

Meena

IN THE HIGH COURT OF BOMBAY AT GOA
MISC. CIVIL APPLICATION NO. 46 OF 2023
WITH
MISC. CIVIL APPLICATION NO. 157 OF 2023(F)
IN
APPEAL FROM ORDER NO.14 OF 2021

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PRAVINKUMAR GOSALIA ... APPLICANT
VS
THE STATE OF GOA AND
OTHERS ... RESPONDENTS

Mr Kaif Noorani, Advocate for the Applicant.

Mr Devidas J. Pangam, Advocate General with Mr Deep
Shirodkar, Additional Government Advocate for the Respondents
– State.

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Mr Devidas J. Pangam, Advocate General with Mr Deep
Shirodkar, Additional Government Advocate for the Applicants–
State.

Mr Kaif Noorani, Advocate for the Respondent.

CORAM: VALMIKI SA MENEZES, J.

DATED: 13th April 2023.

P.C.:

1. This is an application filed by the original respondent in Appeal from Order No.14/2021 (the original plaintiff in Civil Suit No.13/2020), seeking recall of order dated 07/12/2022 passed in that Appeal, to the extent, that the order restrains the applicant herein /original respondent in the appeal, from transporting extracted ore from the suit mining lease, till the disposal of the suit; in the alternative, the applicant seeks a modification of this Court's order dated 07/12/2022 in Appeal From Order No.14 of 2021 to the extent that it restrains the applicant/original respondent from transporting extracted ore till the disposal of the suit.

2. Misc. Civil Application No.157 of 2023(F) filed by the original appellants in Appeal From Order No.14 of 2021 requests this Court to speak to the minute on its oral order dated 07/12/2022 disposing of the appeal, and to record a statement from the original respondent that no transportation of extracted material will be done till the disposal of the suit; in the alternative, for speaking to the minutes of oral order dated 07/12/2022 by recording reasons in support of the directions issued by this Court in clause (ii) of paragraph 12 of the order, that the respondent shall not be permitted to transport any extracted material from mining lease till the disposal of the suit.

3. I shall first deal with the contentions raised in Misc. Civil Application No.157 of 2023(F) filed at the behest of the original respondent (plaintiff in the suit), in Appeal From Order No.14 of 2021.

4. For the purpose of more clarity, it would be apposite to reproduce certain facts that have been considered whilst deciding Appeal From Order No. 14 of 2021 vide this Court's order dated 07/12/2022.

(a) Civil Suit No.13 of 2020 was filed by the respondents in the appeal seeking a judgment and decree declaring, lease of the suit mine to be deemed granted for a period of 50 years from 13/12/1998 ending on 12/12/2048 in terms of Section 8(A)(3) of the Mines and Minerals (Development and Regulation) Act, 1957, and for the consequential relief of a perpetual injunction to restrain the defendants (Appellants in Appeal From Order No.14 of 2021) from dispossessing the plaintiff from the suit lease.

b) After the application for temporary injunction was heard by the Trial Court, it passed an order dated 14/12/2020 partly allowing an application for a temporary injunction in favour of the plaintiffs, directing the defendant, the State of Goa to restore access to the plaintiff

to the accounting system portal, and further interim relief restraining the defendants from dispossessing the plaintiff from the suit lease or from creating third party right therein or from auctioning the suit lease until the final disposal of the suit.

(c) The order of temporary injunction dated 12/03/2020 was carried in appeal before this Court in Appeal From Order No.14 of 2021 by the State of Goa/original defendant in the suit. In that appeal, this Court, by its order dated 07/12/2022 refused to interfere with the impugned order of the Trial Court, thereby confirming the order of temporary injunction, but however also directed that the parties shall maintain status quo in respect of the suit mine, which would include putting the plaintiff to terms that it shall not be permitted to transport any extracted material from the mine till the disposal of the suit.

It is this condition, that the plaintiff is now saddled with, in order to secure the temporary injunction granted by the Trial Court, that is the subject matter of Misc. Civil Application No.46 of 2023.

