

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO. 414 OF 2019
IN
CRIMINAL APPLICATION NO. 368 OF 2012**

SANTOSH
SUBHASH
KULKARNI

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Manish Khandelwal

...Applicant

Versus

ICICI Bank Limited & ors.

...Respondents

Mr. Subhash Jha, a/w Siddharth Jha, Dwivendra Dubey,
Rajesh Patil, Tushar Bansode and Alka Pandey, for the
Applicant.

Mr. Ashok Mundargi, Senior Advocate, a/w Mr. Fiasal Sayyed,
Santosh Budhwani, i/b MKA & Co., for Respondent no.1
ICICI Bank Ltd.

CORAM: N. J. JAMADAR, J.

DATED : 22nd APRIL, 2022

ORDER:-

1. The applicant, who was arraigned as an accused in CR No.68 of 2010, registered with EOW Wing-3, Mumbai, along with respondent no.3, has preferred this application seeking recall of the order dated 27th April, 2012, passed by this Court in Criminal Application No.368 of 2012, whereby this Court had expunged the observations made by the learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai ("ACMM"), in the order in Bail Application No.52/BA/2012 in CR

No.68/2010, whereby the applicant and respondent no.3 were ordered to be released on bail.

2. The applicant and respondent no.3 along with one Vipul Desai, who was then granted the relief of re-arrest bail, were arraigned in CR No.68/2010, for the offences punishable under Sections 120B, 406, 409 and 420 of the Indian Penal Code, 1860. The said Vipul Desai was the then Secretary of the ICICI Provident Fund Trust, which managed the employees provident fund. The applicant and respondent no.3 were engaged in the business of investing surplus fund of employees provident fund in Government Securities. The indictment against Vipul Desai and the applicant and respondent no.3 was that in pursuance of the criminal conspiracy applicant and respondent no.3 invested surplus of the employees provident fund in Government and corporate debt securities at prices that were inflated by Vipul Desai as compared to the actual market value and dishonestly shared the inflated amount.

3. The applicant and respondent no.3 were arrested. By order dated 5th March, 2012 in Bail Application No.52/BA/2012, the learned ACMM was persuaded to exercise the discretion in favour of the applicant and respondent no.3 and release them on bail subject to certain conditions. In the process, the

learned ACMM made certain observations, which reflected upon the acts, omissions and conduct of the trustees of the Provident Fund Trust.

4. The ICICI Bank Ltd. - respondent no.1 - original complainant filed Criminal Application No.368 of 2012 before this Court and sought the relief of quashing and setting aside the order passed by the learned ACMM releasing the applicant and respondent no.3 on bail and arrest and commit the applicant and respondent no.3 to custody. Respondent no.1 also sought an order to expunge certain observations made by the learned ACMM in the aforesaid order.

5. When the application was taken up for hearing, respondent no.1 did not press for the relief of setting aside the bail order and cancellation of bail. Respondent no.1, however, raised a grievance regarding the justifiability and propriety of the observations made by the learned ACMM and prayed to expunge those remarks. This Court, by an order dated 27th April, 2012, directed that the remarks, which were extracted in the order, stood expunged. In the context of the controversy sought to be raised in the instant application, it may be expedient to extract the order dated 27th April, 2012 verbatim.

"1. Learned counsel for the applicant seeks leave not to press the prayer clause (a) of the application. Therefore, the prayer clause (a) is not pressed.

2. Learned counsel for the applicant - original complainant is aggrieved with the observations by the learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai while allowing bail application filed by Manish Khandelwal and Sunil Khandelwal - respondent Nos 2 & 3 herein. The relevant portion of the observation reads thus:-

"26. It appears from the record that the complainant or trustees are now trying to save themselves and blaming the protected accused Vipul Desai for all this incident. It further appears that these trustees have not followed their duties honestly, sincerely and even not followed the responsibilities as of trustees as prescribed in the Rules framed by the bank as stated above and now they are shouting that the protected accused Vipul Desai has taken undue advantage of their trust. It further appears that no minutes of the meeting was prepared by them and all of a sudden that too after six years they got up and shouted loudly that the bank has been cheated by the protected accused and these Khandelwal brothers".

29.Without examining those documents IO cannot give clean chit to the trustees of the trust. All these trustees slept over their rights and duties for the period of 6 years i.e. from 2004 to 2010 and blindly acted upon their commendation of the protected accused and invested the same and not taken their own decision. Thus, under these circumstances, in my opinion, trustees are the responsible persons for causing loss to the said bank.(it is not my opinion or say that protected accused or present Khandelwal brothers are not guilty, but their fate can be decided at the time of trial)".

