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P.V.KUNHIKRISHNAN, J.

Crl.M.Appln.No.1 of 2020 & Crl.Appln.No.2 of 2020
in
B.A.No.2546 of 2020

Dated this the 29th day of May, 2020

ORDER

These applications are filed by the defacto complainant in crime No.462 of 2020 of Vallikunnam Police Station to recall the order dated 11.05.2020 in B.A.No.2546 of 2020. According to the defacto complainant, even though an application was filed by him in the above bail application for impleading, without showing his name in the cause list, the bail application was posted for hearing before the court and the bail application was allowed as per order dated 11.05.2020. According to him, the order is passed without hearing him. According to the counsel, the impleading petition was pending at the time of disposal of the bail application. Hence, he is justified in praying to recall the order passed by this Court in the above bail application.

2. When the above application came up for consideration on 25.05.2020, the counsel for the accused, who are respondent Nos.3 to 6 in this application, submitted that, the party returned the file and he has no instruction for appearing in these applications. Therefore, this Court posted this case to 26.05.2020 to find out whether the lawyer is getting any instruction from his client. On 26.05.2020, Senior counsel Sri.P.Vijaya Bhanu appeared and submitted that, he is instructed to appear in this case. He submitted that, since respondent Nos.3 to 6

obtained a favorable order from this Court and if this Court is entertaining an application to recall the said order, it is better to hear respondent Nos.3 to 6 in these applications, who are accused in the case. Accordingly, this Court on 26.05.2020 passed the following order:

“When this application came up for consideration, the counsel for the respondents 3 to 5, represented through Senior Counsel Sri.P.Vijaya Bhanu submitted that, he had no instruction from his party. This application is filed to recall the order dated 11.05.2020 in BA.No.2546 of 2020. The case of the petitioner in this petition is that he was not heard at the time of passing the order, even though he filed an application to that effect.

Since this is a case in which the party who already filed an application is not heard and the order is passed, I think there is force in the argument of the petitioner. Since the counsel for the accused submitted that, he has no instruction from the party, the Public Prosecutor will inform the Station House Officer, Vallikkunnam Police Station, Alappuzha District to issue notice to respondents 4 to 6 in this application, conveying that, the above application is posted for orders on 29.05.2020.”

3. Today the public prosecutor submitted that, notice is served to respondent Nos.3 to 6. Heard the counsel for the petitioner, the Public Prosecutor and the senior counsel Sri.P.Vijaya Bhanu. Senior Counsel Sri.P.Vijaya Bhanu submitted that, he is instructed to appear in this case on behalf of respondent Nos.3 to 6. Counsel for the petitioner submitted that, the order dated 11.05.2020 is passed by this Court

without hearing him. According to him, as on the date of disposal of the bail application his application for impleadment is pending in this Court. Without posting the application for impleading along with the file, the case was listed. Hence, he was unable to know about the posting of the case. His name was not shown in the cause list. Therefore, he submitted that, the order passed by this Court on 11.05.2020 in B.A.No.2546 of 2020 may be recalled and he may be heard afresh.

4. Senior counsel submitted that, respondent Nos.3 to 6 obtained an order under Section 438 Cr.P.C. If this Court is recalling the order, it will be treated as cancellation of bail order. That will lead to great prejudice to respondent Nos.3 to 6, submitted by the senior counsel. According to him, 'Recalling a bail order' and 'cancellation of a bail order' are different. Senior counsel conceded the fact that the defacto complainant was not heard while disposing the bail application. But the senior counsel submitted that, a re-hearing of the bail application is possible and hence, this Court may kindly hear the bail application after hearing the counsel for the defacto complainant and other parties.

5. This Court considered the contentions raised by both sides. Section 362 of the Cr.P.C says that "save as otherwise provided by this Court or by in other law for the time being in force, no court, when 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 order passed in this case is a final order under Section 438 Cr.P.C. There is an embargo in Section 362 Cr.P.C to entertain any application to alter or review the order passed by a court as per the provisions of Cr.P.C. Hence a rehearing of the case is not possible.

