
(2010) 09 SC CK 0095

In the Supreme Court Of India

Case No : Civil Appeal No's. of 2010 (Arising out of SLP (C) No's. 25043-25045 of 2008)

Kalabharati Advertising

APPELLANT

Vs

Hemant Vimalnath Narichania and Others

RESPONDENT

Date of Decision : 06-09-2010

Acts Referred:

Citation : AIR 2010 SC 3745 : (2011) 1 BomCR 391 : (2010) 9 JT 382 : (2010) 3 KLT 986 : (2011) 1 RCR(Civil) 216 : (2010) 9 SCC 437 : (2010) 10 SCR 971

Hon'ble Judges : P. Sathasivam, J;B. S. Chauhan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.S. Chauhan, J.—Delay condoned. Leave granted.

2. These appeals have been preferred against the judgment and orders dated 4.2.2008/13.2.2008 passed by the High Court of Judicature at Bombay in Writ Petition No. 2366 of 2007 and the consequential order dated 8.2.2008, as amended vide order dated 11.2.2008 passed by the Municipal Corporation of Greater Mumbai by which the hoarding fixed by the appellant in the Anand Darshan Co-operative Housing Society Ltd., Respondent No. 13 (hereinafter called the "Society") had been removed in spite of agreements between the parties.

3. Facts and circumstances giving rise to these appeals are that the appellant who is carrying out a business of advertisement hoardings within the city of Bombay approached the Society in 2001 for grant of permission to erect a hoarding admeasuring 40'x20' in its compound. The Society passed a Resolution in the year 2001, permitting the appellant to erect a hoarding of the aforesaid measurement. The appellant applied to the Municipal Corporation (hereinafter called the "Corporation") for grant of necessary permission for erecting the same. The said application was allowed by the Corporation vide order dated 4.8.2001. Subsequent thereto an agreement dated 5.9.2001 was executed between the

appellant and the Society for a period of three years on various terms and conditions mentioned therein, and was given effect to. The said agreement was renewed after expiry of the period of three years in the year 2004 by the Society and ultimately vide Resolution dated 12.8.2007 for a further period of three years.

4. During this period, a Public Interest Litigation, being Writ Petition No. 1132 of 2002 was filed before the Bombay High Court by one Dr. Anahita Peadoin against the Municipal Corporation of Greater Mumbai pertaining to the grant of permission for hoardings in Mumbai alleging various violations of guidelines issued by the Corporation for the said purpose. The Bombay High Court while entertaining the writ petition constituted a Committee to find out violations of the guidelines of the hoardings in Mumbai and the Committee found that 266 hoardings including that of the appellant had been in violation of the guidelines issued by the Corporation. So far as the appellant is concerned, the Committee came to the conclusion that the said hoarding had been in violation of condition Nos. 16(f) and 16(c), i.e., obstructing the air, light and ventilation and situated in the compulsory open space.

5. The Bombay High Court vide its order dated 1.10.2002 directed the aggrieved parties to file representation before the Statutory Authority, i.e., Deputy Municipal Commissioner, against the findings of the Committee constituted by the Court. Accordingly, the appellant made a representation before the said authority and the said representation was disposed of on 6.4.2004, after giving opportunity of hearing to the appellant and examining the facts in the presence of officers/representatives of the respondent- Corporation, coming to the conclusion that the hoarding of the appellant was not violative of guideline No. 16(f). So far as violation of guideline No. 16(c) was concerned, the appellant was directed to apply to the Chief Engineer (DP) for condonation of compulsory open space clause of guidelines within 15 days with an observation that regularisation of the hoarding would be subject to the outcome of Writ Petition No. 1132 of 2002.

6. In pursuance to the order dated 6.4.2004, appellant approached the said Authority vide representation dated 1.6.2004. The said representation was marked/assigned to the Assistant Engineer (BP) and he was directed to examine the case. The said Assistant Engineer (BP) City-III examined the case and had also made physical verification of the hoarding and prepared the report dated 16.7.2007 to the effect that there was no violation of Clause 16(c) of the guidelines. The said report was placed before the Executive Engineer (BP) City-I of the Corporation who approved the same vide order dated 17.7.2007.

