
(2005) 04 CAL CK 0042
In the Calcutta High Court
Case No : C.R.R. No. 469 of 1996

Harjeet Singh

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 06-04-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 362, 369, 369, 387, 401
Penal Code, 1860 (IPC) — Section 379, 401, 411

Citation : (2005) 2 CHN 445 : (2005) CriLJ 3286 : (2005) 3 CTC 217 : (2005) 4 JCR 422 : (2005) 3 RCR(Criminal) 477

Hon'ble Judges : P.N. Sinha, J;Debi Prasad Sengupta, J;Amit Talukdar, J

Bench : Full Bench

Advocate : Biplab Mitra, Swapan Kumar Mallick, Debabrata Acharya and Amajit De, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

Amit Talukdar, J.—Faced with two different versions one of a Division Bench; another of a Single Bench on the impact of Section 362 of the Code of Criminal Procedure (hereinafter referred to as the said Code) Batabyal, J. felt that the matter should be referred to "appropriate authority for constitution of a larger Bench" to decide the question.

2. Pursuant thereof this Full Bench has been set up by the Hon''ble The Chief Justice.

3. We have been asked to decide as to whether the provisions of Section 362 of the said Code would act* as a bar in recalling an Order passed by the Court when and as to whether it is found that it will offend the principles of natural justice.

4. Factual matrix leading to the reference is required to be set out for the purpose of better appreciation of the entire gamut of the matter.

5. A revisional application was moved before this Court on behalf of one Harjeet

Singh, son of Sardar Har Bhajan Singh making the State as opposite party No. 1 and one P.G. Enterprise as opposite party No. 2. In the said revisional application, preferred u/s 401 read with Section 482 of the said Code, an impugned Order of 01.2.96 passed by the learned Sub-Divisional Judicial Magistrate, Uluberia in G. R. Case No. 483 of 1995 arising out of Uluberia Police Station Case No. 176 dated 08.8.95 under Sections 379 and 411 of the Indian Penal Code was questioned whereby the prayer of the said Harjeet Singh for return of a vehicle along with another prayer of the opposite party No. 2, P.G. Enterprise for return of the said vehicle was rejected.

6. It appears that on the very first day when the said revisional application seems to have been moved as an Unlisted Motion (as it was the practice prevailing at that point of time) the said revisional application which was registered as Criminal Revision No. 469 of 1996 was "disposed of by Batabyal, J. directing the seized vehicle, which was the subject-matter for the prayer in connection with return before the learned Sub-Divisional Judicial Magistrate, Uluberia, to be returned in favour of the petitioner, Harjeet Singh on his furnishing some bonds.

7. As the said revisional application was disposed of at the motion stage, obviously the question of appearance of the opposite party does not arise.

8. It is here where the entire issue emanates from. The opposite party No. 2 in the said revisional application (P.G. Enterprise) filed an application for recalling the ex parte Order dated 27.2.96 passed by Batabyal, J. on 22.4.96.

9. Acting on the basis of the said prayer for recalling Batabyal, J. by his Order dated 16.6.97 after hearing the learned Counsel for the petitioner Harjeet Singh and the learned Counsel for the opposite party No. 2, P.G. Enterprise after considering the various decisions on this issue found:

"Apparently there is a conflict of decisions between the views taken by a Division Bench of this Court and the view taken by a Single Judge of this Court on one hand and the view taken by another learned Single Judge of this Court. In such a situation it is fit and proper that the matter should be referred to the appropriate authority for constitution of a larger Bench to decide the question once for all."

10. This is how we come to the picture.

11. Before proceeding to answer the question it would be profitable to see what is Section 362 of the said Code:

"362. 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."

12. A comparative analysis of the contemporaneous provision of Section 362 of the said Code, in the old Code of 1898 which is Section 369 shows as follows:

"369. Save as otherwise provided by this Court or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court, when it has signed its judgment, shall alter or review the same, except*** to correct a clerical error."

13. A plain reading of the sister provision in the erstwhile Code and the new Code at once strikes a note in the mind of the Reader that in the new Code the word "no Court" would also mean the High Court. In the new Code the provision for restrictions imposed u/s 362 of the said Code has been applied with more rigour barring for correction of a clerical or arithmetical error.

14. There has been a sublime change in the two provisions of the old Code and the new Code. The restriction on a Court to either "alter or review" the judgment has been more rigorous in the new Code as in the New Code the words "or final Order" after the word "judgment" has been inserted.

15. In other words, the scope of the provision contained in the old Code of 1898 (Section 369) has been more amplified in the new Code of 1973 (Section 362) that the Court cannot even review or alter a final Order.

