

(2014) 04 CAL CK 0068

In the Calcutta High Court

Case No : C.O. Nos. 1502 of 2013, 1358 of 2010, 1431 of 2007 and 1222 of 2013

Mahmood Alam

APPELLANT

Vs

Jamshed Alam

RESPONDENT

Date of Decision : 23-04-2014

Acts Referred:

Constitution of India, 1950 — Article 226(1)
Specific Relief Act, 1963 — Section 14(3)(c)

Citation : (2014) 4 WBLR 663

Hon'ble Judges : Subrata Talukdar, J

Bench : Single Bench

Advocate : Bhudev Chatterjee, Sanjeeb Seth and Amaresh Kr. Dhar, Advocate for the Appellant; S.P. Roychowdhury, Buddhadeb Ghoshal and S. Ghoshal, Advocate for the Respondent

Judgement

Subrata Talukdar, J.—The above four civil revisional applications have been assigned to this Bench. The Ld. Counsel appear for the respective parties in the four applications in the order as mentioned above. All the four application involve a common point of law. The said common point of law has been determined by an Hon"ble Special Bench of this Court upon an analogous hearing of the above four applications. After determination of the said point of law the matters have now been assigned before this Bench for hearing on their individual merits. At the very outset Sri Roychowdhury, Ld. Senior Counsel appearing for one of the petitioners raises the question of jurisdiction of this Court to hear the four applications on merits upon determination of the point of law by the Hon"ble Special Bench (supra). The point on jurisdiction raised by Sri Roychowdhury is resisted by the Ld. Counsel appearing for the other parties and accordingly this Court has been urged to settle the point on jurisdiction first prior to proceeding further, if justified, on the merits of each of the individual cases.

2. Accordingly, all the parties except the Howrah Municipal Corporation, which has not been represented before this Court in spite of the repeated dates when

the matters appeared on 24th February 2014, 10th March 2014, 19th March 2014, 28th March 2014 and finally 2nd April 2014. No accommodation on all the aforementioned dates have been sought for on behalf of the Howrah Municipal Corporation and therefore, this Court is now called upon, after hearing the extensive submissions made by the other appearing parties, to pronounce its final orders on the point of jurisdiction.

3. Sri Roychowdhury submits as follows:--

a) That Chapter VII of the Appellate Side Rules, High Court, Calcutta provides for reference of matters to a larger bench. There is a difference in procedure in case of a reference from an original decree and in reference of Civil Revisional Applications.

b) Sri Roychowdhury has submitted that in terms of chapter VII rule 3 the following is provided:--

"If the question arises in an Appeal from an Original Decree, the questions of law shall alone be referred, and the Full Bench shall return the Case with an expression of its opinion upon the points of law for final adjudication by the Division Bench which referred it and in case of necessity in consequence of the absence of any or either of the referring judges for the ultimate decision of another Division Bench.

c) Taking this Court to Ch. VII Rule 4 Sri Roychowdhury submits that it provides as follows: "If the question arise in any matter coming before a Division Bench (taking up application for writs in the nature of labour companies referred to in Article 226(1) of the Constitution of India and application under Section 491 of the Code of Criminal Procedure) in the exercise of its Civil Revisional jurisdiction, the point or points shall be stated as provided in Rule 2, and the matter shall be referred for the final decision of a Full Bench."

It will be useful for this Court to place the provisions of Rule 2 of Ch. VII of the Appellate Side Rules.

Rule 2 provides as follows:--"If the question arises in an Appeal from an Appellate Decree or in an Appeal under clause 15 of the Letters Patent or in a Reference or in any case heard by a bench of two or more Judges, not being a Full Bench the Court referring the case shall state the point or points upon which they differ from the decision of a former Division Bench and shall refer the Appeal, the Reference or the Case for the final decision of a Full Bench."

d) Sri Roychowdhury submits that having regard to the language of Rule 4 of Ch. VII this Court cannot have determination to hear the matters on merits. According to him, it is only the Full Bench which is competent to decide the cases both on the point of law and on the application of law to the merits of the case.

4. Ld. Counsel, Sri Ghosal assisting Sri Roychowdhury has further pointed out to the terms of reference made by two brother Judges of this Court. According to

Sri Ghosal while one of the Hon''ble Judges was pleased to refer the entire civil revisional application to the Larger Bench, a different Single Bench in respect of another matter, was pleased only to refer the point of law to the Hon''ble Special Bench.

