Yaqoob Husain vs State on 16 December, 2020

Equivalent citations: AIRONLINE 2020 ALL 2446

Author: Rohit Ranjan Agarwal

Bench: Rohit Ranjan Agarwal

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Reserved on 07.12.2020

Delivered on 16.12.2020

Court No. - 10

Criminal Misc. Recall Application No.3 of 2020

IN

Case :- CRIMINAL REVISION No. - 1649 of 1989

Revisionist :- Yaqoob Husain

Opposite Party :- State

Counsel for Revisionist :- V.P. Srivastava,Ms.Sufia Saba

Counsel for Opposite Party :- A.G.A.

With

Criminal Misc. Recall Application No.2 of 2020

IN

Case :- CRIMINAL REVISION No. - 1511 of 1992

Revisionist :- Babu Lal And Others

Opposite Party :- State

Counsel for Revisionist :- S.N. Verma,Awadhesh Prasad Pandey

Counsel for Opposite Party :- A.G.A.

With

Criminal Misc. Recall Application No.2 of 2020

IN

Case :- CRIMINAL REVISION No. - 904 of 1995

Revisionist :- Janki And Others

Opposite Party :- State of U.P.

Counsel for Revisionist :- K.N. Raha,Deepak Kumar Srivastava

Counsel for Opposite Party :- A.G.A.

With

Criminal Misc. Recall Application No.2 of 2020

IN

Case :- CRIMINAL REVISION No. - 415 of 1996

Revisionist :- Munendra Singh And Others

Opposite Party :- State of U.P.

Counsel for Revisionist :- R.K. Shangloo,Shivajee Singh Sisodiya

Counsel for Opposite Party :- A.G.A.

With

Criminal Misc. Recall Application No.3 of 2020

IN

Case :- CRIMINAL REVISION No. - 712 of 1997

Revisionist :- Hari Singh And Another

Opposite Party :- State of U.P.

Counsel for Revisionist :- R.K.Asthana,Girish Tiwari

Counsel for Opposite Party :- Govt. Advocate

With

Criminal Misc. Recall Application No.3 of 2020

IN

Case :- CRIMINAL REVISION No. - 1202 of 2000

Revisionist :- Sandip Kumar And Others

Opposite Party :- State of U.P. and Another

Counsel for Revisionist :- Ramji Srivastava,Anoop Misra,R. Bahadur, Sanjeev Kumar Pandey

Counsel for Opposite Party :- Govt. Advocate,D.K. Singh,G.K. Malviya

With

Criminal Misc. Recall Application No.2 of 2020

IN

Case :- CRIMINAL REVISION DEFECTIVE No. - 57 of 1996

Revisionist :- Suresh Alias Kalua

Opposite Party :- State of U.P.

Counsel for Revisionist :- J.S.Tomar,Ajay Kumar Baranwal

Counsel for Opposite Party :- Govt. Advocate

Hon'ble Rohit Ranjan Agarwal,J.

1. In all these seven criminal revisions, application for recalling the final order passed by coordinate Bench of this Court has been moved on the ground that the same was passed due to non presence of the counsel for the revisionists, as such, all the matters are being heard and decided by a common order, and Criminal Revision No.1649 of 1989 is taken as the leading case.

2. In Criminal Revision No.1649 of 1989, the order dated 31.07.2019, which is sought to be recalled, is extracted here as under:

> "1. Called in revise. None appeared to press this revision. In the circumstances, I myself have perused the record.

2. This criminal revision under Section 401 read with Section 397 Cr.P.C. has been filed aggrieved by judgment and order dated 04.07.1989 passed by 4th Additional Munsif Magistrate, Moradabad in Case No. 507 of 1988 convicting and sentencing revisionists under Sections 323/34 and 324/34 I.P.C. Thereagainst accused-revisionists preferred Criminal Appeal No. 83 of 1989 which has been dismissed by Sessions Judge, Moradabad vide judgment and order dated 08.11.1989. This revision has been filed challenging both the aforesaid orders.

