

(2024) 01 CAL CK 0075
In the Calcutta High Court

Case No : CRAN No. 5 Of 2023 In Criminal Revision No. 3659 Of 2019

Sushil Kumar Mohanka & Ors.

APPELLANT

Vs

State Of West Bengal & Anr.

RESPONDENT

Date of Decision : 24-01-2024

Acts Referred:

Indian Penal Code, 1860 — Section 498A
Code Of Criminal Procedure, 1973 — Section 144, 362

Citation : (2024) 01 CAL CK 0075

Hon'ble Judges : Shampa Dutt (Paul), J

Bench : Single Bench

Advocate : Krishnendu Bhattacharya, Avishek Guha, Priyankar Ganguly, Akansha Chopra, Sonal Agarwal, Neelanjana Ghorui, Sarmistha Basak, Meenal Sinha, Priyanka Parida, Arijit Ganguly, Debjani Sahu

Final Decision : Allowed

Judgement

Shampa Dutt (Paul), J

1. The present application has been preferred praying for recall of the judgment and order dated 24.01.23 passed by this Court disposing of the criminal revision on merit and thereby quashing the proceeding being no. 4312/2018 arising out of Newtown Police Station Case No. 437/2018 dated 11.10.2018 under Section 498A of the Indian Penal Code and Charge sheet No. 10/2019 dated 15.01.2019 under Section 498A of the Indian Penal Code.

2. The said prayer has been made invoking Section 362 of the Cr.P.C.

3. The applicant/opposite party no.2's case is that the impugned order has been obtained by presenting fraudulent facts before this Court and for this reason the said order needs to be recalled since it has caused irreparable loss to the opposite party no. 2.

4. That the petitioner has kept this Court in darkness while mentioning the address as Uniworld City Cascades, Tower 3, Flat no. 901, Kolkata-700156,

Rajarhat, whereas she was forced out of the said flat in November, 2020 by the petitioner no. 1, 2 and 3 and was forced to shift downstairs in the same tower in flat 002 (duplex) ground floor where the entire family shifted by 22nd November, 2020 and in which flat she is also a 25% owner.

5. The applicant further states that after the letter of the opposite party to bring the investigation to a halt, many other incidents have been reported by the opposite party no. 2 and none of them have been taken into the Case Diary. The opposite party no. 2 has filed a writ alleging such biased behavior by the Investigating Officer and the same is registered as WPA No 21285/2021.

6. The applicant/opposite party no. 2 states that she has not signed nor received any summons in this case and it is most likely that they have suppressed the new address of the applicant/opposite party no. 2.

7. The appellant further states that she was in severe mental trauma when she found out about the ex parte quashing and the cancellation of bail being disposed off, that it disturbed her for months because she couldn't believe the way the petitioners had abused the due process of law.

8. Adopting such fraudulent means of keeping the Court in darkness and preventing the opposite party no. 2 from contesting the case the petitioner has abused the process of law and for this reason the order dated 24.01.23 needs to be recalled.

9. The applicant further states that this has led to not just the proceeding under Section 498A getting quashed but along with it has taken away the case of cancellation of bail available with the petitioner. It is only when the cancellation of bail order came out, the opposite party wife learnt that there was a quashing proceeding pending against her which has been decided ex parte and thereafter started taking steps to take recourse in law.

10. It is also stated that the documents of service was fraudulently obtained and the directions carried out were done in a cryptic manner by using the address over which the petitioner had full control while they had driven away the opposite party/wife from there along with her belongings.

11. The applicant states that the address has been incorrectly given. Directions of service upon non appearance of the opposite party was all done intentionally at the address where she was not residing. That at a time if any service was done, it was clearly not done upon her but accepted through their servant like before.

12. Through the letter dated 27.08.21 by Advocate Guha & Co. to the lawyer of opposite party no. 2, it is an admitted fact that the said flat was sold long back and the opposite party no. 2 was no more residing there.

13. The petitioner wasted the time and effort of this Court and those of the other State agency knowing fully well that the opposite party did not reside in the

address given in the cause title while parallelly contesting this revisional application against the opposite party.

14. It is submitted that the petitioner with the intention to mislead the Court and prevent the opposite party to appear and present true facts played fraud upon this Hon'ble Court and wasted precious time and effort of this Court along with abusing the power of this Court to achieve nefarious ends.

