

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present:

The Hon'ble Justice Raja Basu Chowdhury

W. P. A. No. 15380 of 2022

Ganesh Chandra Guha

Versus

The State of West Bengal & ors.

For the petitioner	:	Mr. Madhusudan Datta
For the respondent no.2	:	Mr. Soumya Majumder Mr. Bhaskar Mukherjee.
Heard on	:	15.12.2022
Judgement on	:	03.02.2023

Raja Basu Chowdhury, J:

1. The present writ application has been filed challenging the order dated 23rd March, 2022 passed by the 1st Labour Court in Case No. 18 of 2017. The petitioner's case proceeded on the premise that he had joined the service of the respondent no.2 in the year 1971 as a stenographer and had retired from service on and from 17th June, 1997. The petitioner claims that the

respondent no.2 had introduced a pension scheme for its employees including the petitioner. In the petitioner's case despite request since no pension was released, the petitioner filed an application under Section 33(C)(2) of the Industrial Disputes Act, 1947(hereinafter referred to as the said Act), inter alia, praying therein for release of arrears of his pension as per details provided in the said application. The said case was registered as computation case no. 43 of 2001. On contested hearing the learned 1st Labour Court was, inter alia, pleased to dispose the said application by an order dated 28th February, 2011, inter alia, holding that the petitioner is entitled to a sum of Rs. 5,56,994/- from the respondent no.2. Challenging the aforesaid order, a writ application was filed before this Hon'ble Court which was registered as WP No. 8266(W) of 2011. By judgment and order dated 17th January, 2017 this Hon'ble Court was, inter alia, pleased to uphold the order dated 28th February, 2011 passed by the learned Labour Court. The respondent no.2 has since complied with the aforesaid order and has made payment of the arrears of pension as determined in computation case no. 43 of 2001, pertaining to the period from 1st September, 1990 to 1st September, 2000.

2. Since the entitlement to receive the pensionary benefit had already been determined by the Labour Court in computation

case no. 43 of 2001 and despite the same, the respondent no.2 having failed to pay the pensionary benefit, for the period 2nd September, 2000 and onwards, the petitioner filed another application for recovery of his dues under Section 33 (C)(2) of the said Act, which was registered as computation case no. 18 of 2017.

3. It is in connection with the aforesaid case that the petitioner had filed his examination-in-chief on affidavit on 5th July, 2018 and was partly cross-examined on 20th August, 2018. Cross-examination, however, could not be completed on that date as the respondent no.2 sought for an adjournment, which was allowed and the next date of hearing was fixed on 9th October, 2018. Since the hearing was adjourned on 9th October 2018 the matter was posted for further cross-examination on 4th December, 2018.
4. On the adjourned date the petitioner was seriously ill, and bed ridden and as such he sought for an adjournment by filing an adjournment application. The learned Labour Court by order no.15 dated 4th December, 2018 closed the evidence of the petitioner. Following the aforesaid, the respondent no.2 filed an application for expunging the evidence of the petitioner. Such application was taken up for hearing on 13th December, 2019 and by order no. 23, the learned Court was, *inter alia*, pleased

to direct that such petition shall be heard and taken up for consideration at the time of final arguments.

5. Incidentally, during the pandemic on 9th September, 2021 the computation case filed by the petitioner was dismissed for non-prosecution by order no. 35 dated 9th September, 2021. The recalling application filed by the petitioner on 21st December, 2021 was also dismissed on contest by order no. 40 dated 23rd March, 2022.
6. Challenging the aforesaid order, the present writ application has been filed. After exchange of affidavits the matter had come up for final hearing.
7. Mr. Datta learned advocate representing the petitioner submitted that the petitioner had no control when the computation case no. 18 of 2017 was dismissed. The dismissal was affected during the pandemic when there was a resolution adopted by the Bar Association, requesting the learned Judges not to pass any adverse order. He says that learned judge while deciding the application for recall, had gone into the question of closure of evidence of the petitioner and had concluded that recall of such order would not improve the petitioner's case. This according to Mr. Datta was an irregularity in procedure adopted by the learned judge.