3. Having gone through the record, I do not find any manifest error or otherwise illegality, procedural or otherwise, so as to justify interference in criminal revision.

4. Dismissed.

5. The revisionists Yaqoob Husain and Kamal Anwar are on bail. Their bail bonds and surety bonds are cancelled. The Chief Judicial Magistrate, Moradabad shall cause them to be arrested and lodged in jail to serve out sentence passed against them. The compliance shall be reported within two months.

6. Certify this judgment to the lower Court immediately."

3. In the recall application the ground taken is that the revisionist was enlarged on bail in the year 1989 and thereafter this case was looked after by his uncle who was in contact with the concerned advocate. As the counsel was designated as senior advocate, he lost in touch and the matter was finally decided on 31.07.2019. It is contended that the said order be recalled and the criminal revision be restored to its original number.

4. In other revisions, which are also decided on various dates in the absence of counsel, similar prayer has been made for recalling the order passed by coordinate Bench and the matter be restored for decision afresh.

5. On behalf of the applicants-revisionists Sri Sanjeev Pandey, Sri Sunil Kumar, Sri Awadhesh Prasad Pandey, Sri Girish Tiwari, Sri Akhilesh Tripathi, Ms. Sufia Saba and Sri Shiva Ji Singh Sisodiya, Advocates, appeared and advanced their submissions. Sri D.K. Srivastava, learned A.G.A. appeared for the State.

6. The sole question which emerges for consideration is, as to whether in view of bar of Section 362 Cr.P.C., the judgment or order rendered/passed by any coordinate Bench can be recalled though passed in the absence of counsel ?

7. Addressing on this question, Sri Sanjeev Pandey submitted that bar, as contained in Section 362 Cr.P.C., is in regard to altering or reviewing the judgment or order, while in the present case the revision was decided in absence of counsel, thus, it was not a judgment or order and it can be recalled, as no prayer for review or altering the judgment has been made.

8. Reliance has been placed upon a decision of the Apex Court in case of Asit Kumar Kar vs. State of West Bengal and Others (2009) 2 SCC 703. Relevant paras 7 and 8 of the judgment is extracted here as under :

> "6. 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.
>
> 7. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Excise Licensees' Association v. Raghabendra Singh and Ors. (2007) 11 SCC 374 cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences."

9. Reliance was also placed upon a decision in the case of Vishnu Agarwal vs. State of Uttar Pradesh and Another (2011) 14 SCC 813. Relevant para 6 of the judgment is extracted here as under :

> "6. In our opinion, Section 362 cannot be considered in a rigid and over technical manner to defeat the ends of justice. As Brahaspati has observed:
>
> "Kevalam Shastram Ashritya Na Kartavyo 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."

10. Reliance has also been placed upon decision of Santosh vs. State of U.P. (2009) 16 SCC 400. Relevant paras 2, 3 and 4 of the judgment is extracted here as under :

> "2. Though many points were urged in support of the application it is not necessary to go into those in detail.
>
> 3. While issuing notice on 7.11.2008 it was indicated that the matter may be remitted to the High Court for fresh hearing as the revision petition was dismissed in the absence of learned Counsel for the appellant. During the hearing of the application learned Counsel for the appellant indicated various reasons for which there was non appearance on the day the matter was taken up. That being so, it would be appropriate to set aside the impugned order and remit the matter to the High Court for a fresh consideration on merits.

> 4. To avoid unnecessary delay let the parties appear before the High Court on 24.3.2009 so that a date of hearing can be fixed. The Hon'ble Chief Justice of the High Court is requested to post the matter before an appropriate Bench. The appeal is allowed."

11. He next submitted that in case of Central Bureau of Investigation vs. State of U.P. and others 2015(11) ADJ 739, this Court relying upon decisions, cited above, recalled the order and restored the revision. Relevant part of the order are extracted here as under :

> "In view of the aforesaid discussion this Court is of the firm view that Section 362 Cr.P.C. only bars a "review" of the order. It does not bar "recall" of any order specially if the order has been passed ex parte against the principle of natural justice.
>
> Accordingly, the recall application is allowed. The order dated 7.3.2013 is recalled. List this matter alongwith Crl. Revision No. 3385 of 2008 (old Crl. Revision (Defective) No. 457 of 2008) before the appropriate bench in the next cause list."

