

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPLICATION NO. 1274 OF 2014

Mr. Ashok Chavan)
 6/A, Bhagirathi Bhavan,)
 Dadi Seth 1st Cross Lane,)
 Babulnath, Mumbai 400 007) .. Applicant
 (Original Resppondent No.2)

Versus

1 Central Bureau of Investigation)
 Anti-Corruption Branch,Mumbai
 (through Shri S.S. Giri, Addl.SP)

2 The State of Maharashtra) .. Respondents
 (Org. Applicant & Resp.No.1)

Mr. Amit Desai, Sr. Counsel with Gopalkrishna Shenoy, Rohan Dakshini, Ms. Pooja Kothari and Anuj Javeri i/b Federal & Rashmikant, Advocate for the applicant
 Mr. H. S. Venegavkar, Advocate for the respondent No.1-CBI.
 Mr. Ajay Patil, APP for the respondent No. 2-State.

CORAM:-M.L. TAHALIYANI,J.
 DATED : -04/03/2015

ORAL JUDGMENT:

This application is made for recall of order of this Court passed on 19th of November, 2014 in Criminal Revision Application No. 136 of 2014. The prayer clause in the present

application can be reproduced as under:

- i) that this Hon'ble Court may be pleased to recall the Order and Judgment dated 19th November, 2014;
- ii) that this Hon'ble Court fix an early date for the rehearing of the Criminal Revision Application No. 136 of 2014;
- iii) Pending the hearing and final disposal of this application, this Hon'ble Court be pleased to stay the Order and Judgment dated 19th November, 2014 and/or extend the stay granted by this Hon'ble Court;
- iv) For the costs of the present application;
- v) For such other and further reliefs as the nature and circumstances of the case may require.

2 Before I proceed further it is necessary to state that the criminal revision application was filed by respondent No. 1-CBI challenging the order of the learned Spl. Judge in Spl. Case No. 42 of 2012, who refused to delete the name of the applicant (original

accused No. 11) from the charge-sheet of Spl. Case No. 42 of 2012.

3 The applicant is one of the accused in the said spl. Case and is facing trial for the offence punishable u/s 13(2) r/w 13(1)(d) of Prevention of Corruption Act. There are other charges also against rest of the accused. The applicant could not be prosecuted for these charges for want of requisite sanction from Governor of Maharashtra u/s 197 of Cr. P. C. It also may be noted that sanction u/s 19 of Prevention of Corruption Act was not needed as the applicant was not a public servant on the date of filing of the charge-sheet.

4 Respondent No. 1-CBI had moved the application u/s 169 r/w 173(8) of Cr. P. C. for seeking deletion of name of the applicant in view of refusal on the part of Governor of Maharashtra to grant sanction for prosecution of the applicant for other charges levelled against him along with the charges under Prevention of Corruption Act. The other charges include Sections 420, 468 and 471 of IPC. The learned Spl. Judge rejected the application of respondent No. 1 and, therefore, a revision application being Revision Application No. 136 of 2014 was filed in this Court. As

already stated, the said revision application was decided on 19th of November, 2014. The applicant was respondent No. 2 in the said revision application. The applicant had supported the prayer of CBI before the trial Court. It follows that he had also supported CBI during hearing of revision application. Order passed by this Court is sought to be recalled by the applicant (original respondent/accused No. 11).

5 When the application was taken up for hearing, the first issue which arose before the Court was as to whether this Court can recall the order passed on 19th of November, 2014. The question of hearing the revision application afresh would arise only, if the Court decides to recall the order passed on 19th of November, 2014.

6 The learned counsel Mr. Amit Desai appearing on behalf of the applicant has submitted that this Court has made certain observations in the order in respect of which submissions were not made, either by the applicant or by respondent No. 1. It is further submitted that certain part of the allegations mentioned in the order do not form part of the charge-sheet. In addition to this, it is also submitted that the observation of this Court that the trial

Court has already taken cognizance of the offence is contrary to the pronouncement of the trial Court that it had not taken cognizance of the offence. It is also submitted by Senior Counsel Mr. Amit Desai that certain observations with regard to merits of the case against the applicant are prejudicial to the interest of the applicant and may seriously affect the case of the applicant when it comes up for further hearing before the Spl. Judge. These are, in brief, the grounds for seeking recall of the order dated 19th of November, 2014.

7 It was submitted by learned Senior Counsel Mr. Desai, that recall of the order of this Court will not amount to alteration of judgment and, therefore, will not hit by Section 362 of Cr. P.C. Section 362 of Cr. P. C. runs as under:

“362 Court not to alter judgment.- 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.”

8 It is contended that recall of order will also not amount to review and, therefore, it cannot be said that recall is not permitted. The learned Senior Counsel, to canvas the point, has relied upon the following judgments;

- (1) (2011) 14 SCC 770, State of Punjab v. Davinder Pal Singh Bhullar & Ors.
- (2) (2009) 2 SCC 703, Asit Kumar Kar v. State of West Bengal & Ors.
- (3) (2008) 17 SCC491, Bachhaj Nahar v. Nilima Mandal & Anr.
- (4) (2011) 14 SCC 813, Vishnu Agarwal v. State of Uttar Pradesh & Anr.;
- (5) ILR (2005) II DELHI 111, Srichand P. Hinduja & Ors. v. State through CBI.