8. He says if the learned judge intended to hear out the computation case on merits, the learned judge ought to have permitted the petitioner to present its case on the parent application, which could have been done provided the order of dismissal was recalled. The learned judge, however, while deciding an application for recall, which was limited to the question whether the petitioner had been able to show sufficient cause for his non-appearance at the time of dismissal, had embarked on an enquiry on the merits of the parent case, without affording opportunity to the petitioner to address the same.
9. It is submitted that the entitlement of the petitioner to receive pensionary benefits, had already been decided in the previous computation case, however, despite the aforesaid the respondent no.2 having not released the pensionary benefits, the petitioner was compelled to file the computation case. This aspect was not considered by the learned judge.
10. The learned judge ought not to have concluded that recalling of the order dated 9th September, 2021 would not improve the case of the petitioner.
11. Mr. Datta further submitted that even if the cross-examination is incomplete, the entirety of the evidence could not

be treated as inadmissible. In support of the aforesaid proposition, he places reliance on the judgment delivered by this Hon'ble Court in the case of *Dever Park Builders Pvt. Ltd. and Others. v. Smt. Madhuri Jalan and others.*¹

12. In the backdrop as aforesaid Mr. Datta prays that this Hon'ble Court may be pleased to set aside the order dated 23rd March, 2022, thereby restoring the original computation case no. 18 of 2017 to its original number and file.

13. *Per contra*, Mr. Majumder learned advocate representing the respondent no.2 submits that by an order dated 23rd March, 2022 the learned Court had in fact dismissed the matter on merits and as such no interference is called for.

14. He says that the learned Court after careful scrutiny of the matter has concluded that even if there are sufficient grounds for recall, no purpose would be served in restoring the matter. By, drawing attention of this Court to the order no.15, dated 4th December 2018, he says that the PW1 has willfully not subjected himself for cross-examination. The issues on which PW1 has not been cross-examined are not only contentious but the same are vital. He says that since the application for restoration which otherwise had become infructuous on account of failure on the part of the petitioner, to

¹ *Dever Park Builders Pvt. Ltd. and Others. v. Smt. Madhuri Jalan and others.*, AIR 2002 Cal 281

subject himself to be cross-examined, was rightly dismissed by the learned judge. Mr. Majumder further submits that the Labour Court does not have the power to recall its own order and in support of such contention he places reliance on a judgment delivered by the Hon'ble Supreme Court in the case of *Kapra Mazdoor Ekta Union v. Birla Cotton Spinning and Weaving Mills Ltd. and Another*.² He says since Labour Court is not invested with the power to recall or review its own order, no relief can be afforded to the petitioner. He has also argued that unless a relief is expressly prayed for and appropriate pleadings are made no relief ought to be afforded to the petitioner and in support thereof he has relied on a judgment delivered by the Hon'ble Supreme Court in the case of *Chandigarh Administration v. Laxman Roller Flour Mills Pvt. Ltd.*³ He submits that the writ application deserves to be dismissed and no interference is called for.

15. Having heard the learned advocate appearing for the respective parties and having considered the materials on record, I find that the present application has been filed challenging an order by which the learned 1st labour Court had

² *Kapra Mazdoor Ekta Union v. Birla Cotton Spinning and Weaving Mills Ltd. and Another.*, (2005) 13 SCC 777

³ *Chandigarh Administration v. Laxman Roller Flour Mills Pvt. Ltd.*, (1998) 8 SCC 326

refused to recall its order, on the ground that recalling of the order of dismissal for default, shall not improve the case of the petitioner, who was applicant in the said proceedings. I find that the order impugned arise out and in connection with the computation case filed by the petitioner. The computation case relates to a claim arising out and in connection with the claim for payment of pensionary benefits. I find that the 1st Labour Court, West Bengal by an order dated 28th February, 2011 had already decided the entitlement of the petitioner to receive a sum of Rs. 5,56,094/- in connection with a computation case filed by the petitioner under Section 33(C)(2) of the said Act, seeking computation of his claim, in monetary terms, dues to him on account of pension. The respondent no.2 had challenged the said order passed by the 1st Labour Court in a writ application which was registered as WP 8266(W) of 2011. By judgment and order dated 17th January, 2017 a coordinate Bench of this Hon'ble Court while rejecting the challenge, was *inter alia*, pleased to observe as follows:

