
(2013) 07 AHC CK 0311

In the Allahabad High Court

Case No : Criminal Miscellaneous Re-call Application No. 106120 of 2003 in
Criminal Revision No. 814 of 1986

Hari Prakash

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 29-07-2013

Acts Referred:

Citation : (2014) 84 ALLCC 45

Hon'ble Judges : Aditya Nath Mittal, J

Bench : Single Bench

Advocate : Shashi Nandan, R.P. Tripathi and Ashok Kumar Srivastava, for the Appellant;

Final Decision : Dismissed

Judgement

Aditya Nath Mittal, J.—Heard learned Counsel for the applicant, learned A.G.A. and perused the record. This application for recall of order dated 1.2.2002 has been moved with the prayer to condone the delay and set-aside the order dated 1.2.2002. The delay is condoned.

2. The grounds taken in the application are that the applicant has engaged Sri M.P. Singh, Advocate, who had filed this Revision No. 814 of 1986 on 27.5.1986, pursuant to which the applicant was released on bail on 28.5.1986. Later on Sri M.P. Singh was elevated to the Bench so Sri Shashi Nandan, Advocate filed his Parcha on 9.11.1987. The Lower Court record was summoned but the same was not received. Sri Ashok Kumar Srivastava was never engaged by the applicant, who had argued the said case and Sri Shashi Nandan or Sri Ashok Kumar Srivastava never intimated about the hearing of the case and ultimately when the execution warrant was issued on 26.6.2003, then the applicant came to know about dismissal of the said revision for the first time and came at Allahabad on 1.7.2003 and engaged Sri R.P. Tripathi, Advocate to file present recall application. Although other grounds have also been taken regarding merits of order dated 1.2.2002 and various amendments to the Uttar Pradesh Foodgrains

Dealers" (Licensing and Restriction on Hoarding) Order, 1976 have been narrated so as to justify that the applicant has not committed any offence. It has also been mentioned in para 14 of the application that impugned order dated 1.2.2002 is ex-parte without giving any opportunity to the revisionist.

3. Learned A.G.A. has defended the impugned order and has submitted that the said order has been passed by this Court on merits after hearing both the parties.

4. The main question for consideration is whether this impugned order dated 1.2.2002 is ex-parte without giving any opportunity to the revisionist and whether the applicant has engaged Sri Shashi Nandan, Advocate or not. Another question for consideration is whether Sri Shashi Nandan authorised Sri Ashok Kumar Srivastava, Advocate as brief holder to argue the case or not.

5. The Criminal Revision No. 814 of 1986 "Hari Prakash v. State of U.P." was decided by Hon"ble Mr. Justice U.S. Tripathi by order dated 1.2.2002. In the said judgment which is detailed and is running in five pages, it has been specifically mentioned that Sri Ashok Kumar Srivastava holding brief of Sri Shashi Nandan, learned Counsel for the applicant has been heard. The Hon"ble Judge has also considered the points raised by learned Counsel for the revisionist and has given decision on them. The said order dated 1.2.2002 is an order on merits passed after hearing both the parties and every aspect has been considered in detail, therefore, the said order cannot be said to be ex-parte order.

6. Upon the Recall Application dated 2.7.2003, the Hon"ble Judge, who decided the revision on merits, passed the following order on 11.7.2003:--

As per assertion in para 10 of the accompanying affidavit, the applicant has not engaged Mr. Shashi Nandan as well as Sri Ashok Kumar as brief holder of Sri Shashi Nandan as his Counsel and they had no right to argue the case on behalf of applicant. Let notices be issued to Sri Shashi Nandan and Sri Ashok Kumar along with copy of the affidavit to file reply under what authority they had argued the revision on behalf of the applicant. Steps be taken within three days.

7. Pursuant to this order, Sri Shashi Nandan, Advocate along with his junior Sri Ashok Kumar Srivastava appeared on 25.7.2003 and Sri Shashi Nandan, learned Senior Advocate stated that he was engaged in the case on behalf of the applicant and he has authorised his junior Sri Ashok Kumar Srivastava to argue this case. Learned Counsel for the applicant was given time to show the Rule of the Court on the point whether an Advocate duly engaged by applicant is not authorised to hand over brief to his brief holder but no such Rule was shown. Part-VI-Chapter XXIV of the Allahabad High Court Rules contains the Rules framed u/s 34 read with section 16(2) of the Advocates Act, 1961. Rule 2 provides as under:--