12. Reliance has also been placed upon a decision in case of Mithai Lal vs. State of U.P. and others decided on 12.9.2008 wherein the recall application was allowed relying upon the decision of a Full Bench of this Court.

13. Sri Sunil Kumar, Advocate, adding further to the argument made by earlier counsel, submitted that in view of sub-section (2) of Section 401 Cr.P.C., no order under this section shall be made to the prejudice of the accused or other person unless he had an opportunity of being heard either personally or by pleader in his own defence.

14. Thus reading Section 362 along with sub-section (2) of Section 401 Cr.P.C., though the power of altering or reviewing of the judgment does not vest with the Court once it is signed, but, the power of recall exist so as to give effect to sub-section (2) of Section 401 Cr.P.C. According to him, the decision by the Court in the absence of the counsel of the revisionist amounted to prejudice being caused to the accused and was in the teeth of sub-section (2) of Section 401 Cr.P.C.

15. Apart from making the said submission, no other submission was advanced while all the other counsel appearing on behalf of different parties endorsed the argument advanced by two counsels.

16. Sri D.K.Srivastava, learned A.G.A. while setting note for his argument placed before the Court judgment of Full Bench of this Court in the case of Raj Narain and others vs. The State AIR 1959 Allahabad 315, wherein by a majority view, it was held that the power to revoke, review, recall or alter its own earlier decision in a criminal revision and rehearing the same exist in the High Court, while the then Chief Justice Hon'ble O.H.Mootham gave his minority view that the power of review or recall does not exist.

17. Learned A.G.A. then submitted that the judgment in Raj Narain and others (supra) was considered by the Apex Court in case of State of Orissa vs. Ram Chander Agarwala and others (1979)

2 SCC 305 wherein the minority view of this Court was upheld and the Court held that High Court was not competent to review or revise its own judgment in view of the bar as contained in Section 369 Cr.P.C., as it was then. Relevant para 20 of the judgment are extracted here as under :

> "Before concluding we will very briefly refer to cases of this Court cited by counsel on both sides. 1958 S.C.R. 1226 relates to the power of the High Court to cancel bail. The High Court took the view that under Section 561A of the Code, it had inherent power to cancel the bail, and finding that on the material produced before the Court it would not be safe to permit the appellant to be at large cancelled the bail, distinguishing the decision in 1945 Law Reports and 72 Indian Appeals (supra) and stated that the Privy Council was not called upon to consider the question about the inherent power of the High Court to cancel bail under Section 561A. In Sankatha Singh v. State of U.P. (1962) (2) Supp. 817, this Court held that Section 360 read with Section 424 of the CrPC specifically prohibits the altering or reviewing of its order by a court. The accused applied before a succeeding Sessions Judge for re-hearing of an appeal. The learned Judge was of the view that the appellate court had no power to review or restore an appeal which has been disposed of. The Supreme Court agreed with the view that the appellate court had no power to review or restore an appeal. this Court, expressing its opinion that the Sessions Court had no power to review or restore an appeal observed that a judgment, which does not comply with the requirements of Section 369 of the Code, may be liable to be set aside by a superior court but will not give the appellate court any power to' set it aside himself and rehear the appeal observing that "Section 369 read with Section 424 of the Code makes it clear that the appellate court is not to alter or review the judgment once signed, except for the purpose of correcting a clerical error. Reliance was placed on a decision of this Court in Superintendent and Remembrancer of Legal Affairs W.B. v. Mohan Singh (supra) by Mr. Patel, learned Counsel for the respondent wherein it was held that rejection of a prior application for quashing is no bar for the High Court entertaining a subsequent application as quashing does not amount to review or revision. This decision instead of supporting the respondent clearly lays down, following Chopra's case (supra) that once a judgment has been pronounced by a High Court either in exercise of its appellate or its revisional jurisdiction, no review or revision can be entertained against that judgment as there are no provisions in the Criminal Procedure Code which would enable the High Court to review the same or to exercise revisional jurisdiction. This Court entertained the application for quashing the proceedings on the ground that a subsequent application to quash would not amount to review or revise an order made by the Court. The decision clearly lays down that a judgment of the High Court on appeal or revision cannot be reviewed or revised except in accordance with the provisions of the Criminal Procedure Code. The provisions of Section 561A of the Code cannot be invoked for exercise of a power which is specifically prohibited by the Code."

