

(1994) 05 CAL CK 0010
In the Calcutta High Court
Case No : Criminal Rev. No. 1797 of 1993

Lalu Mondal

APPELLANT

Vs

State of West Bengal and Another

RESPONDENT

Date of Decision : 17-05-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 362, 397, 401, 482
Penal Code, 1860 (IPC) — Section 120B, 360, 406

Citation : (1994) 2 CALLT 87

Hon'ble Judges : Rabin Bhattacharyya, J

Bench : Single Bench

Advocate : Subir Chowdhury, Amar Ghosh, Soma Panda and Krishna Bhattacharyya, for the Appellant; B.C. Roy, Asit Goswami, Prolhad Ghosh, Dipika Kanjilal and Achhyut Bose, for the Respondent

Judgement

Rabin Bhattacharyya, J.—Though this case does not bear any, special feature, yet for appreciation of rival claims, the facts of the case when brought to a close reveals that the petitioner-revisionist preferred a revision against an order of the learned SDJM Alipore, 24-Parganas (S) in Behala, PS. Case No. 306(5) of 1993, principally generated for committing offences under sections 320/406 & 120B of the Indian Penal Code.

2. The petition, since listed for hearing, as contested application, a direction was given on the petitioner on 4th of August, 1993, to serve copy of the application upon the State, through the learned Public Prosecutor, High Court and also the other opposite party, either personally or by Registered Post with A.D. and file affidavit-of-service at the time of hearing. Most unfortunately, when the revision was called on for hearing on 20.8.1993, none appeared nor any affidavit-of-service had been filed. In consequence, the revisional application, however, stood dismissed. Interim order, if any, stood vacated. Therefore, the revision, in the background of the aforementioned set of facts, lost its locomotion which was animated or revived by an order of my learned brother dated 25.8.1993.

3. Thereafter, the revision was set down to hearing on 20.12.93, and my learned brother allowed the revisional application directing release of the vehicle in question in the jamma of the petitioner upon executing a bond of Rs. 70,000/- on being satisfied about the service authenticated; by an affidavit, which, according to the present petitioner is the sore of this litigation and sought to have been healed up by a prayer for recall of the order dated 28th December, 1993.

4. The main stay of the claim of the petitioner seeking review of the order is that the service of the notice was absolutely hollow and the remark "refused" was procured. The petitioner having won the first round of litigation in the court below was completely in the dark about the criminal revision and by suppressing the actual state of affairs,, he obtained an order at the peril of the petitioner.

5. The petitioner has claimed in his affidavits that he was not a permanent resident at 31 Dr. K. D. Mookherjee Road, who is a resident of Tetultala Haranath Pore Road, Bhadrakali, P.S. Uttarpara.

6. The matter has been fought tooth and nail by the opposite party in his affidavit. According to the annexures appended to the affidavits, the various documents would signally prove that he was resident of 31 Dr. K. D. Mookherjee Road, Calcutta-60. The residence at Bhadrakali within P.S. Uttarpara is a lame plea to frustrate the order of the court, although the petitioner never took any steps for change of his address by intimating to the prescribed authorities dealing with the vehicle in question.

7. The determination of the point is as to whether a final order passed on 20.12.93, is susceptible to recall.

8. Mr. Chowdhury in refusal of the claim: of the petitioner seeking recall of the order has questioned the power of the court to adjudge the claim.

9. The contention of Mr. Chowdhury is pivoted on the anvil of Section 362 of the Cr. P.C. According to him, Section 482 of the Code of Criminal Procedure has no overriding effect on Section 362 as its being a complete Code in itself.

10. The pith and substance of his contention is that the Court is not wrapped up with residuary power or any power to recall the order complained of. Section 362 of the Cr.P.C. 1973, according to Mr. Chowdhury, entails forfeiture of such power once the judgment or final order is passed. The court does not possess any illimitable power to recall an order or judgment having reached its finality once. Only for correction of arithmetical or clerical error, the arm of the court is long enough to exercise power u/s 362 of the Cr. P.C.

11. To aid his claim he took the support of a long line of decisions to put Mr. Roy out of court. According to Mr. Chowdhury the situation has pushed Mr. Roy's client to an impossible. Mr. Chowdhury relied on Baren Das v. State of West Bengal 1988 Cal Cri Lr 227; Rajul and Another Vs. State of Uttar Pradesh, Narayan Chandra Dev v. State of West Bengal 1989 Cri Lr 105; Chandu Lal Chandraker Vs. Puran Mal and Another, P. Kannan Kunhimangalam Vs. The Food

Inspector Cannanore Municipality, .

12. He is emphatic that the apex court in the country is the only forum where relief in the nature asked for by Mr. Roy's client, the petitioner, could be adjudged.

