Parvez Shahjahan And 4 Others vs State Of U.P. And Another on 6 October, 2023

Author: Saurabh Shyam Shamshery

Bench: Saurabh Shyam Shamshery

HIGH COURT OF JUDICATURE AT ALLAHABAD

Neutral Citation No. - 2023:AHC:192301

AFR

Reserved on 04.10.2023

Delivered on 06.10.2023

Court No. - 48

Criminal Misc. Recall/Restoration Application No. 4 of 2023

IN

Case :- APPLICATION U/S 482 No. - 1835 of 2022

Applicant :- Parvez Shahjahan And 4 Others

Opposite Party :- State Of U.P. And Another

Counsel for Applicant :- M J Akhtar

Counsel for Opposite Party :- G.A.,Praveen Kumar Giri,Shadab Alam

Hon'ble Saurabh Shyam Shamshery,J.

1. This is an application for restoration/ recall of judgment and order dated 24.11.2022 passed by this Court in above captioned case. Conclusion of the order dated 24.11.2022, as mentioned in paragraphs no. 23 and 24, are reproduced hereinafter:

"23. In view of above discussion, I come to conclusion that -:

(1) In pursuance of F.I.R. referred above, the investigation was conducted and a charge sheet was filed on 03.04.2020 under Section 173 (2) Cr.P.C. for offence under Sections 323, 504, 506 and 336 I.P.C. against four applicants except applicant No.2 but the learned trial Court has not taken cognizance on it.

(2) The Superintendent of Police, Azamgarh on the basis of an application filed by complainant has directed for further investigation and not re-investigation, therefore, there was no illegality in the order of further investigation.

(3) After further investigation, on the basis of evidence of doctor and report of CT Scan, supplementary charge sheet was filed on 13.07.2020 against all the applicants for committing offence under Sections 336, 323, 504, 506, 147, 308, 452 I.P.C., therefore, there was no abuse of process in the submission of supplementary charge sheet.

(4) The learned trial Court rightly considered both the charge sheets filed under Section 173 (2) Cr.P.C. as well as supplementary charge sheet filed under Section 173 (8) and after considering the evidence on record, took cognizance and summoned the applicants.

(5) The dispute, if any in regard to contrary statements of doctor cannot be considered to be a ground to quash the criminal proceedings ignoring the medical report of CT Scan of head of injured wherein injury was found and an opinion given by doctor that it was a grievous injury. Therefore, there is no illegality in taking cognizance of offence under Sections 336, 323, 504, 506, 147, 308, 452 I.P.C. by the learned trial Court.

24. In view of above, I do not find any illegality or irregularity or abuse of process of law in the investigation and submission of charge sheet under Section 173 (2) Cr.P.C. and thereafter supplementary charge sheet as well as order of cognizance on both charge sheets and summoning order whereby applicants are summoned."

2. It has been pointed out that aforesaid judgment was challenged by applicants before Supreme Court by way of filing Special Leave to Appeal (Criminal) No. 2672 of 2023 which was dismissed as not pressed reserving the liberty, as prayed for. The order dated 03.03.2023 passed by Supreme Court in its entirety is mentioned hereinafter:

"Mr. Varinder Kumar Sharma, learned counsel appearing for the petitioners submits that the court could not have taken cognizance and issued summons against the accused on the basis of the supplementary chargesheet. However, we find that the High Court had noted that when the first chargesheet was filed, the investigation was incomplete and was continuing. This is contended to be an erroneous finding of the

High Court.

In view of the above, the learned counsel prays for the liberty to withdraw this petition and move the High Court in its review jurisdiction. The Special Leave Petition is accordingly dismissed as not pressed reserving the liberty as prayed for."

3. Sri V.M. Zaidi, learned Senior Advocate assisted by Sri M.J. Akhtar, learned counsel for applicants, has reiterated the averments made in present application for recall/ restoration.

4. An impression was created that there was a perverse finding, however, when learned Senior Advocate was confronted with above referred conclusion, apprehension, if any, was removed.

5. This Court has made a specific query that since there is bar as provided under Section 362 Cr.P.C., under what circumstances present recall/ restoration application could be considered, for that learned Senior Advocate has no satisfactory reply.

