

(1991) 10 BOM CK 0038

In the Bombay High Court

Case No : Criminal Application No. 2123 of 1991 in Criminal Appeal No. 398 of 1980

Suresh T. Kilachand

APPELLANT

Vs

Sampat Shripat Lambate and another

RESPONDENT

Date of Decision : 24-10-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 362, 393, 482
Penal Code, 1860 (IPC) — Section 406, 409

Citation : (1991) 10 BOM CK 0038

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : H.M. Jagtiani, S.C. Cooper, B.V. Dhoria and Mrs. A.R. Parsani, for the Appellant; A.G. Deshmukh and B.R. Patil, Assistant Public Prosecutor, for the Respondent

Judgement

1. An important but rather unusual point has arisen in this and in the companion set of eleven applications which concerns the inherent powers of the High Court, the issue raised being whether in exercise thereof it is permissible to recall a final judgment that has already been signed. The respective parties have argued the point in detail, and before addressing myself to the law on the subject it is necessary to preface the judgment with relevant facts.

2. It is desirable to commence the narration with the statement that the offences alleged relate to the period between 1964 and 1969, the prosecutions were commenced in 1975, they concluded in 1979 against which an appeal was filed in 1980 and for some unstatable reasons, the appeal was just not listed for disposal until the office was specifically directed to list all the old pending matters and ultimately on 21st August, 1991 this and the companion appeals were disposed of through judgments. On 6th September, 1991, an application was filed by the original accused, who is the present applicant, wherein the first prayer is that the judgment dated 21st August, 1991 be set aside and that consequentially the appeal be reheard, with the added prayer that in the meanwhile the order dated

21st August, 1991 be stayed. The essential ground canvassed in the application is set out in paragraph (6), which reads as follows :-

"6. The Applicant had engaged one Mr. Shelim Samuel, Advocate to act and appear for him in the said Criminal Appeal. The Applicant says that he did not know Mr. Samuel personally and had only engaged him as he had been referred him. The Applicant had executed a Vakalatnama in favour of Mr. Samuel to act, appear and plead for him in this matter. Mr. Shelim Samuel expired a few months ago on 4-11-90. The Applicant says that he was totally unaware that Mr. Samuel expired. Thereafter the matter suddenly appeared on Board in August, 1991, after a lapse of about 11 years since filing of the Appeal. Since the Applicant's Advocate had died (unknown to the Applicant) and the matter appeared on Board suddenly after 11 years, the Applicant was unaware of the fact that the matter was on Board for Hearing. Accordingly there was no one present on behalf of the Applicant when the Appeal reached hearing."

3. The applicant, at the relevant time, was the Chairman and Managing Director of the Digvijay Spinning and Weaving Co. Ltd. In July 1969, this Company was taken over by the MSTC because it had turned into a sick unit. The applicant is an industrialist of some status and he claims to be the Chairman and Director of several large Companies. As stated in paragraph (6), according to him, he casually engaged the late Mr. Shelim Samuel on the recommendation of some other person and thereafter left the matter to the Advocate. Once a litigant has engaged an advocate, normally he is entitled to presume that the advocate will look after the proceeding and would intimate him as and when the same came up for hearing but this does not exonerate him from his own responsibility. According to the applicant, he lives mainly in Delhi and his son read about the decision in the Times of India and informed the applicant. But for the vigilance of the applicant's son and the news report, the applicant had for all intents and purposes totally lost track of the case and, therefore, did not follow it up. As the facts will presently indicate, the Applicant at the relevant time was holding a very vital position with the Mills in so far as he was the Chairman and Managing Director. The Prosecution has been instituted by the Secretary of the Digvijay Mills Employees' Co-operative Credit Society Ltd. The Prosecution is one of utmost seriousness because it concerns a relatively large amount of money which belonged to the Employees' Society and which they just cannot afford to lose. Furthermore, it needs to be noted that the amount of money virtually represented the crystallized wages of the employees and since the amount totals over Rs. 5,00,000/- the submission canvassed on behalf of the applicant that he had forgotton about the case is something that cannot be taken likely (lightly ?). Under the arrangement between the Society and the Company, which has been admitted by the Accused before the Trial Court, the repayment of the loans taken by them from the Society was recovered by deductions from their salary. This amount was collected out of the salary that would normally have been disbursed and was to have been transmitted to the Society. The amount could not have been retained by the Accused who represented the management and could not

