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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.A. No.668/2005 & CrI.M.A. Nos.15800-15803/2012**

Date of decision: 3rd September, 2012

VIRENDER Appellant
Through Mr. Bankim Kulshreshtha, Adv. with
Mr. Vivek Sharma, Adv. & Mr. Harish
Nautiyal, Adv.

versus

THE STATE OF DELHI Respondent
Through Ms.Ritu Gauba, APP

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE J.R. MIDHA

GITA MITTAL, J (Oral)

CrI.M.A. Nos.15800-15802/2012

1. Allowed, subject to just exceptions.

**Review Petition No.502/2012 & CrI.M.A. No.15803/2012 (for
condonation of delay)**

2. Thirteen persons including the petitioner Virender were charged under Section 364-A/368 of the Indian Penal Code (IPC) and under Sections 25/27 of the Arms Act for which they stood trial in the case arising out of FIR

No.238/97 which was registered by the Police Station Tughlak Road, New Delhi under the same sections. The trial resulted in the judgment dated 17th May, 2002 of conviction of 11 persons including one Virender Singh, the present petitioner who was thereafter sentenced to rigorous imprisonment.

3. It appears that after the recording of his statement under Section 313 of the Cr.P.C., Virender Singh, absconded and was declared a proclaimed offender by the learned trial Judge. On his re-surfacing, the trial against him was completed which culminated in a judgment dated 26th April, 2005 passed by the learned Additional Sessions Judge finding him guilty of commission of the offence under Section 368 of the Indian Penal Code. After hearing the petitioner, by an order dated 5th May, 2005, the petitioner was sentenced to undergo rigorous imprisonment to life and to pay fine of Rs.1,000/- under Section 364-A read with Section 120-B of the IPC and in default of payment, he was directed to undergo simple imprisonment for three months.

4. The petitioner had assailed his conviction and the sentence imposed upon him by way of Criminal Appeal No.668/2005 which came to be dismissed by a judgment dated 11th December, 2006 after detailed consideration by this court.

5. Leave to petition against the dismissal of said appeal was filed before the Supreme Court of India and came to be listed as SLP (Crl.) No.1145/2007. By the order dated 2nd March, 2007, this special leave was dismissed in

limine.

6. The present petition has been filed by Virender Singh who is undergoing the sentence of rigorous imprisonment, seeking review of the judgment dated 11th December, 2006 passed by this court.

7. It is contended that one Rajesh Adhikari was also arrayed as a co-accused to stand trial with the present writ petitioner but he had been absconding and had been declared as proclaimed offender. He surfaced after the petitioner's appeal had been dismissed by the judgment dated 11th December, 2006. It is urged that Rajesh Adhikari had filed an application under Section 311 of the Cr.P.C. for summoning of Smt. Shashi in the trial against him, which was not granted by the learned trial Judge. It is urged that a judgment of conviction dated 15th September, 2009 was passed against Rajesh Adhikari by the learned trial Court which was assailed before this court in Crl.Appeal No.1365/2011. The appeal was allowed by a judgment dated 2nd January, 2012. The petitioner submits that he is entitled to acquittal and the same judgment as has been passed in favour of Rajesh Adhikari.

8. The present petition has been couched as an application under Articles 226, 227, 21 & 14 of the Constitution of India read with Sections 482 & 374 of the Cr.P.C.. Along with, the petitioner has filed Criminal Miscellaneous Appeal No.15803/2012 praying for condonation of delay in filing the review petition.

9. Given the well settled principle of law that the power of review has to be specifically statutorily conferred, we have right at the outset put a question to learned counsel representing the petitioner with regard to the maintainability of the present petition. Learned counsel for the petitioner has placed reliance on the observations of the Supreme Court in para 114 of the pronouncement reported at **AIR 1988 SC 1531 A.R. Antulay Vs. R.S. Nayak & Anr** which reads as follows:-

“114. In both the judgments it has been clearly observed that judicial order of this Court is not amenable to a writ of certiorari for correcting any error in the judgment. It has also been observed that the jurisdiction or power to try and decide a cause is conferred on the courts by the Law of the Lands enacted by the Legislature or by the provisions of the Constitution. It has also been highlighted that the court cannot confer a jurisdiction on itself which is not provided in the law. It has also been observed that the act of the court does not injure any of the suitors. It is for this reason that the error in question is sought to be corrected after a lapse of more than three years. I agree with the opinion expressed by Justice Mukharji in the judgment as well as the additional opinion given by Justice Misra in his separate judgment.”

10. It is trite that the judgment would be law for the issue specifically raised and decided by the court. In **A.R. Antulay** (supra), the Supreme Court in 1984 had referred the petitioner's trial for offences under the Indian Penal Code and Prevention of Corruption Act, to a single Judge of the High Court of Bombay. The petitioner had challenged the reference by way of a petition before the High Court of Bombay which rejected the same. The

judgment of the Bombay High Court was assailed before the Supreme Court where the court was primarily concerned with its power to transfer the cases against the petitioner under the Indian Penal Code as well as the Prevention of Corruption Act to the High Court and whether the same was authorized by law. Learned counsel for the petitioner is placing reliance on certain observations made in the minority view and not the binding dicta laid down in the said judgment which cannot guide adjudication of the issue before this court.

