

Nazar Vs. Varghese

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Court : Kerala

Decided On : May-22-2003

Reported in : 2003CriLJ3622; 2003(2)KLT1002

Judge : K.A. Mohamed Shafi, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 362 and 482

Appeal No. : M.P. No. 4561 of 1999 in Crl. M.C. No. 3682 of 1997

Appellant : Nazar

Respondent : Varghese

Advocate for Def. : K.C. Peter, Adv.

Advocate for Pet/Ap. : T.M. Abdul Lathif, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

K.A. Mohamed Shafi, J.

1. The 1st respondent in Crl.M.C. 3682/1997 has filed this petition under Section 482 of the CrI.P.C. to set aside the order dated 30.6.1999 passed by this Court in the Crl.M.C. and to rehear and dispose of the Crl M.C. on merits after affording the

petitioner a reasonable opportunity of being heard.

2. CrI.M.C. 3682/97 was filed by the 1st respondent herein to quash Annexure-A3 complaint filed by the 1st respondent - petitioner herein alleging offences punishable under Sections 378, 379 and 420 of the IPC before the Judicial First Class Magistrate's Court, Ernakulam. This Court by the considered order dated 30.6.1999 allowed the CrI.M.C. and quashed Annexure-A3 complaint and the entire proceedings taken by the Judicial First Class Magistrate's Court, Ernakulam against the petitioner therein.

3. It is seen from the order passed by this Court in that CrI.M.C. that the petitioner herein did not appear before the Court in spite of the fact that he was personally served in that proceedings. In this petition the petitioner has contended that though he was regularly appearing before the lower court and prosecuting the proceedings against the 1st respondent herein, on a misunderstanding and wrong advice given by his counsel, he did not appear before this Court and the matter was disposed of against him ex parte and without hearing him. He has also contended that this Court quashed the complaint filed by him against the 1st respondent on the basis of Annexure-A2 agreement produced by the 1st respondent in that CrI.M.C. and in fact that agreement alleged to have executed by him is absolutely false, fabricated and rank forgery. Therefore, he has contended that unless and until the order passed in the CrI.M.C. against him is not set aside and the matter is not heard and disposed of on merits after giving him an opportunity to be heard, he will be put to irreparable injury and loss and untold misery.

4. It is seen that the petitioner had preferred petition for special leave to appeal in SLP (CrI.) 3019/99 before the Supreme Court against the order passed by this Court and withdrew the petition in order to approach this Court for appropriate orders in the matter. Accordingly he has preferred the above petition to set aside the ex parte order and to hear and dispose of the CrI.M.C. on merits after giving him an opportunity of being heard.

5. The 1st respondent opposed this application very vehemently contending that this Court has no jurisdiction to entertain and pass orders as sought by the

petitioner, in view of Section 362 of the Cr.P.C. Section 362 of the Cr.P.C. reads as follows:

'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'.

6. It is the common case that this Court has passed final order disposing of the Crl.M.C. The petitioner has no case that there is any clerical or arithmetical error to be corrected by this Court in the order passed by this Court. What the petitioner seeks is the review of the order passed by this Court in the Crl.M.C. on 30.6.1999, set aside the order and to dispose of the same on merits after hearing the petitioner.

7. From a plain reading of Section 362 of the Crl.P.C. it is patent that that provision deprives this Court of the exercise of such jurisdiction sought for by the petitioner.

8. The counsel for the petitioner vehemently submitted that the 1st respondent has obtained the order in the Crl.M.C. by playing deliberate fraud upon this Court and producing a fabricated and forged document alleged to be an agreement entered into between the petitioner and the 1st respondent and if that order is allowed to stand, it will not only result in irreparable loss and injury to the petitioner but in perpetuation of the deliberate fraud played by the first respondent herein before this Court. Therefore, he submitted that in spite of the provisions of Section 362 of the Crl.P.C. this Court has got inherent jurisdiction to review the order since the order obtained by fraud cannot stand as justice and fraud cannot co-exist. In support of this argument the counsel for the petitioner relied upon the decision in Indian Bank v. Satyam Fibres (India) Pvt. Ltd. (AIR 1996 SC 2592) wherein the Supreme Court has observed as follows:

'20. By filing letter No. 2775 of 26.8.91 along with the Review Petition and contending that the other letter, namely, letter No. 2776 of the even date, was never written or issued by the respondent, the appellant, in fact, raised the plea before the Commission that its judgment dated 16.11.93, which was based on

letter No. 2776, was obtained by the respondent by practising fraud not only on the appellant but on the Commission too as letter No. 2776 dated 26.8.91 was forged by the respondent for the purpose of this case; This plea could not have been legally ignored by the Commission which needs to be reminded that the Authorities, be they Constitutional, Statutory or Administrative, (and particularly those who have to decide a lis) possess the power to recall their judgments or orders if they are obtained by fraud as Fraud and Justice never dwell together (*Fraus et jus nunquam cohabitant*). It has been repeatedly said that Fraud and deceit defend of excuse no man (*Fraus et dolus nemini patrocinari debent*).

