
(2007) 05 AHC CK 0118
In the Allahabad High Court

Smt. Gayatri Mishra

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 25-05-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156, 362, 367, 369, 482

Citation : (2007) CriLJ 3887

Hon'ble Judges : R.K. Rastogi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.K. Rastogi, J.—This is an application for recall of the judgment and order dated 28.2.2007 passed in Criminal Revision No. 966 of 2003 Smt. Gayatri Misra v. State of U.P. and Ors.

2. The facts relevant for disposal of this application are that the applicant had filed an application u/s 156(3) Cr.P.C. against the opposite parties No. 2 to 8 in the court of Addl. Chief Judicial Magistrate, Court No. 10, Ballia., which was registered as Crl. Misc. Case No. 208 of 2002. That application was allowed by the learned Addl. Chief Judicial Magistrate vide his order dated 8.7.2002 whereby he directed the Station Officer concerned to register a case against the accused and investigate the same Aggrieved with that order the accused of that case had filed Criminal Revision No. 292 of 2002 in the court of the Sessions Judge, Ballia, which was heard and decided by Sri Subedar Yadav. Addl. Sessions Judge, Fast Track Court No. 3, Ballia vide his judgment and order dated 30.1.2003. After hearing the parties he was of the view that there was no necessity of police investigation in the case, and he, therefore, passed an order setting aside tin, order passed by the Magistrate, whereby the police was direct ; to register a case and investigate. He, however, gave an option u the learned Magistrate to treat the above application u/s 156(3) Cr.P.C. as a complaint and to proceed with it as complain, case. Aggrieved with that order the complainant filed this revision before this Court.

3. The above revision was fixed for hearing in this Court on 28.2.2007. On the above date none appeared for the revisionist nor for the opposite parties No. 2 to 8, but the learned A.G.A. was present for the State. I, therefore, heard the learned A.G.A. a; I after perusal of the record I dismissed the revision on merit holding that the order passed by the learned Addl. Sessions Judge granting liberty to the Magistrate to treat the application u/s 156(3) Cr.P.C. as a complaint was justified, and :, required no interference by this Court and the revision was therefore, dismissed.

4. Thereafter the complainant filed this application for recalling the above order with these allegations that on 28.2.2007. the name of her counsel Sri Vinod Kumar Sharma was wrongly printed in the cause list as Vinod Kumar Srivastava, and on account of this mistake he could not appear in the court on that date, and so the above order dated 28.2.2007 passed exparte without hearing her counsel should be recalled, and the revision should again be heard on merits.

5. When this application came up before me for hearing I questioned the applicant as to how this application for recall of the order dated 28.2.2007 passed in Criminal Revision No. 966 of 2003 was maintainable in view of the provisions of Section 362 Cr.P.C, which run as under:

362: 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.

6. It may be mentioned that no inherent power has been conferred upon a criminal court as compared to civil court which has been conferred to set aside exparte judgment or order and to review its own order under the provisions of C.P.C. There is no such corresponding provision in the Cr.P.C. On the other hand, Section 362 Cr. P.C. Clearly bars the court to alter or review its judgment or final order except to correct a clerical or arithmetical error. What is clerical or arithmetical error has been explained by Hon''ble Apex Court in the case of Master Construction Co. (P) Ltd. Vs. State of Orissa and Another, and it has been held that arithmetical error is a mistake of calculation and a clerical error is mistake in writing or typing. In the present case, the impugned order does not suffer from any arithmetical error or clerical error. On the other hand, case of the applicant is that her counsel could not appear to argue the case on the date fixed because his name was wrongly printed in the cause list as Vinod Kumar Srivastava in place of Vinod Kumar Sharma. It may, however, be mentioned that the revision was not dismissed in default as there is no provision for dismissal of the criminal revision in default and it was decided on merits holding that the order passed by the Addl. Sessions Judge for treating the application u/s 156(3) Cr.P.C. as a complaint was justified. Now the question is whether this Court can recall or review its above judgment in view of the clear bar u/s 362 Cr.P.C.