37.....

(a).....

(b) The Trustees are the responsible as it appears from their Rules itself for causing loss to the bank employee and no enquiry was conducted by the IO against them till today".

3. The observations were not at all necessary for deciding the entitlement of applicants to bail by the learned Magistrate. These observations in fact cast stigma on the present applicant bank without the applicant's trustees

being given an opportunity of being heard and therefore, these remarks are expunged. The application stands disposed of accordingly.”

6. The principal grievance of the applicant, in the instant application, is that though the applicant and respondent no.3 were impleaded as party respondents to Criminal Application No.368 of 2012, neither a notice of moving the said application before the Court on 27th April, 2012 was given by respondent no.1 – applicant therein nor the Court issued notice to the applicant and respondent no.3. The said order of expunging the observations in the order passed by the learned ACMM is, therefore, *non est* in the eye of the law for having been passed in violation of fundamental principle of judicial process. The applicant and respondent no.3 were not at all aware of the passing of the said order whereby the observations were expunged. During proceedings in Commercial Notice of Motion No.1 of 2019, a statement was made by the Counsel representing Dharirao Ghadage, one of the Trustees of the ICICI Bank Ltd. Provident Fund, that the observations made by the learned ACMM in the order dated 5th March, 2012 in terms of paragraphs 27, 29 and 37 have been expunged by order dated 27th April, 2012 passed by this Court. The said order having been passed without providing an opportunity of hearing to the

applicant and respondent no.3, who were interested parties and would otherwise have been aggrieved persons, therefore, deserves to be recalled.

7. An affidavit-in-reply is filed on behalf of respondent no.1 opposing the tenability of the application. Respondent no.1 contends that the Criminal Court is not vested with the authority to review or recall its order, once a judgment is delivered. Moreover, there is delay of more than eight years in moving the application to recall the order, which has not been satisfactorily explained. Even otherwise, the application is not tenable on facts as well.

8. I have heard Mr. Jha, the learned Counsel for the applicant and Mr. Mundargi, the learned Senior Counsel for respondent no.1.

9. Mr. Jha submitted that the order passed by this Court for expunging the remarks in the order of the learned ACMM is in flagrant violation of basic principle of natural justice. What exacerbates the situation, according to Mr. Jha, is the fact that despite applicant and respondent no.3 having been made parties to the said application, respondent no.1 obtained the order of expunging the remarks behind the back of the applicant and respondent no.3, to their grave prejudice.

Mr. Jha would urge that there is an essential distinction between an order of recall and review. The provisions contained in Section 362 of the Code of Criminal Procedure, 1973 (“the Code”), preclude alteration or review of the order. However, where it is demonstrated that the Court has passed the order without giving an effective opportunity of hearing to the aggrieved party, there is no impediment in recalling such order, which otherwise results in miscarriage of justice.

10. Per contra, Mr. Mundargi would urge that the application is misconceived. A three-pronged attack was mounted by Mr. Mundargi to the tenability of the application. First, there is an inordinate and unexplained delay in seeking the recall of the order. This delay becomes critical, according to Mr. Mundargi, as the parties have been litigating in other proceedings. Thus, the claim that the applicant was unaware of the order passed by this court till the year 2019 is unworthy of credence. Second, the applicant and respondent no.3 cannot be said to be aggrieved persons, who were required to be heard while expunging the wholly unwarranted remarks made by the learned ACMM, while granting bail to the applicant and respondent no.3. Had this Court interfered with the order granting bail, the applicant and respondent no.3 could legitimately urge that such

interference without providing an opportunity of hearing to them was legally impermissible. However, expunging of unwarranted and unjustified remarks by the superior Court does not affect the interest of the applicant and respondent no.3. Third, review of the order disguised as recall is equally barred by the provisions contained in Section 362 of the Code of Criminal Procedure, 1973 (“the Code”) and resort to the inherent power under Section 482 of the Code for the same, would also be not permissible.

11. Mr. Jha joined the issue by forcefully submitting that a recall of an order which came to be passed without giving an opportunity of hearing stands on a completely different footing than the exercise of review jurisdiction. Therefore, the limitations contained in Section 362 of the Code do not impede the redressal of such situation.