15. That the parties have done service upon each other in the MAT suit being no. 2227/2019, in the Civil Revision-CO No. 23/22, in the civil revision for transfer being CO No. 1344/22, in the title suit for partition of the property filed by the petitioners 617/2020, in the domestic violence application, in the cancellation of bail being number 2138/2021, in the Writ Petition being No. 21285/2021 and many other letters and notices and yet chose to keep this Court in darkness about the actual address of the opposite party no. 2.

16. By using their power and strategies, the petitioner got the investigation to a halt and thereafter by furnishing incorrect address of the respondent wife to this Court many a times and showing the disinterest of the respondent wife to pursue the matter, knew that the law would tilt in his favour.

17. That even the police authorities in charge of the matter knew about the shifting and changing of the address since there were several General Diaries done by the petitioner (including the change of address) and the police had refused to take all the General Diaries and FIR of the respondent wife.

18. That for four years almost, the respondent wife fought the matter in different Courts, defending her rights while the petitioner although appearing in all the Courts and defending her case along with managing the children who have been completely abandoned by the father, has lost an important right due to fraudulent acts of the petitioner, as the petitioners through calculated strategy and by playing fraud upon this Court has snatched away the right of the opposite party no.2 to represent her case and has also taken away all her defence by presenting this order in other cases and for this reason such order dated 24.01.23 may be recalled after imposing heavy cost on the petitioners.

19. The applicant has thus prayed for recall of the order on the ground that fraud has been practiced upon the Court.

20. The criminal revision was in respect of Newtown Police Station Case No. 437/2018 dated 11.10.2018 under Section 498A of the Indian Penal Code and Charge sheet No. 10/ 2019 dated 15.01.2019 under Section 498A of the Indian Penal Code.

21. A petition of complaint dated 09.07.2019 was filed by the applicant with the officer in-charge, Newtown Police Station showing her address as Uniworld City Cascades, Tower 3, Flat no. 901.

22. But the said petition does not bear the receipt of the police station.

23. Notice by Newtown Police Station dated 20.07.2019 is addressed to the applicant at Uniworld City, Tower 3, Flat No. 002 and 901.

24. The applicant also had a protection order dated 15.07.2019 passed by the Executive Magistrate in an application under Section 144 Cr.P.C. filed by her in respect of her possession in Flat No. 002 and 901.

25. It appears that Flat No. 901 was sold on 05.03.2021 and is within the knowledge of the applicant.

26. The opposite party in the CRAN application is the petitioner/husband. He has filed his affidavit in opposition and stated therein that the application filed by the applicant/opposite party no. 2 is not maintainable and liable to be rejected on the grounds that:-

"On several occasions, the matter appeared in the list and it was specifically directed upon the petitioners as well as the State through the local Police Authorities to effectuate service upon the opposite party no.2 intimating the next date of hearing and accordingly to appear and defend the application.

Despite service, the opposite party No.2 did not appear and the matter was taken up for final hearing on 04.01.2023. On careful perusal of oral and documentary evidences on record and arguments on merits, this Hon'ble Court has been pleased to pass a detailed order dated 24.01.2023, inter alia, to the effect:-

..... in the present case there is no substance in the allegations and no material exists to prima facie make out the complicity of the applicant in a cognizable offence, as such the proceedings in this case should be quashed.

Accordingly, criminal revision being CRR 3659 of 2019 is allowed.

The proceedings in G.R. Case No. 4312 of 2018 arising out of NewTown Police Station Case No. 437 of 2018 dated 11.10.2018 under Section 498A of the Indian Penal Code and Charge Sheet No. 10/2019 dated 15.01.2019 under Section 498A of the Indian Penal Code, pending before the learned Chief Judicial Magistrate at Barasat, 24 Parganas, North, is hereby quashed....."

27. The criminal revision was decided by a judgment and final order dated 24.01.2023, on merit.

28. That the entire application is based on surmises and conjectures and liable to be dismissed in toto. The Judgment and the Final order dated 24.01.2023 under challenge has been passed after proper and careful appreciation of the facts and corroborating evidences and on merit.

29. That the entire genesis of the application suffers from grave illegality and infirmity. It is vehemently denied that the petitioners have obtained the order impugned in the instant application by perpetuating fraud upon the court by not effecting service of summons upon the opposite party no.2 and by suppressing

the new address of the opposite party no.2. The opposite party no.2 is put to strict proof thereof.