have been used for any other purpose but was required to be forthwith paid over to the Society. The financial condition of the Mills was wholly irrelevant because, as indicated by me above, but for the deduction at source the amount would have been disbursed physically to the employees and it was, therefore, temporarily retained for the purpose of canalization to the Society. Whether the Mills were financially healthy or sick, whether they were making profits or losses were wholly inconsequential factors because the arrangement between the Mills and the Society which has been admitted by the Accused before the trial Court and the deductions also have been admitted, required the forthwith transmission of the deducted amount to the Society and the wrongful retention or diversion for any other purpose would complete the offence of breach of trust. The fact that the payments were not made to the Society even though the amounts were deducted has been admitted by the Accused before the trial Court, but the reason for the non-payment that is given is that the Mills were in a difficult financial condition. Certain other technicalities have been pleaded on the basis of which the Accused was acquitted.

4. I have recounted the aforesaid facts for the limited purpose of recording that the prosecution were not mere frivolous or inconsequential ones, but that they were cases of immense consequences from the point of view of the poor employees. Pursuant to the acquittal, appeals were filed and there is no dispute about the fact that the Accused was served, at which point of time the duty of this Court is completed. As stated in paragraph (6), the Accused who was a big industrialist instructed the concerned employees of his, or lawyers or solicitors, to look after the proceedings. One of the grievances made is that the appeals took an abnormally long period of eleven years to come up for hearing. The appellants, who are the Society, would not have wanted to delay this proceeding though the Accused would have been biased, thereby, but there is no definite indication on record as to why even though appeals of the year 1984 and onwards have been disposed of that these appeals continued to remain in the office even though service was effected and they were ready for hearing in 1980 itself. The passage of time regardless, to my mind, where the cases were of considerable importance due care and caution ought to have been taken to follow them up and had this care and caution been taken the fact that the learned advocate had passed away would have been taken note of. Normally, when an advocate dies, his family or his juniors or associates inform the respective clients, but we do not know whether this was done because the applicant stated that no such intimation was sent. The applicant, however, is a highly placed businessman and admittedly has the benefit of a number of lawyers and solicitors and this Court is, therefore, entitled to accept that all pending matters would be periodically followed up and their progress ascertained from time to time. The matter was on Board before this Court for several days and I had kept it back a number of times hoping that somebody would appear on behalf of the respondent-Accused and finally on 21-6-1991 the appellant's advocate and the learned A.P.P. were heard and the matter was disposed of. It is true that nobody

appeared on behalf of the respondent-Accused, but in the circumstances set out by me above, had the applicant taken the minimum amount of care either to follow up through himself or through any of his employees or through his legal advisors, he would have known that the group of appeals was listed for hearing. There were as many as twelve companion matters which would normally not escape the attention of either the litigant or the Board clerk. Though the Code of Criminal Procedure does not use this term, the principles enunciated under the CPC specifically require that if an application is made for setting aside an ex parte order that it must be shown that the party concerned was following the proceeding with due care and caution and in spite thereof it came to be heard ex parte. That first ingredient is totality totally in the present proceeding.

5. Mr. Jagtiani, learned Counsel appearing on behalf of the applicant, submitted that this was an exceptional situation in so far as the applicant's advocate had died on 4-11-1990, that is about ten months before the appeals were heard, and that this was the reason why the applicant was unrepresented. He, therefore, submitted that the applicant can never be penalised in such a situation having regard to the principles of natural justice and more so since the consequences of the orders passed in appeal are relatively serious that this Court must set aside the judgment dated 21-8-1991 and set the appeals down for de novo hearing. The prayer clause (a) of the application reads as follows :-

"(a) That this Hon'ble Court be pleased to set aside the ex parte Order and conviction dated 21st August, 1991;"

Regardless of this, the submissions canvassed at the Bar by Mr. Jagtiani is to the effect that this is an application for recall of the judgment. Even if one were to overlook the technicalities which are involved, it will be difficult to do so because the degree of casualness has been manifest even in drafting of this application, the question that is required to be decided is whether this Court has the power to recall a final judgment and, if so, whether such a power should be exercised in the present case. Mr. Deshmukh, learned Counsel appearing on behalf of the original appellant, has vehemently contended that the application filed does not demonstrate, even in passing, that the applicant had taken any care and caution in relation to this litigation and he, therefore, submits that no case is made out for setting aside the ex parte order. He further stated that Mr. Shelim Samuel, who was the Counsel engaged by the applicant, was one of the senior and leading members of the Bar and in that capacity when he expired in November, 1990 he was still in practice, that his death was announced predominantly in the newspapers and in the Bar circles and that, consequently even with the minimum of care the applicant and his advisors and lawyers ought to have taken note of this fact. He, therefore, seriously contested the position that the statement made to the effect that the applicant did not know about the death of advocate Shelim Samuel is false and that the same should not be accepted. I would prefer to overlook these submissions in the broad interest of doing fair justice and to hold that if this Court had the power to recall the original judgment that the applicant

be given an opportunity of being reheard, only because of the exceptional circumstances, viz., the fact that the advocate has died.

