

(1985) 08 DEL CK 0045

In the Delhi High Court

Case No : Criminal Revision No. 15 of 1985

Mrs. M.T.R. Powar

APPELLANT

Vs

R.K. Gupta

RESPONDENT

Date of Decision : 26-08-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 362
Income Tax Act, 1961 — Section 277, 278

Citation : (1987) 165 ITR 119

Hon'ble Judges : G.R. Luthra, J

Bench : Single Bench

Advocate : R.L. Mehta and Sanjeev Khanna, for the Appellant; Satpal and Pawan Bahl, for the Respondent

Judgement

G.R. Luthra, J.—The present petition u/s 482 of the Criminal Procedure Code (for short "the Code") is directed against an order dated October 27, 1984, of Shri S. M. Aggarwal, Addl. Sessions Judge, Delhi.

2. The petitioner, Mrs. M.T.R. Powar, is the wife of late Shri S. L. Powar. The petitioner is an architect. Her husband also was an architect. During the lifetime of her husband, both the petitioner and her husband were carrying on the profession of architects, jointly. They were assessed to Income Tax. The Income Tax Authorities found some default in respect of their income relating to the assessment year 1972-73. Hence, the Department filed a complaint in March, 1976, for prosecution of the petitioner and her husband under the provisions of Sections 277 and 278 of the Income Tax Act. The complaint remained pending without much action and in the meantime in 1978, the husband of the petitioner died, with the result that the petitioner alone became the accused. The Income Tax Department did not produce any document or evidence till September 7, 1983. The said Department produced some documents on September 8, 1983. After recording of evidence, the magistrate discharged the petitioner.

3. On April 16, 1984, the Income Tax Department filed a revision petition against

the order of a discharge passed by the Magistrate. The next date fixed was May 18, 1984, on which date none appeared on behalf of the Department and, Therefore, the following orders were passed :

"18-5-84 -- Present: None.

Be awaited. 10-30 a.m.

3-30 p.m. -- Present: None.

Neither Shri Gupta has turned up nor his counsel. The case cannot be awaited any more. Dismissed for want of prosecution. Consigned."

4. On May 19, 1984, the Department brought an application for review of the order dated May 18, 1984, for setting aside the same and for deciding the revision petition on merits. It was thereafter that the impugned order dated October 27, 1984, restoring the criminal revision petition was made. The contention of the petitioner is that after having dismissed the revision petition, the learned Sessions Judge had become functus officio, that he was debarred by Section 362 of the Code from reviewing or setting aside the order of dismissal of the revision petition and that, Therefore, the order dated October 27, 1984, be set aside.

5. I have heard learned counsel for the parties. In Surinder Singh Vs. The State, , I had held that in view of Section 362 of the Code, no criminal court including the High Court had jurisdiction to alter, amend or review its judgment except to correct clerical or arithmetical error. My judgment was based on some judgments of the Supreme Court mentioned therein. There is another judgment of the Supreme Court also to the same effect-- Bindeshwari Prasad Singh Vs. Kali Singh, . In that the following proposition of law was laid down (p. 2433):

"We, however, need not dilate on this point because there is absolutely no provision in the Code of Criminal Procedure of 1898 (which applies to this case) empowering a Magistrate to review or recall an order passed by him. The Code of Criminal Procedure does contain a provision for inherent powers, namely, Section 561A which, however, confers these powers on the High Court and the High Court alone. Unlike Section 151 of the Civil Procedure Code, the subordinate criminal courts have no inherent powers. In these circumstances, Therefore, the learned Magistrate had absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the respondent was to move the Sessions Judge or the High Court in revision."

6. Although the aforesaid authority was on the Code of Criminal Procedure, 1898, yet the said Code was also on similar lines as the present Code. In the present case, Therefore, the learned Sessions Judge had no power to recall or review his own order and the only remedy of the Income Tax Department was to have filed a revision petition against the order dated May 18, 1984, of the learned Sessions Judge.

7. Shri Satpal, learned counsel for the respondent contended that a Sessions Judge has no power to dismiss a revision petition for default, that he can dismiss such a petition only on merits even if the petitioner is absent and that if the revision petition is dismissed for default of appearance, the same can be restored. In support of the proposition that once a revision petition is admitted, it can be dismissed on merits only and not in default, learned counsel relied upon a judgment of the Andhra Pradesh High Court in *S.N. Sharma and Others Vs. The State*, and a judgment of the Himachal Pradesh High Court in *Mina Ram and Others Vs. Jivlu Budhu*. Learned counsel further contended that when a revision petition cannot be dismissed and had to be decided on merits, the order dismissing it for default was wrong and hence could be set aside by the court dismissing the revision petition. He also relied upon a judgment of the Allahabad High Court in *Srikant Srivastava v. State of U.P.* [1985] 1 Cri 924. In that, it was held that a criminal court can restore an application for restoration of another application dismissed in default. Learned counsel further relied upon a judgment of the Andhra Pradesh High Court in *S. A. Venkatesu v. Venkatamma* [1976] Cri LJ 220 which judgment was also relied upon by the learned Sessions Judge in his impugned order.

