Amir Rai And Ors. vs The State Of Bihar And Anr. on 18 May, 1990

Equivalent citations: 1991(1)BLJR41

JUDGMENT

Ram Nandan Prasad, J.

1. The prayer in this application is that this Court in exercise of its inherent powers under Section 482 of the Code of Criminal Procedure should modify its judgment and order dated 22.12.1982 passed in criminal revision 1365/80. This criminal revision 1365/80 had been filed against the judgment and order dated 16.9.1980 passed in criminal appeal. 34/79/27/80 by the 1st Additional Sessions Judge whereby he upheld the judgment and order dated 27.1.1979 passed by Sri S.R. Hussain, Judicial Magistrate, 1st Class, Hajipur in G.R. Case. No. 165/69 in which the learned Magistrate had variously convicted the petitioners under Sections 14, 148, 323 and 324 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for four months for offences under Sections 147, 148 and 323 of the Indian Penal Code and to rigorous imprisonment for six months under Section 324 of the Indian Penal Code.

2. Criminal Revision No. 1365/80 was admitted on the question of sentence only. From the judgment passed in that case it appears that at the time of hearing a prayer was made on behalf of the petitioners that all the sentences under the different offences be reduced to the period the petitioners have already remained in custody. The prosecution of course opposed this prayer and the learned Hon'ble Justice R.N. Prasad (my name sake) after considering all aspect of the matter did not accede to the prayer made on behalf of the petitioners. The judgment of criminal revision 1365/80 shows that the Hon'ble Judge after taking into consideration the facts and circumstances of the case reduced the sentences under Sections 147, 148 and 323 of the Indian Penal Code from rigorous imprisonment for four months to rigorous imprisonment for one month each and he also modified the sentence imposed for the offence under Section 324 of the Indian Penal Code and reduced it from six months to two months and directed that all the sentences shall run concurrently. With the above modifications, the Hon'ble Judge dismissed the criminal revision in question. About a month later i.e., on 24.1.1983 a petition was filed in criminal revision 1365/80 praying therein to modify the judgment and order dated 22.12.1980 on the ground that there has been no compliance of the mandatory provisions of section 360 of the Code of Criminal Procedure and as such the judgment and order passed in criminal revision needs modification. On 2.3.1983, when this petition was placed before the Hon'ble Judge who had passed the judgment and order dated 22.12.1982, he recorded the following order on 2.3.1983.

Heard the learned Counsel for the petitioners, Learned Counsel is allowed to make necessary correction in the top portion of the application and get the application converted into a seperate Cr.

Misc. application. The application is accordingly converted into a Cr. Misc. application. Put up this application for admission on 7.3.1983.

In view of this Order, that petition was converted into a regular criminal miscellaneous came to be registered as an application under Section 482 of the Code of Criminal Procedure and thus the present case criminal miscellaneous 2086/83 was registered. The learned Counsel for the petitioners drew attention to the judgment of the trial court and urged that the court after finding the different accused persons guilty of the offences under Sections 147, 148, 323 and 324 of the Indian Penal Code, all of which are punishable with imprisonment of less than seven years, did not at all consider the question of releasing them on probation and gave no reasons why they could not be released on probation and the various sentences had to be imposed upon them. The submission is that this omission is a clear violation of the mandatory provisions of Section 360 and 361 of the Code of Criminal Procedure (hereinafter referred to as the Code). The appellate court also did not take note of this. It is urged that unfortunately at the time of hearing of the criminal revision application on the question of sentence, me learned lawyer for the petitioners did not address the court on this point and the Hon'ble Judge also missed this point thereby resulting injustice to the petitioners and also violation of the mandatory provisions of the law. In this context, the prayer is that this Court in exercise of its inherent power should correct this illegality and contravention of the mandatory provisions and the question whether the petitioners deserve to be released on probation under Section 360 of the Code of Criminal Procedure or under the Probation of Offenders Act should be duly considered and orders passed in accordance with law.

