# Jawahar Lal @ Jawahar Lal Jalaj vs The State Of U.P Thru Cbi/Acb Lucknow on 5 August, 2015

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

AFR

Court No. - 25

Case :- U/S 482/378/407 No. - 1994 of 2011

Applicant :- Jawahar Lal @ Jawahar Lal Jalaj

Opposite Party :- The State Of U.P Thru Cbi/Acb Lucknow

Counsel for Applicant :- Nandit Srivastava,Kuldeep Srivastava

Counsel for Opposite Party :- Bireshwar Nath

Hon'ble Aditya Nath Mittal,J.

Crl. Misc. Application No.51760 of 2015 - Application for Restoration of the Petition and the Recall of the order dated 29.04.2015.

Heard learned counsel for the applicant-petitioner, learned AGA as well as learned counsel appearing on behalf of the CBI and perused the pleadings.

This application for recall of the order dated 29.04.2015 has been filed with the prayer to restore the Criminal Misc. Case No.1994 of 2011 (U/s 482 Cr.P.C.) (Jawahar Lal @ Jawahar Lal Jalaj vs. The State Of U.P Thru CBI/ACB Lucknow) at its original number and status.

Learned counsel for the applicant has submitted that on 29.04.2015 the counsel for the petitioner all of sudden around 11.30 am developed heaviness and restlessness and rushed to the High Court Dispensary where his blood-pressure was found to be 160/110, upon which the doctor advised him for complete rest and due to this reason, he could not attend the court and could not mention for

adjournment of the case, consequently, the petition was dismissed for want of prosecution. In support of this contentions, learned counsel for the petitioner has relied upon the various judgements, which shall be taken into consideration later on.

It has also been submitted that although, there is no provision in the Code of Criminal Procedure for restoration of a criminal case like Order IX of the CPC. It has further been submitted that Section 362 Cr.P.C. prohibits the court to alter or review the judgement but if any case is dismissed in default, it cannot be said to be a judgement. Therefore, the bar of Section 362 Cr.P.C. is not applicable. It has also been submitted that where the party to the proceedings is deprived of being heard and if in the interest of justice, opportunity of hearing is expedient than such opportunity must be given. It has also been submitted that if there is no provision in the Cr.P.C. for restoration of a petition unlike Order IX of CPC then there is no restriction in the Cr.P.C. to recall and set aside such order, which has been passed in absence of the petitioner.

Learned counsel appearing for the CBI has not raised any objection to the state of health of the counsel for petitioner on 29.04.2015 and has also conceded that if any petition is dismissed for default, then it is neither a judgement in view of Section 353 and 465. He has further submitted that the court can exercise its inherent power to restore such petition. It has also been submitted that if any judgement has been passed without application of mind or where no reasons have been assigned or where it has been dismissed in default, such order can be set aside exercising the powers under section 482 Cr.P.C.

The main question for consideration is that whether a petition under section 482 Cr.P.C., which has been dismissed for want of prosecution can be restored to its original number or not and whether the prohibition as provided by Section 362 Cr.P.C. will apply or not?

Section 362 Cr.P.C. provides as under :

> "362. Court not to alter judgement - 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."

Section 353 Cr.P.C. defines the judgment as under :

> "353. Judgment -
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> 1. The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court by the Presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders:-
>
> (a) by delivering the whole of the judgment; or

(b) by reading out the whole of the judgment; or

(c) by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

2. Where the judgment is delivered under clause (a) of sub- section (1), the presiding officer shall cause it to be taken down in short- hand, sign the transcript and every page thereof as soon as it is made ready, and write on it the date of the delivery of the judgment in open Court.

3. Where the judgment or the operative part thereof is read out under clause (b) or clause (c) of sub-section (1), as the case may be, it shall be dated and signed by the presiding officer in open Court, and if it is not written with his own hand, every page of the judgment shall be signed by him.

4. Where the judgment is pronounced in the manner specified in clause (c) of sub- section (1), the whole judgment or a copy thereof shall be immediately made available for the perusal of the parties or their pleaders free of cost.

5. If the accused is in custody, he shall be brought up to hear the judgment pronounced.

6. If the accused is not in custody, he shall be required by the Court to attend to hear the judgment pronounced, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted: Provided that, where there are more accused than one, and one or more of them do not attend the Court on the date on which the judgment is to be pronounced, the presiding officer may, in order to avoid undue delay in the disposal of the case, pronounce the judgment notwithstanding their absence.

7. No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders, or any of them, the notice of such day and place.

8. Nothing in this section shall be construed to limit in any way the extent of the provisions of section 465."

The exception to the aforesaid section has been enumerated in sub-clause 8 of Section 353 as contained in Section 465, which reads as under:

Section 482 Cr.P.C. is quoted below as under:

"482. Saving of inherent power of High Court - Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

Learned counsel for the petitioner has emphasized the word "secure the ends of justice".

