



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Friday, the Eleventh day of November Two Thousand Sixteen

PRESENT

The Hon`ble Mr.Justice S.NAGAMUTHU
and

The Hon`ble Mr.Justice M.V.MURALIDARAN

CRL MP(MD) No.11088 of 2016

IN

CRL A(MD) No.273 of 2014

MADASAMY S/O.SUBRAMANIAN,
T.KUMARAGIRI @ KAYALURANI
(NOW CONFINED IN PALAYAMKOTTAI
CENTRAL PRISON)

... APPELLANT/SOLE ACCUSED

Vs

STATE THROUGH
THE INSPECTOR OF POLICE,
CRIME BRANCH C.I.D.,
TUTICORIN DISTRICT.

... RESPONDENT/COMPLAINANT

Prayer in CRL MP(MD).11088/2016 :

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to Restore the criminal appeal in Crl.A (MD) No. 273 of 2014 which was dismissed by this Hon'ble Court dated 30.03.2016

Prayer in CRL A(MD).273/2014 :

Petition praying that in the circumstances stated therein and in the grounds filed therewith the High Court will be pleased to allow this appeal and set aside the sentence and fine imposed on the appellant in S.C.No.177 of 2012 on the file of the 2nd Additional Sessions Judge, Thoothukudi by the judgment dated 31.01.2013.

Order: This petition is coming on this day for orders upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of M/S.R.ALAGUMANI, Advocate for the petitioner and of MR.R.RAMA CHANDRAN, Additional Public Prosecutor, appearing for respondent the Court made the following order:-

[Order of the Court was made by **S.NAGAMUTHU, J.**]

The petitioner is the sole accused in S.C.No.177 of 2012 on the file of learned Second Additional Sessions Judge, Thoothukudi. Challenging the conviction and sentence imposed on him, he filed Crl.A.(MD).No.273 of 2014. The maximum sentence imposed on the accused is imprisonment for life. When this appeal came up for hearing before this Court on 30.03.2016, there was no representation for the petitioner/appellant. Therefore, this Court dismissed the appeal for default. Seeking to restore the same, he has come up with this petition before this Court.



2. We have heard the learned counsel for the petitioner and the learned Additional Public Prosecutor for the State and perused the records carefully.

3. The learned counsel for the petitioner would submit that as per the law laid down by the Hon'ble Supreme Court in **Bani Singh and others Vs. State of UP**, reported in **1996 (4) SCC 720**, the appeal against conviction, involving life sentence, ought not to have been dismissed for default. The learned counsel would make reliance on yet another recent Judgment of the Hon'ble Supreme Court in **Surya Baksh Singh Vs. State of Uttar Pradesh**, reported in **2015 1 SCC [Cr1] 313**, wherein following the Judgment in **Bani Singh's** case, the Hon'ble Supreme Court has held, in Paragraph Nos.24 and 26, as follows:-

"24. It seems to us that it is necessary for the appellate court which is confronted with the absence of the convict as well as his counsel, to immediately proceed against the persons who stood surety at the time when the convict was granted bail, as this may lead to his discovery and production in court. If even this exercise fails to locate and bring forth the convict, the appellate court is empowered to dismiss the appeal. We fully and respectfully concur with the recent elucidation of the law, profound yet perspicuous, in *K.S. Panduranga v. State of Karnataka*. After a comprehensive analysis of previous decisions our learned Brother had distilled the legal position into six propositions: (SCC p. 734, para 19)

"19.1. that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;

19.2. that the Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;

19.3. that the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;

19.4. that it can dispose of the appeal after perusing the record and judgment of the trial court.

19.5. that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the appellant-accused if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and

19.6. that if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation."

26. Reverting back to the facts of the present case a perusal of the impugned order makes it abundantly evident



that the High Court has considered the case in all its complexities. The argument that the High Court was duty-bound to appoint an amicus curiae is not legally sound. *Panduranga* correctly considers *Mohd. Sukur Ali v. State of Assam* as per incuriam, inasmuch as the latter mandates the appointment of an amicus curiae and is thus irreconcilable with *Bani Singh*. In the case in hand the High Court has manifestly discussed the evidence that has been led, and finding it of probative value, has come to the conclusion that the conviction is above appellate reproach, correction and interference. In view of the analysis of the law the contention raised before us that it was essential for the High Court to have appointed an amicus curiae is wholly untenable. The High Court has duly undertaken the curial responsibility that fastens upon the appellate court, and cannot be faulted on the approach adopted by it. In this respect, we find no error".

