

(2006) 08 AHC CK 0035

In the Allahabad High Court

Case No : Criminal M. Recall Application No. 90547 of 2006 in Criminal M.
Transfer Application No. 165 of 2005

Hari Prakash Saxena

APPELLANT

Vs

Pratibha Saxena

RESPONDENT

Date of Decision : 04-08-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 362
Penal Code, 1860 (IPC) — Section 379, 411

Citation : (2006) 3 ACR 3329

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

Bench : Single Bench

Advocate : A.B. Saran and Paramatma Rai, for the Appellant; Pankaj Shukla and R.K. Awasthi, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Rastogi, J.—This is an application moved on behalf of Smt. Pratibha Saxena for recalling the order dated 6.4.2006, passed by me in Criminal Misc. Restoration Application No. 55171 of 2006 and the order dated 17.2.2006, passed in CrI. Misc. Recall Application No. 155441 of 2005 and the order dated 27.7.2005, passed in CrI. Misc. Transfer Application No. 165 of 2005, Hari Prakash Saxena v. Smt. Pratibha Saxena.

2. The facts relevant for disposal of the present application are that Hari Prakash Saxena had filed Transfer Application No. 165 of 2005 in this Court for transfer of Misc. Case No. 840 of 2003 and Misc. Case No. 1025 of 2003 arising out of Case No. 1050 of 1998, Pratibha Saxena v. Hari Prakash Saxena pending in the court of Chief Judicial Magistrate, Shahjahanpur to any Court outside Shahjahanpur.

3. Since none was present for Smt. Pratibha Saxena on the date of hearing of this application, it was allowed by me ex parte vide order dated 27.7.2005 and the aforesaid cases were ordered to be transferred to the court of the Chief Judicial Magistrate, Bareilly. Aggrieved with the above ex parte order Smt.

Pratibha Saxena filed an application for recall of the above order which was registered as Crl. Misc. Recall Application No. 155441 of 2005. This application was dismissed in default of the applicant on 17.2.2006. Then the applicant moved another application for recall which was registered as Crl. Misc. Recall Application No. 55171 of 2006. This application was rejected after hearing both the parties on the ground that no proper affidavit was filed in support of the application vide order dated 6.4.2006. Thereafter the applicant moved the present application filing proper affidavit in support of the application. However, the application was contested by the opposite party on the ground that there was no provision for recall of the order passed in a transfer application.

4. Both the parties were heard at length by me on the above point and they cited several rulings before me in support of their contentions. I now proceed to deal with all those rulings.

5. The learned Counsel for the applicant cited before me a ruling of this Court in *Mohammad Mian v. State of U. P.* 1981 ACR 292. This was a case of criminal appeal filed by the accused against his conviction order. Since none appeared on behalf of the Appellant on the date fixed for its hearing, the appeal was taken up and decided without hearing any one for the Appellant. Thereafter an application was moved for recalling the above order. That application was allowed by the Court. It may be mentioned that there is no controversy on this point that a criminal appeal filed against conviction order cannot be decided without hearing either the Appellant in person or his counsel. An order passed in a criminal appeal without hearing the Appellant is bad in law, and such an order was liable to be set aside. It was rightly set aside in the above case.

6. The learned Counsel for the applicant also cited before me a Full Bench ruling of Rajasthan High Court in *Habu Vs. State of Rajasthan*, This was a case of revision which had been filed by the accused against his conviction order and on the date fixed for its hearing, since neither revisionist nor his counsel was present, the revision was dismissed on merits. Thereafter when the accused was arrested after disposal of the revision, he moved an application for setting aside the above order and that application was allowed. It may be mentioned that a criminal revision filed by the accused against conviction order cannot be heard and decided without hearing the revisionist or his counsel. As such the order passed in this case also without hearing the revisionist and his counsel was bad in law and it was rightly set aside.

7. It may be mentioned that in the cases of criminal appeals and revisions against conviction order, the Court has got no jurisdiction to decide appeals or revisions without hearing the counsel for the Appellant or revisionist or the Appellant or revisionist in person, as the case may be, and by deciding the criminal appeal and revision in the absence of the Appellant/revisionist the Court concerned had committed jurisdictional error and such an order containing jurisdictional error could not be sustained and was liable to be set aside.

