

(2009) 07 BOM CK 0029

In the Bombay High Court

Case No : Criminal Miscellaneous Application No. 171 of 2009 in Criminal
Revision Application No. 76 of 2008

Shri Sanjabji Tari and another

APPELLANT

Vs

Shri Kishore S. Borcar

RESPONDENT

Date of Decision : 14-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 127, 362, 401, 482
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2009) 07 BOM CK 0029

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : Rohit Bras De Sa, for the Appellant;

Final Decision : Dismissed

Judgement

N.A. Britto, J.—Heard. By the present application filed u/s 482 of the Code of Criminal Procedure, 1973(Code, for short) the complainant seeks to recall the Judgment dated 16-4-2009.

2. There is no dispute that the said Judgment came to be pronounced on 16-4-2009 in the absence of the complainant, though the complainant had filed his Vakalatnama but the counsel's name was not shown on the cause list. The Criminal Revision Application filed by the accused was heard on 15-4-2009 and as none had appeared on behalf of the complainant it was placed on the next day for Judgment, when Judgment dated 16-4-2009 came to be delivered.

3. As such, there is no dispute that the said Judgment dated 16-4-2009 has been delivered by this Court without hearing the complainant in Revision Application filed by the accused in which the accused was convicted u/s 138 of the Negotiable Instruments Act, 1881. Nevertheless, the question is whether the said Judgment could be recalled or not. There are two views on the subject. Shri Rohit Bras De Sa, learned Counsel appearing on behalf of the complainant has submitted that the complainant was not heard on 15th April, 2008 on account of

the mistake of the Office of the Court, and as such the party should not be allowed to suffer, and, therefore this could be a fit case to correct the said mistake, recall the Judgment and hear the complainant. That in a case like this, the powers u/s 482 of the Code could be exercised, learned Counsel has cited two decisions of this Court. The first is in the case of Deepak Thanwardas Balwani v. State of Maharashtra and another(1985 CRI. L. J. 23) and then the case of Kalawati Ravindra Malewar v. Ravindra Vishwanath Malewar(1997(Supp.) Bom. C.R. 779//1996(1) Mh. L.J. 561). There is also another view expressed by the Full Bench of Rajasthan High Court in the case of Habu v. State of Rajasthan(AIR 1987 Rajasthan 83). In the first case, it was held that the inherent powers of the Court u/s 482 of the Code could be exercised by the High Court to review or revise its Judgment if such a Judgment is pronounced without giving an opportunity of being heard to a party who is entitled to a hearing and that party is not at fault. This Judgment has proceeded on the principle that for the mistake of the Court, a party should not suffer. In the second Judgment, it was held that the applicant/wife was claiming hearing which she was entitled to in terms of sub-section(2) of Section 401 of the Code and since she was not heard the Judgment pronounced in her absence was considered as nonest, and as such had resulted in substantial failure of justice. The Full Bench of Rajasthan High Court in the case of Habu v. State of Rajasthan(supra) held that the powers u/s 482 of the Code can be and should be exercised by the High Court for recalling the Judgment in case the hearing is not given to the accused and the case falls within one of the three conditions laid down u/s 482 of the Code. Learned Counsel on behalf of the petitioner has also relied on another Judgment of the Apex Court in the case of Iddar and others v. Aabida and another((2007) 11 SCC 211). All that happened in that case is that the Apex Court after observing that the High Court had no power to review/recall its Order, set aside the Order dated 20-2-2006 and remanded the case to be heard on merits.

