

(2015) 02 KL CK 0176

In the High Court Of Kerala

Case No : Criminal M.A. No. 10194 of 2014 in Crl. M.C. No. 1612 of 2009

Pushpangathan

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 18-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Criminal Procedure Code, 1973 (CrPC) — Section 362, 482
Kerala Police Act, 1960 — Section 64(3)
Penal Code, 1860 (IPC) — Section 294(b), 308, 323, 324, 326

Citation : (2015) 3 KHC 259 : (2015) 3 KLT 105

Hon'ble Judges : A. Hariprasad, J

Bench : Single Bench

Advocate : G. Shrikumar, Senior Advocate and Anil Vincent, for the Appellant;
K.K. Rajeev, Public Prosecutor and Bechu Kurian Thomas, Advocates for the Respondent

Final Decision : Allowed

Judgement

A. Hariprasad, J.—This Court disposed of the above said Criminal Miscellaneous Case, filed under Section 482 of the Code of Criminal Procedure (in short, "Cr.P.C.") by order dated 13/08/2014 quashing Annexure-A3 private complaint pending before the learned Magistrate. The complainant, who was shown as the 2nd respondent in the Crl. M.C., has preferred this application, again under Section 482 Cr.P.C. requesting this Court to recall the order in the case on the ground that the name of the counsel appearing for the complainant was not shown in the cause list and so, he could not present his version of the case. When the complainant came to know that the Crl. M.C. had been allowed quashing his complaint, he made enquiries, which revealed that the case number was wrongly mentioned in the vakalath submitted by the lawyer on behalf of the complainant and that was the reason why his name was not mentioned in the cause list. The petitioner (complainant) would contend that quashment of complaint resulted in injustice to him. It is also submitted that the sublime

principle of natural justice, viz., the right to be heard has been violated and for that reason, this Court may recall the order quashing the complaint. The legal question arising for determination is whether the prohibition created by Section 362 Cr.P.C. that no Court shall alter or review the judgment or final order disposing of a case after it has been signed, except for correcting a clerical or arithmetical error, will be violated if the request of the complainant is allowed under Section 482 Cr.P.C.? An ancillary question that may arise is whether under all circumstances the powers of this Court under Section 482 Cr.P.C. are controlled by Section 362 Cr.P.C.?

2. Bare minimum facts are thus: The complainant preferred a complaint before learned Magistrate alleging offences against the accused persons therein punishable under Sections 323, 324, 326, 346, 454, 308, 294(b) and 506(ii) of I.P.C. Learned Magistrate took cognizance of the offences and that was challenged by the 5th accused before this Court in the Crl. M.C. The learned counsel for the 5th accused and the learned Public Prosecutor were heard in that matter. The present petitioner, though arrayed as 2nd respondent, was not represented at the time of hearing. It is the submission of the petitioner that name of the counsel engaged by him was not shown in the cause title. On verification, it was revealed that the case number shown in the vakalath was Crl. M.C. No. 1612 of 2008 instead of Crl. M.C. No. 1612 of 2009. Advocate clerk, attached to the office of the advocate engaged by the complainant, has sworn to an affidavit admitting his mistake in showing the case number in the vakalath. Fact of the matter; is that name of the counsel was not shown in the list when the matter came up for consideration. Consequently there was no representation for the complainant, who was the 2nd respondent in the petition. The petitioner believes that had he been heard, the result would have been different and quashment of private complaint would not have been the result. He suffered great prejudice. Hence this application under Section 482 Cr.P.C. to recall the order dated 13/08/2014 in Crl. M.C. No. 1612 of 2009 and also to rehear the case.

3. Heard Shri. G. Shrikumar, learned Senior Counsel appearing for the applicant (complainant), Shri. Bechu Kurian Thomas, learned counsel for the 2nd respondent (petitioner in the Crl. M.C./5th accused) and Shri. K.K. Rajeev, learned Public Prosecutor.

4. The questions need to be resolved are whether the bar to review a judgment or final order created by Section 362 Cr.P.C. is absolute and is it possible, under any circumstance, to abrogate the same by recalling?

