NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 20 of 2014

- Nandkishore Agrawal S/o Late Piramal Agrawal Aged About 49 Years Resident of Proprietor Pooja Floor Mill, In Front of Sindhi School, Raipur, Civil and Rev. Distt. Raipur C.G.

--- Petitioner

Versus

- Smt. Kiran Agrawal Wife of Murari Agrawal, aged about 46 Years, R/o Jawahar Nagar, Raipur, Through - Power of Attorney Murari Agrawal, S/o Rameshwar Lal Agrawal, R/o Jawahar Nagar, Raipur C.G. **--- Respondent**

For the petitioner	:	Mr. Sourabh Sinha, Advocate
For the Respondent	:	Mr. Ashish Surana. Advocate

Hon'ble Shri Justice Goutam Bhaduri

CAV JUDGMENT/ORDER

22.12.2015

1. Heard on admission.

2. The instant petition is preferred u/s 482 of the Code of Criminal Procedure whereby the order dated 10.12.2013 passed by this Court in Acquittal Appeals No.23, 24, 26 & 27 of 2009 which were decided analogously has been sought to be recalled.

3. Brief facts of the case are that earlier four acquittal appeals were filed by Smt. Kiran Agrawal against the judgment dated 27.11.2008 passed by the third Additional Sessions Judge Raipur in Criminal Appeal Nos. 61, 62, 63, & 64 of 2008. By the said judgment dated 27.11.2008, the III Additional Sessions Judge, Raipur, had set aside the order of conviction dated 07.04.2008 passed by the JMFC. By such

order, petitioner Nand Kishore Agrawal was convicted u/s 138 of the Negotiable Instrument Act and sentenced to undergo R.I., for 1 year along-with fine of Rs.1000/- in each case. In default of payment of fine, he was further directed to undergo R.I., for one month. This Court in acquittal appeal preferred by the Respondent Smt. Kiran Agrawal again set aside the order of the appellate Court and upheld the order of conviction passed by the JMFC.

4. Shri Saurabh Sinha, learned counsel appearing for the applicant appearing on behalf of the petitioner would submit that at the time of arguments before this Court in acquittal appeal, deliberately certain facts were not placed by the respondent which the respondent was duty bound to place it. It is stated that consequently it has led to a wrong finding and the respondent herein has played fraud on the court which has resulted in conviction of the petitioner.

5. He would submit that the petitioner obtained a loan from Central Bank and property of the respondent was mortgaged which was valued of Rs.20 lakhs. It is further submitted that in lieu of such mortgage, four cheques were given by the petitioner to the respondent as security thereof. It is contended that subsequently petitioner Nand Kishore Agrawal defaulted in payment of loan being the principal owner. Consequently a notice u/s 13 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest, Act, 2002 (for Short “The SARFAESI Act”) was served on petitioner and respondent on 15.07.2002. It is stated that the notice so served on respondent Kiran Agrawal was in the capacity of guarantor, which was replied by the

respondent to the Branch Manager. Therefore, it is stated that the respondent had full knowledge of actions and notices under the SARFAESI Act. It is stated that though in the notice served by respondent to Bank it was contended that the mortgage was not made of the property but in statement under complaint u/s 138 of N.I. Act, the respondent has admitted the fact about the existence of mortgage. Therefore, when the loan was repaid, the respondent guarantor was allowed to sell her land and the lands were sold. It is, therefore, submitted that deliberately the facts were not brought before the Court. It is stated that when the petitioner cleared the loan of Central Bank and settled the account for Rs.45 lakhs and after compromise, the charge over the land was lifted which subsequently made the respondent to sell the land and consequent upon compromise entered with the Bank.

6. The Counsel further referred to the compromise document Annexure P-1 and the sale deed Annexure P-2 filed with this petition. It is contended that such fact of sale in any case could not have been withheld by the respondent before this Court and the counsel further referred to the statement of Kiran Agrawal recorded before the Court below in the proceeding u/s 138 N.I.Act and would submit that the reading of the statement would go to show that she had no means of income to lend money, therefore, the preponderance of probabilities would lead to point out that in lieu of land mortgaged, 4 cheques were given and no loan was actually given by the respondent to the Petitioner so as to come within the ambit of Section 138 of N.I.Act. He would further submit that immediately after service of notice under

