

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
MISC CIVIL APPLICATION NO. 444 OF 2017
IN
WRIT PETITION NO 202 OF 2014

Dr Pratima Kessarkar ... Applicant

V e r s u s

Shri Ajit Panchwadkar ... Respondent

Shri I. Agha, Advocate for the Applicant.

Shri V P Thali, Advocate for the Respondent.

Coram:- NUTAN D. SARDESSAI, J.

Reserved for Order on : 20th September 2017
Order Pronounced on : 13th October, 2017

ORDER

1. Heard Shri I Agha, learned Advocate for the Applicant and Shri V.P. Thali, learned Advocate for the Respondent.

2. It was the contention of Shri Agha that the Applicant was not represented in the proceedings before this Court. She was initially represented through a Lawyer at the time of the admission and somehow the matter was listed for final hearing in the summer vacation. She used to follow up the matter continuously but since it was vacation time, she was not aware

that the matter would be listed in the vacation before this Court. She was bedridden since 19.04.2017 till 26.05.2017 and underwent an injury and in support of which she produced medical certificates on record. However, on the date of re-opening of this Court after the vacation, she tracked the status of the Writ Petition on 05.06.2017 and when she learnt that the petition was disposed off alongwith the other Writ Petition no. 627 of 2014 and that very day applied for a certified copy of the Judgment dated 15th May 2017. She was not aware of the fact that the matter was listed for final hearing nor was she informed by her Lawyer nor any notice was received by her from this Court that the matter would be listed during the summer vacation. An Oral Judgment came to be passed in her absence when she was unaware of the matter being dismissed, heard and disposed off. She had not received any intimation or even a call from Advocate J. Vaz nor his Junior Sonali D'Costa that the matter would be listed and called out and that her earlier Lawyer was not discharged from the proceedings. The Oral Judgment passed against her was against the principles of natural justice as no opportunity was given to her to represent her case. It was therefore a fit case to recall the Oral Judgment dated 15th May 2017 and the Writ Petition no.202 of 2014 be restored to the file and a fresh hearing be given to her.

3. It was the further contention of Shri Agha that the Respondent had opposed the application on the premise that it was only after obtaining the necessary consent of the Advocate appearing in the matter that the same was listed in

the final list to be put up for vacation. The Writ Petition no.202 of 2014 alongwith the Writ Petition no.627/2014 were listed at serial no.173 of the provisional board and as none had appeared, the matter was listed in the final list of final hearing matters put up for hearing in the summer vacation. The Respondent also opposed her case that she was neither bedridden nor underwent any injury or between that time spelt out by her between 19.04.2017 to 26.05.2017. It was further his contention that there was no positive averment at the instance of the Respondent that the Petitioner was heard. No notice too was issued to her by the earlier Lawyer that the matter was listed. The Court was misled into believing that nothing survived in the Petition and on the basis of the wrong submission, the Applicant's Petition came to be disposed off. She had suffered injuries on account of the impugned Order and therefore the Order had to be recalled and the Petition re-heard.

4. Shri V. P. Thali, learned Advocate for the Respondent submitted that as recorded in the impugned Order that he would inform Mr Vaz that the matter would be taken up on the returnable date indicated in the Order dated 08.05.2017, he had issued necessary intimation to Ms Sonali D'Costa, Junior of Shri Vaz and that he was informed by Ms D' Costa, that Mr Vaz no longer appeared in the matter. There was no denial of the fact by the Applicant that he was directed to contact Advocate Vaz and he did so. There was no affidavit of the earlier Lawyer denying the contents of para 3 of the impugned Order despite the fact that a rejoinder was filed on behalf of

the Applicant. He placed reliance in **State of Maharashtra vs Ramdas Shrinivas Nayak & anr [(1982) 2 SCC 463]** and that in **Bhavnagar University vs Palitana Sugar Mill (P) Ltd. & anr. [(2003) 2 SCC 111]** and submitted that it was unbelievable that the earlier Advocate had not informed the Applicant. Besides, it was his further contention that in her application she had set out that she was bedridden and underwent injury while the certificate produced by her showed that she was suffering from a fracture of the D12 vertebra unlike the next certificate indicating that she was suffering fracture of the lower spine. Assuming at the highest that the contents of her application were correct and the Advocate was not discharged from the proceedings, there was no affidavit of the Advocate to substantiate her case. In any event, no hardship was caused to the Petitioner by the impugned Order and therefore the application had to be dismissed. He further relied in **Rajni Tandon vs Dulal Ranjan Ghosh Dastidar & anr. [(2016) 14 SCC 792]** and wrapped up his arguments that there was no ground to recall the Order and the application had to be dismissed.

