

(1993) 11 GUJ CK 0020
In the Gujarat High Court

Ayubhai Abdulbhai Shah

APPELLANT

Vs

Gabha Bechar and Others

RESPONDENT

Date of Decision : 11-11-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 362, 362, 369, 482, 561A

Citation : (1994) 1 GLR 441

Hon'ble Judges : N.J. Pandya, J

Bench : Single Bench

Judgement

N.J. Pandya, J.—The applicant had filed Misc. Criminal Application No. 4273 which came to be dismissed for default on 27-7-1993, the main ground urged in the application for restoration is that the learned Advocate Mr. K.I. Patel representing the applicant in the original proceeding could not remain present on 27th July, 1993 on account of his ill-health. He was suffering from conjunctivitis and therefore, from 25th July, 1993 to 2nd August, 1993 he was unable to attend the Court. He had also informed to the Registry of the Court by filing a sick note. However, that could be availed of only in civil proceedings and with regard to be criminal proceedings, the learned Advocate was required to get the matter mentioned or to file sick note, if necessary, in respect of each of the proceedings.

2. However, what is involved in the present proceeding is a large question as to whether the Court having passed the said order of dismissal for default of appearance of the party or party's learned Advocate, the matter can be restored or not?

3. In opposition to this request, Section 362 of the Code of Criminal Procedure is relied upon, which reads as under:

Save and otherwise provided by this Court or by any other law for the time being in force, no Court when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or arithmetical

error.

The argument, therefore, is that by allowing the restoration of the matter which is disposed of, the Court is definitely not correcting a clerical or arithmetical error, but according to the submission, it is reviewing its own judgment. Unless there be a power, it cannot be done.

4. The question, therefore, required to be considered is whether the order of dismissal for default is a judgment or a final order? The word judgment or final order is not defined anywhere in the Code. It is, therefore, required to be understood in light of the judicial pronouncements and in the background of the general law.

5. So far as the final order is concerned, it can well be understood when its antonym interlocutory order is understood. In this connection I will first refer to *Madhu Limaye Vs. The State of Maharashtra*, where referring to volume 22 of the third edition of *Habibry 's Laws of England* in para 12 of the judgment, it has been pointed out that an order which does not deal with the final rights of the parties but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure or (2) is made after judgment and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed "interlocutory".

6. By no stretch of imagination, it could be said that by dismissing a matter for default, final decision on matters in dispute has been given. It is certainly not a case where directions are given or declarations are made with regard to the implementation of judgment. It, therefore, remains to be merely a matter of procedure.

7. The aforesaid discussion from the Supreme Court decision read along with the reference to *Halsbury's Laws of England* makes it quite clear that the order dismissing the matter for default is not a decision on merits. The judgment in nothing if not a decision given by a competent Court on merits of a case in respect of a lis between the parties.

8. There are several authorities starting with *Jbrahim v. Emperor* AIR 1928 Ran 288 holding that order of dismissal for default can be reviewed inspite of Section 369 of the Code of Criminal Procedure, 1898. There it has been clearly held that "judgment" contemplated by Section 369 is only a decision on merits. Dismissal for default of appearance therefore, is not a judgment and High Court has power to review dismissal order for default of appearance passed in its appellate jurisdiction.

9. On the same line is *Raju v. Emperor* AIR 1928 Lahore 462. The matter therein was decided with reference to Section 561A and Section 369 of 1898 Code. It is held therein that the High Court has no inherent power to alter or review its own judgment except in case of default, for want of jurisdiction. To the absence of inherent power with regard to alteration or review of its own judgment, obviously

there is a specific provision in the said Section 369 of 1898 Code corresponding to Section 362 of the new Code quoted hereinabove. In other words, the learned Judges of the Lahore High Court have adopted the same reasoning as adopted in Rangoon decision. Dismissal for default not being a decision on merits, Section 369 corresponding to new Section 362 will not be a bar.

10. In *Re: Wasudeo Narayan Phadnis and Others*, relates to a case before a Magistrate who in exercise of his power u/s 259 of 1898 Code had discharged the accused persons on account of the absence of the complainant pointing out that it did not amount to applying his mind to the evidence. In the case the Magistrate has done nothing else but resorted to mere procedural consequence and therefore, it being not a judgment he can certainly review that order and restore the complaint. In the case before the learned Judges of the Bombay High Court the Magistrate while so doing had not issued notice to the accused that was termed as mere irregularity not vitiating the proceedings.