As far as the contention of the learned counsel for the petitioner that the opportunity of being heard was not given to him has a different cannotation with the word 'opportunity of being heard' has been availed or not. The case was listed for 29.04.2015, therefore, it cannot be said that the opportunity of being heard was not extended to the applicant. However, the said opportunity of hearing was not availed by the applicant for the reason that his counsel had suddenly fallen ill and he had to leave the court in the mid day and he could not mention it before the court. It is also settled principle that the party should not suffer for the fault or latches of the counsel.

In Vishnu Agarwal vs. State of Uttar Pradesh; 2011 (74) ACC 609 SC, Hon'ble Suprme Court has held as under :

> 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.
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> 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:
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> " 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."

> "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 :
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> "Kevalam Shastram Ashritya Na Kartavyo Vinirnayah 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."

In Asit Kumar Kar vs. State of West Bengal and others; (2009) 1 SCC (Cri) 851, Hon'ble the Supreme Court has held as under :

> "There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers on merits where 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.
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> We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Licensees Association v. Raghabendra Singh & Ors. [2007 (11) SCC 374] cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences.
>
> In these circumstances, we recall the directions in paragraph 40 of the aforesaid judgment. However, if anybody has a grievance against the grant of licences or in the policy of the State Government, he will be at liberty to challenge it in appropriate proceedings before the appropriate Court. The writ petitions are disposed of with these directions."

In Ram Naresh Yadav and others vs. State of Bihar; 1987 CRI.L.J. 1856 & AIR 1987 SCC 1500, Hon'ble the Apex Court has held as under :

> "It is an admitted position that neither the appellants nor counsel for the appellants in support of the appeal challenging the order of conviction and sentence, were heard. It is no doubt true that if counsel do not appear when criminal appeals are called out it would hamper the working of the court and create a serious problem for the court. And if this happens often the working of the court would become well nigh impossible. We are fully conscious of this dimension of the matter but in criminal matters the convicts must be heard before their matters are decided on merits. The court can dismiss the appeal for non-prosecution and enforce discipline or refer the matter to the Bar Council with this end in view. But the matter can be disposed of on merits only after hearing the appellant or his counsel. The court might as well

> appoint a counsel at State cost to argue on behalf of the appellants. Since the order of conviction and sentence in the present matter has been confirmed without hearing either the appellants or counsel for the appellants, the order must be set aside and the matter must be sent back to the High Court for passing an appropriate order in accordance with law after hearing the appellants or their counsel and on their failure to engage counsel, after hearing counsel appointed by the Court to argue on their behalf. As the matter is being remanded to the High Court, no orders can be passed on the bail application. The appellants, if so advised, may approach the High Court for bail"

In Rafiq and another vs. Munshi Lal and another; AIR 1981 SC 1400, Hon'ble the Apex Court has held as under :

> "The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the

> disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K.Sanghi."

In Raghuvera and others vs. State of U.P.; 1990 CRI.L.J. 2735 (All.), this Hon'ble Court has held as under :

> "It is no doubt true that Section 362 Cr. P.C. debars the court from altering or reviewing any final order or judgment given by a court except to correct the clerical or arithmetical error. But the question arises whether an order dismissing an application for revision for default of the counsel as not pressed can be termed as a judgment or final order? The term "Judgment" has not been defined in the Criminal Procedure Code but a judgment means the expression of the opinion of the Court arrived at after due consideration of the entire material on record, including the arguments, if any, advanced at the Bar. A final order or judgment can only be passed in a criminal court when the court applies its mind to the merit of the case. In case the order is passed in a criminal proceeding and the application for revision is dismissed for default as not pressed, the said order cannot be taken as either final order or a judgment. Thus Section 362 Cr. P.C. is no bar to review ore alter the order dated 14th March 1990. The order in question was passed without going into the merit of the case and is without jurisdiction and as such it has to be set aside."

In K. G. Keralakumaran Nair vs. State of Kerala and other; 1995 CRI. L. J. 2319, the Kerala High Court has held as under:

> "That leads us to the further question whether an appeal or other criminal proceeding dismissed by this Court can be restored to file. The contention is that this Court has no power by virtue of Section 362 of the Code which reads:
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> "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."