2. Save as otherwise provided in any law for the time being in force, no advocate shall be entitled to appear, plead or act for any person in any Court in any proceeding unless the advocate files an appointment in writing signed by such

person or his recognised agent or by some other person duly authorised by or under a power of attorney to make such appointment and signed by the Advocate in token of its acceptance, or the advocate files a memorandum of appearance in the form prescribed by the High Court:

Provided that where an advocate has already filed an appointment in any proceeding, it shall be sufficient for another advocate, who is engaged to appear in the proceedings merely for the purpose of pleadings, to file a memorandum of appearance or to declare before the Court that he appears on instructions from the advocate who has already filed his appointment in the proceeding:

Provided further that nothing herein contained shall apply to an advocate who has been requested by the Court to assist the Court in any case or proceeding or who has been appointed at the expense of the State to defend an accused person in a criminal proceeding.

Explanation:--A separate appointment or a memorandum of appearance shall be filed in each of the several connected proceedings not with standing that the same advocate is retained for the party in all connected proceedings.

8. From the above, it is clear that after elevation of Sri M.P. Singh to the Bench, Sri Shashi Nandan, Senior Advocate was engaged and it is also clear that he had authorised his junior Sri Ashok Kumar Srivastava to argue this case, therefore, the contention of learned Counsel for the applicant carries no weight that Sri Shashi Nandan, Advocate was never engaged. As far as the contents of para 10 of the application are concerned, that whether Sri Shashi Nandan or Sri Ashok Kumar Srivastava intimated the applicant about the hearing of the case or not, carries no weight because it is the duty of the client to have pursued his matter and to have enquired about the progress of the matter from his Counsel.

9. As far as the other points raised in the application that the Uttar Pradesh Foodgrains Dealers" (Licensing and Restriction on Hoarding) Order, 1976 and subsequent amendments are concerned, these points cannot be raised in the recall application. The perusal of the impugned order dated 1.2.2002 reveals that ample opportunity was given to learned Counsel for the applicant to argue the matter and whatever points were raised by learned Counsel for the applicant, have been categorically dealt with in the judgment. The aforesaid judgment dated 1.2.2002 has been passed on merits/after hearing both the parties, therefore, section 362 Cr.P.C. clearly bars any recall of the said order passed on merits because there is no provision in the Code of Criminal Procedure to recall an order passed on merits.

10. Section 362 Cr.P.C. provides as under:--

362. Court not to alter judgment.--Save as otherwise provided by this Code 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.

11. In Hari Singh Mann v. Harbhajan Singh Bajwa and others 2001 (42) ACC 75 (SC), Hon"ble the Apex Court has held as under:--

Section 362 of the Code mandates that 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 section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. The reliance of the respondent on Talab Haji Hussain's case (supra) is misconceived. Even in that case it was pointed that inherent powers conferred on High Courts u/s 561-A (Section 482 of the new Code) has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself. It is not disputed that the petition filed u/s 482 of the Code had been finally disposed of by the High Court on 7.1.1999. The new section 362 of the Code which was drafted keeping in view the recommendations of the 41st Report of the Law Commission and the Joint Select Committees appointed for the purpose, has extended the bar of review not only to the judgment but also to the final orders other than the judgment.

The impugned orders of the High Court dated 30.4.1999 and 21.7.1999 which is not referable to any statutory provisions having been passed apparently in a review petition in a criminal case is without jurisdiction and liable to be quashed. In view of what has been stated hereinabove, the appeals are allowed and the impugned order of the High Court dated 30.4.1999 and 21.7.1999 are set aside restoring its original order dated 7.1.1999.

12. In Harjeet Singh v. State of West Bengal 2005 (33) AIC 469 (Cal., H.C.-F.B.) : 2005 Cr.L.J. 3286 : 2005 (53) ACC 14 (Sum.), the Calcutta High Court has held as under:--

We have given our anxious consideration to the issue involved while striking a balance between the procedure to be followed, protecting the interest of justice in the light of the valuable right to property and the valuable right of audience we feel that in the light of the 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.

We hold that in view of section 362 of the said Code there is a clear bar for any

Court, which includes the High Court, to either review or recall an Order or judgment passed even if it is found subsequently that it offends the principles of natural justice as this is the language of section 362 of the said Code.