6. At this stage, it would be relevant to refer a judgment passed by Supreme Court in Ganesh Patel vs. Umakant Raroria, 2022 SCC OnLine SC 2050 wherein it was held that an application for recall of order was maintainable as it was an application seeking a procedural review and not a substantive review to which Section 362 Cr.P.C. would be attracted. Supreme Court has placed reference on the aspect of different between recall and review by referring a judgment passed in Budhia Swain vs. Gopinath Deb (1999) 4 SCC 396.

7. Learned Senior Advocate has not been able to point out any procedural error occurred in above referred order passed by this Court since it was passed after hearing parties on merit and after considering respective averments raised on behalf of rival parties.

8. The Court further considered the argument of learned Senior Advocate that this application may be considered as a review application. However, since there is a specific bar to review a judgment passed on merit after hearing all concerned parties under Section 362 Cr.P.C., the aforesaid prayer has no legal basis.

9. At this stage, it would be apposite to refer a judgment passed by Supreme Court and another passed by this Court wherein the aforementioned issue has been considered at length:

(A) State of Punjab vs. Davinder Pal Singh Bhullar (2011) 14 SCC 770:

"III. BAR TO REVIEW/ALTER- JUDGMENT

44. There is no power of review with the Criminal Court after 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 disentitled 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. (See: Hari Singh Mann v. Harbhajan Singh Bajwa & Ors., AIR 2001 SC 43; and Chhanni v. State of U.P., AIR 2006 SC 3051).

45. Moreover, the prohibition contained in Section 362 Cr.P.C. is absolute; after the judgment 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. (See: Moti Lal v. State of M.P., (2012) 11 SCC 427: AIR 1994 SC 1544; Hari Singh Mann (2001) 1 SCC 169: 2001 SCC (Cri) 113; and State of Kerala v. M.M. Manikantan Nair, (2001) 4 SCC 752 : AIR 2001 SC 2145).

46. 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. (Vide: Chitawan & Ors. v. Mahboob Ilahi, 1970 Crl.L.J. 378 (All); Deepak Thanwardas Balwani v. State of Maharashtra & Anr., 1985 Crl.L.J. 23 (Bom); Habu v. State of Rajasthan, AIR 1987 Raj. 83 (F.B.); Swarth Mahto & Anr. v. Dharmdeo Narain Singh, AIR 1972 SC 1300; Makkapati Nagaswara Sastri v. S.S. Satyanarayan, AIR 1981 SC 1156; Asit Kumar Kar v. State of West Bengal & Ors., (2009) 2 SCC 703; and Vishnu Agarwal v. State of U.P. & Anr., AIR 2011 SC 1232).

47. This 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 Represented by D.S.P., S.B.C.I.D., Chennai v. K.V. Rajendran & Ors., AIR 2009 SC 46).

48. In Smt. Sooraj Devi v. Pyare Lal & Anr., AIR 1981 SC 736, this Court held that the prohibition in Section 362 Cr.P.C. 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". Those 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 judgment. The inherent power of the Court is not contemplated by the saving provision contained in Section 362 Cr.P.C. and, therefore, the attempt to invoke that power can be of no avail.

49. Thus, the law on the issue can be summarised 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."

(B) Mukesh Updhyay vs. State of U.P. and another, 2019:AHC:42284:

"This issue has been dealt by the Hon'ble Supreme Court in the following judgments :-

The Hon'ble Supreme Court in the matter of Soorja Devi vs. Pyare Lal and Another reported at (1981) 1 SCC 500 has held in paras No.4, 5, 6 and 7 that :-

"4. The sole question before us is whether the High Court was right in refusing to entertain Criminal Miscellaneous Application No. 5127 of 1978 on the ground that it had no power to review its order dated Ist September, 1970. Section 362 of the Code of Criminal Procedure declares :- "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". It is apparent that what the appellant seeks by the application is not the correction of a clerical or arithmetical error. What she desires is a declaration that the High Court order dated September 1, 1970 does not affect her rights in the house property and that the direction to restore possession to Pyare Lal is confined to that portion only of the house property respecting which the offence of trespass was committed so that she is not evicted from the portion in her possession. The appellant, in fact, asks for an adjudication that the right to possession alleged by her remains unaffected by the order dated September 1, 1970. Pyare Lal disputes that the order is not binding on her and that she is entitled to the right in the property claimed by her. Having considered the matter, we are not satisfied that the controversy can be brought within the description "clerical or arithmetical error". A clerical or arithmetical error is an error occasioned by an accidental slip or omission of the court. It represents that which the court never intended to say. It is an error apparent on the face of the record and does not depend for its discovery on argument or disputation. An arithmetical error is a mistake of calculation, and a clerical error is a mistake in writing or typing. Master Construction Co. (P) Ltd. v. State of Orissa.