The Section relates only to judgment or final order disposing of a case. What is a judgment or a final order is not seen defined in the Code But the word 'judgment' is understood to mean an order in a trial terminating in either conviction or acquittal of the accused. It has also been held that judgment means the expression of opinion of the Court arrived at after due consideration of the evidence and all the arguments. Understood in this light, every order under the provisions of the Code cannot be considered to be a judgment within the meaning of Section 353 or coming under the scope of Section 362, of the Code. In short, there must be an investigation of the merits on evidence and after hearing arguments in order to constitute a judgment. In the case of an appeal, such judgment has to

be one rendered on merits after hearing counsel for appellant or the appellant, as the case may be, and Public Prosecutor or counsel appearing for respondent.

15. Whether an order dismissing an appeal for default amounts to a judgment or a final order coming within the scope of Section 362 of the Code is the next aspect that requires consideration. The Calcutta High Court in the decision in Bibhuty Mohun Roy v. Dasimoni Dassi (1909) 10 Cri LJ 287, held that in India a Court cannot review or alter its own judgment in a criminal case, but it has jurisdiction to hear and determine a criminal case which has not been heard and determined on the merits. It was further held that where the Court discharged a rule because no one appeared, it has power to re-open it.

16. In Sahadeo v. Jagannath, AIR 1950 Nagpur 77: (1950 (51) Cri LJ 662), the appeal was dismissed for non-filing of a copy of the judgment. It was held that the order rejecting the appeal cannot be held to be an order amounting to a judgment within the meaning of Section 369 of the Code of 1898 and there was no bar to the consideration of the appeal on its merits.

17. The question whether a criminal Court has inherent power to revive a complaint in a warrant case which was dismissed under Section 259 of the Code of 1898 for the absence of the complainant on the date of commencement of the preliminary enquiry came up for consideration in W.T. Singh v. C.A. Singh, AIR 1961 Manipur 34 : (1961 (2) Cri LJ 352). While holding that such dismissal of the complaint or discharge of the accused will not amount to an acquittal within the meaning of Section 403, of the Code, it was observed that such an order of dismissal, is not a judgment within Section 366, and therefore Section 369, would not apply. It is also observed that the absence of any provision on a particular matter in the Code does not mean that the Court has no such power and the Court may act on the principle that every procedure should be understood as permissible till it is shown to be prohibited by law.

18. The Andhra Pradesh High Court has gone to , the extent of holding that there should be no objection to the maintainability of a second petition for revision when the first one had failed not on the merits but by default. In Satyanarayana v. Narayanaswami AIR 1961 Andh. Pra. 18 (1961) (2) Cri LJ 37), it was held that there is no question of the High Court becoming functus officio by reason of an order of dismissal for default passed by it on a petition by a private party, who has really no right but a mere concession in the matter of moving the High Court in revision.

19. The Mysore High Court had occasion to consider whether a revision application dismissed for default can be restored in the decision in Madiah v. State of Mysore, AIR 1963 Mysore 191 : (1963(2) Cri LJ 23). That was a case of a dismissal of a revision by the High Court. It was held that subject , to the provisions contained in the Code, a judgment , delivered or an order passed on merits is final after it is duly signed by Court. The inherent power of a High Court cannot be exercised in matters specifically covered by the provisions of the Code. Where the Code is silent about the power of the High Court in respect of any, matter arising before it, it can pass suitable orders in exercise of its inherent powers to give effect to any order passed under the Code or to prevent the abuse of the process of any Court or to secure the ends of justice. It was held that this power can also be exercised to reconsider orders of dismissal of an appeal or application passed without jurisdiction or in default

of appearance, where reconsideration is necessary to secure the ends of justice.

20. The Bombay High Court in the decision in Deepak v. State of Maharashtra 1985 Cri LJ 23, observed that the High Court in exercise of its inherent powers can review or revise its judgment if such judgment is pronounced without giving an opportunity of being heard to a party who is entitled to a hearing and that party is not at fault, the reason being that a party cannot suffer for the mistake of the Court. In that case, the hearing was adjourned to 13th February but the adjourned date was inadvertently marked as 8th February on which date the petitioner and his counsel were absent. The High Court on going through the record passed the order dismissing the petition. It was held that since the petitioner was entitled to a hearing, it could be said that the Court acted without jurisdiction and in violation of the principles of natural justice and in the circumstances the review petition must he allowed.

21. A Division Bench of this Court in Padmachandran v. Radhakrishnan (1984 Ker LT 416), was considering the question whether the inherent powers of this Court under Section 482, can be exercised to restore a revision dismissed for default. In that case, the revision was decided in the absence of the counsel. Request was made for re-hearing the revision. The Division Bench held that the earlier order dismissing the revision was really a disposal for default, counsel for petitioner being absent. For the purpose of securing the ends of justice it was found necessary that the Criminal Revision should be heard afresh,

22. The question whether dismissal of a Criminal Revision petition as not pressed amounts to a final order coming within the scope of Section 362, of the Code arose for consideration before the Allahabad High Court in Raghuvira v. State of U. P. (1990) 3 Crimes 225 : (1990 Cri LJ 2735). If was held that a final order or judgment can only be passed by a criminal Court when the Court applies its mind to the merits of the case. In case the order is passed in a criminal proceeding and the application for revision is dismissed for default as not pressed, the said order cannot be taken as either final order or judgment. It was held that Section 362, of the Code is no bar to review or alter the order of dismissal.

