

(2006) 03 AHC CK 0038

In the Allahabad High Court

Case No : Misc. Recall Application No's. 222891 and 222899 of 2005 and
Criminal Revision No's. 1863 and 1951 of 1998

Anand Swaroop Sharma and Others

APPELLANT

Vs

State of U.P. and Sri Brij Bhushan Parasher Sharma

RESPONDENT

Date of Decision : 06-03-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 200, 202, 482
Penal Code, 1860 (IPC) — Section 201, 304B

Citation : (2006) CriLJ 2602 : (2006) 2 DMC 113

Hon'ble Judges : R.K. Rastogi, J

Bench : Single Bench

Advocate : V.P. Srivastava and Ajeet Kumar, for the Appellant; Ram Niwas Sharma and Sunil Vashisth and A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

R.K. Rastogi, J.—Misc. Application No. 222891 of 2005 has been moved by the applicant-revisionists for recalling the judgment and order dated 5.8.2005 passed by this Court in Criminal Revision No. 1951 of 1998, Anand Swaroop and Ors. v. State of U.P. and Anr., and Misc. Application No. 222899 of 2005 has been moved by the same applicant-revisionists for recalling the order of same date passed by this Court in Criminal Revision No. 1863 of 1998, Anand Swaroop and Ors. v. Brij Bhushan Parashar.

2. Since the parties to the above cases are common and common question of law are involved therein, I have heard both the cases together and now I am deciding them by a common order.

3. The facts relevant for disposal of these two applications are that Brij Bhushan Parashar (opposite party in both the cases) had lodged a report against the accused applicants at police station Parikshit Garh district Meerut and on the basis of that report a case under Sections 304B and 201 I.P.C. was registered against the accused persons. The police, however, on completing the

investigation submitted final report in the case. Aggrieved with that report Brij Bhushan Parashar filed a protest petition.

4. The learned Magistrate after hearing on that protest petition passed an order on 15.1.1998 for treating the protest petition as a complaint and fixed a date for recording statements of the complainant and the witnesses under Sections 200 & 202 Cr.P.C. Aggrieved with that order, the complainant Brij Bhushan Parashar filed Criminal Revision No. 42 of 1998 in the court of the Sessions Judge, Meerut, who after hearing the parties, decided it vide his order dated 3.9.1998 and set aside the order passed by the Magistrate for treating the protest petition as complaint, and remanded the case back to his court to re-examine the final report and reassess the evidence and then pass suitable order in the matter.

5. The learned Magistrate after remand of the case heard the complainant and the State and this time he after perusal of the case diary and the evidence therein was of the view that a prima facie case under Sections 304B and 201 I.P.C. was made out against the accused-applicants. He, therefore, passed an order on 5.10.1998 for summoning the accused revisionists under Sections 304B and 201 I.P.C. Aggrieved with that order the accused filed Criminal Revision No. 1863 of 1998 in this Court. They also filed another Criminal Revision No. 1951 of 1998 thereafter against the judgment and order dated 3.9.1998 delivered by the 1st. Addl. Sessions Judge, Meerut in Criminal Revision No. 42 of 1998.

6. Both these revisions were fixed for hearing in this Court, and since none appeared for the revisionists on the date fixed for hearing even after revision of the cause list, I had heard learned Counsel for the State as well as for the complainant opposite party in both the revisions and dismissed the same on merits vide my judgment and order dated 5.8.2005. Aggrieved with that order the accused applicants moved the aforesaid two applications for recalling the same.

7. It is alleged in the affidavit filed in support of both the applications that when the case was taken up by the Court; Sri V.P. Srivastava, who was counsel for the applicants, was busy in another court, and by the time he could be free from that court, the revisions were heard and dismissed in his absence.

8. The complainant Brij Bhushan Parashar filed counter affidavits in both the cases submitting therein that the order of this Court in both the revisions was passed on merits, and so the applications for recall of that order are not maintainable.

9. I have heard learned Counsel for both the parties and have perused the materials on record.

10. The learned Counsel for the opposite party Brij Bhushan Parashar at the very outset submitted that since the judgment of this Court dismissing both the revisions was on merits, it could not be recalled or set aside on the application of the revisionist-applicants.

