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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 27th JANUARY, 2025

IN THE MATTER OF:

\+ CRL.M.C. 4891/2024

VIKASH KUMAR .....Petitioner

Through: Mr. Rishabh Jain, Mr. Chander Vardhan, Mr. Himanshu Bhardwaj, Advocates

versus

STATE NCT OF DELHI .....Respondent

Through: Mr. Aman Usman, APP with Mr. Kausar Shakeel, Advocate.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

CRL.M.A. 38226/2024

1. The State seeks recall of the Order dated 01.07.2024, passed by this Court whereby this Court has quashed FIR No.591/2023 dated 05.09.2023 registered at Police Station Bindapur for an offence under Section 3 of the Delhi Prevention of Defacement of Public Property Act, 2007. A perusal of the Order dated 01.07.2024 shows that the said Order was passed in light of the judgment passed by the Apex Court in Mohan Lal v. State of Punjab, **(2018) 17 SCC 627**.

2. In the present application, it has been pointed out by the Respondent/State that the judgment passed by the Apex Court in Mohan Lal (supra) has been over-ruled by a Bench of five Judges of the Apex Court in Mukesh Singh v. State (NCB), **(2020) 10 SCC 120**. It is, therefore, the case

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of the State that the Order dated 01.07.2024, which was passed in light of the Judgment passed by the Apex Court in Mohan Lal (supra), which stands over-ruled by the Apex Court, be recalled and restored to its original number as the said Order is *per incuriam*. It is further stated by the learned APP that the present application is not barred by Section 362 Cr.P.C as the relief sought in the present application is only for recall of the entire Order dated 01.07.2024. He states that at the time of passing the Order dated 01.07.2024, it was not brought to the notice of this Court that the Judgment relied on by the learned Counsel for the Petitioner has been over-ruled and that the said Judgment is *per incuriam* and, therefore, the bar of Section 362 Cr.P.C would not be attracted to the present application. Learned APP for the State places reliance on the Judgment passed by the Apex Court in New India Assurance Co. Ltd. v. Krishna Kumar Pandey, **(2021) 14 SCC 683**, where the Apex Court has held as under:

> "***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 [State of Punjab v. Davinder Pal Singh Bhullar, (2011) 14 SCC 770 : (2012) 4 SCC (Cri) 496 : (2012) 4 SCC (Civ) 1034 : (2014) 1 SCC (L&S) 208] that the exceptions carved out in Section 362 of the Code would apply only to those provisions where the court has been expressly authorised 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 482CrPC 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*

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Davinder Pal Singh [State of Punjab v. Davinder Pal Singh Bhullar, (2011) 14 SCC 770 : (2012) 4 SCC (Cri) 496 : (2012) 4 SCC (Civ) 1034 : (2014) 1 SCC (L&S) 208] 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 362CrPC 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."***

11. *The case on hand is one where the respondent secured an order from the High Court, behind the back of his employer that his conviction will not have an impact upon the service career of the respondent. The High Court did not have the power to pass such an order. If at all, the High Court could have invoked, after convicting the respondent, the provisions of the Probation of Offenders Act, 1958, so that the respondent could take shelter, if eligible, under Section 12 of the said Act. In this case, the High Court ventured to do something which it was not empowered to do. Therefore, the respondent cannot take umbrage under Section 362CrPC. The second reason why the argument of the learned Senior Counsel for the respondent is fallacious is that the respondent himself was a beneficiary of what he is now accusing the*

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> *appellant of. As we have stated earlier, the criminal revision petition filed by the respondent in Cr.R. No. 402 of 2012 was disposed of by the High Court by a judgment dated 29-6-2012 [Rajkumari Pandey v. State of M.P., 2012 SCC OnLine MP 4397] . Thereafter the respondent moved a miscellaneous application in Criminal Case No. 8951 of 2012 purportedly for the correction of the order. There was neither an arithmetical nor a clerical error in the judgment of the High Court, warranting the invocation of Section 362CrPC. The respondent cleverly borrowed the language of Section 362CrPC to affix a label to his petition and the High Court fell into the trap. After having invited an order, which, by the very same argument of the respondent, could not have been passed, it is not open to the respondent today to contend that there was no jurisdiction for the High Court to pass such an order. It is nothing but a case of pot calling the kettle black."*
>
> (emphasis supplied)

3. The present case is where the Order has been passed in ignorance of the fact that the Apex Court has over-ruled the Judgment relied on by this Court.

