

Rajender & Ors. Vs.state

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Court : Delhi

Decided On : Apr-12-2017

Appellant : Rajender & Ors.

Respondent : State

Advocate for Pet/Ap. : Mr. Singh

Judgement :

\$~1 * + % STATE CORAM: IN THE HIGH COURT OF DELHI AT NEW DELHI
CRL.A. 253/2000 Judgment dated 12th April, 2017 RAJENDER & ORS.
Appellants Through : Mr. S.D. Singh, Mr. Rahul Kumar Singh, Ms. Surabhi Shukla,
Ms. Sweta Sinha and Ms. Vaishali Sharma, Advocates versus Through : Mr.Rajat
Katyal, APP Respondent HON'BLE MR. JUSTICE G.S.SISTANI HON'BLE
MR. JUSTICE VINOD GOEL G.S.SISTANI, J.

(ORAL) CRL. M.A.19200/2016 (Exemption) 1. Exemption allowed, subject to all
just exceptions.

2. The application stands disposed of. CRL. M.A.19196/2016 3. This application
has been filed by the applicants/appellants seeking recall of order dated
14.01.2016 by which the judgment in the appeal was reserved. Recall is also
sought of the judgment dated 19.01.2016 by which the appeal filed by the
appellants stands dismissed.

4. Mr. S.D. Singh, learned counsel appearing for the applicants/appellants submits that the appeal was decided by this Court without following the law and in contravention of the settled position of law. The decision in appeal has violated the rights of the appellants as recognized by the CrI.A. 253/2000 Page 1 of 21 Supreme Court of India and guaranteed under Articles 21 and 22 of the Constitution of India. It is strongly urged before us that reading of the judgment of the Division Bench would show that the counsels who had appeared in the matter were proxy counsels and they had not even filed their vakalatnama. However, in the order dated 14.01.2016 the Court without any justification had stated that arguments had been heard and the matter had been reserved for orders. Mr. Singh contends that the order dated 14.01.2016 would establish that the advocate for the appellants was not present and his junior associates appeared in the matter and had made a request for an accommodation of a day while the order was not factually correct and thus, in violation of the principles of natural justice. In these circumstances, the learned counsel has sought recall of the orders dated 14.01.2016 and 19.01.2016 and an opportunity of hearing is sought.

5. Learned counsel has also pointed out that the appeal was shown in the Regular List of Court No.33 as Item No.113 for the first time in the year 2013. The appeal was shown in Part-B Regular List and such matters are heard on two days in a week, being Thursday and Friday. The counsel submits that the appeal filed by the appellants came up for hearing before the Court on 28.08.2015, on which date notice was issued to the appellants for 10.09.2015. On 10.09.2015, the appellants were duly represented by their counsel and the counsel was carefully examining the Cause List and the matter did not reach for hearing till 11.01.2016. It is also averred that in case the earlier practice would have been followed, the appeal would have been taken up for hearing on Thursday and Friday. It has been averred in this application that there was change in Roster on 12.01.2016 and thereafter, the counsel for the appellants learnt that all matters would CrI.A. 253/2000 Page 2 of 21 be taken up for hearing everyday irrespective of falling in Part-B or Part-A. It is contended that when the matter came up for hearing on 14.01.2016, the Division Bench was informed that the main counsel had appeared on 10.09.2015. The counsels appearing for the main counsel informed the Court that they were proxy counsels and sought an accommodation for a day. Affidavits

of the two counsels have been filed along with this application. Learned counsel has strongly urged before the Court that the hearing of a criminal appeal is not mere a formality, but a substantial right in favour of the appellants. The appellants were not granted a fair opportunity of hearing as the main counsel was not present. The proxy counsels who appeared in the matter were not authorised to appear as their vakalatnama was not on record and they had simply appeared for making a request for an adjournment. Counsel contends that in fact the appeal was decided without hearing any arguments on behalf of the appellants.

