R. Bhagirathi Reddy And Another vs State Of Odisha on 16 August, 2017

Author: S.K. Sahoo

Bench: S.K. Sahoo

IN THE HIGH COURT OF ORISSA: CUTTACK

Misc. Case No. 142 of 2016

(Arising out of Criminal Revision No. 673 of 2003 disposed of on 18.10.2011)

R. Bhagirathi Reddy
and another .....

-Versus-

State of Odisha .....

For Petitioners: - Mr. Yasoban
Senior Advo

For State of Odisha: - Mr. Deepak Kum
Addl. Standing

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Order: 16.08.2017

S. K. Sahoo, J.

This Misc. Case has been filed by the petitioners R. Bhagirathi Reddy and Parsu Das to recall/modify the judgment and order of this Court dated 18.10.2011 passed in Criminal Revision No.673 of 2003 and for acquitting the petitioners from conviction in view of the acquittal of the co-accused persons in Criminal Appeal No.33 of 2002 and Criminal Appeal No.90 of 2002.

This case arises out of Chatrapur P.S. Case No.290 of 1996, in which charge sheet was submitted against the petitioners and other co-accused persons namely N. Ganesh Reddy, Surendra Barik, Kumuda Pattnaik @ Maina, Gourahari Panda, Muna Polei, Surendra Behera and Bina Behera.

While all of them were facing trial before the learned S.D.J.M., Chatrapur in G.R. Case No. 405 of 1996 for offences punishable under sections 452, 324, 326, 294, 341 read with section 34 of the Indian Penal Code, the petitioners absconded at the stage of accused statement for which the case was splitted up and judgment in respect of the co-accused persons was pronounced by the learned Trial Court on 19.02.1999 and they were convicted under sections 452, 324, 326, 341 read with section 34 of the Indian Penal Code though they were acquitted of the charge under section 294 read with section 34 of the Indian Penal Code. Thereafter on apprehension of the petitioners, the accused statements were recorded and judgment was pronounced by the learned Sub-Divisional Judicial Magistrate, Chatrapur in G.R. Case No.405 of 1996(A)/T.R. No.509 of 1997 on 06.05.2000 and the learned Trial Court though acquitted the petitioners of the charge under section 294 read with section 34 of the Indian Penal Code but found them guilty under sections 452, 324, 326, 341 read with section 34 of the Indian Penal Code and sentenced each of them to undergo S.I. for one month for the offence under sections 341/34 of the Indian Penal Code, R.I. for four months and to pay a fine of Rs.500/-, in default, to undergo S.I. for three months for the offence under sections 324/34 of the Indian Penal Code, R.I. for one year and to pay a fine of Rs.500/-, in default, to undergo S.I. for three months for the offence under sections 326/34 of the Indian Penal Code and R.I. for six months and to pay a fine of Rs.500/-, in default, to undergo S.I. for three months each for the offence under sections 452/34 of the Indian Penal Code and the substantive sentences were directed to run concurrently.

The petitioners preferred criminal appeal before the Court of Session which was heard by learned Second Additional Sessions Judge, Berhampur in Criminal Appeal No. 5 of 2001/Criminal Appeal No. 54 of 2000 GDC and the learned Appellate Court vide judgment and order dated 20.08.2003 set aside the order of conviction under sections 341/34 of the Indian Penal Code while confirming the order of conviction in respect of other offences and the sentences passed thereunder by the learned Trial Court. The criminal appeals preferred by co-accused persons namely N. Ganesh Reddy, Muna Polei, and Bina Behera in Criminal Appeal No. 33 of 2002/ Criminal Appeal No. 38 of 1999 GDC and by co-accused Surendra Barik, Kumuda Pattnaik @ Maina and Gourahari Panda in Criminal Appeal No. 90 of 2002/ Criminal Appeal No. 48 of 1999 GDC were heard by learned Additional Sessions Judge, Chatrapur and those were allowed vide separate judgments and orders dated 06.12.2003 and the conviction order passed by the learned Trial Court was set aside The petitioners then preferred Criminal Revision No.673 of 2003 before this Court challenging the judgments and orders of conviction of the Courts below. This Court vide judgment and order dated 18.11.2011 while maintaining the order of conviction of the petitioners under sections 452, 324, 326 read with section 34 of the Indian Penal Code, modified the sentence and reduced it to four months subject to payment of fine of Rs.15,000/- (rupees fifteen thousand only) within a period of two months which was directed to be equally borne by both the petitioners and it was further directed that if the petitioners fail to deposit the said amount, the order of sentence shall revive.