3. Mrs. S.L. Jha, appearing on behalf of the State on the other hand submitted that the petitioners in act were asking for a review on merits of the judgment passed in the criminal revision application and the court does not possess any such jurisdiction to make such a review and the inherent powers of the court cannot be invoked to confer jurisdiction were none exists. In this connection she has also drawn attention to the provision of Section 362 of the Code which specifically prohibits the alteration or review of the judgment except to correct a clerical or arithmetical error. Her submission is that criminal revision 1365/80 had been heard on the question of sentence only and after considering the facts and circumstances of the case the learned judge was pleased only to make certain modifications in the sentence and dismissed the revision application. As such the re-opening of hearing of the criminal revision application for consideration as to whether the sentences ultimately awarded against the petitioners should prevail or whether they should be released on probation amounts to a prayer for alteration and review of the judgment

4. The petitioners have contended that the provision of Section 360 of the Code is mandatory and casts a duty upon the court to consider and determine whether a convicted accused should be released on probation or not and on this account Section 361 makes it obligatory on the court to give special reasons for not dealing with the accused under the provisions of Section 360. In support of his contention the learned Counsel has placed reliance on some decisions of the Supreme Court. The first case cited by him is Bishnu Deo v. The State of West Bengal. In this their Lordships were considering the significance of the words "special reasons" used in Section 354(3) and Section 361 of the code and while so doing they made the following observations:

> If the Court refrains from dealing with an offender under Section 360 or under the provisions of the Probation of Offenders Act, or any other law for the treatment, training, or rehabilitation of youthful offenders, where the Court could have done so, Section 361, which is a new provision in the 1973 Code, makes it mandatory for the court to record in its judgment the special reasons for not doing so. Section 361 thus casts a duty upon the Court to apply the provisions of Section 360 wherever it is possible to do so and, to state 'special reasons' if it does not do so.
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> In the case ,.Surendra Kumar v. The State of Rajasthan, the apex Court appears to have taken a similar view by accepting the contention that a convicted person is entitled to the benefit of mandatory provisions of Section 360 of the Code unless We are special reasons to the contrary. There are several other decisions on this point and the principle enunciated is the same. I, therefore, have no hesitation in accepting the petitioners contention that the provisions of Section 360 of the Code are mandatory and whenever Court records an order of conviction it must consider the applicability of Section 360 of the Code and if it decides not to release the convicted person on probation it muse give special reasons for the same. If the court does not consider the applicability of the provisions of Section 360 of the Code or the Probation of Offenders Act and also gives no reason why the convicted person is not being given the benefit of probation, there is no doubt that it commits an error of law. However, though this may amount to an error of law, it does not make the judgment of court void

5. The petitioners relied on the case Dilbagh Singh v. The State of Punjab :1979 Cr LJ 636, where the Supreme Court while hearing an appeal arising out of a case of murder in which against Dilbagh Singh conviction had been recorded under Sections 324/34 and 323 of the Indian Penal Code, held that in the facts and circumstances of the case the appellant should be released on probation and accordingly passed an order to that effect for his release after executing the bond. Attention was also drawn to the case reported in 1979 Cr LJ 1167 jai Prakash v. The State in which the Delhi High Court while hearing a criminal revision application, observed that the benefit of probation can be denied only if there are special reasons and the High Court itself called for a report from the Probation Officer and on its basis released the petitioner (accused) on probation. On the basis of these decisions, it was submitted on behalf of the petitioners that even though the trial court and the appellate court had omitted to consider the question of release of the petitioners on probation, a duty was cast upon the revisional court to take note of the mandatory provisions of Section 360 of the Code and to determine whether the petitioners should be released on probation and that if the learned judge thought that the petitioners were entitled to benefit of probation he could have easily called for a report from the Probation Officer as had been done by the Delhi High Court in the case of Jai Prakash v. The State (supra), but if he thought that the benefit of probation cannot be given to the petitioner he had to record his special reasons for the same. The argument is that since the mandatory provision of law has been violated resulting in gross injustice to the petitioners, the court in exercise of its inherent powers should correct this injustice and pass orders as to whether they should or should not be released on probation. He argued that even if this amounts to a review of the judgment passed by this Court in criminal revision 1365/80, there is no impediment in doing so

to correct a patent error of law and undoing the injustice that has befallen the petitioners.