30. It is stated by the petitioners that they have effected due service upon the opposite party no.2 at her last known address as mentioned in the cause title above on several occasions as directed by this Hon'ble Court which is evident in the Affidavit of Services on record. However, the postal endorsements show the remark "Not delivered Addressee absent" and "Item returned Addressee moved". If at all the opposite party no.2 has moved from her address as has been stated, it is trite to mention that it is the duty incumbent upon the opposite party no.2 to notify the police authorities who has been investigating the GR Case no. 4312/2018 dated 11.10.2018 and to the Magistrate's Court where the matter is pending for Trial, regarding its change in the address to avoid such unwarranted situations. But the opposite party no.2 has surreptitiously moved from the existing address as mentioned in the cause title without any notice in a deliberate attempt to avoid appearance as the entire proceedings is permeated with malice with mala fide intent to embroil and/or implicate the petitioner in a frivolous criminal case and as such, the onus lies upon the party concerned/addressee to prove that the change of address had been notified properly and despite information of the same, the service of summon was blatantly avoided.

31. As such, the reliefs sought for by the opposite party no.2 is wholly against the orders passed on merits that is, to rehear the matter and/or review on merits.

32. The opposite party/petitioner has relied upon the following judgments:-

- i) Harjeet Singh vs State of West Bengal, (2005) 2 CHN 445.
- ii) Mohammed Zakir vs Shabana & Ors., (2018) 15 SCC 316.
- iii) Narayan Prasad vs. State of Bihar & Ors., (2019) 14 SCC 726.
- iv) State of Madhya Pradesh vs Man Singh, (2019) 10 SCC 161.

33. The applicant/opposite party no. 2 has relied upon the following judgments:-

- i) Ganesh Patel vs Umakant Rajoria, 2022 SCC Online SC 2050.
- ii) R. Rajeshwari vs H.N. Jagadish, (2008) 4 SCC 82.
- iii) Prem Kumar Agarwal vs State of Bihar, 2014 SCC Online Pat 3408.
- iv) Meghmala and Ors. vs G. Narasimha Reddy & Ors., (2010) 8 SCC 383.

34. Considering the pleadings of both sides, the materials on records, the order therein, including the judgments relied upon, the following facts in the present case are relevant:-

- i) Affidavit of service dated 13.05.2022 shows that the applicant had been served at Uniworld City Cascades, Tower-3, Flat No. 901, Kolkata-156. Track Report shows that item was on hold/ addressee absent/then item received (returned).

ii) Affidavit of service dated 18.05.2022 shows the address of the applicant Uniworld City Cascades, Tower-3, Flat No. 901, which is admittedly the address given by the applicant in her first complaint before the police and FIR dated 11.10.2018 shows last status is out for delivery.

iii) Affidavit of service dated 06.07.2022 shows the same address at Flat No. 901, but Track Report shows item on hold addressee absent.

iv) Affidavit of service dated 01.11.2022 address is again at Flat No. 901, which shows item delivery confirmed on 11.10.2022.

v) Affidavit dated 02.01.2023 address is again at Flat No. 901, Track Report shows item delivery confirmed on 26.12.2022.

vi) On 19.12.2022, the petitioner's counsel submitted that a fresh service be effected so that the matter may be referred for mediation.

vii) Accordingly the affidavit of service dated 02.01.2023 was filed in support of due service.

35. Unfortunately there is no service upon the applicant at the said address (Flat 002) though it was well within the knowledge of the opposite parties herein.

36. For reasons best known to the petitioners in the revisional application, they continued to file affidavit of service till the final hearing in 2023, showing due service at the address (Flat No. 901) reportedly, in spite of their own statement and admission that the said flat had already been sold of on March 5th, 2021. Even after 05.03.2021, all services were made at Flat No. 901, though the petitioners and the applicant were residing at Flat 002 together (a duplex). It is on record that after the sale of the flat no. 901, on 5th of March, 2021, the parties were residing in Flat no. 002 (duplex). The applicant in the ground floor and the petitioners on the 1st floor.

37. It appears from Annexure 'C' to the CRAN application at page 45 that the opposite parties to the application had disposed of the property at Flat 901, Cascades Tower-3, Uniworld City, Kolkata 700156, by way of sale on March 05, 2021 (clause 3.3, at page 46).