The petitioners preferred special leave petition before the Hon'ble Supreme Court in SLP (Criminal) No. CRLMP 3088/2015 with an application for condonation of delay which was of 1114 days. The Hon'ble Supreme Court dismissed the SLP application as no proper explanation was given by the petitioners and further holding that even on merit, no ground to interfere with the impugned order in exercise of jurisdiction under Article 136 of the Constitution of India was found.

Mr. Yasobanta Das, learned Senior Advocate appearing for the petitioners strenuously and emphatically contended that at the time of hearing of the revision petition before this Court, the learned counsel then appearing for the petitioners submitted that he did not challenge the conviction of the petitioners on merit and confined his argument on the quantum of sentence only and accordingly, the sentence was reduced by this Court vide judgment and order dated 18.11.2011. It is contended that the petitioners came to know about the pronouncement of judgment for the first time on 16.04.2014. It is further contended that criminal appeals preferred by co-accused persons were allowed by learned Additional Sessions Judge, Chatrapur and the judgment and order of conviction passed by the learned Trial Court was set aside. The learned counsel contended that even though the evidence against the petitioners and the co-accused persons are identical, without bringing the acquittal orders to the notice of this Court at the time of hearing of the revision petition and without placing the revision petition on merit, surprisingly the learned counsel appearing then for the petitioners contended that he did not challenge the conviction of the petitioners on merit. It is further contended that after knowing the result of the revision petition belatedly when warrants were issued against the petitioners, the petitioners approached the Hon'ble Supreme Court. It is contended that on the self same set of evidence when six co-accused persons have already been acquitted, the order of conviction of the petitioners is illegal and unjustified and therefore, the same should be set aside. It is further contended that even though the Hon'ble Supreme Court exercising the jurisdiction under Article 136 of the Constitution of India has dismissed the special leave petition on the ground of delay and also on merit but it is a non-speaking order and therefore, it would not come within the purview of declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution of India and therefore, there is no bar for this Court to recall/modify the earlier judgment and order dated 18.10.2011 and set aside the Trial Court judgment and order of conviction basing on the judgments of the co-accused persons passed in criminal appeals. The learned counsel for the petitioners placed reliance in the cases of Kunhayammed - Vrs.- State of Kerala reported in (2000) 6 Supreme Court Cases 359, M.M. Thomas -Vrs.- State of Kerala reported in (2000) 1 Supreme Court Cases 666, Jeetu Alias Jitendra - Vrs.- State of Chhattisgarh reported in (2013) 11 Supreme Court Cases 489, State of Punjab -Vrs.- Davinder Pal Singh Bhullar reported in (2011) 14 Supreme Court Cases 770 and Rajoo -Vrs.- State of M.P. reported in (2008) 15 Supreme Court Cases 133 and contended that grave injustice has been caused to the petitioners in view of the non-placement of acquittal orders passed in respect of six co-accused persons in criminal appeals before this Court by the arguing counsel at the time of hearing of the revision petition. It is further contended that unless this Court recalls/modifies its earlier order dated 18.10.2011 and acquit the petitioners of all the charges like the co-accused persons, there will be abuse of process and miscarriage of justice.

Mr. Deepak Kumar, learned Addl. Standing Counsel appearing for the State on the other hand contended that when the revision petition has already been disposed of by this Court and the Hon'ble Supreme Court has dismissed the special leave petition on the ground of delay as well as on merit, there is no scope for this Court to recall/modify the judgment and order dated 18.10.2011 even invoking inherent power under section 482 of Cr.P.C. in view of the bar under section 362 of Cr.P.C. Learned counsel placed reliance in the cases of Hari Singh Mann -Vrs.- Harbhajan Singh Bajwa and Ors. reported in A.I.R. 2001 S.C. 43, Chhanni -Vrs.- State of U.P. reported in A.I.R. 2006 S.C. 3051, Moti Lal -Vrs.- State of M.P. reported in A.I.R. 1994 S.C. 1544 and State of Kerala

-Vrs.- M.M. Manikantan Nair reported in A.I.R. 2001 S.C. 2145.