5. Let us consider the magnitude of inability of a Criminal Court in reviewing its judgment or final order created by Section 362 Cr.P.C. The Section reads as follows:

"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."

The Section clearly says that once a judgment or final order disposing of a case has been signed, no Court can alter or review it, except to correct a clerical, or arithmetical error. The possible extreme view could be that by virtue of law stated in the provision, no Court can revise or alter a judgment or final order, even if any grave illegality is discovered after signing the same. Can such a pedantic view be taken in the light of development of law?

6. The point that a Criminal Court cannot review its judgment which has attained finality by invoking inherent powers is well settled. Section 482 Cr.P.C. saves the inherent powers of the High Court in the following words:

"Saving of inherent power of High Court.--Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

On a reading of the above provision, it can be seen that the inherent power vested in the High Court can be exercised in three situations - (i) to give effect to an order under the Code; (ii) to prevent abuse of the process of the Court and (iii) to otherwise secure the ends of justice. The inherent jurisdiction under the Section, though wide, has to be exercised sparingly and carefully and also with caution. Exercise of such power is justified only if any one of the situations specifically laid down in the Section is satisfied. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone the Courts exist (see *State of Punjab Vs. Kasturi Lal and Others*, AIR 2005 SC 4135 : (2005) 123 CompCas 147 : (2005) CriLJ 3200 : (2004) 6 JT 137 : (2004) 6 SCALE 303 : (2004) 12 SCC 195 : (2004) 1 SCR 158 Supp : (2004) AIRSCW 1729 : (2004) AIRSCW 4424 : (2004) 5 Supreme 742 : (2004) 4 Supreme 254 and *Divine Retreat Centre Vs. State of Kerala and Others*, AIR 2008 SC 1614 : (2008) CriLJ 1891 : (2008) 3 JT 353 : (2008) 3 SCALE 532 : (2008) 3 SCC 542 : (2008) AIRSCW 1793

7. It is relevant to notice that the subordinate Criminal Courts have no inherent power unlike the one recognised in the case of Civil Courts by Section 151 of the Code of Civil Procedure, 1908. About the inherent powers of subordinate Courts, the Supreme Court has definitely held that a Magistrate has no jurisdiction to reconsider, recall or review his decision to issue process against the accused, (see *Adalat Prasad Vs. Rooplal Jindal and Others*, (2004) 4 CTC 608 : (2004) 7 JT 243 : (2004) 7 SCALE 137 : (2004) 7 SCC 338 : (2004) 2 UJ 1342 and *Subramaniam Sethuraman Vs. State of Maharashtra and Another*, (2004) 4 BC 598 : (2004) CriLJ 4609 : (2004) 4 CTC 613 : (2004) 8 JT 220 : (2004) 7 SCALE 733 : (2004) 13 SCC 324 : (2005) 1 UJ 55 : (2004) AIRSCW 5326 : (2004) 6 Supreme 662 . It is also well settled that the bar created under Section 362 Cr.P.C. does not apply to interlocutory orders. That is why it has been held that

the Court has power to review an order granting maintenance and also to extend the time for payment of the same.

8. A judgment can be altered after dictation, but before the Judge puts his signature. This proposition has been laid down in *Surendra Singh and Others Vs. The State of Uttar Pradesh*, AIR 1954 SC 194 : (1954) CriLJ 475 : (1954) 1 SCR 330 . It has been reiterated by the Apex Court in *Kushalbhair Ratanbhai Rohit and Others Vs. The State of Gujarat*, AIR 2014 SC 2291 : (2014) AIRSCW 3125 : (2014) CriLJ 2951 : (2014) 2 RCR(Criminal) 819 : (2014) 7 SCALE 219 : (2014) 9 SCC 124 .

9. The expression "clerical or arithmetical error" has been explained by the Supreme Court in *Smt. Sooraj Devi Vs. Pyare Lal and Another*, AIR 1981 SC 736 : (1981) CriLJ 296 : (1981) 1 SCALE 46 : (1981) 1 SCC 500 : (1981) SCC(Cri) 188 : (1981) 2 SCR 485 : (1981) 13 UJ 262 . Clerical error is a mistake in writing or typing and an arithmetical error is a mistake of calculation occasioned by accidental slip or omission by a Court. It is an error apparent on the face of the record and never intended to be said by the Court.