11. The learned Counsel for the complainant opposite party cited before me a ruling of Hon''ble Apex Court in Hari Singh Mann v. Harbhajan Singh Bajwa and Ors. reported in 2001 Criminal Law Journal page 128. In this case facts were that on the application of Harbhajan Singh u/s 482 Cr.P.C. the High Court had passed a final order on 7.1.1999. Thereafter on another application of Sri Harbhajan Singh u/s 482 Cr.P.C., Criminal Miscellaneous Application No. M-15 of 1999) the High Court passed another order on 30.4.1999 reviewing and modifying its earlier order dated 7.1.1999. Then Hari Singh Mann filed Crl. Misc. No. 20653 of 1999 for quashing the order dated 30.4.1999 on the ground that the High Court had no jurisdiction to review or modify its earlier order dated 7.1.1999 under the provisions of the Cr.P.C. This application was rejected by the High Court and aggrieved with that order the appellant Hari Singh Mann filed the aforesaid appeal before Hon''ble Supreme Court. The Hon''ble Supreme Court held that there is no provision in the Cr.P.C. for reviewing the earlier order passed by the Court and so the order passed by the High Court on 30.4.1999 in Crl. Misc. Application No. M-15 of 1999 was illegal and it set aside that order as well as the order dated 21.7.1999 passed in Crl. Misc. No. 20653 of 1999 and restored the original order passed by the High Court on 7.1.1999.

12. The learned Counsel for the opposite party cited before me ruling of this Court also in Kirti Prakash and Others Vs. State of U.P., This was a case of criminal revision, and in the absence of the revisionist the revision was dismissed on merits after hearing the State Counsel. Thereafter the revisionist filed an application for setting aside that order of dismissal of the revision. This application was rejected by this Court relying upon the following rulings of Hon''ble Supreme Court:

1. Sankatha Singh Vs. State of U.P.,
2. Smt. Sooraj Devi Vs. Pyare Lal and Another,
3. Manohar Nathurao Samarth Vs. Marotrao and Others,
4. Hari Singh Mann Vs. Harbhajan Singh Bajwa and Others,

13. The learned Counsel for the applicant in that case had cited a Full Bench ruling of Rajasthan High Court in Habbhu v. State of Rajasthan AIR 1987 Raj 83 in support of his contention that the application for restoration was maintainable. It was held by this Court that the law laid down in this ruling is not good law in view of the ruling of the Hon''ble Supreme Court in Hari Singh Mann's case referred to above.

14. The learned Counsel for the opposite party also cited before me Full Bench ruling of Calcutta High Court in Harjeet Singh Vs. State of West Bengal, In this case the facts were that a revision was filed in the High Court against the order passed by Sub Divisional Magistrate, and when this revision was put up before the Court as an unlisted motion, the High Court finally disposed of the revision passing orders in favour of the revisionist. The opposite party had not put in

appearance before the High Court by that time and no opportunity of hearing was given to the opposite party by the High Court before passing the impugned order. Thereafter the opposite party appeared before the High Court and moved an application for setting aside that *ex parte* order, and then finding some difference of opinion in the rulings on this point, this matter was referred to a Full Bench for decision. In this case, the aforesaid Full Bench decision of Rajasthan High Court in *Habbhu v. State of Rajasthan* (supra) and a ruling of Calcutta High Court in *Lalu Mandal v. State of West Bengal* 1994 Calcutta Criminal Law Journal page 246 were cited by the applicant in support of his contention for setting aside the above *ex parte* order. It was laid down by the Full Bench that the view of Rajasthan High Court in *Habbhu v. State of Rajasthan* was not good law in view of the decision of Hon''ble Supreme Court in *Moti Lal Vs. State of Madhya Pradesh*, The Full Bench over ruled its earlier decision of the Court in *Lalu Mandal v. State of West Bengal* (referred to above) and observed that:

...in the light of clear dictum of the law the Court cannot review or recall its final order, even in cases where the parties may come up before it feeling that they have not been heard or they have left out something, which if placed before the Court, may have resulted in a different decision and that the decision arrived in their absence was an impaired finding. Once the Court lifts its pen after signature it cannot put it once again; except of the situations like for the purpose of rectifying a clerical or arithmetical error.

15. It was further held in this ruling that the only remedy available to the applicant was to seek appropriate relief before the Hon''ble Apex Court and the High Court has no jurisdiction to review or recall its earlier order which was passed at the admission stage without giving any opportunity of hearing to the opposite party.

16. The position in this way is that in view of the law laid down in the above rulings, the applications for recall moved by the applicants are not maintainable and the only remedy available to them against the judgment passed by this Court is to seek suitable relief before the Hon''ble Apex Court.

17. However, before parting with the case, I may add that since the learned Counsel for the applicants has made some submissions on merits of the revision and has cited several rulings before me, I am considering those contentions also. He has cited before me following rulings in support of his case:

1. *Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others*,

2. *Suiresh Chand Jain v. State of M.P. and Anr.* 2001 (1) JIC 740(SC);

3. *Ram Babu Gupta and Anr. v. State of U.P. and Ors.* 2001 (2) JTC 231 (Allahabad) .