6. Mr. Jagtiani submitted that a Division Bench of this Court in the case of *Bombay Cycle and Motor Agency v. B. R. Pandey* 1975 Cri LJ 820, has observed that if a party had not been heard that it would constitute violation of the principles of natural justice and, consequently, the High Court can, in its inherent powers, rehear the case. The view taken was that the application for setting aside the judgment and rehearing the appeal afresh cannot be considered to be one for review or alteration of the judgment, both of which are alone permissible u/s 362 of the Code of Criminal Procedure. In that particular case, an order for return of a vehicle was passed without hearing the Company, which claimed ownership thereof, and consequently, the Court set aside the order and heard the applicant-Company on the ground that it was permissible under the inherent powers. Mr. Deshmukh, learned Counsel appearing on behalf of the Respondent No. 1 - original appellant, has seriously contested this position and he pointed out that, in the first instance, this view is not binding on me because he submitted that on the facts of the present case, the aforesaid decision will not at all be applicable. He has distinguished the case by pointing out that in the *Bombay Cycle and Motor Agency* case 1975 Cri LJ 820 (Bom) , the Company was not aware of the fact that the High Court had passed an order for confiscation of the vehicle and, therefore, for the first time it appeared before the Court and pointed out that it was a necessary party. The breach of the principles of natural justice argued was, therefore, tenable according to Mr. Deshmukh. He submits that in the present instance the applicant was very much a party to this proceeding and his subsequent default in following up the matter cannot be construed as breach of the principles of natural justice. In support of this proposition, Mr. Deshmukh has relied on another Division Bench decision of this Court in the case of *A.H. Satranjiwala Vs. The State of Maharashtra*, . The Division Bench in that case has very clearly observed that once a proceeding has been finally disposed of on merits that the jurisdiction of this Court is exhausted and, consequently, that the inherent powers cannot once again be invoked for the purpose of setting aside that decision. Dealing with the old Section 561A of the Code of Criminal Procedure which is the present Section 482, the Division Bench very clearly observed that the inherent powers cannot be used for the purpose of rehearing the proceeding. In a considered judgment, the Division bench has laid down a very important principle, namely, that once a notice has been duly served on the respondent-Accused and he is represented, if a default occurs thereafter that it cannot be construed as breach of the principles of natural justice because the Court has complied with the requirements of notice. As a result, we have two directly conflicting views of two Division Benches of this Court on the point and it would, therefore, be necessary to see what the Supreme Court has said with regard to this principle.

7. Before dealing with that point directly, Mr. Deshmukh's contention was that u/s 393 of the Code of Criminal Procedure, a signed judgment of the High Court

was a final order and, therefore, the only remedy against such an order, even if it was incorrect, was by way of appeal to a higher Court, in support of this contention, he relied on the observations to this effect in the A.H. Satranjiwala Vs. The State of Maharashtra, as also the observations of the Supreme Court in the case of Janardan Reddy and Others Vs. The State of Hyderabad and Others, wherein the Supreme Court has very clearly observed that the defect, if any, can according to the procedure established by the law be corrected only by a Court of appeal. Mr. Deshmukh further reinforced his submission by relying on the decision of the Supreme Court in the case of State of Orissa Vs. Ram Chander Agarwala and Others, wherein the Supreme Court, while dealing with the inherent powers of the High Court in such a situation, observed as follows (Para 20 of 1979 Cri LJ) :-

"Once a judgment has been pronounced by a High Court either in exercise of its appellate or its revisional jurisdiction, no review or revision can be entertained against that judgment as there is no provision in the Code which would enable the High Court to review the same or to exercise revisional jurisdiction."

The same is the view expressed by the Supreme Court in an earlier decision in the case of Sankatha Singh Vs. State of U.P., wherein the Supreme Court observed :-

"An appellate Court has no power to review or restore an appeal which has been disposed of."