21. In *Smith v. East Elloe Rural District Council*, 1956, the House of Lords held that the effect of fraud would normally be to vitiate any act or order. In another case, *Lazarus Estate Ltd. v. Beasley*, (1956) 1 QB 702 at 712, Denning LJ said:

'No judgment of Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.' 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 power are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the construction 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'.

9. Even though that case arose under the provisions of Consumer Protection Act 68 of 1986 under Civil Law, the counsel for the petitioner submitted that the above observations made by the Apex Court are applicable to all courts and tribunals bestowed with jurisdiction to decide the dispute between the parties, whether civil or criminal so as to enable them to maintain the dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour which is necessary for the proper and orderly administration

of justice and any order obtained by fraud cannot be allowed to stand.

10. Though the above submissions made by the counsel for the petitioner are very forceful and persuasive, the same cannot be accepted in view of the specific provisions of Section 362 of the Cr.P.C. and the consistent interpretation of that provision by the Supreme Court. Moreover, the above principle laid down by the Supreme Court with reference to civil matters cannot be imported to criminal cases in respect of which specific provisions are made in the Cr.P.C.

11. In the decision in *Hari Singh Mann v. Harbhajan Singh Bajwa and Ors.* (JT 2000 (Suppl. 2) SC 394) the Supreme Court relying upon several earlier decisions of the Supreme Court, held that there is no provision in the Code of Criminal Procedure authorising the High Court to review its judgment passed either in exercise of its appellate or revisional or original criminal jurisdiction and such power cannot be exercised with the aid or under the cloak of Section 482 of the Code. In para 10 of the judgment the Supreme Court has observed as follows:

' 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 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 arithmetical error. The reliance of the respondent on *Talab Haji Hussain's case* (*supra*) is misconceived. Even in that case it was pointed out that inherent powers conferred on High Courts under Section 561A (Section 482 of the new Code) has 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.'

12. In view of the law laid down by the Supreme Court in the above judgment regarding the exercise of jurisdiction under Section 362 or 482 of the Cr.P.C. in respect of the judgments and final orders passed by the criminal court, the contention of the petitioner that the order passed by this Court in the above Cr.M.C. is obtained by playing fraud upon the petitioner and this Court and the same has to be reviewed since the fraud will be perpetuated if the order is allowed to stand, is not sustainable. .

13. Even with regard to the power of review of the Supreme Court in criminal proceedings under Article 137 of the Constitution, the Supreme Court has observed in the decision in *Devender Pal Singh v. State, N.C.T. of Delhi* (2003 AIR SCW 351) as follows:

'11. Though the scope of review in criminal proceedings has been widened to a considerable extent in view of the aforesaid exposition of law by the Constitutional Bench, in any case review is not re-hearing of the appeal all over again, and as was observed in *Suthendraraja* (supra) in order to maintain the review petition it has to be shown that there is a miscarriage of justice. Though the expression 'miscarriage of justice' is of wider amplitude, it has to be kept in mind that the scope of interference is very limited'.

14. Considering the above observations made by the Apex Court with regard to its power of review in criminal cases under Article 137 of the Constitution it is patent that the very wide interpretation to Section 482 of the Cr.P.C. and the inherent powers of the criminal court sought to be placed by the counsel for the petitioner in this case is not sustainable. Therefore, the prayer made in the above petition by the petitioner being far beyond the scope of Sections 362 and 482 of the Cr.P.C. and the jurisdiction of this Court, the contention that since fraud has been played by the 1st respondent in obtaining the order in the Cr.M.C. from this Court in order to prevent the 1st respondent from enjoying the fruits of fraud, this Court is competent to review the order passed by this Court in the Cr.M.C., cannot be

sustained.

15. The remedy of the petitioner, if any, with regard to his contention that Annexure A3 agreement produced in the Crl.M.C. by the 1st respondent is a forged and fabricated document which is not signed by the petitioner and the 1st respondent has played deliberate fraud upon this Court in obtaining the order is elsewhere in appropriate proceedings before the appropriate forum.

Under the circumstances, in view of my finding that this Court has no jurisdiction to review the order passed by this Court in the Crl.M.C. on 30.6.1999 either under Section 362 or Section 482 of the Cr.P.C. or the inherent jurisdiction vested with this Court, the above petition is dismissed.

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