23. The same view was expressed by the Karnataka High Court in Ibrahimsab v. Faridabi (1986) 2 Kant LJ 65. It was held that the expression "final order disposing of the ease" means a considered order on merits and not an order of dismissal for default and the provision contained in Section 362, does not come in the way of the Court recalling such order and restoring the revision dismissed for default. \ The decision in Chandran's case ((1989) 2 Ker LJ 845) (supra) did not also consider the scope of the inherent power of this Court under Section 482, of the Code and power of this Court to dismiss an appeal or any other criminal proceeding in exercise of that power or the power of restoration. Having considered those matters in detail in the light of the pronouncements of the various High Courts. I am of the considered view that this Court has all the inherent powers to make any order to prevent the abuse of the process of Court or for the ends of justice or to enforce discipline by invoking the powers under Section 482, of the Code, Section 386 of the Code notwithstanding. The provision contained in Section 386 cannot therefore have any application to the exclusion of those inherent powers. Viewed from this angle and in the light of the principle laid down in Ram Naresh Yadav's case (1987 Cri LJ 1856) (SC). I hold that this Court has power to

dismiss an appeal or any other criminal proceeding for default and this Court has also the power to restore such proceeding on sufficient grounds being shown for non-appearance. But the right of dismissal and the power of restoration can be exercised only by this Court, and that too in exercise of the powers under Section 482 of the Code, and not by any of the Courts subordinate to this Court since those courts have no inherent powers envisaged under Section 482 of the Code.

The point formulated is answered thus:-

> i. A Criminal Appeal shall be disposed of only after perusing the record and hearing the appellant or his pleader, if he appears and the Public Prosecutor, if he appears.
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> ii. A criminal appeal can be decided on merits, only after hearing the appellant or his counsel.
>
> iii. The High Court has powers under Section 482 of the Code of Criminal Procedure to dismiss an appeal or revision or any other criminal proceeding for default or non-prosecution.
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> iv. The High Court has also inherent power to restore any matter dismissed for default or non-prosecution on sufficient reason being shown.
>
> v. The power of dismissal for default and the power of restoration inhere only in the High Court and cannot be exercised by the Courts subordinate to the High Court since they do not possess the inherent powers under Section 482 of the Code.
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> In Giridharilal and others vs. Pratap Rai Mehta and another; 1989 CRI. L.J. 2382, the Karnataka High Court has held as under :
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> Section 362 puts a complete bar for altering or reviewing of a judgment or final order on merits and the only power given to the Courts is that it can correct a clerical or arithmetical error. The said Section does not impose any prohibition for recalling an order.
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> 22. 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 pre-supposes 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.
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> 23. There appears to be no bar contained in S. 362 or any other Sections of the Code for recalling an order.
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> 24. In this view of the matter, it is my considered view that the grant of prayer made by the petitioners would not offend the salutary principle embodied in S. 362 of the Code.

25. It is the contention of the petitioners that the order dated 4-11-1988 passed in non-compliance with S. 401(2) of the Code needs to be recalled to secure the ends of justice and that therefore they can invoke the inherent jurisdiction of this Court.

26. In the case of Habu v. State of Rajasthan, a Full Bench of Rajasthan High Court while answering a reference wherein the question framed was :

"Whether the judgment given in absence of the appellant or his Counsel but the case decided on merits, can be recalled by the Court in its inherent powers under S. 482, Cr.P.C."

On an exhaustive review of the decisions of the Supreme Court and the various High Courts, held (at p. 101) :

"There are two available on the point. According to one view S. 362, Cr.P.C., has been held to be mandatory and puts complete bar and it has been therefore, held that S. 482, Cr.P.C., can also not be invoked for the purposes of reviewing or altering the judgment. The other view is that recalling is different than reviewing and altering and if the Court is of the opinion that gross injustice has been done, then S. 482, Cr.P.C. should be invoked to recall the judgment and rehear the case. In fact the earlier view has impliedly been done away with by their Lordships of the Supreme Court in Sankatha Singh's case. Their Lordships have held that the appellate Court had no power to review or restore an appeal which has been disposed of under Ss. 424 and 369, Cr.P.C. (old). Similar was the view taken in State of Orissa v. Ram Chandra, . Sankatha Singh's case has been referred to in Sooraj Devi's case, , wherein also their Lordships have held that inherent powers cannot be invoked when there is a complete bar. Scope of S. 482, Cr.P.C. was then considered by their Lordships in Manohar Nathu Sao Samarth v. Marot Rao, . Thus on one side as mentioned above the principles which have been laid down by their Lordships of the Supreme Court can be summarised as under :-