5. It is matter on record that the matter was heard on 24.08.2015 when Rule was issued and the issue of maintainability was kept open with a direction to expedite the hearing. Be that as it may, between then, till the matter came to be taken up before the Vacation Judge on 08.05.2017, there was apparently no hearing in the matter for no explicable reason. Be that as it may, the learned Single Judge seized of the matter recorded on 08.05.2017 that

neither the Petitioner i.e. the Applicant herein nor her husband were present unlike Shri V. P. Thali, learned Advocate for the Respondent who was present on that day. It was further brought to the notice of the learned Single Judge that the Order impugned in the Writ Petition no.202 of 2014 was modified by the learned Trial Judge upon an application taken by the Applicant herein and that in view of such modification, nothing really survived in the Writ Petition no.202/2014 filed at her instance though the Order upon modification had been challenged by her husband-Respondent by instituting the Writ Petition no.627 of 2014. The learned single Judge who was seized of the matter noted that as the matter was specifically fixed during vacation, it was not possible to simply adjourn the matter. However, in order to grant further opportunity, he had listed the matter on 12.05.2017. What really transpired on that date is not borne out from the records except a record in the Farad Order that Shri V. P. Thali, learned Advocate had mentioned the matter before the learned Judge and that the matter was listed instead on 15th May 2017. There is no record whatsoever whether the Applicant as the Petitioner was present or her Advocate even on that date and the matter came to stand over on 15.05.2017 when the order under challenge came to be passed.

6. The learned Single Judge while dealing with the Applicant's Petition was seized of the Order passed by the Trial Judge in the matter of visitation rights and that the Applicant had applied for the modification of the Order dated 15.01.2013 passed by the Trial Judge and granted in her favour vide the

Order dated 27.08.2014 and assailed by the Respondent in a separate Writ Petition no.627/2014. The learned Judge found that as the Applicant's grievance against the Order dated 15.01.2013 no longer survived as she had obtained its modification vide the Order dated 27.08.2014, proceeded to dispose off her Petition. Yet, at the same time, the learned Judge reserved the liberty to the parties to apply for variation of the Order in relation to the visitation rights and in that view of the matter, disposed off both the Petitions.

7. The Applicant had produced on record the sickness Certificate indicating that she had suffered a fracture of the D12 vertebra and seeking leave of absence from duty for 24 days w.e.f. 19.04.2017 being absolutely essential for the restoration of her health. It is equally a matter of record that she had relied on another Certificate issued again by the Doctor extending the earlier leave for 15 days w.e.f. 12.05.2017 on account of fracture of the lower spine. Whatever be the medical consequences of her condition, it would not be misplaced to consider the fact that she was immobile initially from 19.04.2017 on account of her fracture to the vertebra D12 and later on account of a fracture recorded as to the lower spine. Whether the fracture be to the D12 vertebra or the lower spine, the fact remains that the Applicant was distressed and immobilised on account of her medical condition which positively prevented her from appearing in Court on the date listed for hearing and covering the period from 8th May to 15th May 2017.

8. No doubt, Shri Thali had acceded to the request of the Court to inform Advocate Vaz that the matter would be taken up on the returnable date indicated in the Order dated 08.05.2017 or some suitable date thereafter and that consequent to such request, he had issued intimation to Ms Sonali D'Costa, Junior to Shri Vaz and who had informed him that Shri Vaz was no longer appearing in the matter. The fact however remains that there was no material forthcoming before the Court that the Petitioner had knowledge about such a communication as to make some alternate arrangement accepting the contention that the matter was fixed in vacation by consent. It is nobody's case that the communication between Shri Thali, learned Advocate for the Respondent and the Junior of Shri Vaz then appearing for the Applicant was within the knowledge of the Applicant and on account of her medical condition was immobilised and therefore was prevented from personally appearing in Court and/or making alternate arrangements for due representation on her behalf before the Court.