7. There had been some dispute between the Society and some of its members and those members raised certain objections/complaints against the erection of the hoarding in question. Those members approached the Co- operative Court challenging the Resolution passed by the Society in favour of the appellant for granting permission to erect the hoarding and also made an application for

interim relief. However, the Co-operative Court dismissed the application for interim relief.

8. Being aggrieved, some of the members of the Society (Respondent Nos. 1 to 5) filed Writ Petition No. 2366 of 2007 before the Bombay High Court against the Society and the appellant for cancellation of the permission granted in favour of the appellant. During the course of hearing of the said writ petition on 4.2.2008, the Joint Municipal Commissioner (Education), Shri S.S. Shinde filed an affidavit to withdraw the earlier order approving the erection and for permission to pass a fresh order in accordance with law. The court accepted the said affidavit and permitted the Corporation to withdraw its earlier order with further liberty to pass fresh orders without giving an opportunity of hearing to the appellant or the Society as it had already been done while passing the earlier order. In pursuance of the said order, a fresh order was passed by the respondent- Corporation on 11.2.2008, not approving the erection of hoarding which had earlier been approved. Hence, these appeals.

9. Shri Ravi Shankar Prasad, Ld. Senior Counsel for the appellant, submitted that as the PIL, i.e., Writ Petition (Civil) No. 1132 of 2002 in which certain direction had been issued by the High Court and a Committee was constituted to examine as to whether hoardings were in violation of the guidelines and an action had been taken in pursuance thereof, is still pending, even if the respondent Nos. 1 to 5 were aggrieved of any order of the Corporation, they ought to have moved an application for intervention and for further direction in the said Writ Petition No. 1132 of 2002. An independent writ petition could not have been filed. So far as the internal dispute between the Society and some of its members is concerned, it is still pending with the Co-operative Court. Only an application for interim relief had been dismissed. Therefore, the writ petition itself was not maintainable as the said respondents had chosen the forum of Co-operative Court under the provisions of Maharashtra Co-operative Societies Act, 1960 (hereinafter called as 'Act'). The High Court had permitted the respondent-Corporation to withdraw its earlier order and to pass a fresh order, that tantamounts to conferring the jurisdiction of review upon the statutory authority, though such power had not been conferred by the Statute. Therefore, the order conferring such power itself is without jurisdiction. The Corporation passed subsequent order without assigning any reason and giving opportunity of hearing to the appellant. It is a clear cut case of legal malice. More so, the respondent Nos. 1 to 5, have been permitted to withdraw the Writ Petition No. 2366 of 2007 itself vide order dated 13.2.2008, therefore, all orders passed therein by the High Court as well as the consequential orders passed by the Corporation stood automatically washed away. Thus, the appellant should be permitted to continue its business with the Society as if no order had ever been passed by the Court or Corporation in regard to the hoardings in question.

10. On the contrary, Shri Atul Yeshwant Chitale, Ld. Senior Counsel appearing for the respondent-Corporation, has submitted that a new policy dated 10.1.2008

has come into existence. The case of the appellant shall be considered strictly in accordance with the terms and conditions incorporated therein. Thus, an opportunity should be given to the respondent-Corporation to consider the case afresh.

Shri Ratan Kumar Singh, Ld. Counsel appearing for respondent Nos. 1 to 5 (original writ petitioners) has submitted that withdrawal of the writ petition does not have any bearing on these appeals as the same had been withdrawn after being satisfied that their grievances stood fully redressed by the interim orders passed by the High Court and consequential orders passed by the Corporation. The order passed by the Corporation could not be challenged before this Court directly, without approaching the High Court. The pendency of the dispute between the Society and its members before the Co-operative Court could not create any hindrance for them to approach the High Court by filing a fresh Writ Petition as they were not parties in the earlier Writ Petition No. 1132 of 2002. The hoardings in question had been in violation of the guidelines of the Corporation and thus, subsequent orders passed by the Corporation do not require any interference. Thus, the appeals have no merit and are liable to be dismissed.

