

**(2014) 08 AHC CK 0144**

**In the Allahabad High Court**

**Case No :** Crl. Misc. Restoration Application No. 211266 of 2014 in Crl. M.T.A.  
Application No. 64 of 2008

Rakesh Srivastava "Nyayik"

APPELLANT

Vs

State of U.P.

RESPONDENT

**Date of Decision :** 11-08-2014

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 362

**Citation :** (2014) 3 ACR 2736 : (2015) 88 ALLCC 694

**Hon'ble Judges :** Mohd. Tahir, J

**Bench :** Single Bench

**Advocate :** Sanjay Srivastava, S.I. Siddiqui, S.M.A. Kazmi and Tahira Kazmi,  
Advocate for the Appellant; Raghubir Singh Yadav and Manish Tiwari, Advocate  
for the Respondent

## Judgement

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Mohd. Tahir, J.—Case called out. Learned counsel for both the parties are present.

2. Heard learned counsel for both the parties and perused the record.

3. Heard on delay Condonation Application No. 211265 of 2014.

4. The delay condonation application is supported by affidavit. The cause shown for the delay in filing the recall application appears to be satisfactory. So, the delay in the filing the recall application is, hereby, condoned. The recall application is treated within time.

5. Heard on restoration/recall application No. 211266 of 2014 which has been moved for getting the order dated 3.3.2014 passed in Transfer Application (Criminal) No. 64 of 2014 recalled.

6. Learned counsel for the applicant has submitted that the transfer application which has been sought to be restored, was fixed for hearing on 3.3.2014 but on that date, the counsel for the applicant could not appear in the court because he

could not mark the case in question in the cause list and consequently the Transfer Application No. 64 of 2008 was dismissed due to absence of the counsel for the applicant. So, the order dated 3.3.2014 be recalled and the aforesaid transfer application be restored to its original number. In support of his contention, he has cited the ruling of Hon"ble Supreme Court which has been rendered in Vishnu Agarwal Vs. State of U.P. and Another, . He has also placed reliance on the Full Bench decision of Rajasthan High Court in the case of Habu Vs. State of Rajasthan, . On the basis of these rulings the contention of the counsel for the applicant is this that the recall/restoration application is maintainable even in criminal side and the bar of Section 362, Cr.P.C. is not attracted.

7. On the other hand, learned counsel for the private opposite party has submitted that by virtue of Section 362, Cr.P.C. the order cannot be recalled and the transfer application cannot be restored to its original number. He has cited the case laws of Allahabad High Court given in Recall/Restoration Application No. 264945 of 2009 filed in Transfer Application (Criminal) No. 90 of 2004, Smt. Madhu Gupta and others v. State of U.P. and another and Hari Prakash Saxena Vs. Pratibha Saxena, . In these case laws of Allahabad High Court, it has been held that if the transfer application is dismissed in default, the order of dismissing the transfer application cannot be recalled and the transfer application cannot be restored to its original number.

8. I have considered the rival submissions of learned counsel for both the parties.

9. The question is this as to whether the words "recall" and "review" are one and the same thing?

10. The answer to this question finds place in the decision of the Hon"ble Apex Court in the case of Vishnu Agarwal (supra) cited by the counsel for the applicant. In this decision, the Hon"ble Apex Court in para-9 referred the observations made in the case of Asit Kumar Kar Vs. State of West Bengal and Others, , in which the Hon"ble Supreme Court made a distinction between recall and review which is as under:

"There is a distinction between.....a review petition and a recall petition. While in a review petition, the court considers on merits whether 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. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Excise Licensees Association Vs. Raghavendra Singh and Others, , cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences."

11. In the above decision of the case of Vishnu Agarwal (supra), the Hon"ble Supreme Court has also specifically held that Section 362, Cr.P.C. cannot be considered in a rigid and over technical manner to defeat the ends of justice.

Where the order or judgment has been passed in the absence of the counsel for the respondent, the recall of that judgment or order cannot be refused by strictly applying provisions of Section 362, Cr.P.C.

12. So, the words recall and review are not one and the same thing. The question formulated above is, accordingly, answered.

13. In the Full Bench decision of Rajasthan High Court (*supra*), it has been held that the power of re-call is different than the power of altering or reviewing the judgment.

14. Hence, according to the decision of the Supreme Court as well as the decision of Full Bench of Rajasthan High Court in the case of Habu (*supra*), the recall/restoration application is maintainable.

15. The general principle regarding the application of precedence is this that when the opinion of the Supreme Court and the High Court differs from each other on any point, in that case, the opinion of the Supreme Court would prevail. In that view of the matter, the opinion of the Supreme Court that the recall/restoration application is maintainable when the order or judgment is passed in the absence of the counsel for the respondent, would prevail over the opinion of the High Court.

16. In the case at hand, there is specific mention in the affidavit filed in support of recall application that the counsel for the applicant could not appear on the date fixed because he could not mark the case in question in the daily cause list. Hence, the reason for not appearing in the court given by the counsel for the applicant appears to be satisfactory. So, this recall/restoration application is, hereby, allowed and the order dated 3.3.2014 passed in the aforesaid Transfer Application (Criminal) No. 64 of 2008 is, hereby, recalled and the aforesaid transfer application is restored to its original number.

17. Interim order dated 29.1.2008 passed in the aforesaid transfer application is, hereby, revived.

List this case for hearing in the first week of September, 2014.