18. Reliance was also placed in case of New India Assurance Co. Ltd. vs. Krishna Kumar Pandey, Manu/SC/1923/2019 wherein the Apex Court while considering the scope of revisional jurisdiction

under Section 397 Cr.P.C. and the bar of Section 362, held that High Court cannot venture to do something which it was not empowered to do and granted benefit where in the garb of correction, the judgment was modified. Relevant para 12 of the judgment are extracted herein as under :

> "The case on hand is one where the Respondent secured an order from the High Court, behind the back of his employer that his conviction will not have an impact upon the service career of the Respondent. The High Court did not have the power to pass such an order. If at all, the High Court could have invoked, after convicting the Respondent, the provisions of the Probation of Offenders Act, 1958, so that the Respondent could take shelter, if eligible, Under Section 12 of the said Act. In this case, the High Court ventured to do something which it was not empowered to do. Therefore, the Respondent cannot take umbrage Under Section 362 of Code of Criminal Procedure. The second reason why the argument of the learned Senior Counsel for the Respondent is fallacious is that the Respondent himself was a beneficiary of what he is now accusing the Appellant of. As we have stated earlier, the criminal revision petition filed by the Respondent in Cr.R. No. 402 of 2012 was disposed of by the High Court by a judgment dated 29.06.2012. Thereafter the Respondent moved a Miscellaneous Application in Criminal case No. 8951 of 2012 purportedly for the correction of the order. There was neither an arithmetical nor a clerical error in the judgment of the High Court, warranting the invocation of Section 362 Code of Criminal Procedure. The Respondent cleverly borrowed the language of Section 362 Code of Criminal Procedure to affix a label to his petition and the High Court fell into the trap. After having invited an order, which, by the very same argument of the Respondent, could not have been passed, it is not open to the Respondent today to contend that there was no jurisdiction for the High Court to pass such an order. It is nothing but a case of pot calling the kettle black."

19. I have learned learned counsel for the parties and perused the material on record.

20. The question, which has cropped up for consideration, as to the maintainability of recall application in view of bar of Section 362 Cr.P.C., had been under consideration for long time. The Apex Court as well as different High Courts had been constantly addressing and adjudicating on the question of bar of Section 362 Cr.P.C.

21. Before this Court, the controversy for the first time erupted before their Lordships in the year 1958 when the old Criminal Procedure Code was in existence and the question, which was referred to the Full Bench was, "whether this Court has power to revoke, review, recall or alter its own earlier decision in a criminal revision and rehear the same? If so, in what circumstances?"

22. The Full Bench constituted in Raj Narain and others (supra) by a majority view, held as under :

> "105. Our answer to the question referred is as follows:

1. That this Court has power to revoke, review, recall or alter its own earlier decision in a criminal revision and rehear the same.

2. That this can be done only in cases failing under one or the other of the three conditions mentioned in Section 561-A, namely:

(i) for the purpose of giving effect to any order passed under the Code of Criminal Procedure;

(ii) for the purpose of preventing abuse of the process of any Court;

(iii) for otherwise securing the ends of justice."

23. While Chief Justice Mootham was of the view that as soon as a judgment in a criminal revision is signed and sealed, Court becomes functus officio and has no power to revoke, review, recall or alter the order it has already made. Relevant para 16 of the judgment in Raj Narain and others (supra) is extracted here as under :

"In all these cases there is, I think, as assumption, express or implied, that the provisions of the Code are subject to S. 561A. That assumption, for reasons which I have, endeavoured to state, I think to be unfounded. In my opinion this Court, as soon as its judgment in a criminal revision case has been signed and sealed, becomes functus officio and has no power to revoke, review, recall or alter the order it has already made. I assume of course that that order was made in the exercise of its jurisdiction: if for any reason the Court makes an order without jurisdiction that order or judgment is a nullity and the application in which it was made must be reheard."