38. At paragraph 5 of the said lawyers' notice dated 27.08.2021, it appears that admittedly the applicant and her in-laws (mother-in-law and father-in-law) are the joint owners of Flat 002, Cascades Tower, Uniworld City, Kolkata-156 and a suit for partition is pending between them.

39. It is clear from the said paragraph that the applicant and her in-laws had been residing at Flat No. 002, Cascades Tower 3, Uniworld City at that point of time (27.08.2021) and the applicant is still doing so, in the ground floor of the duplex.

40. In spite of such knowledge, it can only be presumed, that the service was being attempted at an address where the applicant was not residing, in spite of

the fact that, the said flat no. 901 had already been sold. This was thus only with the intention of having the matter heard in the absence of the applicant.

41. The sale of flat no. 901, on 05.03.2021 has come before this Court only by way of the CRAN application filed by the applicant/opposite party no. 2.

42. It is thus a clear case of committing fraud upon the Court, and the judgment and order dated 24.01.2023 in CRR 3659 of 2019 has been obtained in absence of the applicant, by practising fraud, which is clearly an abuse of the process of Court/law.

43. Section 362 Cr.P.C., lays down:-

"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."

44. The Supreme Court in Ganesh Patel vs Umakant Rajoria, 2022 SCC Online SC 2050, S.L.P. (Crl.) No. 9313 of 2021, on March 7, 2022, held:-

"7. The respondent thereupon preferred an application for recall of the order dated 13.10.2017. The aforesaid order, it was stated, was passed in the absence of the respondent, and based on false information. The High Court recalled the order dated 13.10.2017 vide the impugned order dated 23.10.2021.

8. This application for recall of the order was maintainable as it was an application seeking a procedural review, and not a substantive review to which Section 362 of the Criminal Procedure Code, 1973, would be attracted. On the aspect of the difference between recall and review and when an order of recall can be passed reference can be made to Budhia Swain v. Gopinath Deb.

9. The High Court was therefore right in recalling the order and listing MCRC No. 6576/2017 for hearing and decision on merits."

45. In Sri Budhia Swain & Ors. vs Gopinath Deb & Ors., AIR 1999 SC 2089, on 7 May, 1999, the Supreme Court held:-

"..... The only provision for review in the Act is to be found in Section 38A whereunder a review may be sought for within one year from the date of the decision or order but only on the ground that there has been a clerical or arithmetical mistake in the course of any proceedings in the Act. It was also conceded by the learned counsel for the appellants that the proceedings initiated by the appellants were certainly not under Section 38A. It was also conceded at the bar that the subsequent action of the O.E.A. Collector could be sustained only if supportable by the power to recall. What is a power to recall? Inherent power to recall its own order vesting in tribunals or courts was noticed in Indian Bank Vs. M/s Satyam Fibres India Pvt. Ltd. 1996 (5) SCC 550. Vide para 23, this Court has held that the courts have inherent power to recall and set aside an order (i) obtained by fraud practised upon the Court, (ii) when the Court is

misled by a party, or (iii) when the Court itself commits a mistake which prejudices a party. In A.R. Antulay Vs. R.S. Nayak & Anr. AIR 1988 SC 1531 (vide para 130), this Court has noticed motions to set aside judgments being permitted where (i) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all and was shown as served or in ignorance of the fact that a necessary party had died and the estate was not represented, (ii) a judgment was obtained by fraud, (iii) a party has had no notice and a decree was made against him and such party approaches the Court for setting aside the decision ex debito justitiae on proof of the fact that there was no service.....”

46. The judgment passed in Ganesh Patel vs Umakant Rajoria (Supra) is the latest judgment of the Apex Court. The facts before the Apex Court are very similar to the facts in the present case.

47. Here too the application is for recall on the ground of fraud, which is a procedural review and not a substantive review and as such the restrictions under Section 362 Cr.P.C. shall not apply.

48. CRAN 5 of 2023 is accordingly allowed.

49. The judgment/order dated 24.01.2023 is hereby recalled.

50. CRR 3659 of 2019 is restored to its own file.

51. The judgment/order dated 24.01.2023 in CRR 3659 of 2019 has been recalled on the finding that a fraud has been practiced by the petitioners.

52. Accordingly in the interest of justice, let the matter be released from my list and the case records be placed before the Hon’ble the Chief Justice for assignment.

53. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.