6. It is pointed out by the learned counsel that aggrieved by the order dated 14.01.2016 by which the judgment was reserved, the appellants herein filed an Special Leave Petition (Crl) No.734/2016 (hereinafter referred to as the First SLP) on 18.01.2016 before the Supreme Court of India seeking an opportunity to argue before the Court. A copy of the Special Leave Petition has also been filed along with this application. The High Court rendered its judgment on 19.01.2016 by which the order of conviction was upheld. Accordingly when on 05.02.2016, the SLP came up for hearing before the Supreme Court of India and the same was dismissed as the High Court had already passed the judgment on 19.01.2016 rendering it as infructuous. Learned counsel has contended Crl.A. 253/2000 Page 3 of 21 that the High Court did not consider the evidence on record; did not analyse the same; did not take into account that the entire case of the prosecution is based on circumstantial evidence; there was no eye witness to the incident; or that the prosecution had not proved the guilt of the appellants beyond reasonable doubt.

7. The counsel contends that thereafter the appellants filed another Special Leave Petition (Crl) No.4911/2016 (hereinafter referred to as the Second SLP) on 11.03.2016, inter alia, challenging the final judgment of this Court dated 19.01.2016. The Second SLP came up for hearing before the Supreme Court of India on 25.07.2016 and was dismissed.

8. The applicants/appellants seek review and recall of the judgment passed by the Division Bench of the High Court dated 19.01.2016. Mr. Singh, learned counsel for the appellants submits that there would be no bar under Section 362 of the Code

of Criminal Procedure, 1973 (in short the Code) for altering the judgment and the Court should rely on Section 482 of the Code for preventing abuse of process of law and to secure the ends of justice as the appellants were not represented at the time of hearing before the Court. Learned counsel contends that if an advocate of the appellant is not available, the Court should not have decided the matter on its own and an advocate should have been provided in order to ensure and secure the hearing and assistance from an advocate capable of arguing the matter. Reliance is placed on the judgment in the case of Mohd. Sukur Ali v. State of Assam, (2011) 4 SCC729 more particularly, paragraphs 5 to 9, which read as under: 5. We are of the opinion that even assuming that the counsel for the accused does not appear because of the counsel's negligence or deliberately, even then the Court should not decide a criminal case Crl.A. 253/2000 Page 4 of 21 against the accused in the absence of his counsel since an accused in a criminal case should not suffer for the fault of his counsel and in such a situation the Court should appoint another counsel as amicus curiae to defend the accused. This is because liberty of a person is the most important feature of our Constitution. Article 21 which guarantees protection of life and personal liberty is the most important fundamental right of the fundamental rights guaranteed by the Constitution. Article 21 can be said to be the 'heart and soul' of the fundamental rights.

6. In our opinion, a criminal case should not be decided against the accused in the absence of a counsel. We are fortified in the view we are taking by a decision of the US Supreme Court in Powell Vs. Alabama, 287 US45(1932), in which it was observed :-

""What, then, does a hearing include?. Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper

charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a State or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense". CrI.A. 253/2000 Page 5 of 21 The above decision of the US Supreme Court was cited with approval by this Court in A.S. Mohammed Rafi Vs. State of Tamil Nadu & Ors., AIR2011 Supreme Court 308, vide para 24.

7. A similar view which we are taking here was also taken by this Court in Man Singh & Anr. Vs. State of Madhya Pradesh (2008) 9 SCC542 and in Bapu Limbaji Kamble Vs. State of Maharashtra, (2005) 11 SC412 8. of the Constitution. Articles 21 and Articles 22(1) are as under: In this connection we may also refer to Articles 21 and 22(1) "Article 21: Protection of life and personal liberty.-. No person shall be deprived of his life or personal liberty except according to procedure established by law". Article 22(1): Protection against arrest and detention in certain cases.-. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