24. While deciding a similar controversy, the Hon'ble Supreme Court in State of Orissa vs. Ram Chander Agarwala and others (supra) while considering the scope of Section 369 Cr.P.C., as it was then, upheld the minority view of Chief Justice Mootham and held that once judgment was pronounced by High Court either in exercise of appellate or revisional jurisdiction, no review or revision can be entertained against that judgment as there is no provision in the Criminal Procedure Code.

25. In case of Chandrabali and another vs. State 1979 Cri.L.J. 1218, the Division Bench of this Court had a occasion to consider the scope of Section 362 (Section 369 of old Act) and held as under :

"8. It may be pointed out that even if there was any ambiguity regarding the applicability of Section 369 of the Code to judgments passed by this Court the same has been completely removed by the provision made in Section 362 of the new Code viz. Cr. P.C. 1973. Section 352 of the new Code provides as follows:

> "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 369 of the old Code provided as follows:

> "Save as otherwise provided by this Code or by any other law for the time being in force, or in the case of a High Court, by the Letters Patent or other instrument constituting such High Court, no court when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

> "Thus under Section 362 of the new Code a judgment which has been signed can be altered or reviewed only for correcting a clerical or arithmetical error. No such error has been pointed out in present petition and, therefore, the judgment passed by Hon'ble S.K. Kaul, J. cannot be altered, reviewed or substituted. The same view was taken by V.N. Varma. J. in Badri Prasad Rastogi v. State of U.P. 1979 All LJ 59 we are in respectful agreement with the view taken by the learned Judge.

> 9. We may also point out that in the Full Bench case of Raj Narain (supra) it was observed in the majority judgment that Section 561 A, did not authorise this Court to rehear a case where the applicant or appellant was not heard due to some fault of his or his counsel. Thus the applicant cannot gel any assistance even from the majority judgment in Raj Narain's case (supra) which on this point has not been overruled by their Lordships of the Supreme Court. Thus the applicant in the case on hand will not be entitled to claim rehearing even if we were to hold that the applicant could invoke inherent jurisdiction of this Court reserved under Section 482 of the Cr. P.C."

26. In case of Smt. Sooraj Devi vs. Pyare Lal & Another (1981) 1 SCC 500 the Apex Court while considering the scope of Section 482 Cr.P.C. and bar imposed by Section 362 Cr.P.C. held that attempt to invoke that power can be of no avail. Relevant para 5 of the judgment is extracted here as under :

> "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. Sankatha Singh v. State of U.P. AIR1962SC1208 . 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."

27. Similarly in Hari Singh Mann vs. Harbhajan Singh Bajwa and others (2001) 1 SCC 169 the Apex Court while considering the scope of Section 362 Cr.P.C., held as under :

> "10. 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 acknowledge 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 become 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."

28. It has been constant view of the Apex Court that only a clerical or arithmetical error can be corrected and no more, in view of bar of Section 362 Cr.P.C. The same view was reiterated in State of Kerala vs. M.M.Manikantan Nair (2001) 4 SCC 752. Relevant para 6 of the judgment is extracted here as under :

> "The Code of Criminal Procedure does not authorise the High Court to review its judgment or order passed either in exercise of its appellate, revisional or original jurisdiction. Section 362 of the Code prohibits the court after it has signed its judgment or final order disposing a case from altering or reviewing the said judgment or order except to correct a clerical or arithmetical error. This prohibition is complete and no criminal court can review its own judgment or order after it is signed. By the first order dated 31.05.2000, the High Court rejected the prayer of the respondent for quashing the criminal proceeding. This order attained its finality. By the impugned order, the High Court reversed its earlier order and quashed the criminal proceeding for want of proper sanction. By no stretch of imagination it can be said that by the impugned order the High Court only corrected any clerical or arithmetical error. In fact the impugned order is an order of review, as the earlier order was reversed, which could not have been done as there is no such provision under the Code of Criminal Procedure, but there is an interdict against it."