First point:-

The first point that crops up for consideration is whether after dismissal of the special leave petition by the Hon'ble Supreme Court in exercising jurisdiction under Article 136 of the Constitution of India both on the ground of delay and also on merit, this Court can entertain a Misc. Case to recall/modify its earlier judgment which was challenged before the Hon'ble Supreme Court and take a contrary view. In the case of Kunhayammed -Vrs.- State of Kerala reported in (2000) 6 Supreme Court Cases 359, it is held as follows:-

"18. In our opinion what has been stated by this Court applies also to a case where a special leave petition having been dismissed by a non- speaking order the applicant approaches the High Court by moving a petition for review. May be that the Supreme Court was not inclined to exercise its discretionary jurisdiction under Article 136 probably because it felt that it was open to the applicant to move the High Court itself. As nothing has been said specifically in the order dismissing the special leave petition one is left merely guessing. We do not think it would be just to deprive the aggrieved person of the statutory right of seeking relief in review jurisdiction of the High Court if a case for relief in that jurisdiction could be made out merely because a special leave petition under Article 136 of the Constitution had already stood rejected by the Supreme Court by a non- speaking order.

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27. A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non- speaking order, i.e. it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this Court being the apex court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of Supreme Court would mean

that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The Court sometimes leaves the question (sic) open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down By the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court.

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34. The doctrine of merger and the right of review are concepts which are closely interlinked. If the judgment of the High Court has come up to this Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of this Court. In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged with the judgment of this Court. But where the special leave petition is dismissed - there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. But the High Court, if it exercises a power of review or deals with a review application on merits - in a case where the High Court's order had not merged with an order passed by this Court after grant of special leave

- the High Court could not, in law, be said to be wrong in exercising statutory jurisdiction or power vested in it.

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40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the Court,

(iv) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the apex court of the country and so on. The expression often employed by this Court while disposing of such petitions are - "heard and dismissed", "dismissed", "dismissed as barred by time" and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the merit worthiness of the petitioner's prayer seeking leave to file an

> appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex-parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court.

The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 of the C.P.C. or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 of the C.P.C. act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court.

However this would be so not by reference to the doctrine of merger.

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> To sum up our conclusions are:
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(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-

matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution, the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties." In the case of State of Punjab -Vrs.- Davinder Pal Singh Bhullar reported in (2011) 14 Supreme Court Cases 770, it is held as follows:-

> "77. xxx xxx xxx xxx xxx The issue as to whether the dismissal of the special leave petition by this Court in limine, i.e., by a non-speaking order would amount to affirmation or confirmation or approval of the order impugned before this Court, has been considered time and again. Thus, the issue is no more res integra.
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> A large number of judicial pronouncements made by this Court leave no manner of doubt that the dismissal of the Special Leave Petition in limine does not mean that the reasoning of the judgment of the High Court against which the Special Leave Petition had been filed before this Court stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that this Court did not consider the case worth examining for a reason, which may be other than merit of the case. An order rejecting the Special Leave Petition at the threshold without detailed reasons, therefore, does not constitute any declaration of law or a binding precedent."

The learned counsel for the petitioners placed further reliance in the case of M.M. Thomas -Vrs.- State of Kerala reported in (2000) 1 Supreme Court Cases 666, wherein it is held as follows:-

"13. In this case we are not concerned with the power of review of the Forest Tribunal. It was High Court which reviewed its own judgment and so the question is whether the High Court has such power dehors Section 8C (2) of the Act. Power of review conferred on the Supreme Court under Article 135 of the Constitution is not specifically made applicable to the High Courts. Does it mean that the High Court has no power to correct its own orders, even if the High Court is satisfied that there is error apparent on the face of the record?