10. It is an indisputable proposition that even the High Court cannot review its judgment or final order passed either in the exercise of its appellate or revisional jurisdiction and the prohibition created by Section 362 Cr.P.C. is complete and no Criminal Court can review its own judgment or order after it is signed (see *State of Kerala Vs. M.M. Manikantan Nair*, AIR 2001 SC 2145 : (2001) CriLJ 2346 : (2001) 2 Crimes 226 : (2001) 1 JT 245 Supp : (2001) 3 SCALE 513 : (2001) 4 SCC 752 : (2001) 3 SCR 203 : (2001) 2 UJ 1179 : (2001) AIRSCW 1847 : (2001) 3 Supreme 526 .

11. But the question is whether the expression "review of a judgment or final order" is the same as "recalling a judgment or final order", is there any legal distinction between alteration and review of a judgment or final order on one hand and recall on the other? Unchallengeable is the proposition that when the High Court exercises power under Section 482 Cr.P.C., the Court does not function as a Court of appeal or a Court of revision. Inherent jurisdiction and powers recognised under the Section, though has to be exercised sparingly and carefully, is to be exercised *ex debito justitiae* to do real and substantial justice (see *Central Bureau of Investigation Vs. Shri Ravi Shankar Srivastava, IAS and Another*, AIR 2006 SC 2872 : (2006) CriLJ 4050 : (2006) 7 JT 313 : (2006) 7 SCALE 618 : (2006) 7 SCC 188 : (2006) 4 SCR 450 Supp : (2006) AIRSCW 3990 : (2006) 6 Supreme 305 .

12. Learned counsel for the petitioner strongly relied on a decision of the Apex Court in *Vishnu Agarwal Vs. State of U.P. and Another*, AIR 2011 SC 1232 : (2011) CriLJ 1744 : (2011) 3 JT 538 : (2011) 2 RCR(Criminal) 754 : (2011) 2 SCALE 690 : (2011) 3 SCR 197 : (2011) AIRSCW 1473 . Facts of the case show that when a criminal revision petition was listed before the High Court, no one appeared on behalf of the revisionist, though the counsel for the respondent

appeared. In these circumstances, the order was passed. Subsequently an application was moved by the revisionist for recalling the order passed in his absence alleging that the case was shown in the computer list and not in the main list of the High Court. The learned counsel for the revisionist therefore could not appear before the High Court. The High Court allowed the application and that was challenged before the Supreme Court. In that context, the Supreme Court held as follows:

"6. In our opinion, Section 362 cannot be considered in a rigid and over technical manner to defeat the ends of justice. As Brahaspati has observed:

"Kevalam shastram ashritya na kartavyo vinirnayah yuktiheeney vichare tu dharmahaani prajayate" which means:

"The Court should not give its decision based only on the letter of the law. For, if the decision is wholly unreasonable, injustice will follow."

7. Apart from the above, we are of the opinion that the application filed by the respondent was an application for recall of the order dated 02/09/2003 and not for review. In *Asit Kumar Kar Vs. State of West Bengal and Others*, (2009) 1 JT 654 : (2009) 1 SCALE 745 : (2009) 2 SCC 703 : (2009) 1 SCC(L&S) 541 : (2009) 1 SCR 469 , this Court made a distinction between recall and review which is as under: (SCC p. 705, paras 6-7)

"6. There is a distinction between.....a review petition and a recall petition. While in a review petition, the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party." "

13. Reliance is also placed on another decision of the Apex Court in *State of Punjab Vs. Davinder Pal Singh Bhullar and Others etc.*, AIR 2012 SC 364 : (2012) CriLJ 1001 : (2012) 1 Crimes 44 : (2011) 14 JT 213 : (2012) 1 RCR(Criminal) 126 : (2011) 3 SCALE 394 : (2012) AIRSCW 207 : (2011) 8 Supreme 577 . The Supreme Court held that the power to recall a judgment or order is different from the power of altering/reviewing a judgment. The following words are quoted with profit:

"if a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of Court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 Cr.P.C. would not operate. In such eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it

was not at fault....."