5. The application was opposed by the respondent State of Goa mainly on the contention that the application was in fact seeking a review of the order dated 07/12/2022 of this Court and was therefore filed beyond the period of limitation of 30 days, thus was not maintainable in the form of an application for recall of that order.

6. I have heard the learned Counsel appearing for the parties and perused the record of Misc. Civil Application No.46 of 2023, Misc. Civil Application No.157 of 2023(F) and Appeal from Order No.14 of 2021.

7. Mr Kaif Noorani, learned Counsel appearing for the applicant submits that the application for recall of the order is maintainable since there is no review sought of the order dated 07/12/2022, but what is sought is the recall of a part of the order imposing conditions on the applicant, which was passed without putting the applicant to notice of the injunction sought to be issued against it by the Court. He further argues that the order restraining the applicant from transporting extracted minerals won from the mine prior to the year 2016 caused great prejudice and loss to the applicant, and the applicant being the plaintiff against whom no restraining orders were sought by the respondent during the course of the suit, the Appellate Court has acted beyond its bounds and jurisdiction in imposing a condition on the plaintiff to secure the order of injunction. He relies upon a judgment of the Hon'ble Supreme Court in *Bachhaj Nahar*

v/s. Nilima Mandal and Another reported in (2008) 17 SCC 491 to contend that the original defendant could not have obtained an order from the Appellate Court imposing conditions upon the plaintiff, restraining him from removing mineral stacked at the mine; he further contends that in the absence of any application for modifying the order of temporary injunction passed by the Trial Court, the Appellate Court has committed an error of law in passing the order dated 07/12/2022, restraining the plaintiff in his own suit from removing minerals from the mine.

Per contra, the learned Advocate General Mr Devidas Pangam submits that the application for recall of order dated 07/12/2022 is in effect of an application for review of that order and apart from being filed beyond the period of limitation, and not being supported by an affidavit of the Advocate in terms of the provisions of Order 47 CPC, is nothing but an abuse of the process of the Court; he submits that the Hon'ble Supreme Court has deprecated the practice of filing such applications for recall of orders instead of filing a review application, and for that purpose has cited the judgment dated 09/07/2021 passed by the Hon'ble Supreme Court in Review Petition (Civil) Diary No. 18447 of 2020 in Special Leave Petition (Civil) No.32138 of 2015 and others in *Vedanta Ltd. v/s. The Goa Foundation and Ors.*, in which the Supreme Court has taken note of the fact that review applications are filed months or years after the Judge who has passed such order has retired or is no more available to hear the review

application. He further refers to another judgment of the Hon'ble Supreme Court dated 04/10/2021 passed in Misc. Application No.1572 of 2021 in Civil Appeal No.5041 of 2021 in **Supertech Limited v/s. Emerald Court Owner Resident Welfare Association and others** which specifically deals with, and deprecate the practice of filing "Misc. Civil Application" or "application for clarification/modification" in the guise of a review. He contends that the application ought to be dismissed with costs, the same being actually a review application with grounds which are not available under the provisions of Order 47 CPC.

8. The order dated 07/12/2022, sought to be recalled was rendered by G.S. Kulkarni,J who was seized of the roster dealing with Appeal from Orders of 2021 and all applications connected therewith until 23/12/2022. It is clear therefore that G.S. Kulkarni,J was available to hear the present Misc. Civil Application No.46 of 2023 at least until that. The application was not filed by the original respondent in the appeal until 23/01/2023.

If the order dated 07/12/2022 were sought to be reviewed, an application to that effect ought to have been filed on or before 05/01/2023. The application does not state the date on which the Certified Copy of the order dated 07/12/2022 was applied for and obtained from the Registry of this Court and appears to be totally silent as to the circumstances under which it came to be filed only on

23/01/2023. There are no reasons cited in the application as to why the same was not moved before the very same Judge that passed the order sought to be recalled when he was available until 23/12/2022. Very clearly, therefore, if the applications were treated to be one for review, the same would have been dismissed as barred by limitation. Further, considering the fact that there was no explanation offered by the applicant as to why the same was not moved before the very Judge that passed the order when, he is available at least until 23/01/2023.