SARFAESI Act on respondent on 15.07.2002, the respondent replied it by Annexure P-5 on 20.09.2002 and thereafter proceeded to deposit four cheques with the Bank on 20.09.2002, 24.09.2002, 25.09.2002 and 26.09.2002. He further submits that the complaint was filed by Kiran Agrawal by Annexure P-6 against the petitioner u/s 420, 467, 468 & 471 IPC wherein at Para 6 it was contended that no mortgage was created by Kiran Agrawal in respect of the properties and documents have been fabricated to create mortgage at the behest of the petitioner. He, therefore, submits that at one point of time, the land was stated to be not mortgaged but at the same time, when the loan was settled the respondent proceeded to sell the same land which was mortgaged to different prospective purchasers. So it would go to raise a presumption that the land was mortgaged for security of loan and in lieu thereof cheques were given to the respondent and actually no loan was ever availed by the petitioner from the respondent. He further submits that these facts should have been brought by the respondent before the Court and since it was not brought to the notice of the court, it would amount to playing fraud on the court and the entire order, therefore, vitiates and needs to be recalled.

7. Learned counsel for the petitioner placed his reliance on a decision rendered in case of *S.P. Chengalvaraya Naidu (dead) by L.Rs., Vs. Jagannath (dead) by LRs (1994) 1 SCC* Para 6 and would submit that a litigant who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the

other side then he would be guilty of playing fraud on the court as well as the opposite party. He, therefore, submitted that the respondent by placing the sale deed should have disclosed that the property has been sold by the respondent. He also placed his reliance on a decision reported in ***(2010) 8 SCC 383 – Meghmala and others Vs. G. Narasimha Reddy and others)*** and would submit that where the applicant gets an order/office by making misrepresentations or playing fraud upon the Court, such order cannot be sustained in the eye of law and fraud avoids all judicial acts, ecclesiastical or temporal. Further he placed reliance on a decision reported in ***(2008) 4 SCC 87 – Forbes Forbes Campbell & Co. Ltd., Vs. Board of Trustees, Port of Bombay*** and would submit that if the fraud is played on the court then the specific bar created u/s 362 Cr.P.C., would not apply and consequently in these circumstances if the property has been sold out after the loan has been liquidated and settled the order of conviction needs to be recalled.

8. Per contra, Shri Ashish Surana vehemently opposes the arguments. It is submitted that on the date of judgment on 10.12.2013, all the facts alleged to be pleaded now were available to the petitioner. He submits that the trial Court by order dated 07.04.2008 had convicted the petitioner u/s 138 N.I.Act. Subsequently the appellate Court acquitted the appellant by order dated 27.11.2008 and the High Court by its order dated 10.12.2013 has again convicted. He submits that the compromise with the Bank by the petitioner though is said to have been entered in the year 2009 but the same was not produced till 2013. It is submitted that the compromise letter Annexure P-1 was addressed to petitioner,

Nand Kishre Agrawal and not to the respondent, therefore, he submits that the arguments of the petitioner that it should have been placed before the court by respondent is without any substance. He submits that the statement of respondent before the Court below placed as Annexure A-1, would go to show that respondent has not concealed any fact about the receipt of notice from DRT and the Central Bank and stated that deliberately despite knowing all these facts these notices either from the Bank or DRT were not confronted to the respondent. Therefore, it is stated that if those notices would have been placed during cross examination, the respondent would have replied to it.

9. The counsel further submits that the sentence is only for an year and with fine which is accumulated to Rs.5000/- only. He submits that no restriction was imposed on the respondent to sell the property as the respondent was the owner of the subject land and there is no nexus between the mortgage of the land and receipt of cheques in lieu thereof. It is stated that the proceedings are contested from 2002 to 2013 but no documents have been placed on record. The counsel further submits that the court of JMFC has not passed any order of compensation and after long drawn litigation such defence is raised by way of instant petition which is not available to the petitioner. He submits that on earlier occasion while the order of conviction was passed in acquittal appeal, this court has meticulously considered all the aspects and has passed the order, therefore, neither any fraud has been committed nor any suppression/concealment of fact has been made. Consequently, he submits that the Court may not exercise its jurisdiction vested in it u/s 482

Cr.P.C., as it will amount to review of the order for no reasons.

