

# Vishnu Agarwal vs State Of U.P. & Anr on 22 February, 2011

**Bench: Gyan Sudha Misra, Markandey Katju**

ITEM NO.110

Court No.6

SECTION II

S U P R E M E C O U R T O F I N D I A  
RECORD OF PROCEEDINGS  
CRIMINAL APPEAL NO(s). 1323 OF 2004

VISHNU AGARWAL

Appellant (s)

VERSUS

STATE OF U.P. & ANR.

Respondent(s)

(With office report )

WITH APPEAL(CRL) NO. 875 of 2006  
(With office report)

Date: 23/02/2011 These Appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE MARKANDEY KATJU  
HON'BLE MRS. JUSTICE GYAN SUDHA MISRA

For Appellant(s) Mr. Manoj Swarup, Adv.  
Ms. Lalita Kohli, Adv.  
Mr. Abhishek Swarup, Adv.  
for M/S Manoj Swarup & Co.,Adv.

Mr. Siddhartha Dave, Adv.  
Ms. Vibha Datta Makhija

For Respondent(s) Mr. Sandeep Singh, Adv.  
Ms. Vibha Datta Makhija,Adv.

M/S Manoj Swarup & Co.

UPON hearing counsel the Court made the following  
O R D E R

The appeal fails and is accordingly dismissed. The Appeal is dismissed as having become infructuous.

( Deepak Mansukhani )  
Court Master

( Indu Satija )  
Court Master

(The signed order is placed on the file) REPORTABLE IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL NO. 1323 OF 2004 VISHNU AGARWAL Appellant (s) VERSUS STATE OF U.P. & ANR. Respondent(s) WITH CRIMINAL APPEAL NO. 875 OF 2006 O R D E R Criminal Appeal No. 1323/2004 Heard learned Counsel for the parties. This appeal has been filed against the impugned Judgment of the Allahabad High Court dated 29.1.2004 in Criminal Revision No. 136/1998.

It appears that the aforesaid Criminal Revision was listed in the High Court on 2.9.2003. No one appeared on behalf of the Revisionist, though the Counsels for respondents appeared. In these circumstances, the judgment was passed.

Subsequently, an application was moved for recall of the Order dated 2.9.2003 alleging that the case was shown in the computer list and not in the main list of the High Court, and hence, the learned Counsel for the Revisionist had not noted the case and hence he did not appear.

It often happens that sometimes a case is not noted by the Counsel or his clerk in the cause list, and hence, the Counsel does not appear. This is a human mistake and can happen to anyone. Hence, the High Court recalled the order dated 2.9.2003 and directed the case to be listed for fresh hearing. The aforesaid order recalling the order dated 2.9.2003 has been challenged before us in this appeal.

Learned Counsel for the appellant has relied on the decision of this Court in Hari Singh Mann Vs. Harbhajan Singh Bajwa AIR 2001 SC 43. 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 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 arithmetical error. The reliance of the respondent on Talab Haji Hussain's case (AIR 1958 SC 376)(supra) is misconceived. Even in that case it was pointed that inherent powers conferred on High Courts under Section 561A(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 under Section 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."

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.

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 Vinirayah 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, injustice will follow."

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 Vs. State of West Bengal and Ors. 2009(1) SCR 469, 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 considers 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 Licensees Association Vs. Raghavendra Singh & Ors. [2007(11) SCC 374] cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences."

Hence, we see no error in the impugned order passed by the High Court.

The appeal fails and is accordingly dismissed.

The Appeal is dismissed as having become infructuous.

.....J. (MARKANDEY KATJU) .....J. (GYAN SUDHA MISRA) NEW DELHI  
FEBRUARY 23, 2011