4. Relying on the said Judgments, the learned counsel would submit that this Court ought not to have dismissed the appeal for default and instead, this Court would have either adjourned the case or disposed of the same on merits. The learned counsel would further submit that as per the Judgment of the Hon'ble Supreme Court in **Vishnu Agarwal Vs. State of UP**, reported in **2011 (3) MLJ [Cr1] 63 [SC]**, this Court has got power to recall the said order and Section 362 of the Code of Criminal Procedure is not a bar for recalling such an order.

5. The learned Additional Public Prosecutor would, however, oppose this Miscellaneous Petition. According to him, wantonly, in order to drag on the proceedings, as a device, after having gone out on bail in the case, the accused did not make his counsel to be present and to ensure that the argument was advanced by him. Since it was deliberately done, according to the learned Additional Public Prosecutor, this Court had no other option, except to dismiss the appeal for default.

6. We have considered the above submissions.

7. In **Surya Baksh Singh's** case, as we have extracted hereinabove, the Hon'ble Supreme Court has held that a Criminal Appeal cannot be dismissed by the Appellate Court for default. But, deliberately, with a view to drag on the proceedings, if the counsel for the appellant is absent, according to the Hon'ble Supreme Court, the option available for the Court is either to dispose of the case on merits or to appoint a Legal Aid Counsel or to adjourn the case to enable the party to argue the case on the adjourned date. In this case, the order, which is sought to be recalled, has been made not on merits, but for default. As per the Judgment of the Hon'ble Supreme Court in **Vishnu Agarwal's** case, Section 362 of the Code of Criminal Procedure is not a bar for recalling such an order. In



Paragraph Nos.4 to 8, the Hon'ble Supreme Court has held as follows:-

4. The learned counsel for the appellant has relied on the decision of this Court in *Hari Singh Mann v. Harbhajan Singh Bajwa*¹, SCC para 10 of the said judgment states: (SCC p. 175)

"10. 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 an 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 an arithmetical error.

The reliance of the respondent on *Talab Haji Hussain case*² is misconceived. Even in that case it was pointed that inherent powers conferred on the High Courts under Section 561-A of CrPC, 1898 (Section 482 of the new Code) have 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 under Section 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."

5. The 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.

6. In our opinion, Section 362 cannot be considered in a rigid and overtechnical 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."



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.*³ this Court made a distinction between recall and review which is as under: (SCC p. 705, paras 6-7)

"6. There is a distinction between 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 recalls an order which was passed without giving an opportunity of hearing to an affected party.

7. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in *All Bengal Excise Licensees' Assn. v. Raghabendra Singh*⁴ cancelling certain licences was passed without giving an opportunity of hearing to the persons who had been granted licences."

8. Hence, we see no error in the impugned order passed by the High Court. The appeal fails and is accordingly dismissed.

8. In view of the above Judgment, we hold that Section 362 of the Code of Criminal Procedure is not a bar for recalling the order dated 30.03.2016. But, at the same time, it is made clear that this Court will not be a silent spectator in allowing the parties or the counsel to simply drag on the proceedings by simply keeping away, when the case is being called for hearing. It is also made clear that in an appropriate case, following the Judgment of the Hon'ble Supreme Court, in **Bani Singh's** case, this Court would not hesitate to dispose of the appeal like the present appeal on merits, if the Court deems it necessary.

9. In the result, this Miscellaneous Petition is allowed and the order of this Court, dated 30.03.2016, made in CrI.A.(MD). No.273 of 2014 is set aside and CrI.A.(MD).No.273 of 2014 is restored to file.

10. The learned counsel for the petitioner would submit that he would argue the appeal on 18.11.2016. Therefore, the Registry is directed to list the Criminal Appeal for final hearing on 18.11.2016.

sd/-

Assistant Registrar(RTI)

/ TRUE COPY /



TO

- 1 THE JUDICIAL MAGISTRATE NO.1, KOVILPATTI.
- 2 THE 2ND ADDITIONAL SESSIONS JUDGE, THOOTHUKUDI.
- 3 THE INSPECTOR OF POLICE, CRIME BRANCH C.I.D.,
TUTICORIN DISTRICT.
- 4 THE SUPERINTENDENT, CENTRAL PRISON, PALAYAMKOTTAI.
- 5 THE ADDL.PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

ORDER DATED : 11.11.2016

HEARING DATE: 18.11.2016

ORDER

CRL MP (MD) No.11088 of 2016
IN
CRL A (MD) No.273 of 2014

msm/sk-skn/17.11.16/p6/6c