8. There is no doubt that it is well settled that a criminal revision petition cannot be dismissed for default; the same must be dismissed on merits only. However, if a court wrongly dismisses such a revision petition, there is no provision of law which gives jurisdiction to such a court to set aside its wrong order. Rather, Section 362 of the Code is a complete bar against such restoration and the only remedy available to the person aggrieved is to approach the higher court.

9. *Srikant Srivastava v. State of U.P.* [1985] 1 Cri 924 and *S.A. Venkatesu and Others Vs. Venkatamma and Another*, have no application to the present case. In those cases, there was no question of restoration of any revision petition. Even otherwise, those authorities have no application in view of the Supreme Court judgments on the basis of which I had given my judgment reported as *Surinder Singh Vs. The State*, as well as the other Supreme Court judgment which has been mentioned already.

10. Learned counsel for the respondent also relied upon a judgment of *M. S. Joshi J.* in *Srimati Prema Jain v. Shri Sudhir Kumar Jain*, 2nd [1980] 1 Del 237. It was held that an order dismissing a petition u/s 125 of the Code on account of non-appearance of the petitioner was administrative in nature and that the same was capable of being revoked or reversed by the magistrate passing it. Learned counsel contends that in the present case, the order dismissing the revision petition was merely administrative in nature and that hence the same can be revoked.

11. Firstly, the said authority cannot be relied upon in view of the Supreme Court judgments mentioned already. Secondly, the provisions of Section 125 of the Code are such that even an order passed on merits can be changed subsequently. This has been specifically laid down in subsection (5) of Section 125 of the Code

which reads as under :

"(5) On proof that any wife in whose favor an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

12. In fact, the proceedings u/s 125 of the Code are not strictly criminal in nature inasmuch as there is no accused and no question of any punishment. Under these circumstances, the judgment of M. S. Joshi J. has no application in respect of the proceedings which are strictly criminal in nature.

13. Reliance of learned counsel for the respondent was also on a judgment of the Supreme Court in *Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others*, . Learned counsel particularly relied upon the observations made at page 347 and urges that the review is of two types--one in respect of procedural defects and the other in respect of merits, that even if there is no provision in any law for review of an order relating to procedural defects, the review is competent. The relevant observations in the said judgment are as under :

" The expression " review " is used in two distinct senses, namely, (1) a procedural review which is either inherent or implied in a court or tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record."

14. Learned counsel urges that in the present case, there was only a procedural defect and that, Therefore, notwithstanding the fact that there is no provision for review in the Code, the order dated May 18, 1984, could be reviewed by the learned Additional Sessions Judge.

15. But the aforesaid authority was not on the Code. It was in respect of the Industrial Disputes Act. Therefore, the authorities of the Supreme Court which are on the provisions of the Code itself and which prohibit review are to be followed. Further, the authority of the Supreme Court, relied upon by learned counsel, applies only to those cases where there is neither prohibition nor any provision for review. In the Code (Section 362), there is a complete bar and prohibition against the review and that being so, the learned Additional Sessions Judge could not review his own judgment.

16. Learned counsel for the respondent lastly contends that if this court is of the view that the impugned order dated October 27, 1984, is not legal and should be set aside by this court, the court can also exercise its inherent powers u/s 482, Criminal Procedure Code, and set aside the order dated May 18, 1984, also with the direction that the court should decide the revision petition on merits. He added that the court need not enter into the formalities of first obtaining an application from the respondent for setting aside the order dated May 18, 1984, and then proceed to decide its legality.

17. However, I cannot agree with learned counsel. At this time, the question before me is as to the legality of the order dated October 27, 1984. A formal application will have to be given by the respondent for setting aside the order dated May 18, 1984, and then the matter will be gone into because unless there is a formal application, the present petitioner will be virtually debarred from fully defending the order dated May 18, 1984.

18. Under the above circumstances, I accept the petition, set aside the order dated October 27, 1984, and direct that the revision petition pending before the Additional Sessions Judge shall remain dismissed in terms of the order dated May 18, 1984.

19. Criminal Revision No. 15 of 1985 stands disposed of.