
(2008) 02 AHC CK 0099
In the Allahabad High Court

Vijai Patap Singh and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 01-02-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 362, 385, 386, 462, 482

Citation : (2008) CriLJ 2545 : (2009) 5 RCR(Criminal) 117

Hon'ble Judges : Shiv Shanker, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Shiv Shanker, J.—This is an recall application moved on behalf of the petitioners-applicants Vijai Pratap Singh and others praying for recall of the order dated 18.12. 2007 passed in Crl. Misc. Case No. 2368 of 2006 and a direction for restoration of the case to its original number for hearing.

2. Heard learned Counsel for the applicants, learned A.G.A. and perused the record.

3. Learned Counsel for the applicants submitted that the Crl. Misc. Case No. 2368 of 2006. Vijai Pratap Singh alias Pinkoo and Ors. v. State of U.P. and Anr. was listed on 18.12.2007 in the cause-list in Court No. 28 at serial No. 34 and by way of notice the cases from Court No. 28 were transferred to Court No. 22 and thus the file was placed before Hon. V.D. Chaturvedi, J on 18.12.2007. The information about notice for transferring of cases from Court No. 28 to Court No. 22 came to the knowledge of the counsel for applicants very late. Therefore, the petition was decided in absence of the counsel of the petitioners without hearing him vide order dated 18.12.2007. It has further been contended that lack of information about transfer of case and fault on the part of the counsel for the petitioners was inadvertent and is highly regretted and that, the petition involves some pertinent factual and legal question relating to law and it is expedient in the interest of justice that opportunity of hearing be provided to the counsel of

petitioners and the order dated 18.12.2007 be also recalled. It has been further contended that thereafter, this recall application was moved on 20.12.2007, upon which Hon. V.D. Chaturvedi, J has ordered in the Court for restoration of the petition but the same was not signed while the order has been transcribed on the back of the application. It is further contended that there is latest decision of Apex Court in *Madhumilan Syntex Ltd. and Ors. v. Union of India and Anr.* reported in (2008) 1 SCC 143 that restoration application is maintainable regarding the orders passed u/s 482 Cr.P.C. for dismissal of petition in the absence of the counsel.

4. Learned A.G.A. has urged that the order dated 18.12.2007 has been passed on merits of the case. Therefore, it cannot be recalled or reviewed in the absence of any provisions in the Code of Criminal Procedure. He placed reliance on the decisions reported in *Parsuram Patel v. State of Orissa*, (1994) 4 SCC 664, *Bani Singh and others Vs. State of U.P.*, *Hari Singh Mann v. Harbhajan Singh Bajwa and Ors.* (2001) SCC 113 and *State of Kerala v. M.M. Manikantan Nair* (2001) SCC 808.

5. There is specific provision in Section 462 of the Cr.P.C., which reads as under:

462. Proceedings in wrong place - No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions division, district sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice.

6. Hon"ble Apex Court in *Parasuram Patel and Anr. v. State of Orissa* (supra) has observed that it is now well settled that no criminal appeal can be dismissed on the ground of default in appearance. The Court has to go through the record of the case even in the absence of the appellants or their counsel and decide the matter on merit.

7. In *Bani Singh and Ors. v. State of U.P.* (supra) Hon"ble Apex Court in para 15 of the report observed thus:

...It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on the plain reading of Sections 385- 386 of the Code. The law does not enjoin that the court shall adjourn the case if both the appellant and his lawyer are absent. If the court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial Court....

8. In *Hari Singh Mann v. Harbhajan Singh Bajwa and Ors.* (supra) Hon"ble Apex Court has observed thus:

Section 362 of the Code mandates that no court, when it has signed its judgments or final order disposing of a case shall alter or review the same except

to correct a clerical or an 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 the 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 an arithmetical error. The reliance of the respondent on Talab Haji Hussain case is misconceived. Even in that case it was pointed that inherent powers conferred on High Courts u/s 561-A (Section 482 of the new Code) has to be exercised sparingly, carefully and with caution and only where 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 judgement but also to the final orders other than the judgment.

9. In State of Kerala v. M.M. Manikantan Nair (supra) Hon"ble Apex Court held as under:

By the impugned subsequent order, it cannot be said that the High Court only corrected any clerical or arithmetical error. In fact the impugned order is an order of review, as the earlier order was reversed, which could not have been done.

The Code of Criminal Procedure does not authorise the High Court to review its judgment and order passed either in exercise of its appellate, revisional or original jurisdiction. Section 362 of the Code prohibits the court after it has signed its judgment or final order disposing of a case from altering or reviewing the said judgment or order except to correct a clerical or arithmetical error. This prohibition is complete and no criminal court can review its own judgment or order dated after it is signed.

10. After perusal of the order dated 18.12.2007 it appears that the same was passed in absence of the learned Counsel for the petitioners but the petition has not been dismissed in default for non prosecution. It has been decided on merits of the case by an speaking and detailed order passed by Hon. V.D. Chaturvedi, J. Therefore, the order cannot be recalled or reviewed as per provision of Section 362 Cr.P.C., which prohibits the Court after it has signed its judgment or order disposing of a case from altering or reviewing the said judgment or order except to correct a clerical or arithmetical error as well as in view of the decisions rendered by Apex Court in Parasuram Patel and Anr. v. State of Orissa (supra) Bani Singh and Ors. v. State of U.P. (supra) Hari Singh Mann v. Harbhajan Singh Bajwa and Ors. (supra) and State of Kerala v. M.M. Manikantan Nair (supra), which are applicable to the present case.

11. In *Madhumilan Syntex Ltd. and Ors. v. Union of India and Anr.* (supra) relied upon by the learned Counsel for the applicants, the petition was dismissed for default. Therefore, the restoration was deemed permissible as it does not relate to the order passed on merits of the case. The case relied upon by the learned Counsel for the applicants does not help to the petitioners- applicants in the present case.

12. No doubt the Personal Assistant of Hon. V.D. Chaturvedi, J has transcribed the order in his hand writing upon the recall application but in the absence of any signature of Hon. Judge, there is no order. It is also worthwhile to mention here that the record was sent before Hon.V.D. Chaturvedi, J and the same was brought by the Bench Secretary, who submitted his report upon the order sheet in Hindi to the effect that he had gone to High Court at Allahabad for obtaining the signature of Hon, Judge. Thereafter, his Lordship has said to inform the counsel to argue the matter before any Court. The above report of the Bench Secretary Shailendra Dubey reveals that Hon. V.D. Chaturvedi, J has refused to sign the alleged order transcribed on the back of the recall application. In such circumstances, it cannot be deemed that Hon. Judge has not denied to make the signature upon the order. This also shows that he did not make his signature upon the order for the reason that the order dated 18.12.2007 was passed in the absence of the learned Counsel for the petitioners on merits of the case.

13. After considering the submissions made by learned Counsel for both the parties, going through the decisions referred to by learned A.G.A. and perusing the entire record, the recall application is liable to be rejected.

14. The recall application is rejected.