9. In Maneka Gandhi vs. Union of India AIR 1978 SC597 it has been held by a Constitution Bench of this Court that the procedure for depriving a person of his life or liberty should be fair, reasonable and just. We are of the opinion that it is not fair or just that a criminal case should be decided against an accused in the absence of a counsel. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, in our opinion, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of a counsel, there will be violation of Article 21 of the Constitution. (Emphasis Supplied) 9. It is next contended that the judgment was passed by the

High Court in the absence of retained counsel which has caused serious prejudice to the rights of the appellants and thus, rendered the impugned order to be non est and in view thereof, the Court would be well within its right to exercise its jurisdiction under Section 482 of the Code. Reliance is placed on the judgment in the case of Popular Muthiah v. State, (2006) 7 SCC CrI.A. 253/2000 Page 6 of 21 296. Counsel submits that it has been clearly held in the aforesaid judgment that irrespective of the nature of the proceedings, the jurisdiction under Section 482 of the Code can be exercised by the Court for doing justice to the parties. Reliance is placed on paragraphs 27, 28, 29, 30, 35 and 56, which read as under: inherent 27. While exercising its appellate power, the jurisdiction of the High Court although is limited but, in our opinion, there exists a distinction but a significant one being that the High Court can exercise its revisional jurisdiction and/ or inherent jurisdiction not only when an application therefor is filed but also suo motu. It is not in dispute that suo motu power can be exercised by the High Court while exercising its revisional jurisdiction. There may not, therefore, be an embargo for the High Court to exercise its extraordinary jurisdiction while exercising other jurisdictions in the matter. Keeping in view the intention of the Parliament, while making the new law the emphasis of the Parliament being 'a case before the court' in contradistinction from 'a person who is arrayed as an accused before it' when the High Court is seized with the entire case although would exercise a limited jurisdiction in terms of Section 386 of the Code of Criminal Procedure, the same, in our considered view, cannot be held to limit its other powers and in particular that of Section 482 of the Code of Criminal Procedure in relation to the matter which is not before it.

28. In certain situations, the court exercises a wider jurisdiction, e.g., it may pass adverse remarks against an investigator or a prosecutor or a judicial officer, although they are not before it. Expunction of such remarks may also be directed by the High Court at a later stage even suo motu or at the instance of the person aggrieved.

29. The High Court while, thus, exercising its revisional or appellate power, may exercise its inherent powers. Inherent power of the High Court can be exercised, it is trite, both in relation to substantive as also procedural matters.

30. In respect of the incidental or supplemental power, evidently, the High Court can exercise its inherent jurisdiction irrespective of CrI.A. 253/2000 Page 7 of 21 the nature of the proceedings. It is not trammelled by procedural restrictions in that: (i) power can be exercised suo motu in the interest of justice. If such a power is not conceded, it may even lead to injustice to an accused. (ii) Such a power can be exercised concurrently with the appellate or revisional jurisdiction and no formal application is required to be filed therefor. (iii) It the power under Section 482 of the Code of Criminal Procedure is not unlimited. It can inter alia be exercised where the Code is silent where the power of the court is not treated as exhaustive, or there is a specific provision in the Code; or the statute does not fall within involves application of a special law. It acts ex debito justitiae. It can, thus, do real and substantial justice for which alone it exists. is, however, beyond any doubt that the purview of the Code because it 35. It is also not in dispute that the said power overrides other provisions of the Code but evidently cannot be exercised in violation/ contravention of a statutory power created under any other enactment. 56. So far as inherent power of the High Court is concerned, indisputably the same is required to be exercised sparingly. The High Court may or may not in a given situation, particularly having regard to lapse of time, exercise its discretionary jurisdiction. For the said purpose, it was not only required to apply its mind to the materials on records but was also required to consider as to whether any purpose would be served thereby. (Emphasis Supplied) 10. Learned counsel also contends that although the appellants had filed Special Leave Petitions against the orders dated 14.01.2016 and 19.01.2016, however, the petitions have not been decided on merits. The First SLP was dismissed as infructuous and the Second SLP was dismissed in limine. Reliance is placed on the judgment in the case of CrI.A. 253/2000 Page 8 of 21 Kunhayammed and Others v. State of Kerala and Another, (2000) 6 SCC359(paragraph 40).