14. Learned counsel for the 5th accused contended that the attempt of the complainant is to circumvent the bar under Section 362 Cr.P.C. by an ingenious method of approaching this Court with a petition under Section 482 Cr.P.C. Placing reliance on R. Rajeshwari Vs. H.N. Jagadish, (2008) 4 BC 6 : (2008) 2 CompLJ 20 : (2008) 2 CTC 425 : (2008) 3 JT 405 : (2008) 3 SCALE 443 : (2008) 4 SCC 82 , learned counsel contended that in view of the specific bar created under Section 362 Cr.P.C. in respect of exercise of jurisdiction by the High Court to review its own order, the jurisdiction under Section 482 Cr.P.C., cannot be used to circumvent the bar. The facts in the decision are not comparable with those in the present case. The said decision only lays down a proposition that ordinarily the exercise of jurisdiction under Section 482 Cr.P.C. would be unwarranted to get over the bar created under Section 362 Cr.P.C.

15. There cannot be any quarrel on the proposition that the bar created under Section 362 Cr.P.C. has to be respected. But the concepts of recall, review and/or alteration are to be distinguished clearly. If we understand the said terms correctly, there will not be any difficulty to resolve the issue. Alteration and/or review prohibited by Section 362 Cr.P.C. presupposes the continuance of the order under challenge and effectuation of the same with some changes in it. If a party wants to seek the indulgence of Court to recall an order, he has to show a legal reason for challenging its existence and convince the Court that the order complained of shall not be allowed to continue or operate. When an order is recalled, the whole thing is abrogated and the parties are relegated to the original position; i.e., to a stage anterior to passing any judgment or final order in the matter. Conceptually, review/alteration is done while the order is in existence or force. The exercise undertaken in a review/alteration is to closely examine the order sought to be reviewed so as to find out any illegality or impropriety. For doing so, the existence of the judgment or order must be recognised. When a judgment or a final order is recalled for valid reasons, the resultant legal effect is that the order itself is abrogated or uprooted and the parties will be relegated to a position that existed at the commencement of the proceedings. Therefore, I am of the view that Section 362 Cr.P.C. does not affect the power of this Court to recall a judgment or order, if legal grounds are properly established by the party complaining.

16. Facts of the case in hand show that the order happened to be passed against the complainant in his absence for no fault attributable to him. The affidavit filed in support of the petition sworn to by the advocate clerk shows the reasons for non-appearance of the counsel. The judgment in the proceedings under Section 482 Cr.P.C. resulted in termination of the complaint filed by the complainant before the learned Magistrate. The complainant suffered prejudice and his right to be heard has been adversely affected are points beyond any possible dispute. Hence, I am of the view that the petition is to be allowed. According to the learned counsel for the 5th accused, the private complaint against the 5th

accused (a Police Officer) was filed in contravention of Section 64(3) of the Kerala Police Act, 1960 and it was hopelessly barred by limitation. Therefore, the ultimate fate of the complaint can be visualised even at this stage, contended the 5th accused. Then a further question may arise as to whether right of a person to be heard can be decided without hearing him, if there is high degree of probability that even if he is heard, the situation may not turn in his favour? Learned Authors, HWR Wade and C.F. Forsyth, in their seminal work on Administrative Law, have dealt with the concept of "the right to fair hearing" elaborately. One question posed is what will be the effect where a fair hearing would make no difference? Learned Authors observed as follows:

"Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly. Lord Wright once said (*General Medical Council v. Spackman*, 1943 AC 627 at 644; and see *Annamunthodo v. Oilfields Workers' Trade Union*, 1961 AC 945 at 956 (Lord Denning)).:

If the principles of natural justice are violated in respect of any decision it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

Whether the complainant will ultimately succeed or not cannot be a reason for discarding or negating his plea that his right to be heard has been infringed. It is an essential component of natural rights and it cannot be defeated or ignored. Therefore, I am of the view that the order passed by this Court on Crl. M.C. No. 1612 of 2009 should be recalled for the aforesaid reasons.

In the result, the petition is allowed. The order passed in the above Crl MC on 13/08/2014 is recalled. Post the case for hearing in accordance with the roster.