4. The counter view is expressed by the Full Bench of Calcutta High Court in the case of Harjeet Singh v. State of W.B.(2005 CRI. L. J. 3286) wherein the Full Bench has disapproved the view held by the Full Bench of Rajasthan High Court because it did not take into consideration the law laid down by the Apex Court in the case of Moti Lal v. State of Madhya Pradesh (AIR 1994 SC 1544) wherein in the opinion of the Full Bench, the Apex Court had in no uncertain terms had laid down that as the Section(S.362) had clearly shown that except for correcting clerical or arithmetical error the Court cannot alter its finding, even with the aid of Section 482 of the said Code. Therefore, the Full Bench proceeded to hold that the view expressed by the Full Bench decision of Jaipur Bench of the Rajasthan High Court in Habu's case(AIR 1987 Raj 83) could no longer be considered to be good law in the line of the ratio of Moti Lal's case(supra). There is also another view expressed by this Court in an unreported Judgment in the case of Smt. Amita Grover v. State of Goa(Criminal Miscellaneous Application No.189 of 2008 decided on 11-8-2008). Learned Counsel on behalf of the petitioner submits that the first two decisions relied upon on behalf of the petitioner herein before were

not considered by this Court in the Judgment dated 11-8-2008.

5. In most of the decisions cited on behalf of the petitioner in support of the first view, also reiterate the settled proposition that what is prohibited or expressly precluded by the Code cannot be resorted to by invoking Section 482 of the Code. This Court had taken note of *Habu v. State of Rajasthan*(supra) while deciding the case of *M/s. Venus Steel Products v. Shri Michael Francis Pinheiro* (dec.) through his widow and another(2005 ALL MR(Cr.) 2753) and after considering several decisions had concluded as follows:

The applicant's application has been styled as an application for restoration. The concept of restoration is unknown to the Code of Criminal Procedure, 1973. The only remedy which might have been available to the applicant under the Code was either of recalling the order of dismissal or reviewing the same. As already stated, the Order dated 21-4-04 is a final order disposing of the criminal revision application filed by the applicant. The same cannot be recalled or reviewed in view of the specific bar created by Section 362 of the Code and as held by the Hon"ble Supreme Court in the judgments referred to hereinabove.

6. Thereafter, this Court after referring to *Sunita Jain v. Pawan Kumar Jain and others*(2008(2) SCC 705) held that once the Criminal Court including the High Court passes a Judgment it becomes *functus officio*(ceases to have control over the case). That was what was held by the Apex Court in the said case of *Sunita Jain v. Pawan Kumar Jain and others*(supra) in the following words:

Section 362 makes it clear that a Court cannot alter or review its judgment or final order after it is signed except to correct clerical or arithmetical error. The scheme of the Code, in our opinion, is clear that as a general rule, as soon as the judgment is pronounced or order is made by a Court, it becomes *functus officio*(ceases to have control over the case) and has no power to review, override, alter or interfere with it.

The Apex Court has further noted that:

The Section starts with the words "save as otherwise provided by this Code". Thus, if the Code provides for alteration, such power can be exercised. For instance, sub-section (2) of Section 127 which provides for the same. But in the absence of express power, alteration or modification of judgment or order is not permissible.

7. As observed by the learned Division Bench of the Calcutta High Court, the Full Bench of Rajasthan High Court did not take into account the decision of the Apex Court in *Moti Lal v. State of Madhya Pradesh*(supra). The first two decisions of this Court(at least one of them) as well as that of Rajasthan High Court have also been rendered without taking note of the said case of *Moti Lal v. State of Madhya Pradesh*(supra) as well as the case of *Sunita Jain v. Pawan Kumar Jain and others*(supra). The earlier first two decisions of this Court need not be followed now because of later two decisions of this Court(i.e. *M/s. Venus Steel Products*

and Smt. Amita Grover(supra) which have been rendered in the light of the law laid down by the Apex Court. Having delivered the Judgment dated 16-4-2009 may be without hearing the complainant, this Court has become function officio in its criminal jurisdiction and as such cannot recall the said order. The remedy of the complainant is elsewhere and not before the same Court by invoking Section 482 of the Code. In my view, the powers u/s 482 now cannot be exercised by this Court after it has become functus officio after pronouncing the said Judgment dated 16-4-2009. In view of the above, the application is hereby dismissed.