4. Learned APP for the State also places reliance on the Judgment passed by the learned Single Judge of the High Court of Orissa at Cuttack in Siba Bisoi v. State of Odisha, **2022 SCC OnLine Ori 948**, wherein the learned Single Judge has held as under:

> "***12***. *The question whether the bar under Section 362 would impinge upon the inherent power of the High Court under Section 482 Cr.P.C. was considered by the apex Court in the case of R. Rajeshwari v. H.N. Jagdish reported in (2008) 4 SCC 82, wherein it was held that although a specific bar has been created in regard to exercise of the jurisdiction of the High Court to review its own order and ordinarily, exercise of*

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jurisdiction under Section 482 of the Code of Criminal Procedure would be unwarranted but in some rare cases, the High Court may do so where a judgment has been obtained from it by practicing fraud on it.

***13**. Even otherwise, Section 362 of the Code places a bar on the Court to 'alter' or 'review' its order or judgment. Once the judgment is pronounced and signed the Court becomes functus officio and therefore, no further alteration or review of the same is permissible save and except to correct clerical or arithmetical errors. However, what is sought by the State in the instant IA is not alteration or review but 'recall' of the entire order on grounds as have been noted hereinbefore. In other words, if the IA were to be allowed, it would mean complete abrogation of the order and restoring the parties to the position they were prior to passing of the order.*

***14**. There is thus, an inherent distinction between alteration or review and recall of an order. In the case of Habu v. State of Rajasthan reported in AIR 1987 Raj 83 : 1986 SCC OnLine Raj 54, a full bench of the Rajasthan High Court held that power to recall is different from power of altering or reviewing the judgment.*

***15**. In Pushpangathan v. State of Kerala reported in (2015) 3 KLT 105, the Kerala High Court held that, Section 362 Cr.P.C. does not affect the power of High Court under Section 482 Cr.P.C. to recall a judgment or order, if legal grounds are properly established by the party complaining.*

***16**. The position that emerges from a reference to the case laws noted above is that the bar under Section 362 of Cr.P.C. is not absolute and in any case, does not apply in case of recall of the order. There is no dispute that the inherent power of the High Court under Section 482 of Cr.P.C. can be exercised if any of*

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> *the three conditions exist, namely, to give effect to any order under the Code, to prevent abuse of the process of Court or to secure the ends of justice. In case any of the three conditions exist, the High Court would be justified in exercising its jurisdiction. Therefore, the objection raised by Mr. Panda with regard to maintainability of the I.A. is not tenable. However, whether such course of action is justified in facts and circumstances of the instant case, shall be discussed later."*

5. It is well settled that the elementary rule of justice is that no party should suffer by mistake of the Court (refer : A R Antulay v R S Nayak & Anr., **1988 2 SCC 602)**. In view of the fact that the Order dated 01.07.2024 in *per incuriam* the bar under Section 362 Cr.P.C will not be attracted and, therefore, this Court is inclined to allow the present application and recall the Order dated 01.07.2024.

6. The Petition is restored to its original number.

CRL.M.C. 4891/2024

1. Learned APP for the State seeks some time to file a Status Report.

2. Let the Status Report be filed within one week from today.

3. List on 07.02.2025 at 02:30 PM.

4. Let the copy of the charge-sheet be filed along with the Status Report.

5. Let no coercive action be taken against the Petitioner till the next date of hearing.

SUBRAMONIUM PRASAD, J

JANUARY 27, 2025
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