11. We have considered the rival submissions made by both the parties and perused the record.

Legal Issues:

Review in absence of statutory provisions:

12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed is ultra-vires, illegal and without jurisdiction. (vide: Patel Chunibhai Dajibhai etc. Vs. Narayanrao Khanderao Jambekar and Another, and Harbhajan Singh Vs. Karam Singh and Others,).

13. In Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, ; Major Chandra Bhan Singh Vs. Latafat Ullah Khan and Others, ; Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, ; State of Orissa and Others Vs. Commissioner of Land Records and Statement, Cuttack and Others, and Sunita Jain Vs. Pawan Kumar Jain and Others, , this Court held that the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication and in absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in absence of any statutory provision for the same is nullity being without jurisdiction.

14. Therefore, in view of the above, the law on the point can be summarised to

the effect that in absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification/modification/correction is not permissible.

Case dismissed/withdrawn- effect on interim relief:

15. No litigant can derive any benefit from the mere pendency of a case in a Court of Law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blame the Court. The fact that the case is found, ultimately, devoid of any merit, or the party withdrew the writ petition, shows that a frivolous writ petition had been filed. The maxim "*Actus Curiae neminem gravabit*", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the Court. (vide: *A.R. Sircar (Dr) v. State of U.P.*, 1993 Supp.(2) SCC 734; *Shiv Shankar and Others Vs. Board of Directors, U.P.S.R.T.C. and Another*, ; *Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur, through its Manager and another Vs. Sree Kumar Tiwary and another*, ; *M/S. GTC Industries Limited Vs. Union of India and Others*, and *Jaipur Municipal Corporation Vs. C.L. Mishra*,).

16. In *Ram Krishna Verma and Others Vs. State of U.P. and Others*, , this Court examined the issue while placing reliance upon its earlier judgment in *Grindlays Bank Limited Vs. Income Tax Officer, Calcutta and Others*, and held that no person can suffer from the act of the Court and in case an interim order has been passed and the petitioner takes advantage thereof, and ultimately the petition stands dismissed, the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized.

17. A similar view has been reiterated by this Court in *Mahadeo Savlaram Shelke and Others Vs. Puna Municipal Corporation and Another*, .

18. In *South Eastern Coalfields Ltd. Vs. State of M.P. and Others*, , this Court examined this issue in detail and held that no one shall suffer by an act of the Court. The factor attracting the applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court; the test is whether an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage it would not have otherwise earned, or the other party suffering an impoverishment which it would not have suffered but for the order of the Court and the act of such party. There is nothing wrong in the parties demanding to be placed in the same

position in which they would have been had the Court not intervened by its interim order, when at the end of the proceedings, the Court pronounces its judicial verdict which does not match with and countenance its own interim verdict. The injury, if any, caused by the act of the Court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the Court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. The Court further held:

...Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the Court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are earlier to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated....

19. In *Karnataka Rare Earth and Another Vs. The Senior Geologist, Department of Mines and Geology and Another*, , a similar view has been reiterated by this Court observing that the party who succeeds ultimately is to be placed in the same position in which they would have been if the Court would not have protected them by issuing interim order.

20. The aforesaid judgments are passed on the application of legal maxim "*sublato fundamento cadit opus*", which means in case a foundation is removed, the superstructure falls.

21. In *Badrinath Vs. Government of Tamil Nadu and Others*, , this Court observed that once the basis of a proceeding is gone, all consequential acts, action, orders would fall to the ground automatically and this principle of consequential order which is applicable to judicial and quasi-judicial proceedings is equally applicable to administrative orders.

