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Section 362 CrPC Does Not Bar Recall Of Orders: Allahabad HC [Read Judgment]

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"There is difference between recall and review."

Recalling an order passed in a criminal case, the Allahabad High Court observed that bar contained in section 362 of the Criminal Procedure Code applies for review, and not recall.

Section 362 CrPC provides 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.

However, to recall the order in the present case, Justice Rajeev Misra based this reasoning on a Supreme Court judgment in Vishnu Agarwal Vs.State of U.P. (<https://indiankanoon.org/doc/566105/>) In the said case it was observed: "*There is a distinction between a review petition and a recall petition. While in a review petition, the Court considers on merits whether 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.*"

It also referred to a single bench judgment of the High Court in Jawahar Lal @ Jawahar Lal Jalaj Vs. State of U.P (<https://indiankanoon.org/doc/197574105/>). that held that application for restoration or recall of the order is maintainable and the prohibition of Section 362 Cr.P.C. do not apply in the petitions, which have been dismissed in default without discussing the merits of the case because it do not come within the prohibition of 'alter' or 'review' of judgment, which has entirely a different meaning.

The court, in this case, noted that, while passing the order, the opposite party was not represented by any counsel nor notices were issued to him before finally deciding the application. Rule of audi alterem partem requires that opportunity of hearing should be afforded before an order is passed on judicial side, the bench added. It observed:

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"The Apex Court in case of Vishnu Agarwal (Supra) and judgement of learned Single Judge in Jawahar Lal (Supra) have reiterated that there is difference between recall and review. By seeking recall of order dated 15.12.2016, opposite party No.2 is not seeking review of order dated 15.12.2016 and therefore bar contained in section 362 Cr.P.C. will not come in way. Consequently, I am of the considered opinion that order dated 15.12.2016, is liable to be recalled at the behest of opposite party No.2, who admittedly was not afforded any notice or opportunity of hearing before order dated 15.12.2016 was passed."

Advocate Sikandar B. Kochar appeared for the Applicant and Senior Advocate Anoop Trivedi assisted by Advocates Abhinav Gaur and Vibhu Rai appeared for the Opposite party in this case.

SC View: Section 362 CrPC Bars Recall Also

While setting aside a Madhya Pradesh High Court order that allowed an accused's prayer seeking to review, recall and modify the order, the Supreme Court had observed (<https://www.livelaw.in/top-stories/reviewrecallmodification-of-ordersjudgments-barred-in-criminal-matters-145010>) that, in view of the specific bar which is contained in Section 362, the order of the High Court is unsustainable.

The Supreme Court in Mohammed Zakir vs. Shabana (<https://www.livelaw.in/even-patently-erroneous-orders-cant-be-recalled-by-criminal-courts-reiterates-sc-read-judgment/>) has observed that a Criminal Court including High Court (while exercising criminal jurisdiction) cannot recall an earlier order invoking Section 362 of the Code of Criminal Procedure, on the ground that it was 'patently erroneous'.

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(https://www.livelaw.in/pdf_upload/pdf_upload-364750.pdf)

A.F.R.**Reserved on 02.08.2019****Delivered on 19.09.2019****Court No. - 28****Case :-** APPLICATION U/S 482 No. - 38644 of 2016**Applicant :-** Jaspreet Singh Garewal**Opposite Party :-** State Of U.P.And Another**Counsel for Applicant :-** Sikandar B. Kochar**Counsel for Opposite Party :-** G.A.,Anoop Trivedi**Hon'ble Rajeev Misra,J.****Ref: Criminal Misc. Recall Application No. 4345 of 2017**

1. This application under Section 482 Cr.P.C. has been filed by applicant- Jaspreet Singh Garewal (a co-accused) challenging the order dated 02.12.2016 passed by Additional Sessions Judge, Court No.1, Bareilly in Sessions Trial No.123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, whereby application (Paper No. 309 Kha) filed by accused under Section 309 Cr.P.C. has been rejected.