16. At once what one gathers from a plain perception of the said provisions of Section 362 of the said Code clearly shows that after passing a judgment or even a final Order the Court becomes totally functus officio and it cannot recall the same, even if the provisions of natural justice so demands where a necessary party has not been heard.

17. If we see the provisions of Section 362 of the said Code once again this position has been demonstratively amplified with the rider 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."

18. The Legislature in their wisdom has felt that there must be an end of the road in respect of a legal proceeding after the Court has finally arrived at its decision. Once a Court reaches a conclusion that is final. It cannot be protracted by way of filing review or recall petitions. Even if a necessary party feels aggrieved that his voice has not been heard remedy lies either before the Revisional Court or the Appellate Court, as the case may be. Otherwise the Legislature would not have inserted a rider that the Court will not have the power of review or alter barring for the purpose of correcting a clerical or arithmetical error.

19. Now, let us advert to the two decisions which have baffled the mind of Batabyal, J. leading to this reference as he found there was no consensus of opinion between the Division Bench judgment and the Single Bench.

20. Firstly, we read the Division Bench decision of Narayan Chandra Dey v. State of West Bengal 1989 Cri. LR. (Cal) 185 where Amal Kumar Chatterjee, J. presiding over the said Division Bench held while relying on the decision of the Supreme Court in State of Orissa Vs. Ram Chander Agarwala and Others, :

"Therefore, it can be said without any fear or error that this is an authority which completely bars the entertainment of the application under consideration".

21. While Rabin Bhattacharyya, J. in *Lalu Mondal v. State of West Bengal and Anr.* 1994 C Cri. LR (Gal) 246, while taking into account the Division Bench judgment in *Narayan Chandra Dey's* case (supra) the decision of the Supreme Court in *State of Orissa v. Ram Chander Agarwala*(supra) and other decisions held that:

"20. Section 362 of the Cr. PC was not introduced with that intent and object. It is a procedure ingrained or inhere in the Code that an adversary is always entitled to a notice when a Court set aside an Order or judgment. Section 362 does not and cannot bolt such procedure as it will offend principles of natural justice".

22. We have had the assistance at the Bar of Shri Biplab Mitra, learned Senior Counsel. We are told that even after notice and repeated intimation by Shri Mitra the other side did not appear.

23. Shri Mitra read out from the Division Bench decision of *Narayan Chandra Dey*(supra) as also the Single Bench decision in *Lalu Mondal*(supra) on the issue involved. He further referred to a Full Bench decision of the Jaipur Bench of the Rajasthan High Court (*Habu Vs. State of Rajasthan*,) to show that where opportunity was not given to the other side the Order could be recalled within the purview of Section 482 of the said Code.

24. However, in his usual fairness Shri Mitra the learned Senior Counsel submitted that much after the reference was made there has been the authority of the Supreme Court in *Hari Singh Mann v. Harbhajan Singh Bajwa and Ors.* (2001) SCC (Cri) 113.

25. As we have seen earlier we are to now see the correctness of the ratio of the decision in *Lalu Mondal's* case (supra) delivered by Rabin Bhattacharyya, J. which did not consider the ratio of the Division Bench decision in *Narayan Chandra Dey*(supra), although the same was referred, and came to the finding which has been noticed by us.

26. The Division Bench decision in *Narayan Chandra Dey* (supra), a binding precedent on *Lalu Mondal*(supra) when the learned Single Judge felt that he could not agree or depart from the ratio of the decision of the Division Bench it became necessary that the matter should have been referred to a Larger Bench. This is the procedural aspects of the matter which we are not dealing here.

27. Let us look at the law that is governing the field in this regard.

28. The Full Bench decision of the Jaipur Bench of the Rajasthan High Court, although the same does not have any binding effect on us, yet is also not a correct position which has been expounded as the Supreme Court in *Moti Lal Vs. State of Madhya Pradesh*, , has in no uncertain terms laid down that as the

Section has clearly shown except correcting clerical or arithmetical error the Court cannot alter its finding, even with the aid to Section 482 of the said Code. Clearly the Full Bench decision of the Jaipur Bench of the Rajasthan High Court in Habu's case (supra) can no longer be said to be a good law in the line of the ratio of the Moti Lal's case (supra).

29. The said view of the Supreme Court is also found in *Mosst. Simrikhia v. Dolley Mukherjee @ Chabbi Mukherjee*, : , which took into account the decision of *Smt. Sooraj Devi Vs. Pyare Lal and Another*, . In the said decision of *Mosst. Simrikhia*(supra) the Supreme Court held:

"4. Section 362 of the Code expressly provides 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 save as otherwise provided by the Code. Section 482 enables the High Court to make such Order as may be necessary to give effect to any Order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The inherent powers, however, as much as controlled by principle and precedent as are its express powers by statute. If a matter is covered by an express letter of law, the Court cannot give a go-by to the statutory provisions and instead evolve a new provision in the garb of inherent jurisdiction."

