining a second complaint on the self same allegation. So long as the order of acquittal, passed under section 247 Cr.P.C., remains in force the provision of Section 403 Cr.P.C. shall stand on the way of entertaining a second complaint on the self-same allegations.”

10. The Magistrate while passing the order dated 30.11.2006 had observed, “mmeR me tePbvq GUVB Av`vj tZi KvQ cZxqgvb th, er`x c¶| Avi G gvgj v Pj v tZ P tnb bv|” . Where the complainant is found repeatedly absent on the date, any of the two courses are to be followed by the Magistrate exercising his discretion in indicial manner: (1) To acquit the accused; or (ii) to adjourn the case. Since the discretion vested with the Magistrate, it adopted the first option. However, such discretion has to be exercised with great care and caution because an order of acquittal operates as a bar to a fresh complaint.

11. Since the order passed under section 247 of the Code of Criminal Procedure is one of acquittal the second complaint on the same allegation is not maintainable. At whatever stage of the proceeding the acquittal order section 247 is ordered, such order will operate as a bar the fresh trial, in the same way as are acquittal after trial on merits.

12. In view of such circumstances, the High Court Division ought to have been quashed the proceeding.

13. Accordingly, we find substance in the appeal.

14. Thus the appeal is allowed. The judgment and order of the High Court Division is set aside. The proceeding of C.R. Case No.421 of 2006 is hereby quashed.