6. If an order is passed without hearing a party or without hearing a lawyer who is appearing on behalf of the party, whether Section 362 Cr.P.C is applicable is the question to be decided in this case. This Court in **Pushpangathan v. State of Kerala [2015(3) KLT 105]** held that, Section 362 Cr.P.C does not affect the power of this Court to recall a judgment or order, if legal grounds are properly established by the party complaining. Relevant portion of the judgment is extracted hereunder:

“16. There cannot be any quarrel on the proposition that the bar created under S.362 Cr.P.C has to be respected. But the concepts of recall, review and/or alteration are to be distinguished clearly. If we understand the said terms correctly, there will not be any difficulty to resolve the issue. Alteration and/or review prohibited by S.362 Cr.P.C presupposes the continuance of the order under challenge and effectuation of the same with some changes in it. If a party wants to seek the indulgence of court to recall an order, he has to show a legal reason for challenging its existence and convince the court that the order complained of shall not be allowed to continue or operative. When an order is recalled, the whole thing is abrogated and the parties are relegated to the original position; i.e., to a stage anterior to

passing any judgment or final order in the matter. Conceptually, review/alteration is done while the order is in existence or force. The exercise undertaken in a review/alteration is to closely examine the order sought to be reviewed so as to find out any illegality or impropriety. For doing so, the existence of the judgment or order must be recognized. When a judgment or a final order is recalled for valid reasons, the resultant legal effect is that the order itself is abrogated or uprooted and the parties will be relegated to a position that existed at the commencement of the proceedings. Therefore, I am of the view that S.362 Cr.P.C does not affect the power of this Court to recall a judgment or order, if legal grounds are properly established by the party complaining. "

7. In the above judgment, this Court considered the difference between recall, review and/or alteration. This Court observed that when an order is recalled, the whole thing is abrogated and the parties are relegated to the original position i.e., to the stage anterior to passing any judgment or final order in the matter. But alteration and/or review is prohibited by Section 362 Cr.P.C. Therefore, it is clear that, once an order as per the Cr.P.C is passed by a criminal court, it cannot be altered or reviewed. But the prohibition under Section 362 Cr.P.C is not applicable to recalling orders. **In Robin v. State of Kerala and another [2018 KHC 158]**, this Court considered the same point. This Court observed that, in exercise of powers under Section 482 Cr.P.C, the High Court can recall an order, if the court is convinced that, the party could not take part in the hearing for no fault

of his and that, there was flagrant violation of principles of natural justice. Relevant portion of the order is extracted hereunder:

“Therefore, it is now well settled by the aforestated judgments of the Apex Court as well as that of this Court that conceptually and in substance there is a distinction between review and recall and that what is prohibited by the mandate of S.362 of the Cr.P.C is review or alteration of the judgment or order and that this Court by virtue of the special powers conferred under S.482 of the Cr.P.C., could recall an order for the grounds as enumerated in the aforesaid judgments and where this Court is convinced that the party could not take part in the hearing process and that there was flagrant violation of principles of natural justice etc., then this Court could invoke its jurisdiction to recall the impugned order so as to dispose of the matter afresh after hearing all the affected parties concerned. ”

8. In the light of the above judgments, it is clear that an order passed by this Court in criminal jurisdiction can be recalled by invoking the powers under Section 482 Cr.P.C, if legal grounds are properly established by the party. It is also clear that, if an order is passed without hearing the party, during the hearing process, not due to his fault, it amounts to violation of principles of natural justice. In such circumstances also this Court can recall the order.