9. A perusal of the grounds for recall of the order dated 07/12/2022 are to be found in paragraph 3 to 22 of the application. Primarily, the thrust of the grounds raised in the application are :

(a) that the order dated 07/12/2022 is contrary to law and is bound to cause severe prejudice and loss to the applicant by imposing a condition of not the extract any material from the mine.

(b) That the direction to the applicants to stop the transportation of minerals mined prior to 2016 is prejudicial and contrary to law, causing loss to the applicant, notwithstanding the fact that the mining operations had been suspended by the Indian Bureau of Mines.

(c) That an order imposing terms on the applicant, which amounted to an injunction against the original plaintiff are impermissible at law, more so when the respondent State had neither sought any relief against the plaintiff nor has sought modification of the order of temporary injunction before the Trial Court.

(d) That the order sought to be recalled does not give any reasons for imposing the direction to maintain the status quo in respect of the suit mine.

10. If one considers the grounds raised as referred above, they would, on the face of it, either constitute grounds of an appeal which would necessarily have to be raised before the Hon'ble Supreme Court in an appropriate appeal challenging order dated 07/12/2022, while the remainder of the grounds would neither constitute an error apparent on the face of the record or ground for review on the basis of same or new material which came to the notice of the applicant after the passing of the concerned order.

It is not the case of the applicant that the application is filed on the ground of new material available to them.

11. Looking at the grounds raised in the application, one can clearly conclude that the applicant was trying to avoid the filing of a

review application before the very same judge that had passed the order and later, since the application would have been barred by limitation, has styled the same to be an application for recall of the order dated 07/12/2022. Note must be taken that the fact that the application is not supported by an affidavit of the Advocate who had argued the matter or who was on record or present in Court during the final arguments as was required when filing a review application under Order 47 CPC.

12. In **Supertech Limited** (supra), the Hon'ble Supreme Court was dealing with the practice of filing applications styled as “miscellaneous applications” or “applications for clarification/modification” in the guise of a review application and in that context has made the following observations:

8. In successive decisions, this Court has held that the filing of applications styled as “miscellaneous applications” or “applications for clarification/modification” in the guise of a review cannot be countenanced. In Gurdip Singh Uban (supra), Justice M Jagannadha Rao, speaking for a two-Judge Bench of this Court observed:

“17. We next come to applications described as applications for “clarification”, “modification” or “recall” of judgments or orders finally passed. We may point out that under the relevant Rule XL of the Supreme Court Rules, 1966 a review application has first to go before the learned Judges in circulation and it will be for the Court to

consider whether the application is to be rejected without giving an oral hearing or whether notice is to be issued.

Order XL Rule 3 states as follows:

“3. Unless otherwise ordered by the Court, an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party...”

In case notice is issued, the review petition will be listed for hearing, after notice is served. This procedure is meant to save the time of the Court and to preclude frivolous review petitions being filed and heard in open court. However, with a view to avoid this procedure of “no hearing”, we find that sometimes applications are filed for “clarification”, “modification” or “recall” etc. not because any such clarification, modification is indeed necessary but because the applicant in reality wants a review and also wants a hearing, thus avoiding listing of the same in chambers by way of circulation. Such applications, if they are in substance review applications, deserve to be rejected straight away inasmuch as the attempt is obviously to bypass Order XL Rule 3 relating to circulation of the application in chambers for consideration without oral hearing. By describing an application as one for “clarification” or “modification”, — though it is really one of review — a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly

obtain a hearing in the open court. What cannot be done directly cannot be permitted to be done indirectly. (See in this connection a detailed order of the then Registrar of this Court in Sone Lal v. State of U.P. [(1982) 2 SCC 398] deprecating a similar practice.)

18. We, therefore, agree with the learned Solicitor General that the Court should not permit hearing of such an application for “clarification”, “modification” or “recall” if the application is in substance one for review. In that event, the Court could either reject the application straight away with or without costs or permit withdrawal with leave to file a review application to be listed initially in chambers.”

