

(2013) 10 MP CK 0297
In the Madhya Pradesh High Court
Case No : CRA No. 620 of 2013

State of M.P.

APPELLANT

Vs

Jitendra Singh

RESPONDENT

Date of Decision : 03-10-2013

Acts Referred:

Citation : (2013) 10 MP CK 0297

Hon'ble Judges : S.K. Gangele, J;G.D. Saxena, J

Bench : Division Bench

Advocate : Vivek Khedkar, Deputy A.G. for the State, for the Appellant;

Judgement

1. Heard on admission. The appeal is listed for admission because earlier Division Bench of this Court granted leave to file an appeal. The Division Bench of this Court further ordered that non-bailable warrant of arrest be issued against the respondents. The application for leave to appeal was filed by the State against the judgment of acquittal dated 18th December, 2010 passed by the trial Court in Sessions Trial No. 199/2006. By the aforesaid judgment, the trial Court acquitted the respondents from the offences punishable under Sections 148 and 302 in alternative Section 302 read with Section 149 of IPC. The Division Bench of this Court while granting leave to file an appeal also directed to register the matter as regular criminal appeal and list it for admission. Non-bailable warrant of arrest was also issued against the respondents.

2. The appeal has not been admitted as yet.

3. Shri Ramkesh Singh, learned counsel appearing on behalf of the respondent No. 1 has contended that the appeal has not been admitted as yet and the Division Bench of this Court while issuing non-bailable warrant of arrest against the respondents, at the time of granting leave to file an appeal, has committed an error because when the appeal is not admitted, warrant of arrest could not be issued. He further submitted that in appeal against the judgment of acquittal normally non-bailable warrant of arrest could not be issued.

4. We have requested Shri R.K. Sharma, learned counsel to assist the Court as amicus curiae. He has submitted that this Court can rectify the error. He has further submitted that when the appeal is not admitted for hearing the Court cannot issue non-bailable warrant of arrest against the respondents. In regard to power of the Court to cure the defect, he relied on the judgment of Hon''ble the Supreme Court in the case of Vishnu Agarwal Vs. State of U.P. and Another, . Hon''ble Supreme Court has held as under in regard to power of the Court u/s 362 of Criminal Procedure Code after relying on the earlier judgments of Hon''ble Supreme Court in Hari Singh Mann Vs. Harbhajan Singh Bajwa and Others, , Talab Haji Hussain Vs. Madhukar Purshottam Mondkar and Another, & Asit Kumar Kar Vs. State of West Bengal and Others, :-

6. Learned counsel for the appellant has relied on the decision of this Court in Hari Singh Mann Vs. Harbhajan Singh Bajwa and Others, . Para 10 of the said judgment states:-

Section 362 of the Code mandates that 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 is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. The reliance of the respondent on Talab Haji Hussain Vs. Madhukar Purshottam Mondkar and Another, is misconceived. Even in that case it was pointed that inherent powers conferred on High Courts u/s 561A (Section 482 of the new Code) has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is not disputed that the petition filed u/s 482 of the Code had been finally disposed of by the High Court on 7.1.1999. The new section 362 of the Code which was drafted keeping in view the recommendations of the 41st Report of the Law Commission and the Joint Select Committees appointed for the purpose, has extended the bar of review not only to the judgment but also to the final orders other than the judgment.

7. Learned counsel for the appellant Mr. Manoj Swarup submitted that in view of the aforesaid decision, the High Court erred in law in recalling the Order dated 2.9.2003. We regret we cannot agree.

8. 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, unjust ice will follow.

9. 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 2.9.2003 and not for review. In *Asit Kumar Kar Vs. State of West Bengal and Others*, , this 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 considered 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. Raghendra Singh and Others*, cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences.

5. From the aforesaid decision of Hon'ble the Supreme Court, it is clear that the Court has inherent power to recall the earlier order in exceptional and sparingly circumstances.

6. In the present case, before admitting the appeal for hearing, at the stage of granting leave to file an appeal the Court could not issue non-bailable warrant of arrest, which is without jurisdiction. Hence, the order of issuing non-bailable warrant of arrest against the respondents is hereby recalled.

The appeal is admitted for hearing.

7. It is ordered that the respondents shall furnish bail bonds in the sum of Rs. 50,000/- (Rupees fifty thousand only) each with one solvent surety each in the like amount to the satisfaction of CJM Morena, for their appearance before the Principal Registrar of this Court on a date to be fixed by the Court of CJM, Morena. In case non-bailable warrant of arrests are issued by the Registry in pursuance to the order dated 15-07-2013 that shall be recalled.