

IN THE HIGH COURT OF BOMBAY AT GOA
MISC. CIVIL APPLICATION NO.522 OF 2017
IN
WRIT PETITION NO.40 OF 2004

The Goa Urban Co-op. Bank Ltd.

...Applicants

V/s

Mr. Rui Ferreira & Ors.

....Respondents

Shri G.K. Sardessai with Shri A. Carvalho, Advocates for the Applicants.

Shri V. Rodrigues, Advocate for the Respondent No.1.

Shri P. Faldessai, Additional Government Advocate for the Respondent No.2 & 3.

CORAM : NUTAN D. SARDESSAI, J.

Reserved on : 3rd AUGUST, 2017

Pronounced on : 4th AUGUST, 2017

ORDER :

The applicants have invoked the jurisdiction of this Court by an application for stay of the Recovery Certificate dated 11/05/2017 and the Notice of Demand dated 16/06/2017 in a disposed off petition filed at their instance. The respondent no.1 had filed his affidavit in reply raising preliminary objections to the maintainability of the application reserving the right to file a detailed reply to the application. Be that as it may, Shri V. Rodrigues, learned Advocate for the respondent no.1 came to be heard on the preliminary objections who contended that the Writ Petition filed by the applicants was dismissed against which they had pursued the matter before the Hon'ble Apex Court where the

matter was finally disposed off by the order dated 8/02/2016. The award of the Industrial Tribunal had attained finality upon the decision of the Special Leave Petition at the instance of the applicants and the Hon'ble Apex Court had held him entitled to an amount of ₹42,50,000/-. The applicants had however paid to him an amount of ₹31,09,708/- only thereby which compelled him to move the Labour Commissioner under Section 33-C(1) of the Industrial Disputes Act, 'the Act' for short hereinafter and accordingly the Recovery Certificate was issued in his favour and the Revenue Officer. Therefore the only remedy available to the applicants was by way of a separate Writ Petition to challenge the order of the Labour Commissioner and as this Court had become functus officio on the decision of the petition no.40 of 2004. If at all the applicants were aggrieved by the order of the Labour Commissioner, fresh cause of action arose in their favour and a fresh proceeding had to be initiated and it was not permissible for the applicants to move an application in the disposed off petition. He placed reliance in State of **Uttar Pradesh V/s. Brahm Datt Sharma [1987 2 SCC 179]**, **Himachal Pradesh Road Transport V/s. Balwant Singh [AIR 1992 SC 2201]** and **Custodian of Evacuee Properties V/s. Amjadali Gazanfarali Bukhari & Ors. [(2014) 16 SCC 92]**. The application had therefore to be dismissed with exemplary costs and as there was

no basis in the contention on behalf of the applicants that the High Court had jurisdiction to decide the application.

2. Shri G.K. Sardesai, learned Advocate for the applicants contended that the award of the Industrial Tribunal was upheld by the High Court with certain modifications. In the Hon'ble Supreme Court, a settlement was worked out and pursuant thereto the applicants were ordered to make the payment to the respondent no.1 after allowing deductions towards the income tax. He distinguished the judgment in **Brahm Datt Sharma** (supra) and contended that the application was intrinsically connected with the disposed off petition and no separate cause of action had arisen to maintain independent proceedings. It was his contention that the settlement visualized under Section 33-C(1) was within the parameters of the Act and that the settlement pursuant to which the order was made by the Hon'ble Apex Court was not in terms of the Act. There was no basis in the objections which had to be dismissed.

3. Admittedly, the Industrial Tribunal had passed an award in favour of the respondent for reinstatement with back wages to which the applicants took exception in the Writ Petition No.40/2004. The said petition was decided by a learned Judge of this Court who had confirmed the award dated 30/08/2003 passed

by the Industrial Tribunal with certain modification and which was taken up in the Special Leave Petition by the applicants before the Hon'ble Apex Court and which recorded satisfaction on the dispute being finally settled between the parties once and for all and directed the payment of an amount of ₹42,50,000/- to the respondent within three weeks from the date of the order in full and final settlement of all his dues with a direction that he was to complete the required procedural formalities relating to income tax. In other words, as contended by Shri Rodrigues and rightly so, the Writ Petition filed by the applicants had been finally disposed off and therefore this Court became functus officio leaving no latitude for the applicants to invoke its jurisdiction almost three years later and based on a cause of action that the Labour Commissioner had allowed the application of the respondent under Section 33-C(1) of the Act and ordered the issuance of a Recovery Certificate in its favour for the amount stated therein.