9. The same view has been expressed in a subsequent decision in Ram Chandra Singh (supra) wherein another two-Judge Bench of this Court observed as follows:

“15. In Gurdip Singh Uban [(2000) 7 SCC 296] the law has been laid down in the following terms:

“17. ... This procedure is meant to save the time of the Court and to preclude frivolous review petitions being filed and heard in open court. However, with a view to avoid this procedure of ‘no hearing’, we find that sometimes applications are filed for ‘clarification’, ‘modification’ or ‘recall’ etc. not because any such clarification, modification is indeed necessary but because the applicant in reality wants a review and also wants a hearing, thus avoiding listing of the same in chambers by way of circulation. Such applications, if they are in substance review applications, deserve

to be rejected straight away inasmuch as the attempt is obviously to bypass Order 40 Rule 3 relating to circulation of the application in chambers for consideration without oral hearing. By describing an application as one for ‘clarification’ or ‘modification’, — though it is really one of review — a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open court. What cannot be done directly cannot be permitted to be done indirectly.”

16. In Common Cause [(2004) 5 SCC 222] Lahoti, J. (as the learned Chief Justice then was) speaking for a Division Bench observed:

“2. ... We are satisfied that the application does not seek any clarifications. It is an application seeking in substance a review of the judgment. By disguising the application as one for ‘clarification’, the attempt is to seek a hearing in the open court avoiding the procedure governing the review petitions which, as per the rules of this Court, are to be dealt with in chambers. Such an attempt on the part of the applicant has to be deprecated.”

17. Recently in Zahira Habibullah Sheikh v. State of Gujarat [(2004) 5 SCC 353 : 2004 SCC (Cri) 1613] referring to Order 40 Rule 3, this Court opined:

“6. As noted by a Constitution Bench of this Court in P.N. Eswara Iyer v. Registrar, Supreme Court of India [(1980) 4 SCC 680], Suthendraraja v. State [(1999) 9 SCC 323 : 2000 SCC (Cri) 463], Ramdeo Chauhan v. State of Assam [(2001) 5 SCC 714 : 2001 SCC (Cri) 915] and Devender

Pal Singh v. State, NCT of Delhi [(2003) 2 SCC 501 : 2003 SCC (Cri) 572] notwithstanding the wider set of grounds for review in civil proceedings, it is limited to ‘errors apparent on the face of the record’ in criminal proceedings. Such applications are not to be filed for the pleasure of the parties or even as a device for ventilating remorselessness, but ought to be resorted to with a great sense of responsibility as well.

7. In Delhi Admn. v. Gurdip Singh Uban [(2000) 7 SCC 296] it was held that by describing an application as one for ‘clarification’ or ‘modification’ though it is really one of review, a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open court. What cannot be done directly cannot be permitted to be done indirectly. The court should not permit hearing of such an application for ‘clarification’, ‘modification’ or ‘recall’ if the application is in substance a clever move for review.”

10. More recently, another two-Judge Bench in Rashid Khan Pathan (Applicant) —In Re: Vijay Kurle (supra) held as follows:

“9. In a country governed by the rule of law, finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment. Permitting the parties to reopen the concluded judgments of this Court by filing repeated interlocutory applications is clearly an abuse of the process of law and would have far-reaching adverse impact on the administration of justice.”

11. *The attempt in the present miscellaneous application is clearly to seek a substantive modification of the judgment of this Court. Such an attempt is not permissible in a miscellaneous application. While Mr Mukul Rohatgi, learned senior counsel has relied upon the provisions of Order LV Rule 6 of the Supreme Court Rules 2013, what is contemplated therein is a saving of the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the Court. Order LV Rule 6 cannot be inverted to bypass the provisions for review in Order XLVII in the Supreme Court Rules 2013. The Miscellaneous application is an abuse of the process.*