“The Labour Court had rightly observed that since the company used to pay the premium, it must be for the benefit of the employees. On the contrary, the labour court had also rightly held against the company's firm stand that the respondent no.3 was not entitled to any pensionary benefit in accordance with the rules and regulations of the Pension

Scheme. If the company wanted to maintain the stand that the respondent no.3 had asked for the relief from the wrong person it ought not to have denied his right. In that case it should have taken a detached stand equidistant from both the private respondent as well as the Trust. After considering everything the Labour Court had rightly held that the company cannot deny its liability at this stage.

Thus, I find nothing to interfere with the judgment and order of the Labour Court.

The writ petition is devoid of merits and is dismissed.”

16. It would, thus, be apparent that the Hon’ble Court had not interfered with the finding given by the Labour Court against the stand of the respondent no.2, as regards the petitioner’s entitlement for pensionary benefits in accordance with rules and regulations of the pension scheme. There is no challenge from the aforesaid order, on the contrary I have been informed by the learned advocates appearing for the respective parties that the said order has been accepted and complied with by the respondent no.2.

17. I find that the present claim of the petitioner before the Labour Court, in computation case no. 18 of 2017, arise out and in connection with disbursal of pensionary benefits for the subsequent period that is from 2nd September, 2000 till 31st

December, 2017. The petitioner had adduced evidence by filing affidavit in chief. I find from the order-sheet that 12th July, 2018 was fixed for evidence of the petitioner. On that date the petitioner was present in Court and had been waiting since 10.00 A.M. Unfortunately, the respondent no.2 chose not to appear, and the matter was adjourned to 20th August, 2018. Although the petitioner had filed his examination in chief by way of an affidavit on 5th July, 2018, the documents were tendered and marked as exhibits on 20th August 2018. Cross-examination commenced, on the aforesaid date, however, the same could not be completed since the respondent no.2 had sought for an adjournment and the matter was adjourned and fixed for further cross-examination on 4th October, 2018. The petitioner who is more than 80 years old could not present himself on the adjourned date and his evidence was closed. Records, however, reveal that an adjournment application was filed by the petitioner on the said date a copy whereof has been marked as annexure P-3, to this application.

18. Although the respondent no.2 had taken out an application for expunging the evidence of the petitioner the same was not allowed and by order no. 23 dated 13th December, 2019 the same kept in abeyance to be taken up for consideration at the time of final arguments. Since, thereafter

the pandemic intervened and during the pandemic the computation case no. 18 of 2017 was dismissed for non-prosecution by order no. 35 dated 9th September, 2021.

19. I find that the application filed by the petitioner for recalling the order dated 9th September, 2021 was contested by the respondent no.2. On contested hearing the learned judge while taking into consideration the factum of failure on the part of the petitioner to present himself for further cross-examination, concluded that recall of the order dated 9th September, 2021 would not improve the petitioner's case and hence rejected the application dated 21st December, 2021. It would appear from the order-sheet as noted above, the issue with regard to expunging the evidence of the petitioner had never been taken up for consideration and was pending. This aspect, in my view, was overlooking by the learned judge, while dismissing the application dated 21st December, 2021. Since the Court had already decided by an order no. 23 dated 13th December, 2019 to keep the application filed by the respondent no.2, for expunging the evidence of the petitioner in abeyance, with a direction to have it adjudicated at the time of final arguments, ought not to have ignored such order and opined that recalling of the order dated 9th September, 2021, would not improve the case of the petitioner.

20. In any event when the Court, is considering an application for recall of an order, dismissing an application for default, the Court is concerned with the sufficiency or insufficiency of the grounds as regard non-appearance of the party and his advocate on the date of dismissal.