12. To bolster up this submission, Mr. Jha placed a strong reliance on the judgment of the Supreme Court in the case of *Asit Kumar Kar vs. State of West Bengal and ors*¹ wherein it was enunciated that there is distinction between a petition under Article 32, a review petition and recall petition. In a recall petition the Court does not go into the merits but simply recalls

1 (2009) 2 Supreme Court Cases 703.

an order which was passed without giving an opportunity of hearing to an affected party. The observations of the Supreme Court in paragraphs 4 to 6 are material and, hence, extracted below:

“4. 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, *A.R. Antuley v. R.S. Nayak & Anr.* 1988 (2) SCC 602] it has been observed in paragraph 55 thereof: (SCC p.660)

"55. so also the violation of the principles of natural justice renders the act a nullity".

5. One of the counsel relied upon another Five Judge Constitution Bench decision in *Rupa Ashok Hurra v. Ashok Hurra* [2002 (4) SCC 388]. It is true that in paragraph 9 of the said judgment it has been observed that this Court under Article 32 of the Constitution cannot hold as invalid a judgment of this Court by treating it as a nullity. However, the aforesaid judgment does not say that we cannot pass a recall order when that order has been passed without hearing a party.

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 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. Raghabendra Singh & Ors.* [2007 (11) SCC 374] cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences.”

13. The aforesaid pronouncement was followed by the Supreme Court in the case of *Vishnu Agarwal vs. State of Uttar Pradesh and another*². In this case, the Supreme Court observed that the provisions of Section 362 cannot be

² (2011) 24 Supreme Court Cases 813.

considered in a rigid and over technical manner to defeat the ends of justice. Paragraph 6 reads as under:

“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”

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."

14. In opposition to this, Mr. Mundargi banked upon the judgment of the Supreme Court in the case of *State of Madhya Pradesh vs. Man Singh*³. In the said case, after the High Court had affirmed the conviction of the petitioner for the offence punishable under Section 468, 471 and 490 of the Indian Penal Code, 1860 and reduced the substantive sentence from one year to the period already undergone and enhanced the fine to Rs.10,000/-, the petitioner has filed a petition under Section 482 of the Code and prayed for the grant of benefit under the Probation of Offenders Act, 1958. The High Court was persuaded to extend the benefit of Probation of Offenders Act to the petitioner. In that context, the Supreme Court held that High Court has no jurisdiction to review its order either under Section 362 or under Section 482 of the Code. The inherent

3 (2019) 10 Supreme Court Cases 161.

power under Section 482 cannot be used by the High Court to reopen or alter an order disposing a petition decided on merits. And, thus, the High Court could not have altered the sentence imposed by it.

15. Reliance was also placed on a judgment of the Supreme Court in the case of *Hardev Singh vs. Harpreet Kaur & ors.*⁴ wherein it was reiterated that the High Court could not have recalled its earlier order under Section 482 of the Code in as much as there is no provision for recalling or reviewing an order passed by it in criminal matters.

16. Undoubtedly, the provisions of Section 362 of the Code preclude a Court from altering or reviewing the judgment or a final order or disposing a case except to correct a clerical or arithmetical error. At the same time, the High Court being a Court of record and having plenary jurisdiction cannot be denuded of the authority to recall an order if it is satisfied that such order was passed without providing an effective opportunity of hearing, so as to prevent the miscarriage of justice. The matter cannot be looked at from semantics perspective of the use of the expression, “recall” or “review”. Substance of the matter is required to be kept in view. If the

4 2019 SCC Online SC 1514.

Court finds that an adverse order was passed against an affected party, which was entitled to be heard, due to inadvertence or otherwise, the Court would be justified in recalling the order *ex debito justice*.

17. The pivotal question in the case at hand is whether the applicant and respondent no.3 can be said to be aggrieved by the order of expunging remarks made by the learned ACMM in the order granting bail to the applicant and respondent no.3. Mr. Jha would urge that at the time of granting bail, the Court is required to delve into a number of factors including the genesis of the offence, the motive with which the prosecution is initiated, and the like. Reliance was placed on the observations made by the Supreme Court in the case of *Siddharam Satlingappa Mhetre vs. State of Maharashtra and others*⁵, as regards the factors to be taken into account by the Court. They read as under:

“87. The complaint filed against the accused needs to be thoroughly examined including the aspect whether the complainant has filed false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.

5 (2011) 1 Supreme Court Cases 694.

88. The gravity of charge and exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

89. It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.”

18. In the light of the aforesaid exposition, Mr. Jha invited the attention of the Court to the complaint lodged by the authorised officer dated 10th October, 2010 with the EOW to underscore the fact that the trustees were every much involved in the transactions.