12. *The hallmark of a judicial pronouncement is its stability and finality. Judicial verdicts are not like sand dunes which are subject to the vagaries of wind and weather [See Meghmala v G Narasimha Reddy, (2010) 8 SCC 383]. A disturbing trend has emerged in this court of repeated applications, styled as Miscellaneous Applications, being filed after a final judgment has been pronounced. Such a practice has no legal foundation and must be firmly discouraged. It reduces litigation to a gambit. Miscellaneous Applications are becoming a preferred course to those with resources to pursue strategies to avoid compliance with judicial decisions. A judicial pronouncement cannot be subject to modification once the judgment has been pronounced, by filing a miscellaneous application. Filing of a miscellaneous application seeking modification/clarification of a judgment is not envisaged in law. Further, it is a settled legal principle that one cannot do indirectly what one cannot do directly [“Quando aliquid prohibetur ex directo, prohibetur et per obliquum”].*

13. *Further, there is another legal principle which is applicable in the present case. It is that where a power is*

given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden [Taylor vs Taylor, 1875 (1) Ch D 426]. Hence, when a statute requires a particular thing to be done in a particular manner, it must be done in that manner or not at all and other methods of performance are necessarily forbidden [Nazir Ahmed vs King Emperor, (1936) L.R. 63 IndAp 372]. This Court too, has adopted this maxim [Parbhani Transport Co-operative Society Ltd. vs The Regional Transport Authority, Aurangabad & Others, AIR 1960 SC 801]. This rule provides that an expressly laid down mode of doing something necessarily implies a prohibition on doing it in any other way.”

13. In **Vedanta Limited**(supra), the Hon'ble Supreme Court was dealing with a review application filed with a delay between 20 and 26 months, filed much after the retirement of two Judges who have passed the order sought to be reviewed. Whilst dealing with this contention it has held thus:

“2. In accordance with Rule 2 of Order XLVII of the Supreme Court Rules, 2013, an application for review of a judgement has to be filed within thirty days of the date of the judgement or order that is sought to be reviewed. No cogent grounds have been furnished for the delay between 20 and 26 months by the two parties in filing their applications for review. The judges comprising the two-judge bench in Goa Foundation II, Justices Madan B Lokur and Deepak Gupta, retired from this Court on 30 December 2018 and 6 May 2020, respectively. The State of Goa preferred its four review petitions in the month of November 2019, after Justice Madan B Lokur’s retirement, while Vedanta Limited preferred its four review petitions in the

month of August 2020, right after Justice Deepak Gupta's retirement. Such practise must be firmly disapproved to preserve the institutional sanctity of the decision making of this Court. The review petitioners were aware of the decision of this Court.

3. Keeping in mind the above, we are inclined to dismiss these review petitions on the ground of limitation alone. However, in any event, we also find that no legitimate grounds for review of the judgment in Goa Foundation II have been made out, and dismiss these review petitions on merits as well."

14. In my opinion, the ratio laid down in **Supertech Limited** and **Vedanta Limited** (supra), directly applies to the facts of the present case. The applicant chose not to present this application, even if styled as one for recall of the order, before G.S. Kulkarni,J who had rendered the same, and instead filed it almost 45 days later without offering any explanation for the delay in filing the application. In any event, the grounds stated in the application are clearly not grounds for review, as there is no error apparent on the face of the record demonstrated by the applicant. As held by the Hon'ble Supreme Court in **Supertech Limited** (supra), styling the application as one for "recall of order" would not give the applicants a cause to review or recall the order dated 07/12/2022, more so on the specific ground raised in the application. The second set of grounds, are clearly grounds which can be raised only in an appeal against this Court's order dated 07/12/2022 and such grounds will not be available to the applicant before this Court.

For all these reasons, I hold that the Misc. Civil Application No.46/2023 is devoid of any merit and is nothing but a review filed in the guise of and camouflaged as an application for recall of order dated 07/12/2022. Accordingly, I dismiss the Misc. Civil Application No.46/2023.

15. In view of the dismissal of the Misc. Civil Application No. 46/2023, there would be no cause for speaking to the minute in Misc. Civil Application No.157/2023(F) filed by the State of Goa, since the order dated 07/12/2022, in my opinion, is clearly worded and does not call for any interpretation or for speaking to the minutes. Therefore, in view of the dismissal of application No.46/2023, I proceed to dismiss Application No.157/2023(F) for speaking to minutes. No costs.

VALMIKI SA MENEZES, J.