21. Admittedly, the computation case had been dismissed for non-prosecution. The learned Court in my opinion also while considering the application dated 21st December, 2021 ought to have confined its enquiry, as to whether the petitioner had been able to make out sufficient cause for his non-appearance when the application was dismissed. In this case the learned Court had exceeded its jurisdiction in taking into consideration whether recalling such order would improve the case of the petitioner. In my view, such finding rendered by the learned Court is perverse on the face of it and is liable to be set aside.

22. The issue whether the evidence led by the petitioner requires to be expunged or not has to be adjudicated. When such an issue is yet to be adjudicated, in my view, without adjudicating the same the learned judge ought not to have rendered his opinion that without cross-examination, the incomplete evidence adduced by the petitioner cannot be considered and accepted. In my view, such stage has not come.

23. Mr. Majumder, however, by placing reliance on the judgment delivered in the case of *Kapra Mazdoor Ekta Union v. Birla Cotton Spinning and Weaving Mills Ltd. and Another (Supra)*⁴ has attempted to make out a case that the Tribunal has no inherent power to recall or review its order in absence of statutory provision. I find that the Hon'ble Supreme Court in the aforesaid judgment in paragraphs 15 and 16 was, inter alia, pleased to observe as follows:

“15. *We shall first take up the second question namely whether the Tribunal was functus officio having earlier made an award which was published by the appropriate Government. It is not in dispute that the award was made on 12-6-1987 and was published in the gazette on 10-8-1987. The application for recall was made on 7-9-1987. Under sub-section (1) of Section 17-A of the Act an award becomes enforceable on the expiry of 30 days from the date of its publication under Section 17 of the Act. Thus the award would have become enforceable with effect from 9-9-1987. However, the application for recalling the award was made on 7-9-1987 i.e. 2 days before the award would have become enforceable in terms of sub-section (1) of Section 17-A of the Act. The High Court rightly took the view that since the application for recall of the order was made before the award had become*

⁴ *Kapra Mazdoor Ekta Union v. Birla Cotton Spinning and Weaving Mills Ltd. and Another.*, (2005) 13 SCC 777

enforceable, the Tribunal had not become functus officio and had jurisdiction to entertain the application for recall. This view also finds support from the judgment of this Court in Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal [1980 Supp SCC 420 : 1981 SCC (L&S) 309] . This Court after noticing the provisions of sub-section (3) of Section 20 of the Act which provides that the proceedings before the Tribunal would be deemed to continue till the date on which the award becomes enforceable under Section 17-A, held that till the award becomes enforceable the Tribunal retains jurisdiction over the dispute referred to it for adjudication, and up to that date it has the power to entertain the application in connection with such dispute. The jurisdiction of the Tribunal had to be seen on the date of the application made to it and not the date on which it passed the impugned order. The judgment in Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal [1980 Supp SCC 420 : 1981 SCC (L&S) 309] has been reiterated by this Court in Satnam Verma v. Union of India [1984 Supp SCC 712 : 1985 SCC (L&S) 362] , J.K. Synthetics Ltd. v. CCE [(1996) 6 SCC 92] and M.P. Electricity Board v. Hariram [(2004) 8 SCC 246 : 2004 SCC (L&S) 1092 : JT (2004) 8 SC 98] .

16. *In the instant case as well we find that as on 7-9-1987 the award had not become enforceable, therefore, on that date the Tribunal had jurisdiction over the disputes referred to it for adjudication. Consequently it had the power to entertain an*

application in connection with such dispute. The order of recall passed by the Tribunal on 19-2-1990, therefore, cannot be assailed on the ground that the Tribunal had become functus officio.”

24. As would appear from the above the Hon’ble Supreme Court in the aforesaid case was considering the impact of Section 17A of the said Act. The Hon’ble Supreme Court had held that consequent upon publication of an award and on the expiry of 30 days from the date of publication thereof under Section 17 of the said Act, an award becomes enforceable and thereafter it is no longer open to the Tribunal to review or recall the award as the Tribunal becomes *functus officio*. The aforesaid judgment, I am afraid does not assist the petitioner. The order dated 9th September, 2021 is not an award nor has the same been published under Section 17 of the said Act. It is no bodies case that the said order had been published as an award under Section 17 of the said Act. The aforesaid judgment is not an authority for the proposition that a Tribunal/Labour Court cannot recall its order of dismissal. In fact, in paragraphs 18 and 19 of the aforesaid judgment the Hon’ble Supreme Court while distinguishing between procedural review and review on merits, has quoted with approval the view the view taken by the Hon’ble Supreme Court in the case of *Grindlays Bank Ltd. v. Central Govt Industrial Tribunal.*, and had observed as follows:

