

(2019) 05 SHI CK 0062
In the High Court Of Himachal Pradesh
Case No : Criminal Revision No. 7 Of 2015

Rohit

APPELLANT

Vs

Rashik

RESPONDENT

Date of Decision : 03-05-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 362, 397, 401, 482
Negotiable Instruments Act, 1881 — Section 138, 147
Constitution Of India, 1950 — Article 32

Citation : (2019) 05 SHI CK 0062

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Maan Singh, Ashwani Kaundal

Final Decision : Allowed

Judgement

Sandeep Sharma, J

Cr.MP No. 631 of 2019

1. By way of instant application filed under Section 482 Cr.PC., prayer has been made on behalf of the applicant/petitioner for recalling the judgment dated 15.7.2016, passed by this Court in Criminal Revision No. 7 of 2015, whereby Criminal revision referred herein above, came to be dismissed for non-prosecution.

2. Averments contained in the application, which has been processed through Superintendent, Modern Central Jail, Nahan, suggest that due to miscommunication, applicant/petitioner was unable to impart proper instructions to Mr. G.R. Palsra, Advocate, who was earlier representing him in Criminal Revision No. 7 of 2015, as a consequence of which, criminal revision petition referred herein above, came to be dismissed for non-prosecution.

3. On 15.7.2016, learned counsel for the applicant/petitioner informed this Court that despite several communications, applicant/petitioner is not coming forward

to pursue the matter and as such, Court having taken note of the fact that despite repeated opportunities, applicant/petitioner failed to take steps for the service of the respondent, dismissed the criminal revision petition having been filed by him for non-prosecution. It has been further averred in the application that applicant/petitioner after entering into compromise with the respondent, whereby he paid entire amount in terms of judgment passed by the learned trial Court, remained under the bona-fide belief that no further action, if any, is required to be taken by him. However, fact remains that subsequently, on 22.4.2019, he was taken into custody, whereafter he moved instant application for recalling of judgment dated 15.7.2016, and restoration of revision petition filed by him so that factum with regard to his entering into compromise with respondent is brought on record and judgment of learned trial court holding him guilty of having committed offence under Section 138 of the Negotiable Instruments Act (in short "the Act") is set aside

4. Having carefully perused explanation rendered on record by the applicant/petitioner, this Court is convinced and satisfied that due to unavoidable circumstances, applicant/petitioner was unable to take steps for the service of the respondent, as a consequence of which, criminal revision petition came to be dismissed, but question, which arises for consideration by this Court at this stage is that whether it can proceed to recall its judgment dated 15.7.2016, especially, in view of the bar contained in Section 362 of Cr.PC. As per Section 362 Cr.PC, 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.

5. At this stage, Mr. Maan Singh, learned counsel for the applicant/petitioner while referring to the judgment rendered by the Hon'ble Apex Court in *Asit Kumar Kar v. State of West Bengal and Ors* (2009) 2 SCC 703, contended that there is a distinction between review petition and recall petition. He contended that since revision petition filed by the applicant/petitioner never came to be decided on merits, there is no embargo/impediment for this Court to recall its earlier judgment dated 15.7.2016 because that order was passed simply on account of non-prosecution. It would be profitable to reproduce the relevant paras of the aforesaid judgment as under:

6. There is a distinction between a petition under Article 32, 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.

7. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in *All Bengal Licensees Association v. Raghavendra Singh & Ors*. [2007 (11) SCC 374] cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences. In these circumstances, we recall the directions in paragraph 40 of the aforesaid judgment. However, if anybody has a grievance against the grant of licences or in

the policy of the State Government, he will be at liberty to challenge it in appropriate proceedings before the appropriate Court. The writ petitions are disposed of with these directions.

6. In this regard, reliance is also placed on judgment passed by the Hon'ble Supreme Court in case titled Vishnu Agarwal v. State of Uttar Pradesh and Anr. (2011) 14 SCC 813.

7. In the judgment (supra), Hon'ble Apex Court has held that there is a distinction between review petition and recall petition. While in review petition, court considers on merit 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 the affected party.

8. It is not in dispute that in the case at hand, criminal revision petition having been filed by the petitioner came to be dismissed for non-prosecution on the statement having been made by the learned counsel representing him that petitioner is not coming forward to impart instructions and no finding, if any, ever came to be returned by this Court on merits while passing judgment dated 15.7.2016.

9. Consequently, in view of the facts narrated herein above as well as law taken note herein above, this Court finds no impediment in accepting the prayer made in the instant application and as such, same is allowed, as a consequence of which, judgment dated 15.7.2016, passed by this Court is recalled and petition is restored to its original number. Application stands disposed of.