2. It transpires from record that during pendency of S.T. No. 123 of 2013 (State V Page 1 / 74 the accused Nirmal

Tags

Section 362 CrPC (<https://www.livelaw.in/tags/section-362-crpc>)

Code of Criminal Procedure (<https://www.livelaw.in/tags/code-of-criminal-procedure>)

Allahabad HC (<https://www.livelaw.in/tags/allahabad-hc>)

Justice Rajeev Misra (<https://www.livelaw.in/tags/justice-rajeev-misra>)

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(2011) 74 ACC 609 : (2011) 104 AIC 242 : (2011) AIR(SCW) 1473 : (2011) AIR(SC) 1232 : (2011) AIR(SC)Cri 600 : (2011) 2 AllLJ 722 : (2011) ALLMR(Cri) 1023 : (2011) CriLJ 1744 : (2011) 3 ECrC 172 : (2011) 3 JCR 49 : (2011) 3 JT 538 : (2011) SN2 KCCR 172 : (2011) 4 LW 338 : (2011) 2 LW(Cri) 200 : (2011) 2 RCR(Criminal) 754 : (2011) 2 RecentApexJudgments(RAJ) 585 : (2011) 2 SCALE 690 : (2011) 14 SCC 813 : (2011) 3 SCR 196 : (2011) 1 UC 592 : (2011) 2 WLC 294

SUPREME COURT OF INDIA

DIVISION BENCH

VISHNU AGARWAL — Appellant

Vs.

STATE OF U.P. AND ANOTHER — Respondent

(Before : Markandey Katju, J; Gyan Sudha Misra, J)

Criminal Appeal No's. 1323 of 2004 and 875 of 2006

Decided on : 23-02-2011

- Criminal Procedure Code, 1973 (CrPC) - Section 362, Section 482, Section 561A

Counsel for Appearing Parties

Manoj Swarup, Lalita Kohli and Abhishek Swarup, Manoj Swarup and Co., Siddhartha Dave, Vibha Datta Makhija, Sandeep Singh and Manoj Swarup and Co, for the Appellant;

Cases Referred

- [Talab Haji Hussain Vs. Madhukar Purshottam Mondkar and Another,](#) AIR 1958 SC 376 : (1958) CriLJ 701 : (1958) 1 SCR 1226
- [Asit Kumar Kar Vs. State of West Bengal and Others,](#) (2009) 1 JT 654 : (2009) 1 SCALE 745 : (2009) 2 SCC 703 : (2009) 1 SCC(L&S) 541 : (2009) 1 SCR 469

Final Result : Dismissed

ORDER

Crl. Appeal No. 1323 of 2004

1. The appeal fails and is accordingly dismissed.

Crl. Appeal No. 875 of 2006

2. The Appeal is dismissed as having become infructuous.

Criminal Appeal No. 1323/2004

3. Heard learned Counsel for the parties.

4. This appeal has been filed against the impugned judgment of the Allahabad High Court dated 29.1.2004 in Criminal Revision No. 136/1998.

5. It appears that the aforesaid Criminal Revision was listed in the High Court on 2.9.2003. No one appeared on behalf of the Revisionist, though the Counsels for Respondents appeared. In these circumstances, the judgment was passed.

6. Subsequently, an application was moved for recall of the Order dated 2.9.2003 alleging that the case was shown in the computer list and not in the main list of the High Court, and hence, the learned Counsel for the Revisionist had not noted the case and hence he did not appear.

7. It often happens that sometimes a case is not noted by the Counsel or his clerk in the cause list, and hence, the Counsel does not appear. This is a human mistake and can happen to anyone. Hence, the High Court recalled the order dated 2.9.2003 and directed the case to be listed for fresh hearing. The aforesaid order recalling the order dated 2.9.2003 has been challenged before us in this appeal.

8. Learned Counsel for the Appellant has relied on the decision of this Court in Hari Singh Mann v. Harbhajan Singh Bajwa AIR 2001 SC 43. Para 10 of the said judgment states:

Section 362 of the Code mandates that no Court, when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or arithmetical error. The Section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. The reliance of the Respondent on [Talab Haji Hussain Vs. Madhukar Purshottam Mondkar and Another](#), is misconceived. Even in that case it was pointed that inherent powers conferred on High Courts u/s 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 u/s 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.

9. Learned Counsel for the Appellant Mr. Manoj Swarup submitted that in view of the aforesaid decision, the High Court erred in law in recalling the Order dated 2.9.2003. We regret we cannot agree.

10. 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.

11. Apart from the above, we are of the opinion that the application filed by the Respondent was an application for recall of the Order dated 2.9.2003 and not for review. In [Asit Kumar Kar Vs. State of West Bengal and Others,](#) this Court made a distinction between recall and review which is as under:

There is a distinction between...a review petition and a recall petition. While in a review petition, the Court considers on merits whether 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. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Licensees Association v. Raghavendra 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.

12. Hence, we see no error in the impugned order passed by the High Court.

13. The appeal fails and is accordingly dismissed.

Crl. Appeal No. 875 of 2006

14. The Appeal is dismissed as having become infructuous.