Present:

Mr. Justice Borhanuddin

and

Mr. Justice Md. Ruhul Quddus

Criminal Appeal No.5815 of 2008

Farzana Akter (Kakoli)

...Appellant

-Versus-

Md. Kabir Hossain and others

...Respondents

No one appears for the appellant

Mr. Shah Abdul Hatem, A.A.G.

...for the state-respondent

Judgment on 9.6.2011

Md. Ruhul Quddus, J:

This appeal, under section 28 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 at the instance of a complainant, is directed against order dated 7.7.2008 passed by the Nari-o-Shishu Nirjatan Daman Tribunal, Patuakhali in Nari-o-Shishu Case No.185 of 2004 stopping all further proceedings of the case.

Facts leading to this appeal, in short, are that the appellant filed a petition of complaint before the Nari-o-Shishu Nirjatan Daman Tribunal, Patuakhali against four persons including respondent Nos.1-3 alleging *inter alia*, that she was a girl of 12 years and was a student of class VII at Talbaria Secondary School. Respondent No.1 used to tease her very often on her way to school and proposed her for love-affair. On the date of occurrence, respondent

No.1 along with his accomplices abducted the complainant, while she was going to Madrasha to learn Arabic. Respondent No.1 took her to his house and violated her chastity against her will. Thereafter, she was taken from one place to another and ultimately she was recovered from the maternal house of respondent No.1 on 3.5.2004. On the following day, she went to Golachipa police station for filing an *ejahar*, but the police was reluctant to record the same. Then, she filed Nari-o-Shishu Case No.157 of 2004 before the Nari-o-Shishu Nirjatan Daman Tribunal, Patuakhali on 28.8.2004, which was summarily rejected for want of medical certificate.

The victim Farzana Akter filed another complaint being Nari-o-Shishu Case No.185 of 2004 before the Nari-o-Shishu Nirjatan Daman Tribunal, Patuakhali on 29.9.2004 on the self same allegation. On receipt of the said complaint, the learned Judge of the Tribunal sent it to the Magistrate of First Class, Patuakhali for holding a judicial enquiry and submitting a report. The Magistrate, after completion of his enquiry submitted a report on 3.10.2004, upon which the learned Judge of the Tribunal took cognizance of offences under section 7/9(1) of the Nari-o-Shishu Nirjatan Daman Ain, 2000 (hereinafter called “the Ain”) against respondent No.1 Kabir Hossain and also took cognizance of the offences under sections 7/9(1)/30 of the Ain against three other co-accused.

The learned Judge of the Tribunal framed charge against respondent Nos.1-3 by his order dated 26.9.2007 under the said sections of the Ain and discharged co-accused Riaz Uddin as there was nothing specifically mentioned against him in the petition of complaint. In course of trial, the prosecution

examined two witnesses and filed an application for adjournment on 7.7.2008 in absence of any more witnesses.

On the other hand, the learned Advocate for the defense made submission for dropping all further proceedings of the case on the ground of maintainability. The learned Judge by his order dated 7.7.2008 stopped the proceedings in the midst of trial. The complainant moved in this Court against the said order dated 7.7.2008.

The appeal was taken up for hearing on 23.5.2011, since no one appeared, it was adjourned for a day. The learned Advocate for the appellant appeared on 26.5.2011 and took adjournment till 2.6.2011. Since then, it has been appearing at the top of the list, but the learned Advocate has not appeared to press the appeal.

We have gone through the impugned order. It appears that at the time of hearing the learned Public Prosecutor referred to the case of Abdus Salam Master alias Salam and another Vs. The State reported in 36 DLR (AD) 58, 65 and advanced his submission for continuance with the trial. The learned Judge without distinguishing the said decision of the Appellate Division, ignored it only by saying that "*the case law does not match exactly with the facts of the present case*" and arrived at his decision on the principle of rejection of plaint as provided in Order VII rule 11 of the Code of Civil Procedure and compared the said law with the provision of section 403 of the Code of Criminal Procedure, and dropped the proceedings of the Nari-o-shishu case under trial before him.

In the said case of 36 DLR (AD), the police submitted a final report in a murder case. The Sub-divisional Magistrate accepted the final report and released the accused. The informant thereafter, challenged the final report and filed a *'naraji'* petition before the Magistrate, but subsequently he withdrew the said *'naraji'* petition. Thereafter one Khorshed Alam, who was cited as a witness in the aforesaid *ejahar,* filed a fresh complaint before the Magistrate against the same accused persons. The complaint was registered as a case under section 302 of the Penal Code. The Magistrate examined the complainant on oath, held an enquiry and on the basis of the materials, took cognizance of offence against the accused and issued warrant of arrest against them. This proceeding was challenged in an application under section 561A of the Code of Criminal Procedure, which the High Court Division rejected. Two of the accused went up to the Appellate Division against the said order of rejection passed by the High Court Division. The Appellate Division considered the issue: under what circumstances a second complaint may be entertained after dismissal of a previous complaint and discharge of the accused by a Magistrate on acceptance of the police report on the same allegation. The Appellate Division after hearing of the criminal appeal dismissed the same and thereby affirmed the decision of the High Court Division on the reasons:

> *"… In the case of 'revival' the question of the Magistrate becoming functus officio may arise, but no such question can arise if a fresh complaint is entertained though on the same allegation.*
>
> *" It is not disputed that after dismissal of a complaint or discharge of an accused, a fresh complaint may be entertained on the same allegation*

against the same person whether it is filed by the same complainant or by a different complainant but only in certain exceptional circumstances. Grounds for this principle are two : (1) dismissal of a complaint or discharge of an accused is not "acquittal" within the meaning of section 403 of the Criminal P.C. which expressly prohibits fresh prosecution of a person who has been acquitted; (2) there is no provision in law that prohibits entertainment of a fresh complaint after 'dismissal' or 'discharge'…".

In the same line, we also find the case of Jotish Das Vs. Chandan Kumar Das reported in 4 BLT (AD) 258, 260 wherein under similar facts and circumstances their lordships of the Appellate Division held *"…when a proceeding is stopped under section 339C of the Code of Criminal Procedure and the accused stands released thereunder, such release is neither an acquittal nor a discharge as has been contemplated under the Code and as such the accused cannot claim the protection of section 403 of the Code from facing trial for the same offence."*

For better appreciation of law, section 403 of the Code of Criminal Procedure is quoted below:

"403. Person once convicted or acquitted not to be tried for same offence.- (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other

offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

"(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1).

"(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

"(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

"(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code."

From a plain reading of section 403 of the Code of Criminal Procedure it appears that a person will not be liable to be tried twice for an offence, for which he has already been tried by a Court of competent jurisdiction i.e the

principle of “double jeopardy” has been reflected in the above quoted section of the Code of Criminal Procedure. In the present case, the trial is yet to be commenced. Therefore the question of applicability of section 403 does not arise. The reasoning in the impugned order is supported neither by any statute nor any decision of the Superior Court. The jurisprudence behind a particular provision of civil law and that of a criminal law is quite different. A question arises in a criminal case cannot be decided on the basis of a provision of civil law. For the above reasons, we find merit in the appeal.

In the result, the appeal is allowed. The impugned order dated 7.7.2008 passed by the Nari-o-Shishu Nirjatan Daman Tribunal, Patuakhali in Nari-o-Shishu Case No.185 of 2004 is hereby set aside. The learned Judge of the Tribunal is directed to proceed with the trial in the said Nari-o-shishu case in accordance with law.

Borhanuddin, J:

I agree.