1. That the powers to deal with the case must flow from the statute.

2. That the powers given under S. 362, Cr.P.C. (S. 369, Cr.P.C., old) given to the Court for reviewing or altering is limited only for correcting an arithmetical or clerical error and specifically prohibits Courts from touching the judgment by taking away the powers altering or reviewing the judgment or the final order and as such principle of functus officio has been accepted.

3. That the prohibition contained in S. 362, Cr.P.C. (S. 369, Cr.P.C. old) is not only restricted to the trial Court but also extends to appellate Court or the revisional Court.

> 4. That the inherent powers of the Court cannot be invoked where there is express prohibition and in other words S. 482, Cr.P.C. cannot be invoked.

As against this the analogical deduction which comes out from another set of cases is -

i. Right of the accused to be heard is his valuable right which cannot be taken away by any provision of law, ii. If the accused has not been given an opportunity of being heard is not provided with the counsel when not duly represented it will be violative of principles of natural justice as well as Art. 21 of the Constitution.

iii. That to provide defence counsel in case the accused is not in a position to engage is fundamental duty of the State and has throughout been recognized and now incorporated in S. 304, Cr.P.C., and in Art. 39A of the Constitution.

iv. That bar of review or alter is different than the power of recall;

v. That inherent powers given under S. 482, Cr.P.C. (S. 561-A, Cr.P.C. Old) are wide enough to cover any type of cases if three conditions mentioned therein so warrant, namely -

> (a) for the purpose of giving effect to any order passed under the Code of Criminal Procedure;
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> (b) for the purposes of preventing the abuse of the process of any Court; and
>
> (c) for securing the ends of justice.

vi. The principle of audi alteram partem shall be violated if right of hearing is taken away.

vii. That when the judgment is recalled it is a complete obliteration/abrogation of the earlier judgment and the Appeal or the Revision, as the case may be, has to be heard and decided afresh, viii. That a Court subordinate to High Court cannot exercise the inherent powers and the Code restricts it to the High Court alone.

ix. That no fixed parameters can be fixed and hard and fast rule also cannot be laid down and Court in appropriate cases where it is specified that one of the three conditions of S. 482, Cr.P.C., are attracted should interfere."

The reference was answered by the Full Bench in the following terms :

> i. That the power of recall is different than the power of altering or reviewing the judgment.
>
> ii. That powers under S. 482, Cr.P.C., can be and should be exercised by this Court for recalling the judgment in case the hearing is not given to the accused and the case

falls within one of the three conditions laid down under S. 482, Cr.P.C."

I am in respectful agreement with the law, laid down by the Rajasthan High Court in the decision rendered by the Full Bench.

In Uma Shanker Jha vs. State of Bihar: 2001 (3) PLJR 728, the Patna High Court has held as under :

"It is well known dictum that justice has not only to be done but it should also appear to have been done and therefore, whenever a litigant comes before the Court it is essential that he must go having full faith in his mind and the Court has done justice with his case and he must at least have the satisfaction that he has been heard by Court. The position of a litigant is also helpless because he has to depend upon his lawyer and mercy of others. He has full confidence on his counsel that he will do his best in his interest. It is well settled that if due to carelessness or laches on the part of lawyer, a case is dismissed the litigant should not be made to suffer. In the instant case the admitted position is that the counsel appearing for the Petitioner was not present on any date when the case was fixed for hearing and through the aid of his colleague adjournments were prayed for which were allowed by the court on three occasions but ultimately the court was compelled to reject the similar prayer since the matter had become too old and the stay was granted in this case. Eventually, the matter was heard ex parte and revision preferred by the Petitioner was dismissed after perusing the order passed by the trial court. It would, therefore, appear that no detail hearing was done in the case and the Petitioner could not get the opportunity of, detail hearing. The counsel for the Petitioner has, therefore, submitted that the Petitioner was highly prejudiced because his case was not argued due to which the revision application was dismissed and the Petitioner did not get justice. There was lapse on the part of conducting lawyer which has made him to suffer. It was, therefore, submitted that ill the ends of justice the Petitioner should, be afforded an opportunity of hearing which will be in conformity with the principles of natural justice and the court has inherent powers under Sections 482 of the Code of Criminal Procedure to recall the order for securing the ends of justice.