11. *Sahadeo and Ors. v. Jaganath Kashinath and Ors.* AIR 1950 Nag 77. In this decision, the learned Judges has taken the same view while dealing with a case under Sections 369, 419 and 421 of 1898 Code. An appeal was dismissed for non-filing of judgment copy. It was held to be a rejection and a dismissal of appeal and therefore, it was held that there is no bar to consider the appeal on merits. The case was therefore, remanded in revision. The reasoning was that the said order cannot be said to be a judgment within the meaning of Section 369.

12. *Madiha v. State of Mysore* AIR 1963 Mys 191. In this decision with reference Section 369 and Section 561A of the Code of Criminal Procedure, it is held by the learned Judge of the Court that where a revision application was dismissed for default of appearance, Court can review its order, if necessary, to secure the ends of justice. Section 369 of 1898 Code is not held to be a bar.

13. The head note of a decision of Gauhati High Court reported in *Smt. Tulsi Devi and Others Vs. Bhagat Ram and Another*, also indicates that Section 362 does contain the words "save as otherwise provided by this Code or any other law for the time being in force. It does not take away the inherent power of the High Court. If a revision application is dismissed for default of appearance, it cannot be treated as a final order disposing of the case within the meaning of Section 362 and, therefore, that order can be set aside by the High Court u/s 482.

14. *Raghubans Prasad and Another Vs. State (Prabhu Dayal Missir)*, : In this decision the learned single Judge of that Court has held that order of discharge is not a judgment within the meaning of Section 369 and can be reviewed by the trial Court even though not set aside by superior Court. The learned Judge has further pointed out in paras 3, 10 and 13 of the judgment that in order to constitute a judgment within the meaning of Section 369, there must be an investigation on the merits of the case on evidence and after hearing the arguments, where, however the order is passed summarily without consideration

of the entire evidence, as in the case of the order of discharge, it will not obviously amount to a judgment.

15. On the same line is one more decision of the High Court rendered by its Division Bench reported in Ramballabh Jha Vs. The State of Bihar, . In that case, the name of the Counsel was not shown in the daily list of cases. The appeal came to be dismissed without the Counsel being heard. Referring to Sections 561 A, 369 and 421 of 1898 Code, the learned Judges were pleased to hold that the judgment can be set aside for rehearing u/s 561A holding that the judgment rendered in appeal was without any opportunity being given to the appellant or his Advocate within the meaning of Section 421 and it was liable to be set aside and appeal could be ordered to be reheard in exercise of power u/s 461A.

16. The decision reported in Rajendra L. Acharya Vs. State of Gujarat, is also on the same line wherein also the learned Judges have held that the right of rehearing, when the case was decided without giving an opportunity of hearing was accepted by the Supreme Court and by invoking the inherent powers by the High Court rehearing could be done.

17. Obviously, the aforesaid Patna decision is in keeping with the well-known position of the administration of justice that an act of the Court shall not prejudice any party.

18. My learned brother Justice J.N. Bhatt had an opportunity to deal with an identical question in Misc. Criminal Application No. 3225 of 1993. The Gujarat Electricity Board, its Officer being the original complainant, had filed a complaint before the learned J.M.F.C., Mansa. The accused came to be acquitted. Against that Cri. Appeal No. 924 of 1985 was filed which came to be dismissed for default on 25-2-1993. Pointing out that the Advocate of the original-appellant was unaware of the matter and raising other grounds as well, request for restoration was made. This was opposed to by the original-accused on the ground that Section 362 would come in the way. After referring to the provision of Section 362, my learned colleague straightway resorted to powers u/s 482 of the Code and decided to exercise inherent power reserved thereunder and restored the matter.

19. The result of the discussion so far is clearly to the effect that under the Old Code, the inherent powers reserved u/s 561A corresponding to Section 482 of the New Code are always available in such a case. However, I would like to state here that Section 362 of the Code will be attracted only and only if there is a final order as understood in contradistinction of the word "interlocutory" discussed above. With reference to the judgment also I definitely say that an order would be a judgment only if rights of the parties are decided after taking into consideration the entire material on record which will include oral evidence and documentary evidence, if any and all other materials that might have been placed on record.

19.1. Dismissing a matter for default being not an order of either of these 2

natures, obviously, there is no question of provisions of Section 362 coming in the way. The Court can certainly restore the same, if necessary, by invoking its inherent power u/s 482.

20. I, therefore, allow the application. The matter is ordered to be restored and be placed on the Board for final hearing on 10th of November 1993. Rule made absolute.