6. There is absolutely no doubt that the High Court while hearing the revision application could have applied the provisions of Section 360 of the Code or the Probation of Offenders Act even though the same had not been done by the trial court and the appellate court-vide , Rajan Lal v. The State of Punjab. There is also no doubt that when the High Court while exercising its revisional jurisdiction, did not record in its judgment any special reasons as mandated by Section 361 of the Code an error of law occurred. But the question is can this legal infirmity be removed or rectified in exercise of the inherent powers of this Court under Section 482 of the Code? The petitioners contended that this can be done and for this purpose placed reliance on the case -State of Karnataka v. L. Munniswami. In that case, the Sessions Judge had discharged some accused persons and adjourned, the case for framing of charge against others and when the matter was taken to the High Court the latter in exercise of its inherent powers quashed the order of the Sessions Judge whereby he had directed for training of charge against other accused persons. The State of Karnataka appealed against the order of the High Court and while considering the scope any object of the inherent power under Section 482 of the Code (i.e., Section 561A of the Old Cr.P.C.) the Supreme Court observed as follows:

> In the exercise of this wholesome power the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed The learned Counsel for the petitioners has also cited some other cases AIR 1979 SC 1754-Sharda Prasad v. The State of Bihar 1988 BLJR (SC) 292 : Madhava Rao Sindhiya v. Shambhajee, hearing upon the scope of the inherent powers of the High Court under Section 482 of the Code. Undoubtedly, the legal position is well settled that the inherent power of the High Court under Section 482 of the Code is quite a wide and wholesome power and can be taken recourse to for preventing abuse of the process of the Court or correcting miscarriage of justice. But it will not be correct to say that the exercise of inherent powers has no limitations and may be used in each and every case where some illegality may have occurred. The inherent powers cannot be exercised for assuming jurisdiction where none exists or for doing something which has been specifically prohibited by provision of a statute.

7. The criminal revision application was admitted on the question of sentence only and having considered what sentence will be appropriate the learned Judge who heard the criminal revision application, modified the sentences by reducing them and passed judgment accordingly, Of course an error of law has crept in the judgment because the mandatory provisions of Section 360 and 361 of the Code were overlooked Now in this application under Section 482 of the Code the prayer is to modify the sentence imposed upon the petitioners after considering the applicability of Section 360 of the Code and the Probation of Offenders Act. Undoubtedly, therefore, the prayer for such notification amounts to a prayer for reviewing the judgment. Such review is specifically barred under Section 362 of the Code which is as follows:

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 The learned Counsel for the petitioners accepts that what is sought to be corrected is not a clerical or arithmetical error. The modification sought for is obviously in the substantive part of the judgment and thus the prayer is to review the judgment on merits but this is specifically barred under Section 362 of the Code which means that the court has no jurisdiction to review its judgment, on merits. In the case of State of Orissa v. Ram Chandra Agrawala , in which the Supreme Court was considering the provisions of the old Criminal Procedure Code 1989, it was clearly held that Section 369 of the Code (which corresponds to Section 362 of the new Code) is general in its application and prohibits all courts from altering or reviewing its judgment when once it has been signed. Their Lordships further held as follows:

This inherent power cannot relate to any of the matters specifically dealt with by the Code. It would follow that inherent powers cannot be invoked to exercise powers which would be inconsistent with any of the specific provisions of the Code.

But even earlier to this decision of the Supreme Court, a Full Bench of the Calcutta High (Joint dad come to the same conclusion and held likewise. In the case reported in AIR 1970 Calcutta 485 (Full Bench) : 1970 Cr.LJ 1463 State v. Hari Mundra the question which arose for determination was whether the High Court in its revisional jurisdiction is competent to interfere with an order passed by a single Judge of the High Court in exercise of its original criminal jurisdiction. In this context, an argument was advanced that even the High Court cannot interferee under Section 439 of the Code in exercise of its normal revisional powers, it can do so by exercise of its inherent power Section 561A of the Code (old). The Full Bench observed as follows:

Mr. Rao claimed that even if the High Court cannot interfere under Section 439 of the Code with the order of a Judge of the High Court exercising ordinary cirminal jurisdiction it can do so by the exercise of its inherent powers which has been preserved by Section 561A we are unable to agree. In the present case, the question is one of jurisdiction not of making an order in valid proceedings to give effect to any order under the Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no inherent power in a court to assume jurisdiction can be conferred only by statute....