In Ibrahimsab vs. Faridabi; ILR 1986 Karnataka 2251, the Karnataka High Court has held as under :

"Section 362 Cr.P.C. contemplates judgment and final order disposing of the case. The expressions 'final order disposing of the case' mean a considered order on merits and not an order of dismissal for default and the provisions, therefore, do not come in the way of the Court (Sessions Judge) recalling such order and restoring the revision dismissed for default. The Sessions Judge was, therefore, not justified in dismissing the application made for re-admitting the revision dismissed for default. The petitioner has given satisfactory explanation for not being present on the particular date when the revision came up for hearing.

> The application made before the Sessions Judge is allowed and the Criminal Revision Petition No. 78/83 before the Sessions Judge, Dharwad, is restored and it is ordered that the revision shall be disposed of in accordance with law."

In Ayubbhai Abdulbhai Shah vs. Gabha Bechar and others: 1994 GLH (1) 447, the Gujara High Court, has held as under:

> "The aforesaid discussion from the Supreme Court decision read along with the reference to Halsbury's Laws of England makes it quite clear that the order dismissing the matter for default is not a decision on merits. The judgment in nothing if not a decision given by a competent Court on merits of a case in respect of a lis between the parties.
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> 8. There are several authorities starting with Jbrahim v. Emperor AIR 1928 Rangoon 288 holding that order of dismissal for default can be reviewed inspite of Section 369 of the Code of Criminal Procedure, 1898. There it has been clearly held that 'judgment' contemplated by Section 369 is only a decision on merits. Dismissal for default of appearance therefore, is not a judgment and High Court has power to review dismissal order for default of appearance passed in its appellate jurisdiction.
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> 9. On the same line is Raju v. Emperor AIR 1928 Lahore 462. The matter therein was decided with reference to Section 561A and Section 369 of 1898 Code. It is held therein that the High Court has no inherent power to alter or review its own judgment except in case of default, for want of jurisdiction. To the absence of inherent power with regard to alteration or review of its own judgment, obviously there is a specific provision in the said Section 369 of 1898 Code corresponding to Section 362 of the new Code quoted hereinabove. In other words, the learned Judges of the Lahore High Court have adopted the same reasoning as adopted in Rangoon decision. Dismissal for default not being a decision on merits, Section 369 corresponding to new Section 362 will not be a bar.
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> 10. In re Wasudev Narayan Phadnis relates to a case before a Magistrate who in exercise of his power under Section 259 of 1898 Code had discharged the accused persons on account of the absence of the complainant pointing out that it did not amount to applying his mind to the evidence. In the case the Magistrate has done nothing else but resorted to me procedural consequence and therefore, it being not a judgment he can certainly review that order and restore the complaint. In the case before the learned Judges of the Bombay High Court the Magistrate while so doing had not issued notice to the accused that was termed as mere irregularity not vitiating the proceedings.
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> 11. Sahadeo and Ors. v. Jaganath Kashinath and Ors. AIR 1950 Nagpur 77. In this decision, the learned Judges has taken the same view while dealing with a case under Sections 369, 419 and 421 of 1898 Code. An appeal was dismissed for non-filing of

judgment copy. It was held to be a rejection and a dismissal of appeal and therefore, it was held that there is no bar to consider the appeal on merits. The case was therefore, remanded in revision. The reasoning was that the said order cannot be said to be a judgment within the meaning of Section 369.

12. Madiah v. State of Mysore AIR 1963 Mysore 191. In this decision with reference Section 369 and Section 561A of the Code of Criminal Procedure, it is held by the learned Judge of the Court that where a revision application was dismissed for default of appearance, Court can review its order, if necessary, to secure the ends of justice. Section 369 of 1898 Code is not held to be a bar.

13. The head note of a decision of Gauhati High Court reported in Smt. Tulsi Devi v. Bhagat Ram 1983 Cri.LJ 72 also indicates that Section 362 does contain the words 'save as otherwise provided by this Code or any other law for the time being in force. It does not take away the inherent power of the High Court. If a revision application is dismissed for default of appearance, it cannot be treated as a final order disposing of the case within the meaning of Section 362 and, therefore, that order can be set aside by the High Court under Section 482.

14. Raghubans Prasad v. State : In this decision the learned single Judge of that Court has held that order of discharge is not a judgment within the meaning of Section 369 and can be reviewed by the trial Court eventhough not set aside by superior Court. The learned Judge has further pointed out in paras 3, 10 and 13 of the judgment that in order to constitute a judgment within the meaning of Section 369, mere must be an investigation on the merits of the case on evidence and after hearing the arguments, where, however the order is passed summarily without consideration of the entire evidence, as in the case of the order of discharge, it will not obviously amount to a judgment.