4. **Brahm Datt Sharma** (supra), was employed as an Executive Engineer in the Irrigation Department of the State of Uttar Pradesh against whom a number of charges were framed and proved in a departmental inquiry consequent to which he was dismissed from service. He unsuccessfully challenged the validity of the order before the Uttar Pradesh Public Service Tribunal and therefore filed

a Writ Petition under Article 226 of the Constitution before the High Court of Allahabad challenging the order of dismissal. A Single Judge of the High Court set aside the order of the Tribunal and quashed the State applicant's order dismissing him from service on the ground that he had not been afforded reasonable opportunity of defence inasmuch as the recommendation made by the Inquiry Officer relating to the quantum of punishment against the petitioner had not been communicated to him. He had retired from service during the pendency of the petition before the High Court. The State Government however, issued a notice after his superannuation calling upon him to show cause as to why orders for the forfeiture of his pension and gratuity be not issued in accordance with Article 470(b) Civil Services Regulations as his services has not been wholly satisfactory and the notice contained allegations of misconduct against the respondent regarding financial irregularities committed by him.

5. **Brahm Datt Sharma** (supra), filed an application before the High Court in the Writ Petition which was earlier disposed off on **10/08/1984**. The learned Single Judge held that since the disputed proceedings taken against him had already been quashed, it was not open to the State Government to issue a show cause notice under Article 470(b) Civil Service Regulations, on those very allegations which formed the charges in the disciplinary

proceedings and directed the State Government to pay arrears, salary, pension and other allowances to him. In that backdrop, it was held by the Hon'ble Apex Court at para 10 as below:

"10. The High Court's order is not sustainable for yet another reason. Respondents' writ petition challenging the order of dismissal had been finally disposed of on 10/8/1984, thereafter nothing remained pending before the High Court. No miscellaneous application could be filed in the writ petition to revive proceedings in respect of subsequent events after two years. If the respondent was aggrieved by the notice dated 29/1/86 he could have filed a separate petition under Article 226 of the Constitution challenging the validity of the notice as it provided a separate cause of action to him. The respondent was not entitled to assail validity of the notice before the High Court by means of a miscellaneous application in the writ petition which had already been decided. The High Court had no jurisdiction to entertain the application as no proceedings were pending before it. The High Court committed error in entertaining the respondent's application which was founded on a separate cause of action. When proceedings stand terminated by final disposal of writ petition it is not open to the Court to reopen the proceedings by means of a miscellaneous application in respect of a matter which provided a fresh cause of action. If this principle is not followed there would be confusion and chaos and the finality of proceedings would cease to have any meaning."

The contention therefore of Shri G. Sardesai, learned Advocate for the applicants that this judgment is distinguishable in the facts of the case cannot at all be countenanced.

6. In **Balwant Singh** (supra), his service as a Clerk-cum-Typist on daily wage by the appellant-Himalaya Pradesh Road Transport Corporation was terminated on 18/01/1978 and who challenged

the termination by a Writ Petition before the High Court. The High Court allowed the petition by its judgment dated **31/07/1989** setting aside the termination and declaring him to be entitled to the monetary reliefs for the period during which he actually worked with the appellant-Corporation and which judgment became final. He filed another application on **8/05/1991** in the disposed off petition praying for further relief i.e. during the period when he had not actually worked for the Corporation as a result of the termination of the service which was allowed by the High Court and challenged by the Corporation in appeal before the Apex Court. In that context, the Hon'ble Apex Court held at para 4 as below:

"4. It is significant to note that the respondent did not make an application under Article 136 of the Constitution before this Court challenging that part of the judgment dated 31/07/1989 with which he was aggrieved nor did he make an application for review before the High Court. The judgment, in the circumstances, became final. It was only after the lapse of a period of about two years that the respondent made the belated claim. The High Court, in the circumstances was not, in our view, justified in entertaining the claim and allowing the same. The appeal, is therefore, allowed, the impugned judgment of the High Court is set aside and the aforesaid claim of the respondent is rejected. There will be no order as to costs."

7. In **Custodian of Evacuee Properties** (supra), the main petition i.e. Special Civil Application no.15239 of 2006 had been finally disposed off on **26/09/2006** by the High Court of Gujarat giving a direction to the State of Gujarat and which was duly

complied with by passing a Memorandum dated 21/12/2006. Immediately, upon the disposal of the Special Civil Application and on or about **9/10/2006**, a Miscellaneous Civil Application No.2706/2006 had been filed in the said disposed off petition for some interim protection and directions and moreover three more applications were also filed in the said proceedings thereafter. When Miscellaneous Civil Application no.2706 of 2006 was notified for hearing, the entire petition was reheard by the High Court, though it was not within the scope of the application for which the said Miscellaneous Civil Application had been filed and without looking into the fact that the final direction had been given in **Nirav Vinodchand Shah V/s. Custodian of Evacuee Properties** in **Special Civil Application No.15239 of 2006** had already been complied with by the State Government under memorandum dated 21/12/2006. The Apex Court observed that the High Court had exceeded its jurisdiction by virtually giving a second hearing in a petition which had been disposed off earlier merely because some Miscellaneous Civil Application had been filed only for some interlocutory orders and that the application had also become infructuous because even the final direction given in the main petition had been complied with. The Hon'ble Apex Court observed at paras 10 and 11 as below and in that view of the matter quashed and set aside the order of the High Court while allowing the appeals.