9. i would not venture into the arena as to whether the Respondent had misled the Court that nothing survived in the Petition as it is a matter which transpired between the learned Advocate for the Respondent and before the Vacation Judge seized of the matter. Suffice it to say that the Applicant was not given due opportunity to represent herself before the Court, her Advocate Shri Vaz having withdrawn from the matter and there being no material to show that he had done so under intimation of her. A mere communication by his

Junior to Shri Thali, learned Advocate for the Respondent that he no longer appeared in the matter would not absolve him of the liability particularly when there was no contemporaneous record to show that the Applicant had any intimation from Advocate Vaz about the matter or about his withdrawal from appearance.

10. In **Ramdas Nayak** (supra), the Hon'ble Apex Court observed at Para 4 as under :

"4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation".(1) We

are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. (2) That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that

the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the Judgment.”

11. Bhavnagar University (supra) considered the same observations of the Apex Court in **Ramdas Nayak** (supra) in the matter to what transpired in the course of the proceedings before the Court and observed further that the only way to have the record corrected is by calling the attention of the very Judges who had made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error and if no such step is taken, the matter must necessarily end there.

12. Rajni Tandon (supra) was an application by the Respondent praying for a re-hearing of the Appeal which was disposed off by the Judgment and Order dated 29.07.2009. This Appeal was directed to be listed for hearing during the summer vacation under the heading “specially directed matter” by an order dated 25.11.2008 passed by the Bench presided over by the Hon'ble, the Chief Justice, pursuant to which an advance list was issued for the convenience of the Bar, with the remarks “No letter for deletion will be entertained in the specially directed matters”. It was observed that the records disclosed that a notice was issued by the Registry on 15.05.2009 intimating all the advocates including the advocates herein, that the matter would be listed during the

summer vacation and would not be deleted from the Vacation Bench. Accordingly, the matter was listed on 18.05.2009 on which date Shri Abhijit Sengupta and Shri Ranjan Mukherjee appeared for the Respondents. However, Shri Ranjan Mukherjee who was present in Court disputed the fact that he was present in Court on that date. On 19.05.2009, only the Counsel for the appellant appeared and none appeared for the respondents and after hearing the learned Counsel for the appellant, hearing was concluded and the matter was reserved for Judgment which ultimately came to be delivered on 29.07.2009. In that view of the matter, the Apex Court found no ground to entertain the application for re-hearing and rejected the same.

13. The Judgment in **Rajni** (supra) with respect is clearly distinguishable inasmuch as the Registry had circulated a notice intimating including the Advocates in the matter that the matter would be listed during the summer vacation and would not be deleted from the Vacation Bench. It also revealed that when the matter was listed before the Court on 18.05.2009, Shri Sengupta and Shri Ranjan Mukherjee appeared for the Respondent though it is another matter when Shri Ranjan Mukherjee who was present in Court today disputed the fact that he was present in Court on that date. Besides, having found from the records that the Advocates for the Respondents were present and in their presence the matter was directly listed for hearing on 19.05.2009, the matter came to be heard on 19.05.2009. Such is not the case here where right from the inception when the matter was

taken up on 08.05.2017 there was none on behalf of the Applicant before the learned Vacation Judge i.e. neither the Applicant nor her Advocate and in that view of the matter, an opportunity was given to the absentee party and the matter was listed on 12.05.2017. Since there was none again on behalf of the Applicant i.e. neither the Applicant in person nor her Advocate, the matter came to be mentioned on 12.05.2017 and listed on 15.05.2017 when it came to be disposed off on the basis of the submission at the behest of the Respondent. In any event, it is not as if the Applicant was avoiding the Court for any inexplicable reason or more particularly that she was evading the process of the Court but was rather constrained due to her medical condition from appearing in Court. At the cost of repetition, the communication between Shri Thali and Advocate Shri J Vaz through his Advocate and the report conveyed to him through the Junior of Shri Vaz that he was no longer appearing in the matter was apparently not within the knowledge of the Applicant herein.

14. In any event, by the disposal of her Petition, in her absence, she has been prejudiced from pursuing her Petition. It is not as if by the modification of the Order under challenge, her issues were altogether addressed or that she had no further reliefs in her Petition. By the Order under challenge, she has been virtually non-suited and deprived of an opportunity to pursue her Petition to its legitimate end.

15. In the circumstances, therefore, i deem it appropriate to recall the Order dated 15.05.2017 and restore the Petition No.202 of 2014 to file with an opportunity of fresh hearing to the parties and for the Petition to be heard afresh and decided on merits.

NUTAN D. SARDESSAI J.