7. In the case of Sankatha Singh Vs. State of U.P., the facts were that the

accused had filed an appeal before the Sessions Judge against the conviction order, and on the date fixed for hearing of that appeal, none appeared for the accused appellants. Then the learned Sessions Judge dismissed the appeal on merits. Thereafter the accused moved an application for setting aside that order on the ground that their counsel could not appear to argue the case and so the order dismissing the appeal should be set aside and an opportunity should be provided to the appellant to argue the appeal. This application was allowed by the Sessions Judge who had earlier dismissed the appeal. However, before the appeal could be taken up for hearing, that Sessions Judge was transferred, and in his place another Sessions Judge took over charge. When the appeal came up before him for hearing, he was of the view that his predecessor had no right under the provisions of the Cr.P.C. to set aside the earlier order of dismissal of the appeal, and so the order passed by him for rehearing of the appeal was without jurisdiction. He, therefore, maintained the earlier order of dismissal of the appeal passed by his predecessor, and refused to re-hear the appeal. Aggrieved with that order, the accused challenged it before the High Court but the High Court approved the view taken by the Sessions Judge that the earlier order of dismissal of the appeal could not be reviewed. Then the accused went to the Hon''ble Supreme Court and the Supreme Court dismissing the appeal observed that the appellate court has no power to review or restore an appeal which has been disposed of and so the Sessions Judge could not set aside his earlier order dismissing the appeal when neither the appellants nor their counsel had appeared, and could not order for rehearing of the appeal. It was further held that Section 369 read with Section 424 of the Code (old Cr.P.C.) make it clear that the appellate Court is not to alter or review the judgment once signed, except for the purpose of correcting a clerical error. It was also held that even assuming that the Sessions Judge can exercise inherent powers, he cannot pass the order for re-hearing of the appeal in exercise of such powers when Section 369 read with Section 424 of the Code (old Cr.P.C.) specifically prohibit the altering or reviewing of its order by the Court and that inherent powers cannot be exercised to do what the Code specifically prohibits the Court from doing.

8. It may further be noted that in the above case it was pointed out that the Sessions Judge had not written a speaking order for dismissing the appeal, and had written one sentence only I find no ground for any interference, and so it was argued that his judgment was not in compliance with the provisions of Section 367 Cr.P.C. (old). The Hon''ble Supreme Court in para 7 of the judgment observed in this regard as under:

...The mere fact that he had not expressed his reasons for coming to that opinion does not mean that he had not considered the material on record before coming to the conclusion that there was no case for interference. His omission to write a detailed judgment in the circumstances may be not in compliance with the provisions of Section 367 of the Code and may be liable to be set aside by a superior Court, but will not give him any power to set it aside himself, and re-hear the appeal.

9. The aforesaid observations of the Hon''ble Apex Court in the above ruling make it clear that even if the final order in appeal or revision has been pronounced *ex parte* without hearing one of the parties and even if it is not in compliance of the requirement of law, the Court, which delivered the same, has got no jurisdiction to set it aside, and that it can be set aside by the superior court only. The same view has been followed by the Hon''ble Supreme Court in the case of *Smt. Sooraj Devi Vs. Pyare Lal and Another*, It is a case under the new Cr.P.C. and it has been clearly laid down in this ruling that an order passed by court could not be reviewed or recalled in view of the clear bar u/s 362 Cr.P.C. and that even the inherent powers conferred on court u/s 482 Cr.P.C. could not be invoked for this purpose. The same view was followed in *Motilal v. State of Madhya Pradesh* 1994 Cri.L.J. 1633 (Supreme Court) and in *Hari Singh Maan v. Harbhajan Singh Bajva and Ors.* (xlii)2001 ACC 75 (Supreme Court).