11. Reliance is also placed on the judgment in the case of Hymad Pasha v. State of Andhra Pradesh, (2015) 15 SCC651 more particularly, para 4, which reads as under: this Court the decisions of 4. Two conflicting judgments thus came to be pronounced by the High Court on the same subject-matter which fact was brought to the notice of the High Court in Criminal Miscellaneous Petition No.2349 of 2008 filed under Section 482 Cr PC. That petition was heard and allowed by the High

Court in terms of its order dated 15- 12-2008. The High Court was of the view that the conviction of the appellant having been affirmed in Criminal Appeal No.502 of 2006, the later judgment acquitting the appellant in Criminal Appeal No.690 of 2006 could not be allowed to stand. Relying upon in State of A.P. v. Thadi Narayana [AIR 1962 SC240, A.R. Antulay v. R.S. Nayak [AIR 1988 SC1531 and Keshardeo Chamria v. Radha Kissen Chamria [AIR 1953 SC23 the High Court corrected the mistake committed by it and recalled the order dated 29-8-2008 passed in Hymad Pasha v. State of A.P.[Criminal Appeal No.690 of 2006, order dated 29-8-2008 (AP)]. on the ground that the same was non est and a nullity in the eye of the law and was of no effect whatsoever. In the present appeal the appellant has assailed not only the judgment and order passed by the High Court in Hymad Pasha v. State of A.P. [Criminal Appeal No.502 of 2006, order dated 7-3-2008 (AP)]. whereby his conviction and the sentence awarded to him was affirmed but also order dated 15-12-2008 whereby the order of acquittal passed in Hymad Pasha v. State of A.P. [Criminal Appeal No.690 of 2006, order dated 29-8-2008 (AP)]. has been recalled. 12. The present application is opposed by the learned counsel for the State. It is submitted that the present application is not maintainable in view of the express bar of Section 362 of the Code. This Court does not have the (Emphasis Supplied) CrI.A. 253/2000 Page 9 of 21 power for grant of review except for a correction of a clerical nature or arithmetical error. Counsel submits that inherent power of the Court is not contemplated by the saving provision in Section 362 of the Code. Reliance is placed on the judgment in the case of Smt. Sooraj Devi v. Pyare Lal and Another, 1981 SCC (Cri) 188 (paragraphs 4-6).

13. Learned counsel submits that the judgments sought to be relied upon by the counsel for the applicants/appellants are not applicable to the facts of the present case, more particularly, when a Special Leave Petition filed against the final judgment of this Court stands dismissed and all grounds sought to be urged and have been urged before this Court were also grounds taken in the SLP and thus, the present application would not be maintainable. Counsel contends that in the present case, the appellants were very much represented which is evident upon reading of the order dated 14.01.2016 wherein appearance of both the counsels, who appeared, has been marked. The appellants in their wisdom had filed the

First SLP on 18.01.2016 even before the judgment was rendered, but did not chose to approach the Court by filing of either written submissions or otherwise. The First SLP was dismissed on 05.02.2016 as the counsel had informed the Supreme Court of India that the judgment has already been pronounced. At that stage, it was open for the counsel for the appellants to urge the legal issues which are sought to be urged today before this Court, but the appellants in their own wisdom decided to forego the right to urge the grounds which are sought to be urged today. Counsel further contends that the matter was examined by the Supreme Court of India when the Second SLP was filed by the appellants and the same was dismissed and thus, it is not open for the applicants/appellants to file an Crl.A. 253/2000 Page 10 of 21 application for review which is not maintainable in law and the appellants cannot be allowed to urge the same very grounds which stand rejected by the Supreme Court of India. Counsel for the State has relied upon the judgment in the case of Surya Baksh Singh v. State of Uttar Pradesh, (2014) 14 SCC222 wherein the Supreme Court has culled out the issues available to the High Court while dealing with the appeals where a convict fails to prosecute the appeal after grant of bail. Reliance is placed on para 24 of the judgment, which reads as under: 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 (2013) 3 SCC721 After a comprehensive analysis of previous decisions our learned Brother had distilled the legal position into six propositions: 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 CrI.A. 253/2000 Page 11 of 21 19.6. that if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation. (Emphasis Supplied) 14. We have heard the learned counsel for the parties and given a thoughtful consideration to the matter.