8. The present case is neither of criminal revision nor of criminal appeal. It is of a transfer application. There is no legal bar to dismiss such an application in default, if the applicant is not present on the date fixed for its hearing nor there is any legal bar to allow such an application ex parte if the opposite party is absent on the date fixed for its hearing. There is no general provision in the Code of Criminal Procedure for setting aside any order of dismissal in default of an application or for setting aside ex parte order passed on an application. There are some specific instances in the Code of Criminal Procedure which contain some provisions for grant of relief in such cases, for example, there is a provision for setting aside the ex parte order passed on an application u/s 125, Code of Criminal Procedure on showing sufficient cause but that provision is limited to an application u/s 125, Code of Criminal Procedure and is not of general application. There is a provision for dismissal of private complaints in the case of absence of the complainant, but there is no provision for restoration of the above complaints, though fresh complaint on the same allegation is not barred.

9. The same is the position in respect of transfer application also. A transfer application can be dismissed in default of the applicant and it can also be allowed ex parte in the absence of the opposite party, but there is no provision for restoration of the transfer application or for setting aside ex parte order passed on transfer application. As such, an application for recall of an order dismissing transfer application in default or for setting aside an ex parte order passed on the transfer application is not maintainable. The applicant is, however, not remediless. He can move a fresh transfer application if he still has got good ground for transfer and he can move for re-transfer of the case if he has got sufficient ground for the same. He can also move before higher Court challenging the order passed by the court below. My above view is also supported by the observation of Hon'ble Apex Court in Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Mohan Singh and Others, in which it has been held that rejecting a prior application for quashing would be no bar to entertainment of the subsequent application.

10. The learned Counsel for the opposite party cited before me a ruling of Hon'ble Apex Court in State of Kerala v. M. M. Manikantan Nair 2002 (2) ACR 1693 (SC), in which it has been held that u/s 362, Code of Criminal Procedure a criminal court has no power to review its judgment and it can rectify only clerical or arithmetical errors. He also cited before me another ruling of Hon'ble Apex Court in R. Annapurna v. Ramadugu Anantha Krishna Sastry and Ors. 2004 SCC 1135 , in which the same view has been reiterated. He also cited before me a Full Bench ruling of Calcutta High Court in Harjeet Singh Vs. State of West Bengal, In this case, relying upon the ruling of Hon'ble Apex Court in Moti Lal Vs. State of Madhya Pradesh, it was held that the law laid down by the Full Bench of Rajasthan High Court in the case of Harjeet Singh v. State of Rajasthan, referred to above, can no longer be treated to be a good law. It was further held in this ruling that the provisions of Section 362 of the Code act as a bar in recalling an order passed by the Court even if it is found subsequently that the previous

order passed by the Court was offending the principles of natural justice. In this case, the facts were that the order was passed by a Magistrate in a case u/s 379/411, I.P.C. whereby he had rejected the prayer of Harjeet Singh as well as of opposite party No. 2 P.G. Enterprises for return of vehicle which was involved in the above case. Aggrieved with that order Harjeet Singh filed a revision and it was put up before the High Court as an unlisted motion and on that very date of presentation it was disposed of directing that the vehicle be given to the revisionist Harjeet Singh, The revision was finally disposed of at the very stage of admission. Thereafter the opposite party moved an application for recalling the aforesaid ex parte order, as no notice of revision was given to him. A question arose whether the above application was maintainable or not. It was laid down that the above application was not maintainable in view of the bar of Section 362, Cr.P.C.

11. The learned Counsel for the opposite party also cited before me another ruling of Hon''ble Apex Court in Surendra Singh v. State of Bihar (2006) 1 SCC 575, in which it has been held that review of own judgment by the Court is not permissible u/s 362, Cr.P.C.

12. It is thus clear from the above rulings that the recall application moved by the applicant is not maintainable and so it is liable to be dismissed.

13. The recall application is accordingly dismissed.