30. In *Mosst. Simrikhia* (supra) the earlier decision of the Supreme Court in *Sooraj Debt* (supra) was taken into consideration. What is expressly barred by the Code cannot be done by exercise of the inherent power of the Court. In *Hari Singh Mann's* case (supra) which Shri Mitra has very fairly placed before us, this view has also been reiterated. In *Hari Singh Mann's* case (supra) the decisions of *State of Orissa v. Ram Chander Agarwala* (supra), *Sankatha Singh*(supra) and *U. J. S. Chopra* (supra) have been taken into account and Their Lordships held that the High Court has no jurisdiction to review its own judgment except to the extent of correcting any clerical or arithmetical error. Their Lordships further held that even consequential Order after disposal of the main case on the same petition is unwarranted and amounts to the abuse of process of Court.

31. Recently this view has been propounded again by Joytosh Banerjee, J. in *Mosst. Rabbani Khanam and Ors. v. State and Anr.* 2004 C Cri. LR (Gal) 1035, where the learned Judge relying on the decisions held that:

"Once the High Court passed its judgment and signed, it becomes *functus officio* and neither the Judge who passed the judgment nor any other Bench of the High Court has any power to review or reconsider or alter it except for correcting a clerical error."

32. We very much endorse the view of Joytosh Banerjee, J., espoused in *Mosst, Rabbani Khanam and Ors., v. State and Anr.* (supra).

33. Once the Order, may be a judgment or a final Order, is signed by the Court while disposing of a case, it becomes *functus officio* and it cannot touch its pen

on the same even if the ink has not dried on its signature. That is the spirit of Section 362 of the said Code.

34. The Legislature has taken ample care and thought to oversee such position and made provisions for correction of an arithmetical or a clerical error. The Supreme Court in *Sooraj Devi v. Pyare Lal and Anr.*(supra) has described in detail what is a clerical or a mathematical error.

35. As such, in our humble view there cannot be any confusion in this respect. Both clerical and arithmetical errors are errors and omission very much apparent on the face of the record and do not depend for their discovery on any argument as has been held by the Supreme Court.

36. If one sees the provisions of Section 362 of the said Code very carefully it would at once be clear that the Court after while becoming *functus officio* even before the ink has dried on its signature can neither recall or review its final Order or judgment for whatever purpose the same may be.

37. For better understanding of the crux of the matter the definitional value of review or recall has to be understood properly.

38. The word "Review" has been described in the NEW INTERNATIONAL WEBSTER'S COMPREHENSIVE DICTIONARY OF THE ENGLISH LANGUAGE, ENCYCLOPEDIA EDITION, 1999 as "1. To go over or examine again; look at or study again. 2. To look back upon, as in memory;.....3. To go over, as a manuscript, so as to correct defects. Whereas "Recall" means "1. To call back; Order or summon to return. 2. To summon back in awareness or attention. 3. To collect; remember. 4. To take back; revoke; countermand.....n.3. Revocation, as of an Order."

39. This position has to be understood in the light of the 3-Judge Bench decision of the Supreme Court in *U.J.S. Chopra Vs. State of Bombay*, , where S.R. Das (as the learned Chief Justice of India then was) speaking for the 3-Judge Bench consisting of himself, Bhagwati & Imam, JJ. has clarified that judgment in Section 369 (read Section 362 of the new Code) would mean the judgment of an original trial. However, in the new Code of 1973 that position is quite different and Section 362 would have full impact even for the High Court and "no Court" in the opening words would include the High Court also.

40. In this context it would be of abiding interest to take note of the decision of *Bindeshwari Prasad Singh Vs. Kali Singh*, , where the Supreme Court held that the power of recalling of cases disposed of by judicial Order not possible for any Magistrate as it did not have any power to review or recall an Order as the inherent powers u/s 561A (read Section 482 of the New Code) is only vested with the High Court. In the new Code Section 362 debars even the High Court to override Section 362 by way of invoking the provisions of Section 482 exercising this inherent power. This has been established from the decision of *Hari Singh Mann*(supra) and *Sooraj Devi* (supra).

41. Even the Supreme Court while dealing with the provisions of the old Code (Section 369) in *Sankatha Singh Vs. State of U.P.*, , in a 3-Judge Bench decision consisting of S. K. Das, K. Subba Rao (as the learned Chief Justice of India then was) and Raghubar Dayal, JJ. held Section 369 (read Section 362 of the New Code) read with Section 424 (read Section 387 of the new Code) makes it clear that the Appellate Court is not to alter or review the judgment once signed; except for the purpose of correction of a clerical error.