15. Two questions arise for our consideration: (i) Whether the filing and the dismissal of the SLPs in limine by the Apex Court has any bearing on the present application?. (ii) Whether the present application is maintainable in view of the bar under Section 362 of the Code?.

16. In respect of the first question, we may note that after this Court had reserved the matter for judgment on 14.01.2016, the applicants/appellants had immediately approached the Supreme Court by filing the first SLP. This SLP was dismissed as infructuous on 05.02.2016 as the judgment had already been pronounced by this Court on 19.01.2016. The applicants then filed the second SLP before the Supreme Court. This SLP was dismissed in limine prior to leave being granted on 25.07.2016. The order dated 25.07.2016 reads as under: Heard. No ground for interference is made out to exercise our jurisdiction under Article 136 of the Constitution of India. The special leave petition is dismissed accordingly. Pending application(s), if any, stand disposed of. 17. From a perusal of the order of the Apex Court, it is clear that the SLP has been dismissed at the leave stage only in limine. In Kunhayammed (Supra) it has been held that if a SLP is dismissed at the stage of granting leave no merger will take place and the original order of the inferior court or tribunal remains intact and susceptible to review, if otherwise allowed. CrI.A. 253/2000 Page 12 of 21 While dismissing the SLP, what the Apex Court adjudicated was that the present case is not a fit case for granting leave under Article 136. The relevant paragraphs read as under: 34. The doctrine of merger and the right of review are concepts which are closely interlinked. If the judgment of the High Court has come up to this Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of this

Court. In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged with the judgment of this Court. But where the special leave petition is dismissed - there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. But the High Court, if it exercises a power of review or deals with a review application on merits - in a case where the High Court's order had not merged with an order passed by this Court after grant of special leave - the High Court could not, in law, be said to be wrong in exercising statutory jurisdiction or power vested in it. 40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the Court, (v) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the apex court of the country and so on. The expression often employed by this Court while disposing of such petitions are - heard and dismissed, dismissed, dismissed as barred by time and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the merit worthiness of the petitioners prayer seeking leave to file an appeal and having formed an opinion may say dismissed on merits. Such an order may be passed even ex-parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 of the C.P.C. or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 of the C.P.C. act

as guidelines) are not necessarily the same on which this court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger. 44. To sum up, our conclusions are: Crl.A. 253/2000 Page 14 of 21 (iv) An order refusing special leave to appeal may be a non- speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed. (Emphasis Supplied) 18. From the foregoing, it is clear that the filing and the dismissal of the SLP by the Apex Court cannot amount to merger of the judgment dated 19.01.2016. The judgment remains intact and can be reviewed by this Court, if the power so exists. Thus, the dismissal of the SLP cannot preclude the present application as the Supreme Court has merely held that there are no grounds to allow the leave and hear the appeal. At the same time, the judgment does not enable the applicant to seek review where it is precluded otherwise. For this, the second question framed by us gains significance.

19. The present application has been filed under Section 482 of the Code seeking, in effect, the review and recall of the order dated 14.01.2016 and the judgment dated 19.01.2016. Learned counsel for the respondent has objected to the maintainability of the application in view of Section 362 of the Code.