Court-cannot be used only for interim relief:

22. It is a settled legal proposition that the forum of the writ court cannot be used for the purpose of giving interim relief as the only and the final relief to any litigant. If the Court comes to the conclusion that the matter requires adjudication by some other appropriate forum and relegates the said party to that forum, it should not grant any interim relief in favour of such a litigant for an interregnum period till the said party approaches the alternative forum and obtains interim relief. (vide: *The State of Orissa Vs. Madan Gopal Rungta*, ; *Amarsarjit Singh Vs. The State of Punjab*, ; *State of Orissa Vs. Ram Chandra Dev and Mohan Prasad Singh Deo*, ; *The State of Bihar Vs. Rambalak Singh and Others*, and *The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke* of

Bombay and Others,).

23. It is settled proposition that an order of withdrawal of a suit does not amount to a decree of the court, which can be executed. (See: Kandapazha Nadar and Others Vs. Chitraganiammal and Others,).

24. It is not permissible for a party to file a writ petition, obtaining certain orders during the pendency of the petition and withdraw the same without getting proper adjudication of the issue involved therein and insist that the benefits of the interim orders or consequential orders passed in pursuance of the interim order passed by the writ court would continue. The benefit of the

interim relief automatically gets withdrawn/neutralized on withdrawal of the said petition. In such a case concept of restitution becomes applicable otherwise the party would continue to get benefit of the interim order even after losing the case in the court. The court should also pass order expressly neutralizing the effect of all consequential orders passed in pursuance of the interim order passed by the court. Such express directions may be necessary to check the rising trend among the litigants to secure the relief as an interim measure and then avoid adjudication on merits. (Vide Abhimanyoo Ram v. State of U.P. (2008) 17 SCC 73).

Legal Malice:

25. The State is under obligation to act fairly without ill will or malice- in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, ; Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another, ; State of Andhra Pradesh and Others Vs. Goverdhanlal Pitti, ; Chairman and M.D., B.P.L. Ltd. Vs. S.P. Gururaja and Others, and West Bengal State Electricity Board Vs. Dilip Kumar Ray,).

26. Passing an order for an unauthorized purpose constitutes malice in law. (Vide Punjab State Electricity Board Ltd. Vs. Zora Singh and Others, and Union of India (UOI) through Govt. of Pondicherry and Another Vs. V. Ramakrishnan and Others,).

27. The instant case is required to be examined in the light of the aforesaid settled legal propositions.

Admittedly, Writ Petition No. 1132 of 2002, wherein the issue of examining the

violation of guidelines issued by the Corporation had been raised and the High Court had passed certain directions which had been complied with and in pursuance of the same the Corporation passed an order dated 6.4.2004 that an order passed by it would be subject to the decision in the said Writ Petition No. 1132 of 2002 is still pending before the High Court. In such a fact-situation, if the respondent Nos. 1 to 5 were aggrieved by the order passed by the Corporation they ought to have filed an application for intervention and appropriate directions in the said writ petition. Undoubtedly, there could be no prohibition for filing a fresh writ petition, but it would have been more appropriate for them to file an application in the said pending writ petition as it is necessary that contradictory orders must not be passed in similar circumstances.

28. The High Court could not have allowed the Corporation to recall its earlier order and pass a fresh order, that too, without giving an opportunity of hearing to the appellant and the Society. Review is a statutory remedy. In spite of several queries put by us to the learned Counsel for the respondents, no provision for review under the statute could be brought to our notice. The court cannot confer a jurisdiction upon any authority. Conferring jurisdiction upon a Court/Tribunal/Authority is a legislative function and the same cannot be conferred either by the court or by the consent of the parties. Such an order passed by the High Court is without jurisdiction and, therefore, a nullity. Any order passed in pursuance thereof, also remains unenforceable and inexecutable. More so, the High Court could not have permitted the Corporation to pass an order without giving an opportunity of hearing to the appellant and the society. More so, the Corporation could not pass an order recalling the order passed by it earlier and reviewing the same without assigning any reason. It was obligatory on the part of the Corporation to explain as to what was the material on record on the basis of which the earlier order has been changed. Thus, the order passed by the Corporation stood vitiated for not recording reasons and violating the principles of natural justice. It establishes the allegations of legal malice made by the appellant against the Corporation.

