

A.F.R

Reserved

Case :- CONTEMPT No. - 1213 of 2019

Applicant :- Sudhir Kumar Srivastava

**Opposite Party :- Alok Kumar Mukherjee, The Then Sr.Registrar Of
Hon'Ble High C**

Counsel for Applicant :- Jyotinjay Verma

Counsel for Opposite Party :- Gaurav Mehrotra

Hon'ble Abdul Moin,J.

(C.M. Application No.11525 of 2020)

1. Heard learned counsel for the applicant and Sri Gaurav Mehrotra, learned counsel for the respondent.
2. An application for recall has been filed seeking recall of the order dated 20.01.2020 passed in Contempt Petition No.1213 of 2019 in re: Sudhir Kumar Srivastava vs. Alok Kumar Mukherjee, by which the contempt petition had been dismissed. The said application has been filed by learned counsel for the applicant duly supported by an affidavit of one Sri Shanti Sewak, describing himself to be the Clerk of learned counsel for the applicant. It has also been indicated in paragraph 2 of the affidavit that the applicant is an affected person and has been falsely implicated. It is not understood as to what prevailed upon the Clerk of the learned counsel for the applicant to file an application for recall inasmuch it has not been indicated in the said affidavit as to what has precluded or prevented the applicant himself namely Sudhir Kumar Srivastava from filing the said application and it has been left for the Clerk of the learned counsel to indicate that the applicant has been falsely implicated.
3. Be that as it may, the fact of the matter is that the Court vide order dated 20.01.2020 had dismissed the contempt petition after considering the facts and circumstances of the case.

4. Upon the application for recall being taken up, a preliminary objection has been raised by Sri Gaurav Mehrotra, learned counsel for the respondent, that the application for recall in effect is seeking review of the order dated 20.01.2020 by which the contempt petition had been dismissed and once no power of review is vested with the Court under the Contempt of Courts Act, 1971 (for short, 'Act of 1971') as such the said application merits to be rejected on this ground alone.

5. In support of the said argument, learned counsel for the respondent has placed reliance on a judgment of the Apex Court in the case of **Delhi Administration vs. Gurdip Singh Uban and others** - (2000) 7 SCC 296, to contend that an application for "clarification, modification or recall" in substance is an application for review.

6. Placing reliance on a judgment of this Court passed in **Contempt Petition No.1591 of 2000** in re: **Sharwan Kumar vs. Harminder Raj Singh (IAS)**, decided on **09.02.2016**, it is argued that the Court has held that where a contempt petition has been dismissed on merits then an application for recall would not be maintainable.

7. Reliance has also been placed on a Division Bench judgment of this Court in the case of **State vs. Baldev Raj - 1991 SCC OnLine All 1070**, which has also held the same.

8. Placing reliance on the aforesaid judgments, Sri Gaurav Mehrotra, learned counsel for the respondent, submits that the preliminary objection merits to be upheld and the application for recall merits to be rejected.

9. On the other hand, learned counsel for the applicant on the basis of averments contained in paragraph 5 of the application for recall as well as paragraph 13 of the written submissions filed by the learned counsel for the applicant dated 04.03.2020 contends that as this Court has "failed" to peruse the records of the case and notice the averments made on affidavit as such the application for recall would be maintainable. Various other grounds have also been taken on the merits of the case so much so that in paragraph 6 of the application it has been contended that certain submissions of the counsel

for the applicant as have been quoted verbatim in the said paragraph of the application, were not the submissions of the counsel for the applicant/petitioner.

10. Strangely, the averments of paragraph 6 of the affidavit have been sworn by the Clerk on the basis of information derived from the learned counsel for the applicant. What is strange is that the order dated 20.01.2020 was dictated in the open Court and no demur or protest was raised by the learned counsel for the applicant at the time of dictation of the said order that allegedly wrong submissions were being recorded and now in an affidavit sworn by the Clerk of the learned counsel for the applicant the said plea is being taken !

11. On the ground of maintainability of the application for recall, learned counsel for the applicant has placed reliance on the judgment of the Apex Court in the case of **Municipal Corporation of Greater Mumbai and another vs. Pratibha Industries Limited and others** - (2019) 3 SCC 203, to contend that the High Court being a Court of record has jurisdiction to recall its own order and that while exercising the power under Article 226 of the Constitution of India nothing precludes the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction.

12. Reliance has also been placed on a Division Bench judgment of this Court in the case of **Maharaja Dharmendra Prasad Singh and another vs. Vivek Agarwal and others** - 2010 (28) LCD 323 that following the maxim "Actus Curiae Neminem Gravabit", i.e. an act of the Court shall prejudice no man, this Court is vested with the power to recall the order dated 20.01.2020 passed on merits.

13. Having heard learned counsel for the parties and having perused the records, what is apparent is that the order dated 20.01.2020 had been passed on merits dictated in open Court whereby the Court not finding any contempt to have been committed by the respondent/contemnor, proceeded to dismiss the contempt petition.

14. Now an application for recall has been filed trying to argue certain points and trying to indicate that the Court "failed" to peruse the records and notice the averments made on an affidavit and supporting annexures.