5. Sri Ghosal has submitted that the scope of the Revisional Court is only to set address any jurisdictional issue arising out of the challenge to the order impugned. He further submits that there is no scope to interfere with the merits of the dispute.

6. In view of the limited scope of interference by a Revisional Court qua an Appellate Court, the merits of the issue cannot be gone into by this Bench after the Hon''ble Special Bench has settled the reference on the point of law.

7. It is the further submission of Sri Ghosal that the role of the Revisional Court is limited to consider the jurisdictional error or material irregularity and not the scope and merit of each particular case as pending before the respective learned trial Court. Since the point of law has been settled by the Hon''ble Special Bench the matters are now fit to be relegated to be decided by the respective Ld. Trial Courts on the merits of each of them.

8. Per contra Sri Bhudeb Chatterjee, appearing for the petitioner in CO 1502 of 2013 has submitted as follows:--

a) After the decision on the point of law by the Hon''ble Special Bench, all the four matters were assigned to this Bench to be disposed of in the light of the proposition of law settled by the Hon''ble Special Bench. In this respect the directions of the Hon''ble Special Bench on law are binding on this Bench in so far as the disposal of the present revisional applications are concerned.

b) According to Sri Chatterjee there is a usual procedure for reference to the Larger Bench or the Hon''ble Special Bench. In the event an Hon''ble Single Bench desires any point of law to be decided by a Larger Bench it is required to send the case before the Hon''ble Chief Justice. The terms of reference will then be settled and placed before the Full Bench, the Larger Bench or the Special Bench as the case may be. Once the terms of reference are settled the Full Bench, the Larger Bench or the Special Bench as the case may be shall decide on the same and, upon such decision the matter shall be relegated to the appropriate Single Bench from which the reference emanated to be decided on merits in the light of the proposition of law as settled by the Full Bench, Larger Bench or the Special Bench as the case may be.

c) Sri Chatterjee draws the attention of this Court to Rule 8 of Ch. VII of the said Appellate Side Rules. Rule 8 provides as follows: "Every decision of a Full Bench shall be treated as binding on all Division Benches, and Judges sitting singly, upon the point of law or usage having the force of law determined by the full bench, unless it be subsequently reversed by a Bench, specially constituted, consisting of such number of Judges as in each Case shall have been fixed by the

Chief Justice, or unless a contrary Rule have since been laid down in a pre-Constitution decision of the Judicial Committee of the Privy Council or of the Federal Court of India or in a decision of the Supreme Court of India.

Note - The judgment of the Court in all civil and criminal cases heard by a Full Bench shall be printed and distributed for information to all the judges of the Court."

9. Therefore, according to Sri Chatterjee it is the duty of the Single Bench or, in other words, the judge sitting singly to decide the case on remand in the light of the proposition of law settled by the Hon''ble Special Bench by applying the same to the merits of each case.

10. Sri Chatterjee relies upon a decision of this Court reported in (2010) 1 CHN (Cal) 721 in the matter of General Manager (PA), Allahabad Bank and Ors. v. Shib Shankar Mukherjee. He also relies on a second decision of this Court reported in Ahamed Hossain Sk. Vs. State of West Bengal and Others,

11. It has been, inter alia, held in the case of Shib Shankar Mukherjee that any reference must be on a pure question of law already decided by a Coordinate Bench which is a precedent on that point of law. There is no scope of referring a question of fact or even a mixed question of law and fact already decided by an Coordinate Bench in earlier judicial proceedings between the self-same parties or parties claiming through them. The Court in Shib Shankar Mukherjee's case was pleased to also consider the issue of res judicata which, however, is not germane to the discussion in this judgment. In Shib Shankar Mukherjee's case the Court was pleased to rule the reference as incompetent inasmuch as the reference was not on a pure question of law but basically an issue of fact already decided in the facts of the case by an earlier Coordinate Bench.

12. Drawing inspiration from Shib Shankar Mukherjee's case (supra) Sri Chatterjee submits that the referring Court or, in this case, the revisional Court is supreme on facts. The reference was only on a point of law and now, once such law has been settled, the matter has been returned on assignment to be decided on merits.

13. In Ahmed Hussain Sheikh's case (supra) this Court was pleased to consider the provisions of Ch. VII of the Appellate Side Rules and discuss the powers of reference as contained under the said rules. The Court was further pleased to discuss the circumstances in which the Coordinate Bench of a Court can refer matters for being settled by a Full Bench or a Special Bench or a Larger Bench as the case may be in the face of an earlier decision by a Coordinate Bench of this Court.