20. We proceed to analyse the scope of Section 362 and its relation with Section 482 of the Code. Section 362 of the Code reads 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. (Emphasis Supplied) Crl.A. 253/2000 Page 15 of 21 21. The law with regard to inherent powers saved under S.482 vis--vis S.362 is well-settled.

22. In *State of Orissa v. Ram Chander Agarwal*, (1979) 2 SCC305 AIR 1979 SC87 (in the context of Code of Criminal Procedure, 1898) the High Court had reviewed and recalled its previous judgment enhancing the punishment qua few of the convicts. This was challenged before the Supreme Court. The Apex Court considering the operation of Sections 369 (S.362 under the new Code) and S.561-A (S.482 of the New Code) observed that the inherent powers could not be exercised in a manner to defeat the express provisions of the Code. Thus, it cannot be invoked for enabling the court to review its own order which is specifically prohibited by Section 369 by providing that, no court when it has signed its judgment, shall alter or review the same except to correct a clerical error. 23. In the background of the new Code, 1973, a Division Bench of the Apex Court in *Smt. Sooraj Devi v. Pyare Lal and Another*, (1981) 1 SCC500 had once again stated that the S.482 cannot be used to by-pass the express prohibition of Section 362 of the Code. The relevant portion reads as under: 5. The appellant points out that he invoked the inherent power of the High Court saved by Section 482 of the Code and that notwithstanding the prohibition imposed by Section 362 the High Court had power to grant relief. Now it is well settled that the inherent power of the court cannot be exercised for doing that which (*Sankatha Singh v. State of U.P.* [AIR 1962 SC1208:

1962. Supp 2 SCR817: (1962) 2 Cri LJ288). It is true that the prohibition in Section 362 against the court altering or reviewing its judgment is subject to what is otherwise provided by this Court or by any other law for the time being in force. Those words, however, refer to those is specifically prohibited by the Code CrI.A. 253/2000 Page 16 of 21 provisions only where the court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the court is not contemplated by the saving provision contained in Section 362 and, therefore, the attempt to invoke that power can be of no avail.

6. The High Court, in our opinion, is right in declining to entertain the application. The appeal must be dismissed. But we may observe that anything said by the High Court in the criminal proceeding against Kailash Chandra Jain should not be allowed to influence the judgment of the court in the civil suits mentioned above or in any proceeding arising therefrom. (Emphasis Supplied) 24. The judgment has been followed in *Mostt. Simrikhia v. Smt. Dolley Mukherjee @ Smt. Chhabimukherjee*, AIR 1990 SC1605 (1990) 2 SCC437(paragraph 7).

25. In *Hari Singh Mann v. Harbhajan Singh Bajwa*, (2001) 1 SCC169(paragraph 8-10) it was held by the Supreme Court that the High Court has no jurisdiction to alter or review its own judgment or order except to the extent of correcting any clerical or arithmetical error and the practice of filing criminal miscellaneous petitions after disposal of main case and issuance of fresh directions in such petition amounts to abuse of process of the Court as once a matter is finally disposed of, the Court in the absence of a specific statutory provision becomes *functus officio* in respect of that matter.

26. Thus, it is clear that the inherent powers recognised under Section 482 cannot be used to override the express bar contained in Section 362 of the Code. Even the judgment in *Popular Muthiah* (Supra), it has been recognised that the power under Section 482 cannot be exercised when there is a specific provision in the Code [paragraph 30 (iii)]. CrI.A. 253/2000 Page 17 of 21 27. The reliance placed upon the judgment in *Hymad Pasha* (Supra) by the appellant is misplaced. The High Court of Andhra Pradesh had, while dealing with two separate appeals from the same order, dismissed the appeal on one occasion and oblivious to the

previous order, had allowed the appeal from the very same order. Upon being appraised of this anomaly, the High Court exercised its power of review and recalled the subsequent order allowing the appeal. This was held to be correct inasmuch as the subsequent order was anyways a nullity. That being so, neither the scope of S.482 was discussed nor the bar of Section 362 of the Code. It is settled law that it is not possible to impute an intent to render a decision on a point which was not before them and which they never intended to deal with. Thus, the judgment cannot be said to be laying any general principle of law that High Court can exercise its power under S.482 of the Code to review its orders. [See Commissioner of Income Tax v. K. Ramakrishnan, ILR1993(2) Ker 188; and Dr. Nalini Mahajan & Ors. v. Director of Income Tax (Inv.) and Ors., (2002) 98 DLT525(DB)].