42. Of recent times *State of Rajasthan Vs. Gurcharandas Chadha*, relied on the decision of *State of Orissa v. Ram Chandra Aggarwal* (supra) and reiterated the position with regard to the bar of review of an Order. In *R. Annapurna v. Ramadugu Anantha Krishna Sastry and Ors.* 2004 SCC (Cri) 1135 the Supreme Court has found the High Court has no power to recall or review its own Order.

43. We are further tempted to refer to the decision of Nirmal Kumar Sen, J. in *Sarbeswar v. Adhir* ILR 1959 (Cal) 69, wherein it has been held:

"The Court has no jurisdiction to set aside or review its own judgment or Order which has already been signed."

His Lordship was dealing with a provision of Section 369 of the Code (Section 362 of the new Code) and had taken into account the ratio of the 3-Judge Bench decision of the Supreme Court in *U. J. S. Chopra* (supra). We hold that the ratio of the decision of *Sarbeswar Panda* (supra) is still a good law; so also the decision of *Mosst. Rabbani Khanam* (supra) is a trite position and is good law.

44. Even in still recent times the Supreme Court in *Naresh and Others Vs. State of Uttar Pradesh*, , in a 3-Judge Bench decision held that after the High Court had come to a specific and expressed finding it could not subsequently change the decision.

45. In the CPC Order 47 provides for review of a judgment but in the scheme of the said Code the said provision is literally absent. It would be doing harm to the intent of the legislature if the same is imported by a Court either in exercise of its inherent power, as seen from the decisions of the Supreme Court or by way of making alterations or corrections in a consequential manner.

46 ..From what we have seen and discussed in the foregoing paragraphs it is now axiomatic truth that once the Court disposes of a matter finally by way of signing its judgment it becomes *functus officio* and it can neither recall nor review an Order passed by it in view of the bar of Section 362 of the said Code. In other words, Section 362 of the said Code operates as a stumbling block for the Court to proceed in the said direction after it has finally disposed of the matter.

47. The question has been formulated for our decision in this reference as to whether Section 362 of the said Code would act as a bar in recalling an Order passed by the Court when it is found it will offend the principles of natural justice, has to be answered in the fact situation of the particular case.

48. Earlier discussion fortifies us to the conclusion that Section 362 of the said Code under whatever situation the Order finally was passed would have full impact upon it for the purpose of recall or review of the same. In the matter at hand before Batabyal, J. he had disposed of the matter on the very first day as Unlisted Motion on the basis of the submission of the learned Advocate for the petitioner and the materials available to His Lordship on the basis of subjective satisfaction. Even though the matter was decided ex parte and it attained its finality and affected the right of property of the other side, who was not heard, the said decision cannot be recalled as it was the subjective satisfaction of His Lordship, which persuaded him to pass such an Order. The same was final and could not be reviewed and/or recalled by the opposite party, who felt he was not heard and his right of audience was curbed.

49. The only course left open to the opposite party was to have preferred an appeal or revision as applicable before the Higher Forum against the same but taking out an application for recalling or review does not meet the approval of Section 362 of the said Code.

50. This Rule may have its disadvantage also. In a given case there may be a direction of the Court for the purpose of finally: deciding a matter to issue notice upon the other side. The other side may not be properly served or some mischief in the same may occasion and it may be shown that intentionally the other side has not appeared whereas actually there was no proper service if the Court disposes of the matter finally on such premises then also rigours of Section 362 of the said Code would apply, however, unfortunate it may be. No provision for recalling the same being heard ex parte would be available to such a party who has been left out.

51. In the light of what have been discussed as Batabyal, J. on 27.2.96 finally disposed of the revisional application in Criminal Revision No. 469 of 1997 at the motion stage, even if the opposite party No. 2, was not heard as the learned Judge may have felt it not proper to do so there was no scope for recalling the said Order which has reached its finality after its disposal. The opposite party No. 2 so aggrieved could have preferred any other relief as contemplated under the law and the question of violation of natural justice does not arise in this case.

52. 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.

53. In our considered opinion the Division Bench decision of Amal Kumar Chatterjee and J.N. Hore, JJ. in Narayan Chandra Dey(supra) is the correct view; so also the decisions of Sarbeswar Panda v. Adhir Kumar Jana(supra) passed by Nirmal Kumar Sen, J. and Mosst. Rabbani Khanam and Ors.(supra) passed by Joytosh Banerjee, J. are also the right position. The view expressed by Rabin Bhattacharyya, J. in Lalu Mondal(supra) cannot be said to be a good law and stands overruled.

54. 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.

55. Reference answered accordingly.

56. The matter now be placed before the appropriate Single Bench.

Debiprasad Sengupta and P.N. Sinha, JJ.

57. We agree.