18. I have carefully gone through all theses rulings. In the case of D.

Lakshminarayana v. V. Narayana (supra) it was laid down by the Hon''ble Supreme Court that when the Magistrate passes an order on the complaint to record statements of complainant and witnesses under Sections 200 and 202 Cr.P.C. he takes cognizance of the case.

19. In Suresh Chand Jain v. State of M.P. (supra) the facts were that a complaint was filed before the Magistrate and on that complaint the Magistrate passed an order for investigation by police u/s 156(3) Cr.P.C. That order was challenged by one of the accused persons, but it was held that the order passed by the Magistrate was completely valid. It was further held that prior to taking cognizance on a complaint the Magistrate can pass an order u/s 156(3) Cr.P.C. directing the police to investigate the matter. It was further observed that if the Magistrate takes cognizance of the offence and examines the complainant on oath, then he has to follow the procedure prescribed under Chapter XV Cr.P.C. and in that case he cannot pass an order for police investigation, but since in the present case the order for police investigation was passed by the Magistrate without taking cognizance and without passing any order for recording statement of the complainant and his witnesses, the order passed by him was completely valid.

20. The above view of Hon''ble Supreme Court has been followed by Full Bench of this Court in Ram Babu Gupta and Anr. v. State of U.P. and Ors. referred to above.

21. The learned Counsel for the revisionist applicants contended before me that in this case the Magistrate had passed an order on 15.1.1998 treating the protest petition as complaint and had fixed a date for recording statement of the complainant and his witnesses under Sections 200 and 202 Cr.P.C. His contention was that in this way the Magistrate had taken cognizance of the case, and there was no justification to pass any order interfering with the above discretion exercised by the Magistrate.

22. I do not find any force in the above contention. It is to be seen that in the present case the complainant informant had lodged a report against the accused under Sections 304B and 201 I.P.C. and the police after investigation submitted a final report in the case. The complainant filed a protest petition against that report. The law on the point is that in such a case of final reports, if there is evidence against the accused in the case diary, the Magistrate on the basis of that evidence can summon the accused and the case shall proceed as a state case. However, if there is no evidence or insufficient evidence against the accused in the case diary and the complainant files affidavits of some witnesses to substantiate his allegations against the accused persons, the proper course for the Magistrate in such a contingency is to treat the protest petition as a complaint and to record the statements of the complainant and witnesses under Sections 200 and 202 Cr.P.C., and then if he finds out that there is sufficient evidence on the basis of those statements, he can summon the accused persons, and then the case shall proceed as a complaint case.

23. In the present case, the police had submitted a final report in the case, and against that final report, the complainant had filed the protest petition, and on that protest petition the learned Magistrate passed an order for treating it as a complaint and for recording statements of the complainant and witnesses. Such an order could be passed only in that contingency when there, was no evidence against the accused persons in the case diary. The learned Addl. Sessions Judge in his judgment dated 3.9.1998 passed in criminal revision No. 42 of 1998 has discussed the entire evidence which was against the accused in the case diary and then he passed an order setting aside the order of the Magistrate and remanded the case to him for re-hearing and to pass an order in accordance with law. Thereafter the learned Magistrate again heard the complainant and the State counsel and passed an order that in view of the statements of the complainant as well as of the witnesses Virendra and Yogendra recorded by the Investigating Officer in the case diary there was sufficient evidence for summoning the accused Manoj, Anand Swarup, Smt. Maya, Vipin Kumar, Km. Minakshi and Sanjay Sharma under Sections 304B and 201 I.P.C. and so he passed the order summoning them.

24. As discussed by me above, when there is sufficient evidence against the accused in the case diary, the accused are to be summoned on the basis of that evidence in the case diary, and there is no question of treating the protest petition as a complaint nor the statements of the complainant and witnesses under Sections 200 and 202 Cr.P.C. are to be recorded in such a case. Thus, the order dated 5.10.1998 passed by the Magistrate was completely justified. Criminal Revision No. 1863 of 1998 (filed by the accused applicants against the aforesaid order dated 5.10.1998 passed by the Chief Judicial Magistrate, Meerut) and Criminal Revision No. 1951 of 1998 (preferred by the applicants against the judgment and order dated 3.9.1998 of Sri Mohammad Abid,. then 1st Addl. Sessions Judge, Meerut in criminal revision No. 42 of 1998) had no force and were rightly dismissed on merits vide order dated 5.8.2005. Thus, the applicants have got no good case even on merits for setting aside the order of dismissal of revisions. Moreover, the applications for setting aside the aforesaid judgment and order dated 5.8.2005 are not maintainable in view of the law laid down by Hon"ble Supreme Court and this Court, referred to above. Hence, both the applications are dismissed.