15. The order dated 20.01.2020 is not an order by which the contempt petition may have been dismissed in default rather it is an order passed on merits. Thus, the application for recall filed by the applicant/petitioner by simply indicating it to be a recall of the order is in fact an order of review as would be apparent from perusal of the averments made in the said affidavit along with the averments made in the written submissions. Thus, keeping in view the law laid down by the Apex Court in the case of **Gurdip Singh Uban (supra)**, it is apparent that the application in effect and in substance is one for review.

16. It is settled proposition of law that a review or an appeal is a statutory remedy. In this regard, a coordinate Bench of this Court in the case of **Sharwan Kumar (supra)** has held as under:-

"After hearing learned counsel for parties and going through the record, the first and foremost question to be considered that if the contempt petition has already been dismissed on merit then the whether the application for recall of the said order is maintainable or not ?

Answer to the said question finds place in the Division Bench judgment of this Court passed in the case of Mahaveer Prasad Verma Vs. Central Administrative Tribunal, Lucknow and others, 2013 (31) LCD 351, in paragraph No. 4 held as under:-

"By the order dated 10.1.2012, the contempt petition filed by the petitioner, was dismissed in his absence on the ground that the petitioner respondent has not moved any application to bring on record the successor since the contemner was transferred. Tribunal noted that an application for recall of an order passed in a contempt proceeding, is not maintainable. So far as the finding of Tribunal that recall/review application is not maintainable, seems to be correct.

Virtually, recalling of the order dated 10.1.2012, will amount to review of earlier decision was was passed with the finding on merit to the extent that successor officer has not been brought on record. Review/recall or appeal are the statutory remedies, vide AIR 1966 SC 641, Harbhajan Singh v. Karam Singh and others, 1988 (14) ALR 706, Vijai Bahadur Vs. State of U.P., 1995 (26) ALR 627, Ram Jiwan Singh and others Vs. The District Inspector of Schools, Kanpur and others, 1979 (5) ALR 168, 1998 (33) ALR 456, New India Assurance Co. Ltd. Vs. Smt. Bimla Devi and others, 1997 (88) RD 562, Smt. Shivraji and others Vs. Dy. Director of Consolidation, Allahabad and others, AIR 1970 SC 1273, Patel Narshi Thakershi and others Vs. Pradyumansinghji Arjunsinghji, 1987 (13) ALR 680, Dr. (Smt.) Kuntesh Gupta Vs. Mgt. of Hindu Kanya Mahavidyalaya, Sitapur etc., AIR 1964 SC 436, Laxman Purushottam Pimputkar Vs. The State of Bombay and others, and AIR 1965 SC 1457, Patel Chunibhai Dajibha etc. Vs. Narayanrao Khanderao Jambekar and another. Unless provided under the Act, no application for review/recall may be moved. The contempt of Courts Act, 1971 does not contain any provision for review of a judgment. Hence the impugned order dated 13.9.2012 does not seem to suffer from any impropriety or illegality"

17. Apart from above, there is no power under the Act of 1971 conferring any power of review and thus no such power can be exercised by this Court.

18. A Division Bench of this Court in the case of **Baldev Raj (supra)** has also held that the Act of 1971 impliedly excludes the power of recall or review.

19. So far as the judgment of the Division Bench of this Court in the case of **Maharaja Dharmendra Prasad Singh (supra)** is concerned, that was a case in which despite filing of a caveat by learned counsel for the respondent, the caveat had not been noted by the Registry, with the result that an ex-parte interim order was passed by the High Court. Considering the said fact, the High Court after applying the maxim *Actus Curiae Neminem*

Gravabit recalled the said order. Thus, the facts and ratio of the said case are not applicable here.

20. Likewise, the judgment of the Apex Court in the case of **Pratibha Industries Limited (supra)** was a case in which the application filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, 'Act of 1996') had been entertained and an injunction had been granted on the ground that there was an arbitration clause in the contract. An arbitrator had also been appointed by the High Court. An application for recall was filed contending that there was no arbitration clause and thus the order was recalled by the Single Judge. Upon an appeal being filed under Section 37 of the Act of 1996, the Division Bench set-aside the order of recall on the ground that there was no power to review or recall the said order vested with the Court under the Act of 1996. Upon the matter being carried to the Apex Court, the Apex Court held that once there was no arbitration agreement consequently the provisions of the Act of 1996 were itself not applicable and hence proceeded to set-aside the Division Bench judgment of the High Court. Thus, the very applicability of the Act of 1996, in which the order was passed, was held to be inapplicable by the Apex Court and accordingly, the order of Single Judge of High Court recalling his order appointing the arbitrator was upheld despite there being no provision in the Act 1996 for review an order. In the instant case it is not the case of the applicant/petitioner that the Act of 1971 is not applicable. Hence, the judgment in the case of **Pratibha Industries Limited (supra)** may not be of any help to the applicant/petitioner.

21. Considering the aforesaid discussions, it is apparent that this Court has no power to review or recall the order dismissing the contempt petition on merits. Accordingly, the preliminary objection is upheld and the application for recall of order dated 20.01.2020 is rejected.

Order Date :- 18.02.2021

(Abdul Moin, J.)

A. Katiyar