"10. The High Court of Gujarat had virtually reopened the case and taken a decision without taking into account the facts duly recorded in the Memorandum issued by the Government on 21/12/2006. It is very strange as to how after disposal of the case, in a miscellaneous application, which had been filed only for the purpose of maintenance of status quo during the pendency of some proceedings, the Court heard the matter again and that too when the said miscellaneous application had become infructuous.

11. In our opinion, final decision had already been taken by the State of Gujarat in pursuance of the direction given by the High Court of Gujarat in Nirav Vinodchand Shah V/s. Custodian of Evacuee Properties (supra) on 21/12/2006 and therefore, nothing further was required to be done by the High Court. We are, therefore, of the view that Miscellaneous Civil Application No.2706 of 2006 and subsequent civil applications filed in Special Civil Application No.15239 of 2006 should not have been entertained by the High Court after the Government of Gujarat had issued Memorandum dated 21/12/2006."

8. In **Nazma** (supra), the Hon'ble Apex Court was concerned with the legality and propriety of an order passed by the High Court of Allahabad in a disposed off Criminal Miscellaneous Writ Petition. In the brief facts, during the subsistence of the appellants marriage, the first respondent kept on harassing her demanding dowry, which resulted in the lodging of an FIR by her brother and a case registered under Sections 498-A, 323, 324, 504, 506 of the Indian Penal Code (IPC) and Sections 3 & 4 of the Dowry Prohibition Act against the first respondent and his family members. Family members of the first respondent then filed a Criminal Miscellaneous Writ Petition for quashing the FIR in which the appellant was not made a party, but only her brother. It was

submitted before the High Court by the family of the first respondent that an amount of ₹2,000/- per month would be deposited in the Court of the Chief Judicial Magistrate, until the conclusion of the trial and the appellant could withdraw the same and thereupon the High Court made an order that as the investigation was only with regard to the matter pertaining to the demand of dowry and some ancillary offences under the Indian Penal Code, they were inclined to interfere primarily with an intent to settle the dispute between the parties amicably and directed that the arrest of the petitioners i.e. the respondent no.1 and his family members would not be effected until the conclusion of the investigation or submission of the report under Section 173 Cr.P.C. and the petition was finally disposed off. The first respondent too filed a Criminal Miscellaneous Writ Petition before the High Court seeking identical reliefs without making the appellant or his brother a party which was disposed off by the High Court on 25/09/2003 stating that the first respondent should not be arrested until the conclusion of the investigation or submission of any report under Section 173 Cr.P.C. and finally disposed off the petition.

9. In **Nazma** (supra), the Investigating Officer filed a report closing the investigation. The learned Chief Judicial Magistrate however took cognizance of the case and issued summons which

order was challenged by the first respondent in Revision Petition no.694/2004 and dismissed by the High Court on **24/02/2004**. The first respondent then filed a Criminal Miscellaneous Application no.133306 of 2004, in the disposed off Criminal Miscellaneous Writ Petition No.5877 of 2003 and which was allowed by the High Court feeling it expedient to stay his arrest until the conclusion of the trial. In that application, the appellant was not made a party and the Court practically reviewed its earlier order dated **25/09/2003** by which it had directed the Stay of arrest till the conclusion of the investigation or submission of any report under Section 173 Cr.P.C. giving rise to the appeal at her instance. In that backdrop, the Hon'ble Apex Court was of the view that the High Court had committed a grave error in entertaining the said Criminal Miscellaneous Application in a disposed off Criminal Writ Petition No.5877/2003 which was disposed off on 25/09/2003. The Apex Court observed that the practice of entertaining Miscellaneous Applications in disposed off Writ Petitions was deprecated by this Court in **Hari Singh Mann** (supra) and quoted para 8 as follows:

"8. We have noted with disgust that the impugned orders were passed completely ignoring the basic principles of criminal law. No review of an order is contemplated under the Code of Criminal Procedure. After the disposal of the main petition on 7-1-1999, there was no lis pending in the High Court wherein the respondent could have filed any miscellaneous petition. The filing of a miscellaneous petition not referable to any provision of the Code of Criminal Procedure or the rules of the court, cannot be resorted to as a substitute of fresh litigation. The record of the proceedings produced before us shows that

directions in the case filed by the respondents were issued apparently without notice to any of the respondents in the petition. Merely because Respondent 1 was an Advocate, did not justify the issuance of directions at his request without notice of the other side. The impugned orders dated 30-4-1999 and 21-7-1999 could not have been passed by the High Court under its inherent power under Section 482 of the Code of Criminal Procedure. The practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the court."

