

(2016) 05 AHC CK 0009

In the Allahabad High Court

Case No : Crl. Misc. Recall Application No. 126367 of 2016 in Application No. 5938 of 2016

Virendra Kumar Anand @ V.K. Anand

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 30-05-2016

Acts Referred:

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

Citation : (2016) ACD 589 : (2016) 2 Crimes 776

Hon'ble Judges : Suneet Kumar, J.

Bench : Single Bench

Advocate : Manu Saxena, Advocate, for the Appellant; G.A., Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Suneet Kumar, J.—By means of this recall application, the applicant seeks to recall order dated 28.3.2016, whereby the petition was disposed of directing the court below to conclude the trial under Section 138 of Negotiable Instrument Act 1881 (N.I.Act) expeditiously within a stipulated period without granting unnecessary adjournment.

2. The applicant herein sought quashing of proceedings of complaint case No. 3255 of 1999, (Rajendra Swarup Dixit v. Aneja Consultancy and another), filed under Section 138 of N.I. Act. The petition under Section 482 Cr.P.C was filed by Sri Manu Saxena, learned counsel for the applicant. The matter was argued at length by the counsel, thereafter, petition was disposed of. The present recall application has been instituted by a subsequently engaged counsel, Sri Anil Tiwari, along with the earlier counsel, who appeared to press the recall application.

3. The assertions made in the recall application are on the merit of the case stating therein that the cheques in question was signed by the applicant as

authorised signatory of a proprietor firm M/s Aneja Consultancy, therefore, the applicant would not be liable for prosecution. Upon being summoned the applicant, as well as, Chief Managing Director of the firm, filed objection against the summoning order and an application for discharge. Discharge application was rejected against which the applicant filed a petition being Crl. Misc. Writ Petition No. 7015 of 2001, wherein, vide order dated 6.12.2001, further proceedings of complaint case against petitioner/applicant was stayed. The writ petition was subsequently dismissed in default on 3.4.2015 and remains as such till date. It is sought to be contended that thereafter on the issuance of warrant, the entire proceedings of complaint was challenged in proceeding under section 482 Cr.P.C which was disposed of by this court, order passed therein is being sought to be recalled. It is sought to be contended that unless the firm is prosecuted, the official of the firm as such cannot be prosecuted in view of Section 141 N.I. Act. Reliance has been placed upon *Aneeta Hada v. Godfather Travels and Tours (P) Ltd*, 2008(13) SCC 703. It is further contended that the applicant is prepared to deposit the entire sum due before this Court to show his bona fide, therefore, the legal questions that is being raised in the recall application be decided by this Court.

4. Sri Anil Tiwari, learned counsel for the applicant would contend that the complaint filed under Section 138 NI Act against the applicant is misuse of process of court, the applicant is authorised signatory of the cheque and is not responsible for the affairs of the firm, further, the cheque was issued by a proprietor firm, therefore, the applicant cannot be prosecuted for an offence under Section 138 not being the account holder.

5. Be that as it may, the recall application is gross misuse of process of the court. It is not the case of the applicant that his counsel was not heard, it is also not the case of the applicant that the submission advanced before the Court was not taken into consideration, therefore, the order as such cannot be recalled. In this background, in my opinion, the present application is misconceived, under the garb of recall application, the matter cannot be reagitated on merit, whatever was argued and pressed by the learned counsel before the Court was considered and accordingly order was passed. The ground that are being sought to be pressed through the recall application was neither raised nor pressed when the matter was argued by the previous counsel. Further, conduct of the applicant is also not bona fide as it was clearly pleaded that earlier he had assailed the summoning order and order rejecting the discharge application in a petition being Crl. Misc. Writ Petition No. 7012 of 2001 before this court, in which an interim order was granted on 6.12.2001 staying further proceedings of the complaint case. The writ petition came to be dismissed on 3.4.2015 for non prosecution. In paragraph 16 of the petition filed subsequently under Section 482 Cr.P.C, it was averred "that the matter with regard to discharge of the applicant therefore concluded and now the Court below is proceeding further with criminal case pending before the court below". The plea that is being sought to be taken in the recall application was also raised in the petition under Section 482 Cr.P.C in

para 19. The recall application would not state as to whether any application was filed to restore the criminal misc. writ petition which was dismissed in default, therefore, in absence of such an assertion the order passed on discharge application attained finality.

6. Full Bench of five Judges in *Mahesh v. State*, 1971 ALJ page 668 held, "the legal position can be summarized by laying down that the High Court is not possessed of general power to review, revise or reconsider the judgment or order duly pronounced in criminal appeal or a criminal revision, though the judgment or order can be so reviewed, revised or reconsidered in exceptional circumstances in exercise of the inherent power under Section 561-A (presently section 482), Cr.P.C, provided that the inherent power is so exercised for one of the three purposes detailed therein".

7. There is no power of review with the criminal court after the judgment has been rendered. The High Court can alter or review its judgment before it is signed. When an order is passed, it cannot be reviewed. Section 362 Cr.P.C 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 is dis-entitled to entertain a fresh prayer for any 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 order for disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. There is also no provision for modification of the judgment. (*Vide Hari Singh Mann v. Harbhajan Singh Bajwa*, 2001 (1) SCC 169).