14. High Court as a Court of Record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A Court of Record envelope all such powers whose acts and proceedings are to be enrolled in a perpetual, memorial and testimony. A Court of Record is undoubtedly a superior Court which is itself competent to determine the scope of its jurisdiction. The High Court, as a Court of Record, has a duty to itself to keep all its records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The High Court's power in that regards is plenary. In Naresh Sridhar v. State of Maharashtra, a nine Judge Bench of this Court has recognised the aforesaid superior status of the High Court as a Court of plenary jurisdiction being a Court of Record.

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17. If suo power of correcting its own record is denied to the High Court, when it notices the apparent errors its consequence is that the superior status of the High Court will dwindle down. Therefore, it is only proper to think that the plenary powers of the High Court would include the power of review relating to errors apparent on the face of record."

While countering the decisions relied upon by the learned counsel for the petitioners, the learned counsel for the State placed reliance in the cases of Hari Singh Mann -Vrs.- Harbhajan Singh Bajwa and Ors. reported in A.I.R. 2001 S.C. 43 and Chhanni -Vrs.- State of U.P. reported in A.I.R. 2006 S.C. 3051, wherein it is held that 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 Code of Criminal Procedure 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. In the case of Moti Lal -Vrs.- State of M.P. reported in A.I.R. 1994 S.C. 1544 and State of Kerala -Vrs.- M.M. Manikantan Nair reported in A.I.R. 2001 S.C. 2145, it is held that the prohibition contained in section 362 Code of Criminal Procedure is absolute after the judgment is signed. Even the High Court in exercise of its inherent power under Section 482 Code of Criminal Procedure has

no authority or jurisdiction to alter/review the same.

In the cases of Chitawan and Ors. -Vrs.- Mahboob Ilahi reported in 1970 Criminal Law Journal 378, Deepak Thanwardas Balwani -Vrs.-State of Maharashtra and Anr. reported in 1985 Criminal Law Journal 23, Habu -Vrs.- State of Rajasthan reported in A.I.R. 1987 Rajasthan 83 (F.B.), Swarth Mahto and Anr. -Vrs.- Dharmdeo Narain Singh reported in A.I.R. 1972 S.C. 1300, Makkapati Nagaswara Sastri -Vrs.- S.S. Satyanarayan reported in A.I.R. 1981 S.C. 1156, Asit Kumar Kar -Vrs.- State of West Bengal and Ors. reported in (2009) 2 Supreme Court Cases 703 and Vishnu Agarwal v. State of U.P. and Anr. reported in A.I.R. 2011 S.C. 1232, it is held that 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 of the Code of Criminal Procedure 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.

In the case of Smt. Sooraj Devi -Vrs.- Pyare Lal and Anr. reported in A.I.R. 1981 S.C. 736, it is held that the prohibition in section 362 Code of Criminal Procedure 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 of the Code of Criminal Procedure and, therefore, the attempt to invoke that power can be of no avail.

The decisions placed by the learned counsel for the petitioners are distinguishable in the context of the present facts of the case. Section 362 of Cr.P.C. clearly stipulates that once the criminal Court signs its judgment or final order disposing of a case; it shall not alter or review the same except to correct a clerical or arithmetical error. Even though there is no such things as the principle of constructive res judicata in a criminal case but there is no scope for any review of the judgment by a Court after it signs its judgment or final order disposing of the case either at the instance of any party or even suo motu by exercising its inherent power under section 482 of Cr.P.C. The power of recall is different than the power of altering or reviewing the judgment. A criminal revision petition, once admitted, cannot be dismissed for default but has to be adjudicated on merits. The Code of Criminal Procedure does not contemplate of making an order of dismissal of revision for default. Once the records of the Courts below are called for, the High Court can exercise its powers under section 401 read with section 397 of Cr.P.C. to examine the correctness, legality or propriety of the order, recorded or passed irrespective of the fact whether the counsel for the petitioner is present or not at the time of call of the matter for final hearing. However, if on a petition filed by the petitioner, the Court is satisfied that due to some unavoidable reason, the learned counsel for the petitioner could not appear when the matter was taken up for hearing, it may recall the order passed in rare cases for the ends of justice and to prevent miscarriage of justice. As soon as the judgment or final

order disposing of the case is signed, it becomes final and the Court is functus officio. The only remedy available to the aggrieved party is to challenge the order in the higher Court. Unlike the statutory provision under order XLVII of Code of Civil Procedure, there is no provision in the Cr.P.C. for review of the judgment or final order disposing of a case once it is signed.