11. Before us, there is no dispute at all that there is no provision of the Code of Criminal Procedure which confers power of review on this court. The judgment of this court rendered on 11th December, 2006 was passed upholding the judgment of conviction passed by the learned trial Court. The judgments are based on a careful scrutiny of the evidence which had been recorded in the petitioner's trial. Rajesh Adhikari's case was decided on evidence recorded in his trial. In this view of the matter, it is certainly not open to us at this stage to assume review jurisdiction which is not conferred on us by the Statute.

12. Our attention has been drawn to a pronouncement of the Supreme Court reported at **2001 (1) SCC 169 Hari Singh Mann Vs. Harbhajan Singh Bajwa** wherein the Supreme Court has criticized the court entertaining any application in a disposed of criminal matter in the following terms:-

“8. We have noted with disgust that the impugned orders were passed completely ignoring the basic principles of criminal law. No review of an order is contemplated under the Code of Criminal Procedure. After the disposal of the main petition on 7-1-1999, there was no lis pending in the High Court wherein the respondent could have filed any miscellaneous petition. The filing of a miscellaneous petition not referable to any provision of the Code of Criminal Procedure or the rules of the Court, cannot be resorted to as a substitute of fresh litigation. The record of the proceedings produced before us shows that directions in the case filed by the respondents were issued apparently without notice to any of the respondents in the petition. Merely because the respondent 1 was an Advocate, did not justify the issuance of directions at his request without notice of the other side. The impugned orders dated 30-4-1999 and 21-7-1999 could not have been passed by the High Court under its inherent power under Section 482 of the Code of Criminal Procedure. The practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the court.

9. There is no provision in the Code of Criminal Procedure authorising the High Court to review its judgment passed either in exercise of its appellate or revisional or original criminal jurisdiction. Such a power cannot be exercised with the aid or under the cloak of Section 482 of the Code. This Court in *State of Orissa v. Ram Chander Agarwala* held:

“20. Before concluding we will very briefly refer to cases of this Court cited by counsel on both sides. *Talab Haji Hussain* 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 *Lala Jairam Das v. King-Emperor* 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.* this Court held that Section 369 read with Section 424 of the Code of Criminal Procedure specifically prohibits the altering or reviewing of its order by a court. The accused applied before a succeeding Sessions Judge for rehearing 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 367 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 itself and re-hear 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 *Supdt. and Remembrancer of Legal Affairs W.B. v. Mohan Singh* 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* case that once a judgment has been pronounced by a High Court either in exercise of its appellate or revisional jurisdiction, no review or revision can be entertained against that judgment as there is no provision 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.””

(underlining by us)

13. It needs no elaboration that so far as the jurisdiction of a court after disposal of an appeal on merits is concerned, the same can only be to the limited extent as statutorily prescribed by Section 362 of the Cr.P.C.

14. Learned counsel for the petitioner has also relied on the pronouncement of the Supreme Court reported at **(2006) 6 SCC 359 Kunhayammed & Ors. Vs. State of Kerala & Anr.** In this case, the court has laid down the law on the effect of dismissal of a special leave petition by a non-speaking order or a dismissal where no reasons were given that it does not constitute res judicata in the context of exercise of powers under the Kerala Private Forest (Vesting & Assignment) Act, 1971. In the present case as well, the Special Leave Petition has been dismissed in limine. However, we still are unable to hold that this court has powers of review so far as exercise of criminal appellate jurisdiction is concerned.

15. Learned counsel for the petitioner has also placed reliance on the judgment reported at **AIR 2002 SC 1771 Rupa Ashok Hurra Vs. Ashok Hurra & Anr.** and connected petitions. This judgment was rendered in the

context of Article 142 of the Constitution of India and it was held that the Supreme Court could exercise inherent power and re-consider the final judgment in cases of gross abuse of the process of the court or gross miscarriage of justice in rarest of the rare case. We may note that exercise of even such power was carefully confined to a very narrow area by the Supreme Court placing reliance on the doctrine of *ex debito justitiae*.

16. In the instant case, the judgment against the petitioner rests on the evidence led before the Trial Court in the trial against him.

17. We may note that if we were to agree with the petitioner, it can give rise to a situation where co-accused may at will abscond from justice and re-surface after pronouncement(s) against the co-accused to cloud the evidence which has already been recorded of a particular witness or who is otherwise before the court. The same is clearly not legally permissible.

18. The reference in the caption of this petition to Articles 226 and 227 of the Constitution, is clearly misconceived inasmuch as this court is not sitting in writ jurisdiction. The review petition has been filed in a disposed of criminal appeal.

19. Learned counsel for the petitioner has submitted that he had filed a petition under the Right to Information Act before the Supreme Court and that a letter dated 24th February, 2012 was received from the court directing the petitioner to proceed in the matter in accordance with law. It is contended that the present petition had been filed as a result thereof.

20. We are unable to see as to how the response to a petition under the Right to Information Act could render the present review petition maintainable. The petitioner was merely directed to examine the matter and take steps in accordance with law. The present petition is certainly not 'in accordance with law'.

For all these reasons, this petition is dismissed as not maintainable.

Crl.M.A. No.15803/2012

21. In view of the fact that we have held that this court does not have the power of review in view of the fact that statute does not prescribe limitation for filing a review, this application for condonation of delay is misconceived and is not maintainable.

Dasti.

GITA MITTAL, J

J.R. MIDHA, J

SEPTEMBER 03, 2012
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