14. Sri Shyamal Chakraborty, Ld. Counsel appearing for the opposite party in CO 1431 of 2013 and for the petitioner in CO 1358 of 2010 submits that the revisional application being CO 1431 of 2013 is on a totally different issue. According to him, CO 1431 of 2013 could not fall within the ambit of

consideration of the Hon''ble Special Bench at all. The issue in CO 1431 of 2013 is the delayed filing of the written statement. However, in view of the fact that the same parties are litigating, Sri Chakraborty submits the matter was placed before the Hon''ble Special Bench.

15. Supporting the stand of Sri Chatterjee on the point of jurisdiction Sri Chakraborty further submits that CO 1358 of 2010 pertains to a subject on which the proposition of law has been decided by the Hon''ble Special Bench. The issue, according to him, is the legal construct to be given to a Power of Attorney (for short POA) entered between a developer qua the grantor of the said POA. The further issue in CO 1358 of 2010 is whether the developer as the holder of the POA can be considered to be a mere agent and the POA can be revoked at the will of the grantor.

16. Sri Chakraborty finally submits that the proposition of law having been settled by the Hon''ble Special Bench, CO 1358 of 2010 now can be decided on merits by this Bench on assignment.

17. Heard the parties. Considered the materials on record.

18. This Court notices that the reference CO 1358 of 2010 by one of the Benches of this Court to the Hon''ble Special Bench was as follows:--

i) Whether the suit at the instance of a developer is not maintainable in view of Section 14(3)(c) of the Specific Relief Act?;

ii) Whether the Power of Attorney executed by the owner in favour of the developer for effectuating the terms and conditions of the development agreement gives a bare agency to the developer without any interest, in subject matter or not?

"Let this revisional application be placed before the Hon''ble Chief Justice for constituting a Larger Bench for deciding the same for the observations made herein above."

19. On the basis of the above two points the Hon''ble Single Bench was pleased to also refer CO 1431 of 2007 before the Hon''ble Larger Bench. The reference is worded as follows:--"Since a similar and identical point is raised in this revisional application as is raised in CO 1358 of 2010 let this revisional application be also placed before the Hon''ble Chief Justice for determination by the Larger Bench."

20. While referring CO 1222 of 2013 with CO 1502 of 2013 another Single Bench of this Court after recording a detailed order was pleased to refer the matters to a Larger Bench as follows:--"Having due regard to the submissions of learned Advocates of both the sides, I am of the view that if I express my opinion over the matter, in my view, it will not be proper, as there are conflicting decisions over the same matter. The judicial decorum does not permit to do so. When inconsistent views have been expressed by Division Benches of co-equal strength the conflict could be resolved by constituting a Larger Bench according to the

decision of Delhi Development Authority Vs. Ashok Kumar Behal and Others, . Prima facie, two similar matters have been referred to the Larger Bench by the Ld. Single Bench of this Hon''ble Court by holding that contrary views are available in view of the decision of Bhaskar Aditya (supra) being contrary to the decisions of Vipin Bhimani and Anr. (supra) and Shamali Das (supra).

Since contrary views have been expressed, in my view, the matter should be decided finally by a Larger Bench. Accordingly, keeping in conformity with the two points as framed by the Ld. Single Bench, the following two questions are framed for decision by a Larger Bench in the matter:--

- i) Whether the suit at the instance of a developer is not maintainable in view of Section 14(3)(c) of the Specific Relief Act; and
- ii) Whether the Power of Attorney executed by the owner in favour of the developer for effectuating the terms and conditions of the development agreement gives a bare agency to the developer without any interest, any subject matter or not.

This being the position all further proceedings of the two applications as well as the Misc. Appeal No. 205 of 2011 pending before the 1st Appellate Court shall be stayed till the decision over the matter by a Larger Bench.

Send the records before the Hon''ble Chief Justice to place the same before the Larger Bench constituted in pursuance of the order dated February 7, 2013 passed in CO 1353 of 2010.

21. To the mind of this Court the references by the two Hon''ble Single Benches to the Larger Bench are clear and self-explanatory. The references, according to this Court are on the common points of law which have arisen in the four respective civil revisional applications. The said references have been made in tune with the letter and spirit of Ch. VII of the Appellate Side Rules.