8. Moreover the prohibition contained in Section 362 Cr.P.C is absolute; after the judgement is signed, even the High Court in exercise of its inherent power under Section 482 Cr.P.C has no authority or jurisdiction to alter/review the same (*vide Moti Lal v. State of M.P.* (2012) 11 SCC 427).

9. If a judgement has been pronounced without jurisdiction or in violation of principle of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 Cr.P.C would not operate. In such an eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault.(*vide Chitawan v. Mahboob Ilahi*, 1970 Cri. LJ 378(All), *Asit Kumar Kar v. State of West Bengal*, (2009) 2 SCC 703).

10. Supreme Court by virtue of Article 137 of the Constitution has been invested with an express power to review any judgment in criminal law and while no such

power has been conferred on the High Court, inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code itself (Vide State v. K.v. Rajendran, 2008(8) SCC 673.

11. In Sooraj Devi v. Pyare Lal, 1981 (1) SCC 500, apex court held that the prohibition in Section 362 Cr.PC against the court altering or reviewing its judgment, is subject to what is "otherwise provided by this code or by any other law for the time being in force". These words, however, refer to those provisions only where the Court has been expressly authorised by the code or other law to alter or review its judgement. The inherent power of the court is not contemplated by the saving provision contained in Section 362 Cr.PC and, therefore, the attempt to invoke that power can be of no avail.

12. Thus, the law on the issue can be summarized to the effect that the criminal justice delivery system does not clothe the court to add or delete any words, except to correct the clerical or arithmetical error as specifically been provided under the statute itself after pronouncement of the judgment as the Judge becomes functus officio. Any mistake or glaring omission is left to be corrected only by the appropriate forum in accordance with law (Refer State of Punjab v. Davinder Pal singh Bhullar, (2011) 14 SCC 770).

13. The same principle is applicable while considering an application for recall / modification/review of an order passed under Section 482 Cr.P.C.

14. The inherent power under Section 482 Cr.PC is intended to prevent the abuse of the process of the court and to secure the ends of justice. Such power, cannot be exercised to do something which is expressly barred under the code. If any consideration of the facts by way of review is not permissible under the Code and is expressly barred, it is not for the court to exercise its inherent power to reconsider the matter and record a conflicting decision. If there had been change in the circumstances of the case, it would be in order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the court. Where there are no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a view which is expressly barred under Section 362 Cr.PC.

15. In Smt. Sooraj Devi v. Pyare Lal and another, 1981(1) SCC 500 it has been held that a clerical or arithmetical error is an error occasioned by an accidental slip or omission of the court. The inherent power of the court is not contemplated by the saving provision contained in Section 362 and therefore, the attempt to invoke that power can be of no avail.

16. In Vishnu Agarwal v. State of Uttar Pradesh and another, 2011 (14) SCC 813, it has been held that Section 362 cannot be considered in a rigid and overtechnical manner to defeat the ends of justice, therefore, where an application filed by respondent was an application for recall of the order passed

without hearing as the case could not be marked and not for review. In a recall petition court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing.

17. Apex Court in *State of Gujarat v. Ramprakash P Puri*, (1969) 3 SCC 156 reiterated the position that an order can be recalled or reviewed in exercise of inherent power to rectify mistake of the court by saying:

"Procedure has been described to be a handmaid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it. Like all rules of procedure, this rule demands a construction which would promote this cause".

18. Once judicial satisfaction is reached that the direction was not open to be made and it is accepted as a mistake of the court, it is not only appropriate but also the duty of the court to rectify the mistake by exercising inherent powers". Judicial opinion heavily leans in favour of this view that a mistake of the court can be corrected by the court itself without any fetters (*A.R. Antullay v. R. S. Nayak*, (1988) 2 SCC 602 (7 Judges)).

19. In my opinion a tribunal or a court may recall an order earlier made by it if :

(i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,

(ii) there exists fraud or collusion in obtaining the judgment,

(iii) there has been a mistake of the court prejudicing a party, or

(iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented (*Refer Budhia Swain and others v. Gopinath Deb*, (1999) 4 SCC 396, *A.R. Antullay v. R.S. Nayak*, (1988) 2 SCC 602).

20. The power to recall a judgment will not be exercised when the ground for reopening the proceedings or vacation the judgement was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence.

21. A distinction has to be drawn between lack of jurisdiction and a mere error in exercise of jurisdiction. The former strikes at the very root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the order passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed thereon unless set aside in the manner known to law by laying a challenge subject to the law of limitation.

22. In view of above, the recall application fails to make out any of the essential

ingredients to recall the earlier order. The applicant under the garb of recall or modification application cannot re-agitate the matter on merit by pressing a ground though raised was not pressed or even if not raised cannot be permitted to be raised subsequently.

23. In my opinion the application is misconceived and has been filed to delay the trial, which is accordingly dismissed with a cost assessed at Rs. 5,000/ to be deposited before the court below which shall be paid to the complainant-opposite party no.2.