“18. It was, therefore, submitted before us, relying upon Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal [1980 Supp SCC 420 : 1981 SCC (L&S) 309] that even in the absence of an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. The submission must be rejected as misconceived. The submission does not take notice of the difference between a procedural review and a review on merits. This Court in Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal [1980 Supp SCC 420 : 1981 SCC (L&S) 309] clearly highlighted this distinction when it observed: (SCC p. 425, para 13)

“Furthermore, different considerations arise on review. The expression ‘review’ is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Court in Patel Narshi Thakershi case [(1971) 3 SCC 844 : AIR 1970 SC 1273] held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal.”

19. Applying these principles it is apparent that where a court or quasi-judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the court or the quasi-judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the court or quasi-judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits (sic ascertains whether it has committed) a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the court or quasi-judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the court or the quasi-judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch as the opposite party concerned was not

heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be reheard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In Grindlays Bank Ltd.v. Central Govt. Industrial Tribunal [1980 Supp SCC 420 : 1981 SCC (L&S) 309] it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be reheard and decided again.”

25. I find that the petitioner while seeking recall of the order dated 9th September 2021, did not seek review of the order on merits, nor did the Labour Court dismiss the computation case on merits. The petitioner’s advocate was absent on 9th September 2021 due to illness, as such the petitioner cannot be faulted on the ground of nonappearance of his advocate. Further the matter was dismissed during the pandemic. As such the petitioner was prevented by sufficient cause for his non-appearance on the date of dismissal. This aspect was also overlooked while dismissing the computation application. The

power to recall an order dismissed for default or procedural irregularity is inherent in every court and Tribunal. The objections thus raised by Mr. Majumdar are unmeritorious and the same cannot be sustained.

26. It has, also, been strenuously argued on behalf of Mr. Majumder that unless the petitioner prays for recall of the order dated 9th September, 2022 in the writ application, this Court ought not to recall the same and restore the original computation case. In support of his contention that unless a relief is expressly prayed for and appropriate pleadings are made no relief ought to be afforded to the petitioner, he has placed reliance on the judgment delivered by the Hon'ble Supreme Court in the case of *Chandigarh Administration (supra)*⁵. I am, however, unable to accept such contention of Mr. Majumder. Once the rejection of an application seeking recall of the order dated 9th September, 2022 is set aside, this Court is competent to restore the original computation application to its original number and file. In any event a specific prayer seeking restoration of the case no.18 of 2017 has been made in the writ application. In the light of the above and observations made herein, I am of the view that the judgment relied on by Mr.

⁵ *Chandigarh Administration v. Laxman Roller Flour Mills Pvt. Ltd.*, (1998) 8 SCC 326

Majumder in the case of *Chandigarh Administration (supra)*⁶ has no bearing in the facts of the instant case and does not assist the respondent no.2.

27. For reasons morefully discussed hereinabove the order dated 23rd March, 2022 cannot be sustained and is accordingly set aside. In view thereof, the computation case no. 18 of 2017 is restored to its original number and file by recalling the order of dismissal and considering the advanced age of the petitioner it is expected that the learned Court shall hear out and dispose of the said Computation Case no.18 of 2017, as expeditiously as possible, preferably within a period of 6 months from the date of communication of this order without giving unnecessary adjournment to the parties.

28. The writ application is accordingly disposed of.

29. There shall be no order as to costs.

30. Urgent certified Photostat copy of this order if applied for be made over to the parties upon compliance of all formalities.

(Raja Basu Chowdhury, J.)

⁶ *Chandigarh Administration v. Laxman Roller Flour Mills Pvt. Ltd.*, (1998) 8 SCC 326