22. In paragraph 18 of the Delhi Development Authority v. Ashok Kr. Behal and Ors. the Hon''ble Apex Court was pleased to observe as follows:--

"Inconsistency and contradiction in the orders passed by the same Court on the same point regarding the same scheme cannot be allowed to be continued or perpetuated. If the contention of the learned Counsel is accepted then an anomalous situation would arise by which the price fixed for a few of the MIG flats in the Scheme would be much less than the price fixed for the remaining flats allotted in the same year which cannot be permitted. The law laid down by the Supreme Court is binding on all Courts within the territory of India and the law laid down by a High Court is binding on all Courts within its jurisdiction. It is a cardinal principle of rule of law that inconsistency and contradiction in the orders has to be avoided at all costs to bring about a certainty in the mind of the subordinate Courts and the litigant public. This principle would stand violated in case two binding principles on the same point of the same Court are allowed to operate simultaneously."

23. In the present four matters the Hon''ble Special Bench after deciding the reference has been pleased to hold as follows:-"the questions posed in the reference are answered as elaborately indicated herein. It needs be reiterated that there may not be an absolute legal proposition de hors the facts. It needs also to be stressed that the expressions "developer", "owner" and "development" agreement as loosely used in legal pleadings, documents and judgments have been used in the present judgment in the sense as more fully indicated herein above.

Let the four matters now be placed before the relevant Bench for disposal in accordance with law in light of the answers to the questions posed in this reference."

24. Therefore, in the opinion of this Court the following conclusions emerge:--

i) That the reference to the Hon''ble Special Bench by both the Hon''ble Single Benches was on the determination of the law which arose in all four civil revisional applications.

ii) Although the language in the reference by the Hon''ble Single Benches may have been to the effect that the entire civil revisional application be placed before the Hon''ble Special Bench, the intent of the reference was clear. The intent of the reference was apparent from the points outlined by the Hon''ble Single Benches for determination by the Hon''ble Special Bench.

iii) The other Hon''ble Single Benches were also pleased to refer the matters before them to the Hon''ble Special Bench after framing the legal issues to be considered. By doing so the Hon''ble Single Benches made the scope of the reference very clear.

iv) Therefore there is little substance in the argument of Sri Roychowdhury and Sri Ghosal that by usage of the language "place the revisional applications before the Hon''ble Chief Justice" means that the Hon''ble Special Bench acquires the jurisdiction to consider the entire civil revisional application on merits.

The Hon''ble Special Bench has defined its role in deciding the four matters on the legal reference and then directing placement of the matter before "the relevant Bench for disposal in accordance with law in light of the answers to the questions posed in this reference."

v) In the light of Rule 8 Ch. VII of the Appellate Side Rules the Court of civil revision is not denuded of its jurisdiction to hear the matters on merits after the point of law has been settled by the Hon''ble Special Bench. In the facts of the present cases after determination of the points of law by the Hon''ble Special Bench the provisions of Rule 8 Ch. VII of the Appellate Side Rules shall apply with full force in contradistinction to the provisions of Rules 3 and 4 of Ch. VII of the said Appellate Side Rules.

vi) The judgment of this Hon''ble Court reported in Shib Shankar Mukherjee's

case (supra) is apposite to the facts of the present case inasmuch as a reference is only on a point of law. This Court is in respectful agreement with the ratio of decision in Shib Shankar Mukherjee's case that upon determination of the point of law the matter must return to be decided on facts before the Court of appropriate jurisdiction.

25. In the light of the above discussion this Court is of the considered view that it has the jurisdiction to hear the four civil revisional applications on merits. This Court is of the further view that the orders passed by the learned trial Court or the learned First Appellate Court, as the case may be in the four matters under consideration, are bound to be tested before this revisional Court in the light of the reference settled by the Hon''ble Special Bench.

26. The preliminary arguments on jurisdiction are answered as above.

27. Place CO 1502 of 2013, CO 1358 of 2010, CO 1431 of 2007, CO 1222 of 2013 for further hearing on merits under the heading "Contested Application" in the monthly list of June 2014.

28. In the light of the reference made by the Hon''ble Single Bench of CO 1431 of 2007 to the Hon''ble Special Bench in presence of Sri Chakraborty, this Court finds Sri Chakraborty's submission on the maintainability of the reference qua CO 1431 of 2007 fit to be considered at the stage of final hearing of the matter.

Later: It is submitted by the petitioner in CO 1502 of 2013 that there is grave urgency in hearing of this matter in view of the fact that construction is going on in the premises in question. Sri Ghosal, learned Counsel appearing for the opposite party in CO 1502 of 2013, however, disputes such submission.

Let these four matters appear in the monthly list of May 2014 under the heading Contested Application instead of June 2014.