29. Similarly, in R.Annapurna vs. Ramadugu Anantha Krishna Sastry and others (2002) 10 SCC 401, the Apex Court had held that High Court had no power to recall or review its own order. Relevant para 5 of the judgment is extracted here as under :

> "When appellant came to know of the said order, she moved the High Court with a prayer to recall the said order, but that was dismissed on the premise that the High Court has no power to recall or review its own order. To that extent, the High Court was correct. Hence, the special leave filed by the appellant challenging the order passed on the recall petition SLP (Crl.) No. 976/1998 has been dismissed by us."

30. Similar view was taken in State Represented by DSP, SB CID, Chennai vs. K.V. Rajendran and others (2008) 8 SCC 673. Relevant para 5 of the judgment is extracted here as under :

> "22. As noted hereinearlier, Section 362 of the Code prohibits reopening of a final order except in the cases of clerical or arithmetical errors. Such being the position and in view of the expressed prohibition in the Code itself in the form of Section 362, exercise of power under Section 482 of the Code cannot be exercised to reopen or alter an order disposing of a petition decided on merits.
>
> .....
>
> 25. As noted hereinearlier, Section 362 of the Code prohibits a Court from making alternation in a judgment after the final order or Judgment was signed by the Court disposing of the case finally except to correct clerical or arithmetical errors. In our view, therefore, Section 362 of the Code cannot apply in the facts and circumstances of the present case. There was no clerical or arithmetical error in the order."

31. In Sunita Jain vs. Pawan Kumar Jain and others (2008) 2 SCC 705 the Apex Court held as under :

> "31. The section makes it clear that a Court cannot alter or review its judgment or final order after it is signed except to correct clerical or arithmetical error. The scheme of the Code, in our judgment, is clear that as a general rule, as soon as the judgment is pronounced or order is made by a Court, it becomes functus officio (ceases to have control over the case) and has no power to review, override, alter or interfere with it.
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> 32. No doubt, the section starts with the words "Save as otherwise provided by this Code". Thus, if the Code provides for alteration, such power can be exercised. For instance, Sub-section (2) of Section 127. But in absence of express power, alteration or modification of judgment or order is not permissible.
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> 33. It is also well settled that power of review is not an inherent power and must be conferred on a Court by a specific or express provision to that effect. (Vide Patel

> Narshi Thakershi and Ors. v. Shri Pradyumansinghji Arjunsinghji (1971) 3 SCC 844). No power of review has been conferred by the Code on a Criminal Court and it cannot review an order passed or judgment pronounced."

32. In Surya Baksh Singh vs. State of Uttar Pradesh (2014) 14 SCC 222, the Apex Court while laying down guidelines, had held that High Court cannot dismiss an appeal for non prosecution simplicitor without examining the merits. Their Lordships further held that the Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent. Further Court can dispose of the appeal after perusing the record and judgment of the trial court, and also if the case is decided on merits in the absence of the appellant, the higher Court is the remedy in the situation. Relevant para 24 of the judgment is extracted here as under :

> "It seems to us that it is necessary for the Appellate Court which is confronted with the absence of the convict as well as his Counsel, to immediately proceed against the persons who stood surety at the time when the convict was granted bail, as this may lead to his discovery and production in Court. If even this exercise fails to locate and bring forth the convict, the Appellate Court is empowered to dismiss the appeal. We fully and respectfully concur with the recent elucidation of the law, profound yet perspicuous, in K.S. Panduranga v. State of Karnataka (2013) 3 SCC 721. After a comprehensive analysis of previous decisions our learned Brother had distilled the legal position into six propositions: (SCC p.734, para 19) "19.1.that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;
>
> 19.2. that the Court is not bound to adjourn the matter if both the Appellant or his Counsel/lawyer are absent;
>
> 19.3. that the Court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;
>
> 19.4. that it can dispose of the appeal after perusing the record and judgment of the trial court.
>
> 19.5. That if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the Appellant-accused if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and 19.6. That if the case is decided on merits in the absence of the Appellant, the higher court can remedy the situation."