Cr. Revision No. 7 of 2015

By way of instant criminal revision petition filed under Section 397 read with Section 401 of Cr.PC, challenge has been laid to judgment dated 18.11.2014, passed by the learned Additional Sessions Judge, Kullu, District Kullu, H.P., in Criminal Appeal No. 107 of 2014, affirming judgment of conviction and sentence dated 12.8.2014, recorded by the learned Special Judicial Magistrate, Kullu, in complaint No. 276-1/2011/77-1/2013, whereby the learned trial Court while holding the petitioner-accused guilty of having committed offence punishable under Section 138 of the Act convicted and sentenced him to undergo simple imprisonment for a period of three months and to pay compensation to the tune of Rs.85,000/- (70,000/- cheque amount and Rs. 15,000/- as damages) to the complainant.

10. Precisely the facts, as emerge from the record are that respondent-complainant instituted a complaint under Section 138 of the Act, in the court of learned Special Judicial Magistrate, Kullu, H.P., against the petitioner-accused, alleging therein that on 30.1.2011 and 12.2.2011, the accused had borrowed a sum of Rs. 30,000/ and Rs.40,000/-, respectively, from him and with a view to discharge his liability, he issued two cheques bearing No. 490639 dated

17.3.2011 for Rs. 30,000 and another Cheque bearing No. 563373 dated 17.3.2011 for Rs. 40,000/- drawn at UCO Bank Raison Kullu, in favour of the complainant, however, fact remains that the aforesaid cheque were dishonoured on its presentation on account of closed account. Since petitioner-accused failed to make the payment good within the stipulated period despite issuance of legal notice, respondent/complainant was compelled to initiate proceedings before the competent Court of law under Section 138 of the Act.

11. Learned trial Court on the basis of material adduced on record by the respective parties held the petitioner-accused guilty of having committed offence under Section 138 of the Act and accordingly, sentenced him as per the description given herein above.

12. Being aggrieved and dis-satisfied with the aforesaid judgment of conviction recorded by the court below, accused preferred an appeal in the court of learned Additional Sessions Judge, Kullu, H.P., which also came to be dismissed vide judgment dated 18.11.2014, as a consequence of which, judgment of conviction recorded by the learned trial Court came to be upheld. In the aforesaid background, present petitioner-accused has approached this Court by way of instant proceedings, seeking therein his acquittal after setting aside the judgments of conviction recorded by the courts below.

13. Today during the pendency of the case, Mr. Maan Singh, learned counsel for the petitioner while referring to the compromise (Annexure A-1 annexed with Cr.MP No. 631 of 2019), whereby the petitioner has paid full and final payment to the respondent-complainant, contended that in view of the subsequent developments, this Court while exercising power under Section 147 of the Act as well as in terms of guidelines issued by the Hon'ble Apex Court in Damodar S. Prabhu V. Sayed Babalal H. (2010) 5 SCC 663, can proceed to compound the offence.

14. Mr. Ashwani Kaundal, learned counsel for the respondent complainant on the instructions of the respondent, who is present in Court while fairly acknowledging the factum with regard to compromise arrived at inter-se parties contended that since entire payment in terms of the judgment passed by the learned trial court stands duly paid to the respondent complainant, this Court can accede to the aforesaid prayer made by the learned counsel for the petitioner for compounding of offence. This Court also recorded statement of the complainant-respondent namely Mr. Rashik, who on oath stated that he with his own volition and without there being any external pressure, has entered into compromise with the petitioner-accused, whereby he has received the entire sum of Rs. 85,000/- from the petitioner-accused. He further stated that he has no objection in case judgment of conviction recorded by the learned courts below is quashed and set-aside in view of the compromise arrived at inter-se us. His statement is taken on record.

15. Having taken note of the fact that complete amount in terms of judgment

passed by the learned trial Court, stands paid to the respondent- complainant, this Court sees no impediment in accepting the prayer made having been made by the petitioner for compounding of offence while exercising power under Section 147 of the Act. Hon'ble Apex Court in Damodar S. Prabhu case (supra), has categorically held that court, while exercising power under Section 147 of the Act, can proceed to compound the offence even after recording of conviction by the courts below.

16. Consequently, in view of the above, present matter is ordered to be compounded and impugned judgments passed by the courts below are quashed and set-aside and the petitioner-accused is acquitted of the charges framed against him under Section 138 of the Act. Release warrants be prepared and sent through email/fax to the quarter concerned forthwith. Accordingly, the petition is disposed of, so also pending applications, if any.