The Hon'ble Apex Court further held at paras 12 and 13 as below and in that view of the matter allowed the appeal setting aside the impugned order of the High Court with costs to be paid by the first respondent of ₹25,000/- to the appellant.

12. We are sorry to note that in spite of the clear pronouncement of law by this Court, still, the High Courts are passing the similar orders, which practice has to be deprecated in the strongest terms. Of late, we notice that the High Courts are entertaining writ petitions under Articles 226 and 227 of the Constitution, so also under Section 482 CrPC and passing and interfering with various orders granting or rejecting request for bail, which is the function of ordinary Criminal Court. The jurisdiction vested on the High Court under Articles 226 and 227 of the Constitution as well as Section 482 CrPC are all exceptional in nature and to be used in most exceptional cases. The jurisdiction under Section 439 CrPC is also discretionary and it is required to be exercised with great care and caution.

13. We are of the view that the High Court has committed a grave error in not only entertaining the criminal miscellaneous application in a disposed of writ petition, but also passing an order not to arrest the 1st respondent till the conclusion of the trial. Grant of bail or not to grant, is within the powers of the regular Criminal Court and the High Court, in its inherent jurisdiction, not justified in usurping their powers. Once the criminal writ petition has been disposed of, the High Court becomes functus officio

and cannot entertain review petitions or miscellaneous applications except for carrying out typographical or clerical errors. In the instant case, the High Court has entertained a petition in a disposed of criminal writ petition and granted reliefs, which is impermissible in law.

10. Section 33-C deals with the recovery of money due from an employer and sub-section (1) reads as under :

(1) Where any money is due to a workman from an employer **under a settlement** or an award or under the provisions of [Chapter V-A or Chapter V-B], the workman himself or any other person authorised by him in writing in this behalf, or, in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate government for the recovery of the money due to him, and if the appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue:

11. Admittedly, the issue was brought to a quietus pursuant to the order of the Hon'ble Apex Court dated 8/02/2016 by which the applicants herein were directed to pay an amount of ₹42,50,000/- to the respondent within three weeks and he was held not entitled to any other benefit on any count in respect of the services rendered by him in the applicants Bank though he was required to complete the required procedural formalities within a week for income tax purposes. Admittedly, the respondent had not received the said amount as ordered by the Hon'ble Apex Court and what was received by him was short of ₹11,40,291/- which the applicants

deducted towards the tax at source thereby compelling the respondent to move the Labour Commissioner under Section 33-C(1) of the Act for the recovery of the amount due from his employer with interest thereon. The Labour Commissioner had made the order in his favour and issued the Certificate of Recovery which was sought to be given effect to through the instrumentalities of the respondent no.3.

12. 'Settlement' in terms of Section 2(p) means :

"2(p) "Settlement" means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to [an office authorised in this behalf by] the appropriate Government and the conciliation officer]."

13. Although Shri G. Sardessai, learned Advocate for the applicants has tried to split hairs on the settlement arrived at before the Hon'ble Apex Court not being the settlement as defined under the Act, nonetheless, a constricted view cannot be taken as sought to be buttressed by him to defeat the very order passed by the Hon'ble Apex Court by a circuitous path and on the specious plea that the settlement before the Hon'ble Apex Court was not one contemplated within the meaning of "settlement" under the Act. The respondent therefore was very much within his right to invoke

the jurisdiction of the Labour Commissioner in the issuance of the Recovery Certificate in terms of Section 33-C(1) of the Act and to follow it to its logical conclusion by necessary direction to the respondent no.3 for its implementation.

14. On a discussion of the material at large, it cannot at all be heard on behalf of the applicants that no fresh cause of action had arisen to them or rather the cause of action which had arisen to maintain the Miscellaneous Civil Application in a disposed off petition was tenable. The preliminary objections in view of the foregoing discussion and the judgments on the point are therefore upheld and the application is held not maintainable for the stated reliefs and is accordingly dismissed with costs.

NUTAN D. SARDESSAI, J.

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