

ORDER SHEET

IA NO. GA/1/2024
WPO/1258/2021

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

ANUP GOSWAMI
VS
STATE BANK OF INDIA AND ORS

BEFORE:
The Hon'ble JUSTICE SUBHENDU SAMANTA
Date : 23rd August, 2024.

Appearance:
Ms. Parna Roy Choudhury, Adv.
Ms. Payel Ghosh, Adv.
...for the petitioner

Mr. Debasish Saha, Adv.
Mr. Hemraj Adhikary, Adv.
Ms. Sucheta Pal, Adv.
Mr. Avirup Roy Sanyal Adv.
...for the respondents

The Court: This is an application for recalling of the order dated 19th July, 2024 passed by this Court in WPO/1258/2021.

Learned counsel appearing on behalf of the petitioner submits that by passing the impugned order, this Court actually disposed of the writ petition without hearing of the petitioner. Learned counsel further submits that this Court has observed that the instant writ petition was not maintainable or entertainable. It is the submission of the learned counsel of the present petitioner that it was a changed brief and the vakalatnama was not filed. Thus the learned counsel appearing for the petitioner had no locus at the time when the matter was called on. It is the further submission of the learned counsel for the petitioner that the petitioner was stuck before the Hon'ble Division Bench in another matter, that is why she could not appear

before this Court when the matter was called on for hearing. She further submits that by virtue of principle of *audi alteram partem*, the present petitioner is required to be heard before disposing of the entire writ petition. She further submits that the present petitioner may be given an opportunity of being heard regarding the merit of this matter. She further submits that there are several merits in the matter and the present petitioner was terminated from the service in an inappropriate disciplinary action caused by the respondent authority. Thus, the instant writ petition is very well maintainable before the writ Court. In support of her submission she cited a decision of the Hon'ble Apex Court passed in *Indian Bank vs. Satyam Fibres (India) Pvt. Ltd.* reported in (1996) 5 SCC 550.

"22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the court's business."

She also cited another decision of the Hon'ble Apex Court in *New India Assurance Company Limited vs. Krishna Kumar Pandey* reported in (2021) 14 SCC 683.

"10. But the above contention of the learned Senior Counsel for the respondent is fallacious for two reasons. The first is that Section 362 of the Code is expressly subjected to "what is otherwise

provided by the Code or by any other law for the time being in force.” Though this Court pointed out in Davinder Pal Singh that the exceptions carved out in Section 362 of the Code would apply only to those provisions where the court has been expressly authorized either by the Code or by any other law but not to the inherent power of the court, this Court nevertheless held that the inherent power of the Court under Section 482 CrPC is saved, where an order has been passed by the criminal court, which is required to be set aside to secure the ends of justice, or where the proceeding amounts to abuse of the process of court. In para 46 in particular, this Court held in Davinder Pal Singh as follows: (SCC p. 795)

“46. If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 CrPC would not operate. In such an eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall, alteration has to establish that it was not at fault.”

She also pointed out the judgment of a Co-ordinate Bench of this Court passed in WPA No.21399 of 2007 wherein the Co-ordinate Bench of this Court has specifically held that the point of maintainability has to be raised in a writ petition at the earlier stage.

Refuting the contention of the learned counsel for the petitioner, the learned advocate for the respondent authority submits that the impugned

order passed by this Court cannot be recalled. He further submits that the ground of recall as mentioned in the petition is itself contradictory. He further submits that by virtue of the decision of the Hon'ble Apex Court in *Budhia Swain and Others vs. Gopinath Deb and Others* reported in (1999) 4 SCC 396, the Hon'ble Apex Court has categorised when an order of Court can be recalled as follows.

"8. In our opinion a tribunal or a court may recall an order earlier made by it if

- (i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,*
- (ii) there exists fraud or collusion in obtaining the judgment,*
- (iii) there has been a mistake of the court prejudicing a party, or*
- (iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.*

The power to recall a judgment will not be exercised when the ground for reopening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence."

He also cited a decision of the Hon'ble Apex Court in *Delhi Administration vs. Gurdip Singh Uban and Others* reported in (2000) 7 SCC 296.

"20. We should not however be understood as saying that in no case an application for "clarification", "modification" or "recall" is

maintainable after the first disposal of the matter. All that we are saying is that once such an application is listed in Court, the Court will examine whether it is, in substance, in the nature of review and is to be rejected with or without costs or requires to be withdrawn with leave to file a review petition to be listed in chambers by circulation. Point 1 is decided accordingly.”

Learned counsel for the respondent also cited a decision of the Hon’ble Apex Court in *A. P. SRTC and Others vs. Abdul Kareem* reported in (2007) 2 SCC 466.

Heard learned counsel for both the parties. Perused the observations of the Hon’ble Apex Court in the matter of recalling. I have perused the order passed by this Court. It appears that the matter was called on 19th July, 2024. At that time, none appears on behalf of the petitioner. The respondent authority was represented through their learned counsel. Learned counsel for the respondent authority has argued on the point before this Court that the writ petition is not maintainable as similar issue was involved and decided by a Co-ordinate Bench in WPA/25650/2023 wherein the Co-ordinate Bench of this Court has passed the order that the writ petition of similar nature is not entertainable. The respondent authority sought for the similar direction.

It is true that at the time of deciding such issue, the petitioner was not present and the petitioner was not heard.

In *Satyam Fibres* (supra) Hon’ble Supreme Court has considered the situations when fraud upon Court has caused.

In *Krishna Kumar Pandey* (supra) Hon’ble Apex Court has decided the inherent power of High Court in a criminal proceeding u/s. 482 of the Cr. P.C.

Thus, the observations and principles of Supreme Court in the cited cases are not similar to that facts of the present case, hence, they are distinguishable.

Considering the entire circumstances of the case, it appears to me that this Court has heard the petition on merits and passed an order on the point of maintainability. The petitioner was given the appropriate opportunity of appearance but she could not appear due to the reasons as stated by the petitioner in the petition itself.

Considering the scope of recalling the order which was touching the merits of this matter, I am of the view that order under recall is of such a nature which disposed of a writ petition on merits, cannot be recalled; if such be done, this Court will be sitting on appeal of its own judgment. Considering the same, I am of the view that the petitioner has only opportunity to prefer necessary application before the appropriate higher forum against the order under challenge.

Considering the circumstances, I think it necessary to hold that the instant application (GA/1/2024) for recalling appears to be not meritorious and the same is dismissed and disposed of.

(SUBHENDU SAMANTA, J.)