
(2011) 09 AHC CK 0081
In the Allahabad High Court
Case No : Criminal Revision No. 4000 of 2010

Madan Upadhyay and Others

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 13-09-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 198(1), 311, 362
Penal Code, 1860 (IPC) — Section 109, 494

Citation : (2011) 09 AHC CK 0081

Hon'ble Judges : Kashi Nath Pandey, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Kashi Nath Pandey, J.—This revision has been filed by Madan Upadhaya son of Ram Naresh Upadhaya, Smt. Saroj Upadhaya wife of Madan Upadhaya, Ram Naresh Upadhaya son late Lekh Raj Upadhaya, Smt. Mukhiya wife of Ram Naresh Upadhaya, Km. Rina daughter of Ram Naresh Upadhaya and Manoj Kumar Upadhaya son of Ram Naresh Upadhaya against the judgment and order dated 9.8.2010, passed by Addl. Sessions Judge, Ballia in Criminal Revision No. 146 of 2008, Anjani Kumar Tiwari alias Lallan v. Madan and Ors. u/s 494/109 Indian Penal Code, 1860.

2. I have heard the learned Counsel for the parties and perused the record.

3. Revision No. 146 of 2008 was filed against the order dated 18.3.2008 in criminal case No. 1774 of 2007, Kripa Shankar v. Madan and Ors. u/s 494/109 Indian Penal Code, 1860.

4. It is to be noted that a complaint was filed by Kripa Shankar Tiwari on account of the second marriage by Madan accused, whose first wife, the daughter of Kripa Shankar Tiwari is alive. The complaint was filed u/s 198(1)(C) Cr. P.C. Kripa Shankar Tiwari died on 28.11.1991. Then Lallan @ Anjani Kumar Tiwari son of late Kripa Shankar Tiwari moved an application for permission of the court to

prosecute the complaint, which was allowed by the court's order dated 4.1.1992. Vide order dated 28.9.2006, the evidence of the complainant was closed and for further proceeding 2.11.2006 was fixed. It means the case was not disposed of finally in absence of complainant's evidence, even it was not dismissed in absence of the complainant, but 2.11.2006 was fixed for further proceeding. Vide order dated 18.3.2008, the application dated 2.11.2006 moved by Anjani Kumar Tiwari from the side of the complainant for recall of the order dated 28.9.2006 and giving opportunity to the complainant for evidence was rejected on the ground that No. order passed by the criminal court can be recalled in any provision of the Code of Criminal Procedure He has referred Section 362 Code of Criminal Procedure Even on this date the case was not finally disposed of. 22.5.2008 was fixed for further orders. Against this order in Revision No. 146 of 2008 the order dated 18.3.2008 passed by the Judicial Magistrate was quashed and the case was remanded to the Magistrate to reconsider the application dated 2.11.2006 moved by the complainant after hearing the parties. Against this order the present revision had been moved.

5. Learned Counsel for the revisionist submitted before the court Hari Singh Mann v. Har Bhajan Singh Bajwa and Ors. JT 2000 (2) SC 394 and argued that according 362 Code of Criminal Procedure once the matter is finally disposed of by the court, the court become functus officio, the moment the order disposing of the case is signed. Such an order can not be altered except to the extent of correcting clerical or arithmetical error.

6. The impugned order which is in the centre is order dated 28.9.2006 i.e.

PARIBADI KE SAKHSHYA KA AVSAR SMAPT KIYA JATA HAI. BASTE AGRIM KARYAWAHI DINANK 2.11.2006 KO PESH HO.

7. Thus the order dated 28.9.2006 can not be said to be a final order disposing of the case, therefore, if the application is moved on the next date i.e. 2.11.2006 for recalling the order of closer of evidence and giving opportunity to the complainant for adducing evidence, it can not be said to be barred by Section 362 Code of Criminal Procedure The case could have been otherwise when on 28.9.2006 the judgment could have been pronounced, such is not the case, therefore, the order dated 28.9.2006 is an order of interim nature. On the date 2.11.2006 fixed for further proceeding it was within the power of the Magistrate to permit the complainant to lead the evidence, because, the case was still pending. According to Section 362 Code of Criminal Procedure which is 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.

8. Thus on perusal of Section 362 Code of Criminal Procedure the crux behind the section is final order, disposing of a case. The impugned order dated 28.9.2008, the recall of which has been rejected vide order dated 18.3.2008, can

not be said to be final order, disposing of a case. Therefore, Hari Singh Mann v. Har Bhajan Singh Bajwa and Ors. JT 2000 (Suppl. 2) Supreme Court page 394 is not applicable to this case. Even without recalling the said order evidence of complainant and witnesses present in court could have been recorded u/s 311 Code of Criminal Procedure

9. Learned Counsel for the opposite party has cited Lakshmi Shanker v. State of U.P. XXXVII 1998 ACC 573 and argued that an order contrary to an earlier interim order may be recorded. As every procedure in Code of Criminal Procedure is to be interpreted to advance the cause of justice. There may not be any necessity of any formal order of recall of earlier order. If it appears to be essential for just decision of the case u/s 311 Code of Criminal Procedure the court can examine such witnesses present in the court.

10. Considering all the above circumstances, I do not find any reason to interfere with the judgment and order dated 9.8.2010, passed in Criminal Revision No. 146 of 2008, by which the case has been remanded to the Judicial Magistrate to rehear and reconsider the application dated 2.11.2006, moved by the complainant in Criminal Case No. 1774 of 2007.

11. Accordingly, the revision is liable to be dismissed. The revision is dismissed.