19. Mr. Jha placed reliance upon the observations of the Supreme Court in the case of *D. Venkatasubramaniam and others vs. M. K. Mohan Krishnamachari and another*⁶ wherein the Supreme Court adverted to the propriety of making observations or passing directions without providing opportunity of hearing to the affected party. The observations in paragraphs 33 to 35 are instructive and hence extracted below:

6 (2009) 10 Supreme Court Cases 488.

“33. Yet another aspect of the matter, the appellants have not been impleaded as party respondents in the criminal petition in which the whole of the allegations are levelled against them. The High Court never thought it fit to put the appellants on notice before issuing appropriate directions to the police to arrest, seize the property and file charge sheet. This Court in *Divine Retreat Centre V. State of Kerala & Ors.* observed: (SCC p.565, para 51)

"51. We are concerned with the question as to whether the High Court could have passed a judicial order directing investigation against the appellant and its activities without providing an opportunity of being heard to it. The case on hand is a case where the criminal law is directed to be set in motion on the basis of the allegations made in anonymous petition filed in the High Court. No judicial order can ever be passed by any court without providing a reasonable opportunity of being heard to the person likely to be affected by such order and particularly when such (2008) 3 SCC 542 order results in drastic consequences of affecting one's own reputation."

(emphasis is of ours)

34. The High Court in the present case, without realizing the consequences, issued directions in a casual and mechanical manner without hearing the appellants. The impugned order is a nullity and liable to be set aside only on that score.

35. We are not impressed by the submission made by the learned counsel for the respondent that the High Court did not issue any directions but merely disposed of the petition with the observations reminding the police of its duty. The question that arises for consideration is whether there was any occasion or necessity to make those "observations" even if they are to be considered to be observations and not any directions. It is not even remotely suggested that there was any deliberate inaction or failure in the matter of discharge of duties by the police. There was no allegation of any subversion of processes of law facilitating the accused to go scot-free nor there is any finding as such recorded by the High Court in its order.”

20. The aforesaid pronouncement, in my considered view, if construed in proper perspective fortifies the view which this

Court was persuaded to take in expunging the observations made by the learned ACMM. Twin factors weighed with this Court. First, observations made by the learned ACMM were not necessary for deciding the entitlement of the applicant and respondent no.3 to bail. Second, the observations did cast stigma on the applicant bank without the applicant's trustees being given an opportunity of being heard. Both the grounds are worthy of sustaining the order of expunging the remarks.

21. It is true that while deciding bail application the Court may reflect upon the acts and conduct of the prosecution and/or complainant/witnesses. However, the said exercise is undertaken to evaluate the entitlement of the applicant for bail. If the observations transgress the scope of consideration for bail and fall in the realm of opining about the guilt or otherwise of the persons, who are not parties to the said proceedings, the observations fall foul of the principle that nobody should be condemned unheard.

22. This Court while passing the order sought to be recalled found that the offending observations were not germane for deciding the entitlement of the applicant and respondent no.3 for bail. It is interesting to note that in his order dated 5th March, 2012, in paragraph no.29, the learned ACMM while

recording critical observations against the trustees of the ICICI Bank Ltd. Employees Provident Fund made disclaimer that it was not his opinion or say that Vipul Desai or the applicant and respondent no.3 were not guilty but their fate could be decided at the time of trial. These observations clearly indicate that the learned ACMM delved into the propriety of action on the part of the trustees *de hors* the complicity or otherwise of the applicant and respondent no.3.

23. In the aforesaid view of the matter, the applicant and respondent no.3 cannot be said to be the persons, who were aggrieved by the expunging of the observations, which appeared to be plainly unwarranted, in the given circumstances of the case. Therefore, the submission on behalf of the applicant that it was imperative for the Court to hear the applicant and respondent no.3, on whose application for bail those observations were made, before expunging those remarks does not merit acceptance.

24. The matter can be looked at from a slightly different perspective. With the passage of almost 10 years, the observations made by the learned ACMM, even if retained and restored, do not command any value except a historical fact. It is trite that the observations made while deciding bail application

are tentative and *prima facie*. They do not bear upon the adjudication of guilt or otherwise in the very same case, much less, affect the outcome of other collateral proceedings. Therefore, at this length of time, there is neither any justification for, nor propriety in, recalling the order passed by this Court on 27th April, 2012 in Criminal Application No. 368 of 2012.

25. The upshot of the aforesaid consideration is that the application deserves to be dismissed.

26. Hence, the following order:

: O R D E R :

The application stands dismissed.

[N. J. JAMADAR, J.]