15. On the same line is one more decision of the High Court rendered by its Division Bench reported in Ramballabh Jha v. State of Bihar . In that case, the name of the Counsel was not shown in the daily list of cases. The appeal came to be dismissed without the Counsel being heard. Referring to Sections 561 A, 369 and 421 of 1898 Code, the learned Judges were pleased to hold that the judgment can be set aside for rehearing under Section 561A holding that the judgment rendered in appeal was without any opportunity being given to the appellant or his Advocate within the meaning of Section 421 and it was liable to be set aside and appeal could be ordered to be reheard in exercise of power under Section 461A.

16. The decision reported in Rajendra Laldas Acharya v. State 1993 (2) GLH 22 : 1993 (2) GLR 1259 is also on the same line wherein also the learned Judges have held that the right of rehearing, when the case was decided without giving an opportunity of hearing was accepted by the Supreme Court and by invoking the inherent powers by the High Court rehearing could be done.

17. Obviously, the aforesaid Patna decision is in keeping with the well-known position of the administration of justice that an act of the Court shall not prejudice any party.

18. My learned brother Justice J.N. Bhatt had an opportunity to deal with an identical question in Misc. Criminal Application No. 3225 of 1993. The Gujarat Electricity Board, its Officer being the original complainant, had filed a complaint before the learned J.M.F.C., Mansa. The accused came to be acquitted. Against that Cri. Appeal No. 924 of 1985 was filed which came to be dismissed for default on 25-2-1993. Pointing out that the Advocate of the original-appellant was unaware of the matter and raising other grounds as well, request for restoration was made. This was opposed to by the original-accused on the ground that Section 362 would come in the way. After referring to the provision of Section 362, my learned colleague straightway resorted to powers under Section 482 of the Code and decided to exercise inherent power reserved thereunder and restored the matter.

19. The result of the discussion so far is clearly to the effect that under the Old Code, the inherent powers reserved under Section 561A corresponding to Section 482 of the New Code are always available in such a case. However, I would like to state here that Section 362 of the Code will be attracted only and only if there is a final order as understood in contradistinction of the word "interlocutory" discussed above. With reference to the judgment also I definitely say that an order would be a judgment only if rights of the parties are decided after taking into consideration the entire material on record which will include oral evidence and documentary evidence, if any and all other materials that might have been placed on record.

19.1. Dismissing a matter for default being not an order of either of these 2 natures, obviously, there is no question of provisions of Section 362 coming in the way. The Court can certainly restore the same, if necessary, by invoking its inherent power under Section 482.

In Ramautar Thakur and others vs. State of Bihar; AIR 1957 Patna 33 & 1957 Cri. L.J. 82, the Patna High Court has held as under :

"There is no statutory provision for such a restoration. The power to restore a case dismissed for default, if it exists, must, therefore, be an inherent power, which is saved by- the provisions of Section 561 A, Criminal P. C., This section was inserted in the Criminal Procedure Code by the Amendment Act of 1923. It is merely a saving clause which does not confer a new power on the High Court. The decisions of the High Courts prior to this amendment are, therefore, still applicable, The Criminal Procedure Code, unlike the Civil Procedure Code, does not define 'Judgment' A 'judgment' means the expression of the opinion of the Court arrived at after, a due consideration of the evidence and all the arguments. The above meaning of the word 'Judgment', as is to be found in Full Bench decisions of the Madras High Court in Re Chinna Kaliappa Goundan, ILR 29 Mad 126 (Q), of the Bombay High Court in

Emperor v. Nan-dial Chunilal, 48 Bom LR 41: (AIR 1946 Bom 276) (FB) (R), and of the Calcutta High Court in Damu Senapati v. Shridhar Rajwar, ILR 21 Cal 121 (S), was approved by their Lordships Bhagwati and Imam JJ., in the Supreme Court case just mentioned.

Their Lordships mentioned that the observations of the Madras High Court in its Full Bench decision, just referred to, were quoted with approval by Sulaiman J., in Dr. Hori Ram Singh v. Emperor, AIR 1939 FC 43 (T), in which his Lordships Sulaiman J., observed that the Criminal Procedure Code did not define a 'judgment', but various sections pf the Code suggested what it meant His Lordship then discussed those sections and concluded that 'judgment' in the Code meant a judgment of conviction or acquittal.

The question, therefore, for our consideration is, is the order of dismissal for default a 'judgment' ?

For the reasons given above, I hold that this Court has got powers to restore Cri. Revn. No. 198 of 1956, which stood dismissed for default, by force of the order of this Court dated 10-2-1956, in the exercise of its inherent jurisdiction under Section 561A, Criminal P. C."