33. In case of Mohammed Zakir vs. Shabana and Ors. (2018) 15 SCC 316, the Apex Court held that however patent error is there, the order can only be corrected in the process known to law and not under Section 362 of the Code of Criminal Procedure. Relevant para 4 of the judgment is extracted

here as under :

> "The High Court should not have exercised the power Under Section 362 Code of Criminal Procedure for a correction on merits. However patently erroneous the earlier order be, it can only be corrected in the process known to law and not Under Section 362 Code of Criminal Procedure The whole purpose of Section 362 Code of Criminal Procedure is only to correct a clerical or arithmetical error. What the High Court sought to do in the impugned order is not to correct a clerical or arithmetical error; it sought to rehear the matter on merits, since, according to the learned Judge, the earlier order was patently erroneous. That is impermissible under law. Accordingly, we set aside the impugned order dated 28.04.2017."

34. In a recent decision in case of Sanjeev Kapoor vs. Chandana Kapoor & Ors. AIR 2020 SC 1064, His Lordship Ashok Bhushan, J. while dealing with the bar of Section 362 held as under :

> "18. The Legislative Scheme as delineated by Section 369 of Code of Criminal Procedure, 1898, as well as Legislative Scheme as delineated by Section 362 of Code of Criminal Procedure, 1973 is one and the same. The embargo put on the criminal court to alter or review its judgment is with a purpose and object. The judgments of this Court as noted above, summarised the law to the effect that criminal justice delivery system does not cloth criminal court with power to alter or review the judgment or final order disposing the case except to correct the clerical or arithmetical error. After the judgment delivered by a criminal Court or passing final order disposing the case the Court becomes functus officio and any mistake or glaring omission is left to be corrected only by appropriate forum in accordance with law.

35. During the course of argument a recent judgment dated 16.11.2020 rendered by Hon'ble Apex Court in Criminal Appeal Nos.750-751 of 2020 Parveen vs. State of Harayana was placed, where a criminal revision was dismissed for want of prosecution and not on merit, and their Lordships were of the view that a revision cannot be dismissed in default and the same was restored to its original number. Relevant paras 7 and 8 of the judgment are extracted here as under :

> "7. The High Court, in our view, was manifestly in error in rejecting the revision in default, on the ground that the appellant's advocate had remained absent on the previous four occasions. Since the revision before the High Court arose out of an order of the conviction under the Arms Act, the High Court ought to have appointed an Amicus Curiae in the absence of counsel, who has been engaged by the Legal Services Authority, Rohtak. The liberty of a citizen cannot be taken away in this manner.
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> 8. In the circumstances, we are of the view that it would be appropriate to allow this appeal and set aside the impugned orders of the High Court dated 11 February 2020 and 16 July 2020. CRR No.1316 of 2018 is restored to the file of the High Court. Since during the pendency of the Special Leave Petition, the appellant was admitted to bail

by this court and the appellant was on bail during the pendency of the revision before the High Court, the order enlarging the appellant on bail shall continue to remain in operation pending the disposal of the revision by the High Court. The appellant shall cooperate in the disposal of the revision."

36. Coordinate Bench of this Court in Criminal Revision No.2930 of 2012 (Smt. Farhana vs. State of U.P. and Another) vide order dated 02.4.2019 had held once an order was signed by the Court disposing of a case, no Court shall alter or review the same except to correct a clerical or arithmetical error.

37. Tracing out the legislative history of an enactment in the earlier Code, Section 369 was similar to Section 362 of the present Code of Criminal Procedure, 1973. The minority view taken by the Full Bench of this Court in Raj Narain and others (supra) was upheld by the Supreme Court in case of State of Orissa vs. Ram Chander Agarwala and others (supra) and since then it has been constant view of the Apex Court that once the judgment or order is pronounced and signed by the Court, it becomes functus officio and the power is only limited to the correction of clerical and arithmetical error and nothing beyond that.