It cannot be lost sight of that the Hon'ble Supreme Court has passed the following order:-

> "Heard learned counsel for the petitioners.
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> No proper explanation has been given out by the petitioners to condone the delay of 1114 days in filing the SLP. The application for condonation of delay is accordingly dismissed.
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> Even on merits, we find no ground to interfere with the impugned order in exercise of our jurisdiction under Article 136 of the Constitution of India.
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> This special leave petition is accordingly dismissed on the ground of delay as also on merit."

Even though the order passed by the Hon'ble Supreme Court is a non-speaking one and no reasonings have been assigned thereon for dismissal of the special leave petition but it is clear that the Hon'ble Court not only considered the matter on the ground of delay but also on merit. Such order refusing special leave to appeal may not stand substituted in place of the judgment of this Court under challenge and may not attract the doctrine of merger and may not be a declaration of law by the Supreme Court under Article 141 of the Constitution of India but it is apparent that the Hon'ble Court was not inclined to exercise its discretion so as to allow the petitioners to file an appeal. After dismissal of the special leave petition, when there is no statutory right of review available for the petitioners under Cr.P.C., this Court cannot assume such a jurisdiction to decide the case on merits when there is no apparent error noticed in the earlier judgment.

Therefore, the contentions raised by the learned counsel for the petitioners that after dismissal of the special leave petition by the Hon'ble Supreme Court, this Court can entertain a Misc. Case to recall/modify/review its earlier judgment, are not acceptable on the principle of judicial discipline as well as on law.

Second point:-

> The learned counsel for the petitioners while canvassing his second point contended that even if the counsel for the petitioners in order to cut short the matter did not challenge the conviction on merit but nonetheless it was obligatory on the part of this Court to decide the revision on merits and not to accept the concession and proceed to deal with the sentence aspect only. He placed reliance in the case of Jeetu Alias Jitendra -Vrs.- State of Chhattisgarh reported in (2013) 11 Supreme Court Cases 489 wherein Hon'ble Justice Dipak Misra speaking for the Bench, observed as follows:-

> "21. Tested on the touchstone of the aforesaid legal principles, it is luminescent that the High Court has not made any effort to satisfy its conscience and accepted the concession given by the counsel in a routine manner. At this juncture, we are obliged to state that when a convicted person prefers an appeal, he has the legitimate expectation to be dealt with by the Courts in accordance with law. He has intrinsic faith in the criminal justice dispensation system and it is the sacred duty of the adjudicatory system to remain alive to the said faith. That apart, he has embedded trust in his counsel that he shall put forth his case to the best of his ability assailing the conviction and to do full justice to the case. That apart, a counsel is expected to assist the Courts in reaching a correct conclusion. Therefore, it is the obligation of the Court to decide the appeal on merits and not accept the concession and proceed to deal with the sentence, for the said mode and method defeats the fundamental purpose of the justice delivery system. We are compelled to note here that we have come across many cases where the High Courts, after recording the non- challenge to the conviction, have proceeded to dwell upon the proportionality of the quantum of sentence. We may clearly state that the same being impermissible in law should not be taken resort to. It should be borne in mind that a convict who has been imposed substantive sentence is deprived of his liberty, the stem of life that should not ordinarily be stenosed, and hence, it is the duty of the Court to see that the cause of justice is subserved with serenity in accordance with the established principles of law."