Having regard to this position, I pointed out to Mr. Jagtiani, learned Counsel appearing on behalf of the applicant, that the aforesaid decisions undisputedly take the view that a High Court would have no jurisdiction to reopen a proceeding which has once been finally disposed of regardless of how good the grounds may be. For this purpose, I granted the parties sometimes as they desired to advance further arguments. Mr. Jagtiani thereafter, at the resumed hearing, advanced the submission that the decisions referred to supra essentially proceeded on the footing that Section 362 of the Code of Criminal Procedure prescribes a bar to the alteration or review of a final judgment save and except for the purpose of correcting a clerical or arithmetical error. He stated that none of these decisions are on the proposition canvassed by him, namely, that he is not asking for an alteration or for a review of the earlier judgment, but that the judgment be recalled on the ground that the case was disposed of in breach of the principles of natural justice. As regards the natural justice point, I have dealt with it in detail and I have already indicated my reasons for holding that there was no breach even in fact or in law of the principles of natural justice.

8. Mr. Jagtiani has placed very strong reliance on a Full Bench decision of the Rajasthan High Court in the case of Habu Vs. State of Rajasthan, . The Rajasthan High Court has, in the course of a very detailed judgment, held that review and recall are distinct powers and that while exercising the inherent powers for furtherance of personal liberty and principle of audi alteram partem that the recall

for the purpose of giving a hearing to the Accused would not be in conflict with the provisions of Section 362 of the Code of Criminal Procedure. The Full Bench had occasion to consider the entire case law on the subject starting from 1924 and ending with the latest decision of the Supreme Court and in paragraphs 38 and 39 observed that there are two distinct views that have emerged as a result of all these decisions, one of them being to the effect that a High Court cannot in exercise of inherent powers do something which is expressly barred by Section 362 of the Code of Criminal Procedure and the second being that the recalling of a judgment is neither an alteration nor a review and that, consequently, it is permissible for securing the ends of justice in appropriate cases to exercise the powers of recall. The Full Bench after analysing a number of decisions of the Supreme Court wherein the right of a party to be heard was gone into observed that if a case has been decided *ex parte* without a party having been heard for whatever reason then it would constitute a valid ground for recall of that judgment.

9. There can be no two opinions with regard to the basic principle enunciated by Their Lordships which is well-crystallised that a party has a right to be heard. The question is as to what happens when the party has been afforded that right and the party does not avail of it as in the present case. What is more fundamental and what Their Lordships of the Rajasthan High Court do not seem to have really considered is the all important question as to what is the procedure to be adopted for taking corrective action or, put more directly, having regard to the position in law under the Code of Criminal Procedure and as laid down by the decisions of the Supreme Court, whether it is open to the same Court to take the corrective action that is suggested or whether it is only an appellate Court that can take the action in question. I need to illustrate this aspect further because Section 362 of the Code of Criminal Procedure applies to all judgments and in a given case one can certainly visualise a situation whereby shortly after a judgment has been finalised a party may apply to the very Court and may be able to demonstrate a fundamental error, but the framers of the Code of Criminal Procedure have still specified that it shall be not be open to review the judgment in these circumstances. This is essentially because of the principle of finality and also because the appellate remedy has been provided precisely in order to correct all such errors. Obviously, the law makers did not intend multiplicity of litigations because they could have visualised a case of the present type which started in 1975, was disposed of in 1991 and where the appeal is sought to be reopened once again with the prospect of further hearing. It is quite obvious, therefore, that even if it is held that the sacred rule of *audi alteram partem* is to apply that it may be good ground to seek the interference from an appellate Court but not from the same forum.

10. The last decision that was relied upon by Mr. Jagtiani is in the case of *Giridharilal v. Pratap Rai Mehta* 1989 Cri LJ 2382. In this case, a learned single Judge of the Karnataka High Court had occasion to analyse in detail the distinction between the terms "recall", "alter" and "review". The Court observed

"The expression "to recall" a judgment as understood would be to revoke, cancel, vacate, or reverse a judgment for matters of fact. When a judgment is annulled by reason of errors of law, it is said to be reversed."

Dealing with the effect of altering, reversing or reviewing a judgment as against recalling it, the Court observed (at p. 2386 of Cri LJ) :-

"When a judgment or final order is recalled it would result in complete abrogation as if there was no judgment or final order at all. The alteration or review presupposes continuing of the initial judgment or final order with the effectuation of some changes or re-examination and reconsideration of the judgment or final order. There appears to be no bar contained in S. 362 or any other sections of the Code for recalling an order."