10. The same controversy arose in the case of *Harjeet Singh Vs. State of West Bengal*, It was a case of Calcutta, and in this case the facts were that at the time of hearing on admission of a revision, one Hon''ble Single Judge of the High Court without notice to the opposite parties passed an order for release of a seized vehicle in favour of revisionist. Thereafter the opposite party appeared and moved an application for setting aside the above *ex parte* order of release of the vehicle on the ground that no opportunity of hearing was provided to ii before passing the impugned order and so the order should be set aside and suitable order should be passed after hearing him also. Then the question arose whether such an order could be recalled or reviewed in view of the bar of Section 362 Cr.P.C. and the Full Bench of Calcutta High Court, after considering the case law on the point held that it has no jurisdiction to recall the order of the Single Judge. Their lord ships observed in para 52 of the judgment:

...in the light of the clear dictum of the law, the Court cannot review or recall its final order, even in cases where the parties may come up before it feeling that they have not been heard or they have left out something, which if placed before the Court, may have resulted in a different decision and that the decision arrived in their absence was an impaired finding. Once the Court lifts its pen after-signature it cannot put it once again; except of the situations like for the purpose of rectifying a clerical or arithmetical error.

11. The Court further observed in para 54 of its judgment, as under:

We hold that in view of Section 362 of the said Code there is a clear bar for any Court, which includes the High Court, to either review or recall an order or judgment passed even if it is found subsequently that it offends the principles of natural justice, as this is the language of Section 362 of the said Code.

12. The learned Counsel for the applicant has cited before me two rulings of Hon''ble Apex Court in support of his contentions that the order passed by this Court on 28.2.2007 should be set aside. These two rulings are:

1. *Satin Chandra Pegu v. State of Assam* 2007 (2) SCC 92;

2. Ram Abhilakh v. State of U.P. and Ors. (xvii) 2007ACC 867.

13. The facts in the case of Satin Chandra Pegu were that the counsel for the revisionist had been appointed as a government counsel and so he did not appear before the High Court of Guwahati for the revisionist when the revision was listed for hearing and so the revision was dismissed after hearing learned Counsel for the State. It was held by the Hon''ble Apex Court that since the revisionist was not heard it was in the interest of justice to set aside the impugned order of the High Court and remit the matter to it for fresh hearing.

14. In the case of Ram Abhilakh the facts were that revisionist had been perusing the revision diligently, but on the date fixed for hearing, his counsel could not appear, and so the revision was dismissed on merits holding that concurrent findings had been recorded by the courts below; and they did not require any interference. In this case also the order for dismissal of the revision was set aside by Hon''ble Supreme Court in the interest of justice.

15. It was contended by the learned Counsel for the applicant that the facts of the present case are similar to those of the aforesaid rulings, and so in view of these latest rulings of Hon''ble Supreme Court, his application for recall of the order should be allowed by this Court.

16. Taking into consideration the law laid down in the aforesaid rulings I am not in a position to accede to the above request of the applicant. It is to be seen that as laid down in the rulings of Hon''ble Supreme Court in-the cases of Sankatha Singh, Smt. Sooraj Devi, Moti Lal & Hari Singh Maan (supra) and the full Bench decision of Calcutta High Court in Harjeet Singh (supra) it is clear that the Court which passes an order dismissing the criminal appeal or revision on merits, has no jurisdiction to set aside that order, and this power can not be exercised even u/s 482 Cr.P.C, but as laid down in the aforesaid rulings, the aggrieved party is not remediless. He has got the remedy to challenge that order before a superior court and the superior court may in appropriate cases set aside the impugned order. This is what has been done by the Hon''ble Apex Court in the cases of Satin Chandra Pegu and Ram Abhilakh. referred to above. It is to be seen that in both these two rulings the Hon''ble Supreme Court has not made any observation to this effect that the High Court could set aside its own earlier order. On the other hand, it has allowed both the appeals in the interest of justice taking into consideration the submissions made by the appellants.

17. So the legal position is that this Court has got no jurisdiction to review or set aside its own earlier order, but the applicant has got the remedy to file an appeal against its order before the Hon''ble Supreme Court and the Apex Court may pass suitable orders in the matter as has been done by it in the cases of Satin Chandra Pegu and Ram Abhilakh (supra).

18. The present application for recall of the order dated 28.2.2007, in this way, is not maintainable in view of the clear bar of Section 362 Cr.P.C. ,and it is, therefore, dismissed.