13. There cannot be any bone of contention about the proposition of law reiterated by the above decisions. It postulates that once the judgment or order is delivered, the Court becomes functus officio and power to alter or correct the judgment and order is not all pervading but restricted to correction of arithmetical and clerical errors. The Court in Smt. Sooraj Devi Vs. Pyare Lal and Another, , took the view that inherent power of the Court is not contemplated by the saving provision contained in Section 362, and, therefore, the endeavour even if made by a party to invoke the residuary power can be of no avail. The view taken by the Supreme Court in State of Orissa Vs. Ram Chander Agarwala and Others, is that residuary power can never be invoked for exercise of power which is specifically prohibited by the Court such as u/s 362. Therefore, the law laid-down by the Apex Court in Sooraj Devi (supra) followed the ratio decidendi in State of Orissa v. Ramchander Agarwala. The point, therefore, boils down to this that Section is absolute in theory and in practice.

13a. Mr. Roy, the learned Advocate, appearing in support of the petition in his usual fairness did not raise any finger of protest about the proposition of law laid-down and reiterated by the courts of our country. But the argument of Mr. Roy lands on a different field, the potentiality of which will not only be evaluated but also assessed as I proceed while considering the second submission of Mr. Chowdhury. It is needless to repeat that the principal contention of Mr. Chowdhury adds a feather to his cap.

14. Mr. Chowdhury is eloquent in his submission that the service of notice on the petitioner as directed by the court is water and airproof. It is no good to cry over the spilt milk. The Court since accepted the service following which the final order was passed on the date aforementioned. It, therefore, cannot be reopened as Section 362 of the Cr. P.C. creates an insurmountable bar. It is a formidable hurdle in the way of the petitioner seeking recall of the order. But the law if does not help the petitioner, there cannot be any other alternative save to push him at Bhadrakali, as urged. It is a contrivance to steel a march on him in vain as the overwhelming documents put in by Mr. Chowdhury's client is the last nail on the coffin.

15. Mr. Roy to displace the contention of Mr. Chowdhury is vocal that the order impugned is void ab initio. There was no service in the eye of law after the revision was restored to file. To buttress his claim he has taken me through the ordersheets for revelation of the actual state of affairs which according to Mr. Roy does not bring the case within the wing of Section 362 of the Cr. P.C. He is candid in his submission that the Court will certainly fold its hand if the conditions laid-down in Section 362 have been complied with. There is no cleavage of opinion

about the circumstances when Section 362 will make a steady march.

16. According to Mr. Roy, it is manifest from the ordersheets that the revision stood dismissed on 22.8.93, for non-appearance of the parties. There is no slender prima facie material on record which could foreshadow service on his client after restoration of the revision. Therefore, there was no scope or chance for the petitioner to know about the fate of the restoration petition, although he had no previous knowledge about the institution of any revision before this Court against the order of the learned SDJM.

17. Apart from disputing the service, he has strongly urged that the revisionist had earlier knowledge that his client was a, resident of Bhadrakali. It is noticeable that there are various annexures on record prima facie evidencing Bhadrakali was his home address. However, I refrain myself from making any inflated or deflated remark about his home address or place of residence. But it passes all comprehension to believe that the registered letter in the instant case proceeded in a meteoric speed and reached its destination within 24 hours where the petitioner kept himself ready to refuse it i.e. it was posted on 19.8.93 and reached on 20.8.93. It appears that the action is computerised, as argued. The remark "refused" in the background of petitioner's success in the court below, as loudly spoken by Mr. Roy generates suspicion about service. It may be legitimately inferred that had the postal service in our country would have been so quick, prompt and reacted with the exigency of law and circumstances, possibly the courts would not have been crowded with the litigations. The circumstances are not rare but many where service has been affirmed by one and denied by the other, in consequence whereof litigations too often soared high. But it is not the lone and the whole cause but one among many which hardly could be overlooked.

18. Reverting to the case at hand, the hunch is elsewhere. Mr. Roy had made an overwhelming claim that after the restoration of the revision in absence of notice on the adversary of the revisionist, Section 362 of the Cr. P.C. is not applicable. The Section maintains silence about the judgement or order when passed overlooking the facts and circumstances. If Section 362 is accepted as sacrosanct, it will open the floodgate of fraud, corruption and conspiracy to secure an order or judgement by means other than holy.

19. Section 362 of the Cr. P.C. 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 sets aside an order or judgement. Section 362 does not and cannot bolt such procedure as it will offend principles of natural justice. In view of the above, it cannot cap the claim of Mr. Roy. The claim of Mr. Roy cannot be allowed to be whittled down under the canopy of Section 362. It seems to me that it is much ado about nothing.

20. For the foregoing reasons, I cannot accept the contention of Mr. Chowdhury and reject the same, but I accept the contention of Mr. Roy in the light of the

legal and factual exposure of the case and, therefore, it is accepted.

The order dated 20.12.93 is hereby recalled and the matter will be placed before the regular bench for an appropriate order.