13. In *State of Orissa Vs. Ram Chander Agarwala and Others*, , Hon''ble the Apex Court has held as under:--

Before concluding we will very briefly refer to cases of this Court cited by Counsel on both sides. *Talab Haji Hussain Vs. Madhukar Purshottam Mondkar and Another*, relates to the power of the High Court to cancel bail. The High Court took the view that u/s 561-A of the Code, it had inherent power to cancel the bail, and finding that on the material produced before the Court it would not be safe to permit the appellant to be at large cancelled the bail distinguishing the decision in 1945 Law Reports and 72 Indian Appeals (supra) and stated that the Privy Council was not called upon to consider the question about the inherent power of the High Court to cancel bail u/s 561-A. In *Sankata Singh v. State of U.P.*, this Court held that section 360 read with section 424 of the Code of Criminal Procedure specifically prohibits the altering or reviewing of its order by a Court. The accused applied before a succeeding Sessions Judge for re-hearing of all appeal. The learned Judge was of the view that the Appellate Court had no power to review or restore an appeal which has been disposed of. The Supreme Court agreed with the view that the Appellate Court had no power to review or restore an appeal. This Court, expressing its opinion that the Sessions Court had no power to review or restore an appeal observed that a judgment which does not comply with the requirements of section 369 of the Code, may be liable to be set aside by a superior Court but will not give the Appellate Court any power to set it aside himself and rehear the appeal observing that section 369 read with section 424 of the Code makes it clear that the Appellate Court is not to alter or review the judgment once signed, except for the purpose of correcting a clerical error. Reliance was placed on a decision of this Court in *Superintendent and Remembrance of Legal Affairs W.B. v. Mohan Singh and others* by Mr. Patel, learned Counsel for the respondent wherein it was held that rejection of a prior application for quashing is no bar for the High Court entertaining a subsequent application as quashing does not amount to review or revision. This decision instead of supporting the respondent clearly lays down, following *Chopra's* case (supra) that once a judgment has been pronounced by a High Court either in exercise of its appellate or its revisional jurisdiction, no review or revision can be entertained against that judgment as there are no provisions in the Criminal Procedure Code which would enable the High Court to review the same or to exercise re-visional jurisdiction. This Court entertained the application for quashing the proceedings on the ground that a subsequent application to quash would not amount to review or revise an order made by the Court. The decision clearly lays down that a judgment of the High Court on appeal or revision cannot be reviewed or revised except in accordance with the provisions of the Criminal Procedure Code. The provisions of section 561-A of the Code cannot be revoked for exercise of a power which is specifically prohibited by the Code.

14. It is also relevant to mention that the said application dated 2.7.2003 was dismissed in default on 23.9.2005, regarding which a recall application dated 29.9.2005 was moved which was allowed by order dated 8.11.2005. The offence relates to the year 1980 and the applicant was convicted by the Special Judicial Magistrate, Azamgarh by judgment and order dated 13.2.1986, passed in Suit No. 1019 of 1982, regarding Case Crime No. 51 of 1980, u/s 3/7 Essential Commodities Act, P.S. Sarai Amir, District Azamgarh. The said judgment of Trial Court was challenged in Criminal Appeal No. 23 of 1986 before the Sessions Judge, Azamgarh and the Sessions Judge, Azamgarh after hearing both the parties, maintained the conviction but reduced the period of imprisonment from eight months to three months by judgment and order dated 22.5.1986. The said judgment of Appellate Court was challenged before this Court in Criminal Revision No. 814 of 1986 which has been decided on merits after hearing both the parties by judgment and order dated 1.2.2002 and all aspects of the matter have been considered in detail and the sentence passed by learned Sessions Judge has been maintained. In the judgment dated 1.2.2002, it has also been clearly mentioned that the offence punishable u/s 3/7 of E.C. Act is punishable with imprisonment of not less than three months, therefore learned Sessions Judge has already sentenced the applicant with minimum sentence and there is no ground to reduce it.

15. As the judgment and order dated 1.2.2002 has been passed on merit and after hearing both the parties, therefore, for the facts and circumstances of the case, I do not find any ground to recall the said order. The recall application is rejected and the interim order, if any, is vacated. The applicant is directed to appear within 30 days from today before the Sessions Judge, Azamgarh to serve out the sentence granted by Sessions Judge, Azamgarh in Criminal Appeal No. 23 of 1986 "Hari Prakash v. State of U.P." by judgment and order dated 22.5.1986, failing which the Sessions Judge shall be at liberty to issue non-bailable warrant against the revisionist/applicant Hari Prakash. The office is directed to inform the Sessions Judge, Azamgarh and Chief Judicial Magistrate, Azamgarh by sending the copy of order dated 1.2.2002 along with this order, for compliance.