29. The submission made on behalf of respondent Nos. 1 to 5 that appellant could not challenge the orders passed by the Corporation directly before this Court without approaching the High Court is preposterous for the reason that Corporation passed the impugned orders in pursuance of the orders passed by the High Court itself. In fact, it could amount to challenging the basic order passed by the High Court before itself under the garb of challenging the consequential orders passed by the Corporation. "The clitch of appeal from Ceasar to Ceasar's wife can only be bettered by appeal from one's own order to oneself." (See Ram and Shyam Company Vs. State of Haryana and Others,).

30. It has been mentioned by the appellant in the petition that respondent No. 1 himself has vetted the agreement reached between the appellant and the respondent-society and was a party to the same. Therefore, he was fully aware as what was the agreement and how it would be given effect to. The respondent

No. 1 has not denied this averment. Nor he has explained as to what were the changed circumstances, which made him aggrieved. More so, if the said respondent Nos. 1 to 5 were aggrieved of the order passed by the Co-operative Court rejecting their application of interim relief, they could have approached the appropriate forum challenging the same, rather they have chosen to approach the High Court leaving the matter pending before the Co-operative Court.

31. Respondent No. 1 had approached the Co-operative Court and could not get the interim relief. He filed a writ petition along with others after meeting his Waterloo there. Subsequently, after obtaining the interim orders from the High Court and consequential orders from the Corporation withdrew the writ petition.

The respondent Nos. 1 to 5 for the reasons best known to them have prayed for withdrawal of the Writ Petition No. 2366 of 2007 and the High Court vide order dated 13.2.2008 allowed the said respondents to withdraw the same. The order reads as under:

As per the statement by Mr. S.U. Kamdar on 4th February, 2008, the earlier order has been withdrawn by the corporation and fresh order has been passed by the concerned officer. The copy of the said order is produced. It is marked Exhibit-X for identification purpose. Mr. S.U. Kamdar has further reported to the court that the action of removal of the hoardings has already been commenced and it will be completed within two to three days.

In view of the fresh order passed by the corporation marked Exhibit-X and the statement of Mr. S.U. Kamdar, learned Counsel for the petitioner states that the grievance in the petition is redressed and, therefore, he may be allowed to withdraw the petition with liberty to file similar type of petition if occasion so arises.

Petition is allowed to be withdrawn with liberty as prayed for.

32. "Withdrawal" means "to go away or retire from the field of battle or any contest." Thus, the word 'withdrawal' is indicative of the voluntary and conscious decision of a person. Therefore, if the said writ petitioners (respondent Nos. 1 to 5) have voluntarily abandoned their claim withdrawing the said writ petition, they cannot be permitted to take any benefit of the orders passed by the High Court or the statutory authority in pursuance thereof. Once the foundation is removed, the super-structure is bound to fall. Interim relief is granted only in aid of and as ancillary to the main relief which may be available to the party at the time of final adjudication of the case by the court. In case the orders passed by the High Court and, consequently, by the Corporation are accepted to be in effect even today, it would be tantamount to allowing the writ petition without any adjudication on the issues involved therein. After obtaining interim relief, a party cannot avoid final adjudication of the dispute on merit and claim that he would enjoy the fruits of interim relief even after withdrawal/dismissal of the case. Law certainly would not permit such a course. Respondent No. 1 is a practising advocate. He is not a layman, nor it can be assumed that he could not

understand the consequences of withdrawal of the writ petition. Therefore, all orders passed by the High Court and the statutory authority stood washed away on withdrawal of the said writ petition and the said writ petitioners cannot claim any benefit of either of the same.

33. In view of the above, appeals deserve to be allowed to the effect that the appellant and the respondent-Society may act as if no order had ever been passed, adversely affecting their contract, by the High Court in Writ Petition No. 2366 of 2007 or any statutory authority and they may proceed with the agreement/contract in accordance with law.

34. Needless to say that this judgment/order would have no bearing on the order passed by any court/tribunal or statutory authority independent of the proceedings taken in Writ Petition No. 2366 of 2007.

35. The appeals are allowed as explained hereinabove. No order as to cost.