11. With due respect to the learned single Judge of the Karnataka High Court, it is essential to bear in mind that the well-set principles relating to the interpretation of statutes very clearly indicate that it is not permissible to introduce something into a statute or to read something into a statute when the legislature has not made a provision for it. Section 362 of the Code of Criminal Procedure taken as a whole is unambiguous and can be summarized to indicate that a Court is precluded from carrying out any changes to a final judgment by way of alteration or review except to correct clerical or arithmetical errors. The use of the words "alter" and "review" further narrows down the situation in which a Court can exercise powers in respect of its own judgment. Apart from the corrections of errors, the legislature has been very categorical in pointing out that even an alteration or a modification of a final judgment is not permissible. This principle presupposes that even if the original judgment were to be maintained with a slight change that a Court is prohibited from making such a change. As then come to the lesser situation where a party applies for a review of a judgment in such situation a Court may reconsider it and still maintain the same judgment, but the legislature prohibits even such a review because the end result of such review may throw up a situation whereby an alteration may appear justified and if that is not permissible, the same would apply to the powers of review. What needs to be borne in mind, therefore, is that in the light of such specific prohibitions, the bar placed u/s 362 of the Code of Criminal Procedure cannot be overcome by having resort to the provisions of Section 482. I do not need to cite the numerous cases wherein the law has now been crystallized to the effect that if there is an express bar in the Code that it cannot be overcome by resorting to the inherent powers because such a procedure would render the provisions prescribed in the bar as totally redundant. It would, therefore, have to be held that in spite of the views expressed by their Lordships of the Rajasthan High Court and the Karnataka High Court that the correct position in law is that a Court has no power to re-call a judgment.

12. It would be useful to bear in mind the supportive arguments which would clinch the issue, the first of them being that the expression "re-call" of a judgment is virtually a play with words because it involves the process of setting

aside the judgment and this is a power which, under the Code of Criminal Procedure, rests only with the appellate Court. Secondly, by using the word "re-call", one cannot escape from the fact that the expression "re-call" is a disguise for an initial process of setting aside the final judgment, restoration of the matter, re-hearing, which involves a review and the ultimate possibility of an alteration of the judgment. This would bring us a full circle back to Section 362 of the Code of Criminal Procedure and it is precisely for this reason that the Supreme Court in the judgment referred to supra as also the Division Bench of this Court held that it is not permissible.

13. In this view of the matter, it follows that this Court has no power to recall the judgment dated 21-8-1991.

14. I need to deal, in passing, with some of the other submissions advanced by Mr. Jagtiani, the first of them being, according to him, that the accused has been convicted u/s 409 of the Indian Penal Code while he was charged u/s 406 of the Indian Penal Code and that, consequently, it will have to be held that he has been convicted of an offence without having been charged thereunder. This submission is incorrect because Section 409 of the Indian Penal Code deals with merely a different form of criminal breach of trust, the general charge being the same, where the character of the accused committing an offence of criminal breach of trust happens to be one wherein the law expects a high degree of honesty and confidence a higher sentence is prescribed, but the charge of criminal of trust is still the same, one. The argument is, therefore, fallacious.

15. Next it was submitted that Section 409 of the Indian Penal Code is punishable with imprisonment for life when the learned trial Magistrate did not have the power to impose a sentence beyond seven years and, therefore, that the trial Court had no jurisdiction. It needs to be pointed out that the trial Court did have jurisdiction to try the offence of criminal breach of trust and the trial Court has not imposed any sentence beyond its jurisdiction. On the other hand, the sentence is imposed by the High Court which certainly has unlimited jurisdiction in these matters.

16. The last argument canvassed was that on merits the accused ought to have been heard on the question of sentence. This argument again is misconceived because a perusal of the judgment dated 21-8-1991 will indicate that I have only imposed a sentence of fine which is more or less equivalent to the amount of money in respect of which the offence has been committed. Having regard to the circumstances of the case and the amount involved, this was a fit case in which a jail sentence should have been imposed on the accused in addition. I have taken into consideration the fact that a long time has elapsed, and that the accused was not before me when the order was passed. I have, therefore, presumed that if a prayer for leniency were to be made, this Court would have, in the circumstances of the case, probably not imposed a jail sentence but would have confined the punishment to one of fine. Taking into consideration these factors, I have imposed only a fine. Under these circumstances, it needs to be noted that

no prejudice is going to be caused to the accused whatsoever.

17. On an overall view of the matter and apart from the fact that this Court cannot in law re-call the judgment dated 21-8-1991, to my mind, this is not a case in which there is any scope for a re-hearing. A technical plea was sought to be advanced with regard to the question of limitation which has been dealt with in the judgment apart from which there is precious little substance in this contention.

18. In the result, the criminal application fails and stands dismissed. The rule is accordingly discharged. The ad interim stay granted on this application to stand vacated.

19. Application dismissed.