10. I have heard learned counsel for the parties and have also perused the documents filed along-with this petition.

11. The document of compromise of loan by Bank is placed as Annexure P-1. It is dated 04.04.2009 and is addressed to Nand Kishore Agrawal. It is a document of Central Bank and speaks about the settlement of loan for Rs.45 lakhs This letter/communication is addressed to Nand Kishore Agrawal, the petitioner. The petitioner has claimed that after such settlement of account the respondent was able to sell the mortgaged land. The records show that before that, the notice under SARFAESI Act was served to the petitioner and guarantor by Annexure P-4 dated 15.07.2002. Now with such documents if the statement of Kiran Agrawal is perused as deposed in case u/s 138 N.I. Act, in the cross examination she admitted at Para 9 that she had received notice from the Central Bank and also from DRT. At Para 2 of the statement she stated that she had advanced loan of Rs.20 lakhs to the petitioner and in lieu thereof, 4 cheques of Rs.5 lakhs each were given which were presented and dishonoured. Therefore the contention of the petitioner that the respondent deliberately suppressed the notice of Central Bank and DRT cannot be appreciated in view of the fact that the respondent Kiran Agrawal was examined and cross examined on 21.03.2005 and in the cross examination, though suggestions were given about the receipt of notices but she was not confronted with the notices. Even otherwise for the sake of argument, if it is admitted that notices of the

DRT was issued to the respondent in the capacity of guarantor but reading of the statement do not establish the fact that cheques were given as security for the land mortgaged. The petitioner has failed to establish such link. On the contrary, the respondent has taken the stand that the transaction of mortgage is different and transaction of loan is different. This Court vide order dated 10.12.2013 has observed those facts at Para 19 that the evidence which has come on record failed to bridge the defence of petitioner Nand Kishore Agrawal to establish that the cheques were issued in lieu of security for creation of mortgage.

12. Even if it is held that because of the fact the loan was liquidated and the property came out of the mortgage, but in absence of any evidence and suggestion in the cross examination it cannot be held conclusively that the land was mortgaged and in lieu thereof as a security, the cheques were given to the respondent. During hearing of acquittal appeal, no application in the nature was moved before this Court by the petitioner to raise a defence to show that the land was mortgaged and cheques were given as security for mortgage and after the loan is liquidated, the charge having been diluted and consequent thereto the respondent has sold the property. It is for the first time after the order of conviction is passed, this petition has been moved to recall earlier order dated 10.12.2013. A perusal of the documents and statement of respondent would go to show that no fraud has been played by the respondent. If the petitioner was sensitive to establish that cheques were held as security of mortgage, it should have been proved by the cogent evidence and confrontation with the documents and

suggestions during cross examination. Having failed to do so in the cross examination because the sale deed has been made after the loan is liquidated, it cannot be presumed only on submission of the petitioners.

13. Hon'ble the Supreme Court in a case law reported in (**2014) 10 SCC 754 – Abdul Basit alias Raju V. Mohd. Abdul Kadir Chaudhary** has held at Para 21 that it is an accepted principle of law that when a matter has been finally disposed of by a court, the court in the absence of a direct statutory provision becomes functus officio and cannot entertain a fresh prayer for relief in the matter unless and until the previous order of final disposal has been set aside or modified to that extent. It is also settled law that the judgment and order cannot be reviewed by the court passing such judgment and order in the absence of any express provision in the Code for the same. Section 362 of the Code operates as a bar to any alteration or review of the cases disposed of by the court. The singular exception to the said statutory bar is correction of clerical or arithmetical error by the Court.

14. Further, Their Lordships in **AIR 2012 SCC 364 at Para 26 – State of Punjab Vs. Davinder Pal Singh Bhullar and others** has held that there is a bar to review the judgment which reads as under:

> "26. 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, Cr.P.C., 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. (See Hari Singh Mann v. Harbhajan Singh Balwa and others., AIR 2001 SC 43; and Chhanni v. State of U.P., AIR 2006 SC 305. Moreover, the prohibition contained in Section 362 Cr.P.C., is absolute; after the judgment is signed, even the High Court in exercise of its inherent power under Section 482 Cr.P.C., has no authority or jurisdiction to alter/review the same (See: Moti Lal V. State of M.P., AIR 1994 SC 1544; Hari Singh Mann (supra) and State of Kerala v. M.M. Manikantan Nair, AIR 2001 S.C. 2145)"

15. Further, Their Lordships in **AIR 2011 SC 1232 – Vishnu Agrawal Vs. State of U.P., and others** has specifically laid down that "there is 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 any opportunity of hearing to an affected party.

16. Applying the aforesaid principles as laid down by the Supreme Court, a perusal of the document would show that it is not a case that the opportunity has not been given to the petitioner. The proceeding was pending from 2002 till the year 2013 and after judgment of 2013, the petitioner's contention that certain documents have not been considered, cannot be appreciated.

17. In view of the foregoing observations, I am not inclined to entertain this petition and it is dismissed at the motion stage itself.

Sd/-

GOUTAM BHADURI
JUDGE

Rao