38. Recalling the order would amount to setting aside the earlier order passed by the coordinate Bench and restoring the case for rehearing afresh. Reliance placed by the learned counsels representing revisionists upon decision in case of Asit Kumar Kar (supra) was in relation to writ petition filed under Article 32 of the Constitution of India, wherein their Lordships of Supreme Court held that there was a distinction between a petition under Article 32, a review petition and a recall while the present recall applications had been filed in criminal revisions, wherein final orders have passed on merits by the Court after perusal of the records and application of mind, though the counsel for the revisionist in respective cases were not present. The order itself indicates that the Judge had perused the record and after going through the same, passed the judgment. Recalling the order would amount to reviewing/rehearing the same. Thus, the case relied upon is of no help.

39. Now coming to the case of Vishnu Agarwal (supra) relied upon by the revisionists, from the perusal of the same it appears that relying upon the decision of Asit Kumar Kar (supra) the Court had recalled the order. The Supreme Court in case of Surya Baksh Singh (supra) had clearly laid down the legal position into six proposition wherein it is provided that Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent. Further the Court after perusing the records and judgment of Trial Court can dispose of the case. Lastly, it was propounded that if the case is decided on merits, in the absence of appellant, the higher Court can remedy the situation.

40. Thus in all the cases before this Court, the Court had proceeded to decide after going through the records as mandated in the above case, and passed judgment in the absence of counsel for the revisionists. Now the only remedy left, as per the decision of Surya Baksh Singh (supra), is of approaching the higher Court and no recall application is maintainable before this Court for remedifying the situation.

41. The argument raised as to sub-section (2) of Section 401 Cr.P.C. as to prejudice being caused to accused as he did not have opportunity of being heard either personally or by pleader in his own defence is of no avail, as the Apex Court had in depth dealt with such situation where matters are being placed on Board and no one turns up to press the same and had laid down guidelines in case of Surya Baksh Singh (supra).

42. The Apex Court in K.S.Panduranga vs. State of Karnataka (2013) 3 SCC 721 had even held that it is not obligatory on the part of Appellate Court in all circumstances to appoint amicus curiae in a criminal appeal to argue on behalf of accused. Relevant para 15 of the judgment is extracted here as under :

> "On a studied perusal of the said decision, it is noticeable that the Court has stated about the role of the lawyer and the role of the Bar Association in the backdrop of professional ethics and norms of the Constitution. It has been categorically held therein that the professional ethics require that a lawyer cannot refuse a brief, provided a client is willing to pay his fee and the lawyer is not otherwise engaged and, therefore, no Bar Association can pass a resolution to the effect that none of its members will appear for a particular accused whether on the ground that he is a policeman or on the ground that he is a suspected terrorist. We are disposed to think that in Mohd. Sukur Ali (supra), the aforesaid case was cited only to highlight the role of the Bar and the ethicality of the lawyers. It does not flow from the said pronouncement that it is obligatory on the part of the Appellate Court in all circumstances to engage amicus curiae in a criminal appeal to argue on behalf of the accused failing which the judgment rendered by the High Court would be absolutely unsustainable."

43. Simply because the counsels had not appeared in the revised call, the decision rendered by the coordinate Bench after perusing the record cannot be rendered otiose and the order cannot be recalled. Bar expressed under Section 362 Cr.P.C. is clear, that once the Court had signed its judgment or final order, disposing of a case, it shall not alter or review the same except to correct clerical or arithmetical error.

44. This bar has been provided by the legislature intentionally so as to put a safeguard that the final judgment and orders are not altered or reviewed now and then. Apex Court has also felt that if any leverage is granted and the orders are permitted to be recalled on the ground of absence of counsels, it would cause great chaos and thus has propounded six legal propositions wherein the Courts can decide the cases in absence of counsel only after perusal of record and the same can be remedified only by the higher Court.

45. Thus, in view of the law laid down by the Apex Court, no judgment or order can be altered, reviewed or recalled in view of bar under Section 362 Cr.P.C.

46. In the result, all the recall applications are hereby rejected.

Order Date :- 16.12.2020 KA