In the case of Hari Singh Mann vs. Harbhajan Singh Bajwa; 2001 SCC (Cri) 113, Hon'ble the Apex Court has held as under :

"We have noted with disgust that the impugned orders were passed completely ignoring the basic principles of criminal law. No review of an order is contemplated under the Code of Criminal Procedure. After the disposal of the main petition on 7.1.1999, there was no lis pending in the High Court wherein the respondent could have filed any miscellaneous petition. The filing of a miscellaneous petition not referable to any provision of Code of Criminal Procedure or the rules of the Court, cannot be resorted to as a substitute of fresh litigation. The record of the proceedings produced before us shows that directions in the case filed by the respondents were issued apparently without notice to any of the respondents in the petition. Merely because the respondent NO.1 was an Advocate, did not justify the issuance of directions at his request without notice of the other side. The impugned orders dated 30th April, 1999 and 21st July, 1999 could not have been passed by the High Court under its inherent power under Section 482 of the Code of Criminal Procedure. The practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the court.

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 (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."

In the case of State of Punjab vs. Davinder Pal Singh Bhullar and others; 2012 Cri. L. J. 1001 SC, Hon'ble the Apex Court has held as under :

> "If a judgment has been pronounced without jurisdiction or in violation of principles 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 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"

From the aforesaid judgments of Hon'ble the Apex Court as well as of various High Courts, it is clear that prohibition of Section 362 Cr.P.C. is absolute and when the judgment has been signed, even the High Court in exercise of its inherent power under section 482 Cr.P.C. has no authority or jurisdiction to alter or review the same.

Certainly, if any petition has been dismissed for want of prosecution or in default of the petitioner and the reasons for decision have not been rendered after applying the mind to the pleadings of the case as well as the grounds of petition, that order of dismiss in default cannot be termed as 'Judgment' because the judgement should contain not only the facts and pleadings of the case but also the documentary as well as oral evidence. In the judgment, it is required that there should be marshalling of the facts as well as appreciation of the evidence in respect of the determination of the matter in issue. The judge is also required to give reasons for its decision after looking into the

various probabilities as well as cogent reasons for relying or not relying the contention and evidence of either party.

The process of judgment involves the following stages:

I. Collection of Facts;

II. Time Sequencing of Facts III. Shifting facts from opinions IV. Marshalling of Facts V. Find out the Problems (Charge/Issues) VI. What is the main problem (Charge/Issue) VII. Record of Evidence VIII. Churning of Evidence IX. Shifting of Evidence X. Weighing the different alternatives XI. Apply Precedents XII. Look into Prohibitions XIII. Findings and Conclusions XIV. Order.

In the present case, the petition has been dismissed for want of prosecution, although opportunity of hearing was given but that opportunity of hearing could not be availed due to sudden illness of the counsel. The inherent power under section 482 Cr.P.C. can be exercised to give effect to any order under Cr.P.C. or to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Certainly, if the application has been dismissed for default, that cannot be termed as 'judgement'.

Accordingly, the bar as provided by section 362 Cr. P.C. shall not be applicable. This court has power to dismiss in default any application or writ petition and at the same time has also power to restore such proceedings on sufficient grounds being shown for non-appearance provided it appears to the court that default was not wilful and it was accidental. There are instances, where either legal advise is given or due to shrewd character of the litigant malafide efforts are adopted with a view to delay the proceedings of the case, such tactics are also adopted to get the case dismissed in default and then to move application for restoration and thus, lingering on the proceedings. Certainly, such practice must be carved out and should not be permitted to continue.

The views expressed by the various High Courts in the aforesaid decisions are in favour of the restoration of such petition, which has been dismissed in default in exercise of powers under section 482 of the code of criminal procedure with a view to secure the ends of justice and I am also in respectful agreement with the views expressed by the various High Courts in the aforesaid decisions.

Therefore, I am of the view that if any petition has been dismissed in default and the application for recall is made, then it will not come within the meaning of words 'alter' or 'review' as expressed in Section 362 of the Code. Accordingly, such orders may be recalled or set aside provided the intention of the parties is bonafide i.e. party who has moved the application for recall or restoration is not unnecessary lingering on the proceedings malafidely or that interim order or stay order, if any, is not being misused.

Accordingly, the application for restoration or recall of the order is maintainable and the prohibition of Section 362 Cr.P.C. do not apply in the petitions, which have been dismissed in default without discussing the merits of the case because it do not come within the prohibition of 'alter' or 'review' of judgment, which has entirely a different meaning.

In the present case, the petition was dismissed for want of prosecution because the counsel for the petitioner could not appear due to sudden illness for which the learned counsel for the CBI also has raised no objection.

Accordingly, the application for recall is allowed.

The order dated 29.04.2015 is recalled. The petition is restored to its original number and status.

Order Date :- 5.8.2015 VNP/-