In this case, no inherent power is available to assume and exercise a jurisdiction the Court does not possess.

The learned Counsel for the petitioner also drew attention to a decision of the Full Bench of the Allahabad High Court Raj Narain v. The State wherein the majority view

(Mothum C.J. Contra) was that if the case could come within the ambit of the three conditions mentioned in Section 561A, for exercise of the inherent power, then the High Court has power to revoke, review, recall, or alter its own earlier decision The Full Bench appears to have enlarged the scope of inherent powers a bit too wide. The position in this regard now stands crystallized by the decision of the Supreme Court in Ram Chandra Agrawala's case (supra) and scope of Section 482 of the Code has to be defined in accordance with that judgment. It is now well settled that the Court has no inherent power of review and such a power must be conferred by law either specifically or by necessary implication vide Patel Narahi Thakarahi v. Praduemun Singhji. In the case of Grindlay's Bank v. Central Government Industrial Tribunal reported in AIR 1981 SC 606, the apex Court, however, indicated that there is an exception to the principle that the power of review can be exercised only on the basis of statutory provision. It observed that the expression "review" is used in two distinct senses, namely:

(i) A procedural review which is either inherent or implied in a Court or Tribunal to set-aside a palpably erroneous order passed under a misapprehension by it, and (ii) a review on merits when error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Court in fatel Narahi Thakarahi, (supra) held that no review lies on merit unless a statute specifically provides for it. Obviously, when a review is sought due to procedural defect the inadvertant error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process and such power ihherest in every Court or Tribunal.

The position, therefore, is clear that no review lies on merits unless the statute expressly provides for it but where a procedural error has crept in due to in advertance of the Court then every Court has inherent power to correct the same ex debito justitiae with a view to prevent the abuse of the process of the Court so far as review of a judgment given by a criminal court is concerned, it has to be borne in mind that there is no specific provision in the Criminal Procedure Code giving such power of review and indeed on the contrary there is a clear bar placed on the power of review by the specific provisions of Section 362 of the Code. In my opinion, therefore, in view of the provisions of Section 362 of the Code a Criminal Court has no jurisdiction to review its own judgment on merits.

8. The petitioners placed reliance on a case reported in 1989 PLJR p. Krishna Prasad and Ors. v. Sushila Devi. That case arose out of a criminal revision application disposed of in favour of the petitioner on the basis that "learned Counsel for the opposite parties concedes to the application and he has nothing to say". The opposite parties thereafter filed and application under Section 482 of the Code alleging that in fact the opposite party was appearing in person and no conhsel had been engaged by him and that the order in the revision application had been obtained by the petitioner by applying a trick On the basis of materials on record the Court found that opposite party was appearing in person in the revision case and on the date of hearing he was not given any opportunity of being heard and thus the order passed in the criminal revision application did not record the correct situation. In this context, the Court in exercise of its inherent powers ordered that the criminal revision application be put down for rehearing. I do not think this case helps the petitioners

in any way. Obviously, there was procedural error as the Court had mistakenly thought that both the parties were present and had been heard and as such passed the order disposing of the criminal revision application. In this situation the Court was fully justified in ex debito justitiae and correcting the procedural error that had crept in The petitioner also placed reliance on the case reported in 1989 Cr LJ 2382. Girdharilal and Ors. v. Pratap Raj Mehla. That was also a case where a criminal revision filed in the Karnataka High Court had been allowed without hearing the other party. Thereafter an application was filed under Section 482 of the Code while considering whether such an application should be admitted or not the Court passed the order at the admission stage making distinction between alter and review and recall and prima facie was of the opinion that while Section 362 of the Code prohibits alteration and review of a judgment, there is no such prohibition in "recalling" a judgment or an order passed by a criminal court. For taking this view his Lordship placed reliance on a full Bench decision of the Rajasthan High Court reported in AIR 1987 Raj. p. 83-Habu v. The State of Rajasthan what view was finally taken by the Karnataka High Court in that application is not known. However, I and may self in difficulty in accepting the position that though alteration or review is prohibited, the judgment in its entirety may be "recalled" and set aside in exercise of the inherent powers under Section 482 of the Code and then reheard on merits. What is directly and specifically prohibited by the statute, namely the provisions of Section 362 of the Code, cannot be done indirectly by taking recourse to the power of recall and under the garb of recall setting aside the earlier judgment and rehearing it on merits which in defect means review of the judgment. However so far as re-hearing a criminal revision application or any other case on the ground that a gross procedural error has crept in inasmuch as the other party was not given opportunity for hearing resulting in violation of the principle of natural justice, every court has inherent power to correct its own mistake and re-hear the case by giving opportunity to the other side. When it does soil will be acting ex debito justitiae. For this obviously there is no prohibition. Since the situation is the Karnataka case was the same its re-hearing could be justified on the principle that the Court had inherent power to act ex debito justitiae and correct its own mistake.