9 After having gone through the judgments cited by the learned Senior Counsel, I am of the view that three of the said judgments can be referred to decide as to whether the order in question can be recalled.

10 The first judgment in the series, which I am referring to is **(2009) 2 SCC 703 (cited supra)**. The Hon'ble Supreme Court

in the said judgment at para 4 has said;

“It is a basic principle of justice that no adverse orders should be passed against a party without hearing him. This is the fundamental principle of natural justice and it is a basic canon of jurisprudence. In the seven-Judge Constitution Bench of this Court in A.r. Antulay v. R.S. Nayak, it has been observed in para 55 thereof:(SCC p.660)

“55. ... So also the violation of the principles of natural justice renders the act a nullity.”

It is further said at para 6 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 recall an order which was passed without giving an opportunity of hearing to an affected party.”

11 In the 2nd judgment reported at **(2011) 14 SCC 813,**

Vishnu Agarwal v. State of Uttar Pradesh & Anr., the Hon'ble Supreme Court at para 6 has said;

“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”

“The court should not give its decision based only on letter of the law.

For if the decision is wholly unreasonable, injustice will follow.”

“7 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 v. State of W.B.* This Court made a distinction between recall and review.”

12 The 3rd judgment which may be referred to as reported at **(2011) 14 SCC 770, State of Punjab v. Davinder Pal Singh Bhullar & Ors.** Para 49 of the said judgment runs as under:

“49 Thus, the law on the issue can be summarised to the effect that the criminal justice delivery system does not clothe the court to add or delete any words, except to correct the clerical or arithmetical error as specifically been provided under the statute itself after pronouncement of the judgment as the Judge becomes functus officio. Any mistake or glaring omission is left to be corrected only by the appropriate forum in accordance with law.”

13 The summary of the above stated judgments of the Hon'ble Supreme Court is that the recall is permissible only if the opportunity of being heard is not given to the party. Any mistake or glaring omission is left to be corrected only by the appropriate forum in accordance with law.

14 The learned counsel has invited my attention to certain portions of my order and submitted that the issues which were not canvassed have been dealt with by this Court. It was also submitted that certain portion of the order in which the charges against the applicant have been mentioned briefly is not in accordance with the

charge-sheet filed by respondent No. 1-CBI. Those portions were brought to my notice during the course of hearing. I have gone through those portions of the order and I find that I have not reproduced the charge-sheet as a whole in my order. I have summarized the charge which was running into few pages. Therefore, there is bound to be change in the language of the investigating officer and this Court. It does not mean that the Court has said something which was not there in the charge (brief statement of the allegations against the applicant).

15 My attention was also invited to the observations made by this Court that though the learned trial Judge has stated that cognizance of offence had not been taken, the order of the learned trial Court clearly indicated that the cognizance of the offence had been taken by the learned trial Judge. The reasons for these observations have also been recorded by me, in my order.

16 The learned Senior Counsel has also invited my attention to certain portions of the order, particularly, the portion in which, I have stated "*it could not be a co-incident that two of the close relatives of the applicant got two flats worth crores of rupees*

according to the market value, by investing much lesser amount as compared to the market value.” The learned Senior Counsel has also taken exception to the portion of the order of this Court in which it is stated *“after inclusion of 40% civilian members, a proposal for allotment of land got momentum and got accelerated”*.

17 Considering the judgments, which have been referred to by me herein above, it is abundantly clear that the order can be recalled only if the opportunity is not given to the party adversely affected by the order. In the present case the applicant's advocate was heard at length for few hours and almost all issues were argued before me by the learned counsel. Therefore, it cannot be said that the opportunity was not given to the applicant of being heard. More than sufficient opportunity was given to the applicant. Some of the observations made by this Court, which are stated to be prejudicial to the interest of the applicant, are made on the basis of the statement of allegations against the applicant filed by respondent No. 1. It is possible that certain portion of the order may contain certain observations without there being detail deliberation at the time of hearing. Such observations are not necessarily incorrect

only because there was no detail deliberation. In any event, if this Court has committed some mistake or error while making such observations, the same cannot be cured by this Court by recalling the order.

18 In this regard one may refer to the judgment of Hon'ble Supreme Court in the matter of **State of Punjab v. Davinder Pal Singh Bhullar & Ors. (cited supra)**, where it is clearly stated that any mistake or glaring omission shall be left to be corrected only by the appropriate forum in accordance with law. It is further stated that the criminal justice delivery system does not clothe the court to add or delete any words, except to correct the clerical or arithmetical error. Hence, I am of the view that even if some mistake or glaring omission has been committed by this Court, while passing the order dated 19th of November, 2014, the same is subject to the decision of the Hon'ble Supreme Court. I do not think that recall of order is remedy for the same.

19 Before parting with the order, it may be mentioned here that though the learned Senior Counsel has also relied upon the judgment of the Supreme Court in the matter of **A. R. Antulay v. R.**

S. Nayak, reported at (1988) 2 SCC 602, I do not find it necessary to refer the same for the purpose of deciding the present application. The reason for the same is that in the case of **A. R. Antulay**, the order in question was passed by the Hon'ble Supreme Court itself. In the present case remedy is available to the applicant before the Hon'ble Supreme Court. This is not the Court of last resort for the applicant.

20 I do not find any merits in the application. The application stands dismissed.

21 The learned counsel for the applicant prays for stay of the judgment and order. Prayer for stay is rejected.

(JUDGE)

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