The ratio laid down in the case of Jeetu Alias Jitendra (supra) is not applicable to a revision petition inasmuch as the revisional Court is not bound to address on the merits of the case even though the learned counsel for the petitioner submits that he does not want to address any arguments on merits but only on the quantum of sentence. The counsel for the petitioner is the best person to decide as to whether to address the Court on merits along with sentence aspect or only on the quantum of sentence. After going through the brief at the time of preparation for argument, if the counsel for the petitioner is convinced that there is nothing on merits to argue and the lower Courts judgments on conviction aspect do not suffer from any infirmity, he might think it proper not to address the Court on merits of the revision petition as it would be a sheer wastage of valuable time of the Court which would ultimately yield no result and in such eventuality, he would be quite justified in making the submission that he does not want to address the Court on merits. If the counsel for the petitioner so decides and makes a submission not to address on merits, the revisional Court is not bound to go into merits of the case. However, in spite of such submission made by the counsel for the petitioner not to address the Court on merits, in view of the discretionary power conferred on the High Court while exercising powers of revision under section 401 of Cr.P.C. to exercise the power conferred on a Court of appeal by section 386 of Cr.P.C., in appropriate cases, the revisional Court can go into the merits for testing the correctness, legality or propriety of any finding recorded by the Court below. There is some restriction as to the manner in which the power in revision as opposed to that in appeal is to be used. Revision is not right of litigant. Exercise of revisional power by the High Court under section 397 read with section 401 of Cr.P.C. is to call for the records of any inferior criminal Court and to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court and to pass

appropriate orders. Revisional power of the High Court is purely discretionary and should be exercised only in rare cases to prevent miscarriage of justice when there is glaring defect in the procedure on the point of law resulting in the failure of justice.

Therefore, the contentions raised by the learned counsel for the petitioners that in spite of the concession made the counsel not to challenge the conviction of the petitioners on merits, this Court should have decided the revision petition on merits apart from dealing with the sentence aspect, cannot be accepted.

Third point:-

> The learned counsel for the petitioners raised his third point and contended that law is well settled that where on the evaluation of a case, this Court reaches the conclusion that no conviction of any accused is possible, the benefit of doubt must also be extended to the co-accused similarly situated though he has not challenged the order of conviction by way of an appeal, in other words, it becomes the duty of the High Court to extend the benefit of acquittal in the appeals also to a non- appealing similarly situated accused. (Ref:- Bijoy Singh -Vrs.- State of Bihar reported in 2002 Criminal Law Journal 2623, Raja Ram -Vrs.- State of M.P. reported in (1994) 2 Supreme Court Reporter 114, Dandu Lakshmi Reddy -Vrs.- State of A.P. reported in 1999 Criminal Law Journal 4287, Anil Rai -Vrs.- State of Bihar reported in A.I.R. 2001 S.C. 3173, Suresh Chaudhary etc. -Vrs.- State of Bihar reported in 2003 Criminal Law Journal 1717 and Rajoo -Vrs.- State of M.P. reported in (2008) 15 Supreme Court Cases 133).
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> Even though there is no dispute over the proposition of law advanced by the learned counsel for the petitioners but when the acquittal judgments in respect of the co-accused persons passed in criminal appeals were not placed at the time of hearing of the revision petition and it is not known as to whether such judgments were placed before the Hon'ble Supreme Court in the special leave petition or not, there is no scope for this Court to assess the evidence against the petitioners vis-à-vis the evidence against the co-accused persons already acquitted in this Misc. Case so as to give benefit of acquittal to the petitioners. A counsel for the petitioner while arguing a revision petition can address the Court on all the grounds taken in the petition or on some specific grounds leaving the other grounds. If after considering the grounds argued, the revisional Court passes a judgment or final order, it cannot be reviewed or modified or even recalled on the ground that inadvertently the counsel for the petitioner could not address the Court on some other relevant grounds. If such things are permitted then there would be no end to it and even after the judgment or final order is passed, the petitioner will come up with petition after petition to recall and rehear the revision petition on some left out grounds and thereby making mockery of the very purpose underlying the provision contemplated under section 362 of Cr.P.C.

> The judgment pronounced by this Court on 18.10.2011 is neither without jurisdiction nor in violation of principles of natural justice. This Court after giving due opportunity of hearing to the learned counsels for the petitioners and the State decided the revision petition and the special leave petition against such decision has been dismissed and therefore, entertaining this Misc. Case and allowing the prayer for recall/modification and thereby reviewing the judgment and passing an order of acquittal of the petitioners would be against the statutory provision under section 362 of the Cr.P.C. which is impermissible even invoking the inherent power under section 482 of Cr.P.C.

Therefore, the Misc. Case being devoid of merit, stands dismissed.

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S.K. Sahoo, J.

Orissa High Court, Cuttack The 16th August, 2017/Pravakar