9. Admittedly, in this case, the petitioner who is the defacto complainant filed an application for impleading himself in the bail application. It is stated in the petition that, he submitted the impleading petition through e-mail on 29.04.2020. The counsel

submitted that the Registry sent a confirmation page regarding the mail. Annexure R3(2) is the confirmation mail received by the counsel for the petitioner in this case. Annexure R3(2) is an auto generated reply to show that the impleading petition which is produced as Annexure R3(1) is received. Annexure R3(3) is the communication on behalf of the counsel for the petitioner and the online helpline centre. The counsel submitted that, when he contacted the helpline over phone, the officer informed him that, petition was sent for listing. The counsel also submitted that BA TMP 272 of 2020 was not posted after filing the impleading petition. In the meanwhile, the Registry started numbering of the temporary bail application and renumbered the case as B.A.No.2546 of 2020. B.A.No.2546 of 2020 was listed on 11.05.2020. The name of the counsel for the petitioner/defacto complainant was not mentioned in the cause list. Impleading petition was also not posted along with bail application. Hence, this Court happened to pass the order dated 11.05.2020 in B.A.No.2546 of 2020. According to the counsel, the order was passed by this Court, without hearing him. According to the counsel, the impleading petition was pending before this Court at the time of disposal of the bail application. But the Registry has not posted the impleading petition along with the bail application.

10. After hearing both sides, I think this is a case in which this Court passed the order dated 11.05.2020 without hearing the counsel

for the petitioner/defacto complainant. It is also a fact that, at the time of passing the order dated 11.05.2020, the impleading petition of the petitioner/defacto complainant is pending before this Court. But it was not placed along with the bail application. Therefore, I think the petitioner is entitled to get relief.

11. The senior counsel, at this stage submitted that, if this Court is recalling the order, sometimes it may be taken as cancellation of the bail order. Therefore, the senior counsel submitted that, it may be clarified that recalling the order will not amounts to cancellation of the bail order. 'Cancellation of the bail order' and "recalling of the order" are different. Cancellation of a bail order is possible only after hearing the counsel and hearing the case on merit. But for recalling the order passed under Section 438 Cr.P.C, there is no consideration of the case on merit. This Court is recalling this order, because the petitioner/defacto complainant was not heard and his application for impleadment is pending at the time of disposal of the bail application. In such circumstances, recalling an order will not amounts to cancellation of the bail order. A bail order passed by this Court cannot be cancelled under Section 482 Cr.P.C. There are provisions under Criminal Procedure Code to cancel a bail order. In this case, this Court is exercising the jurisdiction under Section 482 Cr.P.C to recall the order passed under Section 438 Cr.P.C for the simple reason that, the affected party is not heard. I make it clear that, I have not considered

the merit of the case either way while passing this order. Therefore, the apprehension raised by the senior counsel will not stand. Alteration or review of an order granted under Section 438 Cr.P.C is not possible in the light of Section 362 Cr.P.C. But recalling an order passed under Section 438 Cr.P.C is possible, if the order is happened to be passed without hearing a necessary party. When an order is recalled, the whole thing is abrogated and the parties are relegated to the original position i.e., to the stage anterior to passing any judgment or final order in the matter. Exercise undertaken in a review/alteration is to closely examine the order to be reviewed so as to find out any illegality or impropriety in it. For doing so, existence of the order or judgment must be recognised. When a judgment or final order is recalled for valid reasons, the resultant legal effect is that, the order itself is abrogated and the parties will be relegated to a position that existed at the commencement of the proceedings. Therefore, the "order recalling a bail order" is entirely different from "an order of cancellation of bail". This Court cannot cancel the bail order under Section 482 Cr.P.C. This Court can entertain an application under Section 482 Cr.P.C to cancel an order passed under Section 438 Cr.P.C by a Sessions Court. In such situation, this Court will definitely will look in to the correctness of the order on merit. Such an exercise cannot be done, when the order passed under Section 438 Cr.P.C, is by this Court itself.

12. In the light of the discussion made above, it is clear that

the petitioner/defacto complainant was not heard while passing the order dated 11.05.2020. in B.A.No.2546 of 2020.

13. Hence, these applications are allowed.

14. CrI.M.A.No.2 of 2020 is allowed, recalling the order dated 11.05.2020 in B.A.No.2546 of 2020. CrI.M.A.No.1 of 2020 is allowed. The petitioner is impleaded as additional respondent No.3 in B.A.No.2546 of 2020

Registry will post this Bail Application before the appropriate court, as per the roster.

Hand over.

Sd/-

P.V.KUNHIKRISHNAN, JUDGE

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