28. We proceed to analyse the facts of the present case. Admittedly, a notice was issued to the applicants/appellants on 28.08.2015 and were duly represented on 10.09.2015. Thereafter, the roster of this Court changed on 12.01.2016 and as per the new roster, criminal appeals from the years 1999 to 2003 were to be heard by DB-III. Further, the distinction between Part-A and Part-B of the Regular List was done away with. Though the learned counsel for the applicants has argued that confusion arose owing to the removal of classification in Regular List; that does not seem to be the case. In the application itself, it has been said that on CrI.A. 253/2000 Page 18 of 21 12.01.2016, the appellants had learnt that the matters shall be taken up everyday.

29. We have checked the listing of the matter from the records of this Court. After the change in roster, the matter was listed as Item No.5 in the Regular List on 12.01.2016. It has been contended in the application that on 13.01.2016, a proxy counsel remained in Court all day and was informed that the Court had discharged all matters for one day (paragraph 14). The actual grievance of the applicants is against this information from an unknown source to an unknown proxy counsel for the applicants. If that were true, there was no reason to justify the presence of the proxy counsel on 14.01.2016. Further by 14.01.2016, the matter had moved up in the list to effective Item No.2 as the Bench had disposed of Item Nos. 1, 2 and 3 of the Regular List. The relevant portion of the Cause List for 14.01.2016 is

reproduced:

30. Thus, it was clear to any prudent counsel that the list was moving as three matters had been disposed of in the first two days of the new Roster. Even then the counsel for the applicant claims that there was any confusion as to whether the matter would be taken up. Crl.A. 253/2000 Page 19 of 21 31. Thereafter, the matter was taken up for hearing on 14.01.2016, where the appearance of the counsels for both the parties had been marked. The counsel for the appellant had argued the matter before the Bench; their submissions have been recorded in paragraph 7 in the judgment dated 19.01.2016.

32. We may also add that when the judgment was reserved on 14.01.2016, the learned counsel for the applicant could have mentioned the matter before the same Bench or could have even filed written submissions penning down his arguments. However, learned counsel chose to approach the Apex Court in SLP, which could have been drafted by 16.01.2016, i.e. within 2 days; but not the written submissions. Even on the day of the pronouncement, the same could be mentioned as the judgment had not been signed and sealed. It was not done. [See *Kushalbhai Ratanbhai Rohit v. State of Gujarat*, (2014) 9 SCC124.

33. In the present case, the appellants were represented in Court and ample opportunity was available to the appellants/applicants to approach the Bench while the judgment was reserved.

34. To conclude, we find as under: (i) (ii) ample notice was given to the appellants; the appellants were represented on 14.01.2016 and the counsel had led arguments before this Court; (iii) Prior to the pronouncement of the judgment or even on the day of pronouncement, no written submissions were filed; (iv) The judgment of the Division Bench dated 19.01.2016 was challenged by filing SLP (Crl.) No.4911/2016 which was dismissed; and Crl.A. 253/2000 Page 20 of 21 (v) No review of the judgment dated 19.01.2016 is maintainable.

35. In view of the foregoing, we find that the present application is nothing but an attempt to re-agitate the matter. To use our inherent powers in such manner will be an abuse of the process of this Court in itself and thus, run counter to the intent

of Section 482 of the Code.

36. Accordingly, Crl. M.A. 19196/2016 is dismissed. APRIL12 2017 //pst//
G.S.SISTANI, J.

VINOD GOEL, J.

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