5. The appellant points out that he invoked the inherent power of the High Court saved by Section 482 of the Code and that notwithstanding the prohibition imposed

> by Section 362 the High Court had power to grant relief. Now it is well settled that the inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code. Sankatha Singh v. State of U.P3. It is true that the prohibition in Section 362 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". Those 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 judgment. 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.

The Hon'ble Supreme Court in the matter of Narayan Prasad vs. State of Bihar reported at 2017 SCC Online SC 1738 has held that :-

> 6. In order to decide the controversy at hand, it would be useful to reproduce Sections 362 and 482 of The Code of Criminal Procedure, 1973 [hereinafter 'CrPC' for brevity] -
>
> 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.
>
> 482. Saving of inherent powers 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.
>
> 7. Plan reading of these Sections indicate that the prohibition under the Section 362 of Cr.P.C. is absolute; after the judgment is signed even the High Court in exercise of its inherent power under Section 482 of CrPC has no authority or jurisdiction to alter/review the same. The inherent power under Section 482 of CrPC was purported to avoid the abuse of the process of the Court and to secure ends of justice. Such power cannot be exercised to do something which is expressly barred under the Code.
>
> 8. 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."

Co-ordinate Bench of this Court in a judgment dated 30.5.2016 passed in Criminal Misc. Recall Application No.126367 of 2016 in Application u/s 482 No.5938 of 2016 has held that :-

> "Full Bench of five Judges in Mahesh Vs. 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".

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 Vs. Harbhajan Singh Bajwa, 2001 (1) SCC 169).

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 CrP.C has no authority or jurisdiction to alter/review the same (vide Moti Lal Vs. State of M.P. (2012) 11 SCC 427).

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 Vs. Mahboob Ilahi, 1970 Cri. LJ 378(All), Asit Kumar Kar Vs. State of West Bengal (2009) 2 SCC 703)".

In view of the abovementioned judgments, the review petition is expressly barred under Section 362 Cr.P.C and applicant has not able to point out that impugned judgment was passed contrary to the rule of natural justice or passed without jurisdiction, therefore, even under power of 482 Cr.P.C., this review application cannot be entertained. Thus, the present review application is rejected being not maintainable."

10. It would also be apposite to refer a very recent judgment of Supreme Court in State through Central Bureau of Investigation vs. Hemendhra Reddy and another, 2023 SCC OnLine SC 515 on further investigation even after final report was submitted and for reference conclusion of the judgment is reproduced hereinafter:

> "83 We may summarise our final conclusion as under:

(i) Even after the final report is laid before the Magistrate and is accepted, it is permissible for the investigating agency to carry out further investigation in the case. In other words, there is no bar against conducting further investigation under Section 173(8) of the CrPC after the final report submitted under Section 173(2) of the CrPC has been accepted.

(ii) Prior to carrying out further investigation under Section 173(8) of the CrPC it is not necessary that the order accepting the final report should be reviewed, recalled or quashed.

(iv) Further investigation is merely a continuation of the earlier investigation, hence it cannot be said that the accused are being subjected to investigation twice over. Moreover, investigation cannot be put at par with prosecution and punishment so as to fall within the ambit of Clause (2) of Article 20 of the Constitution. The principle of double jeopardy would, therefore, not be applicable to further investigation.

(v) There is nothing in the CrPC to suggest that the court is obliged to hear the accused while considering an application for further investigation under Section 173(8) of the CrPC. "

11. In aforesaid circumstances since counsel for applicants is not able to point out any procedural error in the judgment dated 24.11.2022 and further as held in Davinder Pal Singh Bhullar (supra) and Mukesh Updhyay (supra) that there is a bar under Section 362 Cr.P.C., to review any judgment except it was passed contrary to the principles of natural justice or being passed without jurisdiction, however, admittedly, no such circumstance exist in present case.

12. Application is accordingly rejected.

Order Date :- 06.10.2023 AK