9. Having taken note of the various rulling cited by the petitioners and also the decisions of the Supreme Court and other High Courts, the legal position which clearly emerges is as follows:

> (i) The inherent powers of the High Court as indicated in Section 482 of the Code (561A of the old Code) may be exercised to make such orders as may be necessary to give effect to any order under the Code in a valid proceeding, or to prevent abuse of the process of any Court or otherwise to secure the end of justice. This inherent power is a wide and wholesome one and there is no hard and fast rule and the Court may exercise such power in appropriate cases wherever it considers necessary.
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> (ii) That inherent power cannot be invoked in respect of matters for which there is specific provision in the statute.
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> (iii) The inherent power cannot be invoked where there is express prohibition in the Code or any other statute. Section 362 of the Code is one of those provisions which contains an specific prohibition and debars all courts (including the High Court) from altering or reviewing the judgment of final order. Thus this section embodies the

principle of functus officio and as such a Court has no jurisdiction to review or alter its judgment or final order on merits.

(iv) The power of a Court to act ex-debito justitiae and correct procedural errors which has occurred due to the Courts own inadvertance or mistake thereby resulting in violation of the principle of natural justice is a plenery power which inheres in every Courts. It is incidental to the functioning of every Court and does not flow from any statutory provision.

(v) What cannot be done directly due to any specific statutory prohibition, cannot and should not be done indirectly by invoking the inherent powers of the High Court. This is a well settled legal principle and has been recently enunciated also in the case reported in Judgments Today 1987(4) SC 637, State of Karnataka v. Rajan Kumar Machananda.

10. The prayer of the petitioners to modify the judgment in criminal revision No. 1365/80 amounts to reviewing the judgment on merits and this the law does not permit. No doubt an error of law has crept in the judgment passed in revision inasmuch as the mandatory provision of Sections 360 and 361 had not been complied with but nevertheless it is not possible to invoke the inherent powers under Section 482 to review the judgment for correction such an error. I am fortified in this view by the decision of the Karnataka High Court reported in 1988 Cr LJ 2334. The facts of that case were exactly similar to the present case. The trial court had convicted the petitioner for the offences which were punishable with imprisonment of less than seven years, neither the trying Magistrate nor the appellate court considered the applicability of Section 360 of the Code or the Probation of Offenders Act. When the revision was heard in the High Court, although a ground relating to release on probation had been taken, it was not urged at the time of hearing and the High Court while hearing the revision petition upheld the conviction but modified the sentences imposed upon the petitioners under various sections. 'Thereafter, an application under Section 482 of the Code was filed in which it was contended that the error which has crept in due to non-compliance of the mandatory provisions of Sections 360 and 361 of the Code may be corrected by exercise of inherent powers. His Lordship observed "it is by now well settled that an alteration or modification in the sentence alone without touching the merits or the section under which conviction is recorded, amounts to review of the judgment in the eye of law" and in this context held that the inherent powers could not be invoked to rectify the error which may have occurred due to omission to consider the applicability of Section 360 of the Code or the provisions of Probation of Offenders Act. I am in full agreement with the view expressed in this decision.

11. in view of what has been discussed above, the prayer of the petitioners cannot obviously be granted. The application, is, therefore, dismissed.