
(2012) 08 CAL CK 0149

In the Calcutta High Court

Case No : C.C. No. 209 of 2010 GA No. 1503 of 2012

M/s. Tetulia Coke Plant(P) Ltd. and Others

APPELLANT

Vs

P.S. Bhattacharya

RESPONDENT

Date of Decision : 23-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 8, 34
Constitution of India, 1950 — Article 136, 141

Citation : (2012) 4 CALLT 711

Hon'ble Judges : Debasish Kar Gupta, J

Bench : Single Bench

Advocate : Vineeta Meharia and Mr. Pijush Meharia, for the Appellant; Shaktinath Mukherjee Mr. Kalimnddin Mondal, Nikhil Ray, Aniruddha Mitra and Mr. Partha Basu, for the Respondent

Judgement

Hon'ble Justice Debasish Kar Gupta

1. This is a rule issued under Contempt of Courts Act, 1971 for alleged wilful disobedience of the Judgment dated March 25, 2010 passed in the matter of M/s. Tetulia Coke Plant(P) Ltd (in re. W.P. No.1279 of 2005). By virtue of the aforesaid Judgment the Eastern Coal Field Ltd. was directed to refund the price of the coal paid in excess of notified price under "e" Auction Scheme. The operative portion of the above Judgment are quoted below:

It may be pointed out that by virtue of the order dated August 8, 2005 passed in this writ application, the applicants/writ petitioners paid the price of the coal to the respondent no.4 under the "e" Auction Scheme in excess of the notified price of the same. Therefore, the applicants are entitled to get the consequential relief of getting refund of the aforesaid amounts.

It is true that this Court in course of judicial review cannot settle any disputed claim but at the same time the consequential relief of refunding back the aforesaid amount may be granted to the applicants following measures adopted

by the Hon''ble Supreme Court for granting consequential relief to the writ petitioners who were before the Hon''ble Supreme Court.

With the above discussions and observations, I direct the respondent no.4 to refund the price of the coal paid in excess of the notified price under "e" Auction Scheme in the following manner : 6

1). The petitioner shall furnish all documents to the learned Advocate-on Record of the respondent no.4 showing actual payments made by the respective applicants/petitioners to the respondent no.4 during the period from May, 2005 to December, 2006 and the difference between the amount paid and the amount notified by April 30, 2010.

2) The documents furnished by the applicants/petitioners shall be verified by the concerned officers of the respondent no.4 within 4 weeks thereafter.

3) In case of any difference, the learned Advocate-on-Record would deliberate upon the matter so as to enable them to come out with accepted solution.

With the above observations and directions, this writ application and the application bearing G.A. 1370 of 2008 are disposed of.

There will, however, be no order as to costs.

After delivery of this judgment, a prayer is made on behalf of the respondent no.4 for staying operation of this judgment and the same is opposed by the learned Counsel appearing for the petitioners. The above prayer is rejected.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance of all requisite formalities.

Debasish Kar Gupta, J.

2. An appeal arising out of the aforesaid judgment in the matter of Eastern Coal Fields Ltd Vs. M/s. Tetulia Coke Plant (P) Ltd. and Ors.(in re. APO No.226 of 2010) was dismissed by a Division Bench of this High Court with the following orders:

After considering the facts of this case, we do not find that there is any illegality and irregularity in the order so passed by the Hon''ble First Court. Accordingly, we do not find any reason to interfere with the order so passed by the Hon''ble First Court.

We also find that Mafatlal case cannot be a help to the appellants. On the contrary, we find that appellant has collected the excess amount from the writ petitioner and the said amounts were collected on the basis of the price held at e-auction which has been set aside by the Hon''ble Supreme Court. Hence, the grounds tried to be taken by the appellant can not be accepted by us.

Accordingly, we find that arguments made by Ms. Vineet Meharia, learned Advocate on behalf of the respondents has much force and accepted by us.

Hence, we dismiss this appeal.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Pinaki Chandra Ghose, J.

I agree.

Asim Kumar Ray, J.

LATER:

Stay asked for is refused.

Pinaki Chandra Ghose, J.

3. The Eastern Coal Fields Ltd., filed SLP before the Hon''ble Supreme Court challenging the aforesaid judgment in the matter of Eastern Coal Fields Ltd Vs. Tetulia Coke Plant(P) Ltd and Ors. (in re. Civil appeal no.6888 of 2011). It was disposed of on August 10, 2011 with the following order:

In that view of the matter, we find no reason to take a different view than what is taken by the learned Single Judge of the High Court of Calcutta as also by the Division Bench of the same Court. Pursuant to the orders passed by this Court, the accounts in terms of the orders of the learned Single Judge has been verified and the said accounts have been settled. Therefore appropriate steps shall be taken now to give effect to the judgment and order passed by the learned Single Judge.

The amount in terms of the settled accounts shall be paid by the respondents in accordance with law within a period of two months, failing which the amount will carry an interest @9% per annum.

In terms of the aforesaid order, this appeal is disposed of, leaving the parties to bear their own costs.

Dr. Mukundakam Sharma Anil R. Dave

NEW DELHI,

AUGUST 10, 2011

4. On November 24, 2011 this court issued the instant rule under the Contempt of Courts Act, 1971 against (i) Sri S. Chakrabarty, Director(Tech.)/OP, Eastern Coalfields Limited, (ii) Sri. V. K. Singh, Head of the Department(Sales), Eastern Coalfields Limited, Sales and Marketing Division for alleged wilful disobedience of the judgment dated March 25, 2010 delivered by this court in the writ application. On January 26, 2012 the Eastern Coal Fields Ltd. refunded the price of coal paid in excess of notified price under "e" Auction Scheme together with an interest @ 9% for the period from August 10, 2011, i.e. from the date of judgment delivered by the Hon''ble Supreme Court in Civil Appeal No.6888 of

2011, till the date of actual payment to the writ petitioner/companies save and except the writ petitioner/company no.17.

5. The allegation of wilful disobedience of the order passed in the writ application is based on two grounds. The first ground is non-payment of interest on price of the coal paid in excess of the notified price under "e" Auction Scheme upto August 10, 2011 and the second one is non-payment of any amount to the writ petitioner company no.17.

6. At the very outset, a preliminary objection is raised on behalf of the aforesaid alleged contemnors with regard to the maintainability of this contempt proceeding before this court and the same is taken up for consideration.

7. It is submitted by Mr. Shakti Nath Mukerjee, learned senior advocate appearing on the behalf of the alleged contemnors, that it is the settled principles of law in respect of the doctrine of merger that the reference of the judgment of the writ application in the judgment of the Hon'ble Supreme Court is a part of judgment of the Hon'ble Supreme Court itself. According to Mr. Mukherjee, the Hon'ble Supreme Court repeatedly affirmed the principle that whenever an appeal is co-extensive with the matter before the Trial Court and the appeal has been disposed of on merits, it is the appeal Court's judgment which would prevail. It is further submitted by Mr. Mukherjee that it is the settled principles of law that the disposal of SLP does not bring about a merger because the doctrine of merger has a limited and no universal application. But at the same time this concept of limitation cannot be so widened so as to nullify the effect of a judgment delivered by the appellate court which in its scope is coextensive with the judgment of the Trial court and when the appeal has been disposed of on merit.

8. It is further submitted by him that under the guise of a contempt application the applicants are seeking payment of interest over and above what has been provided by the Hon'ble Supreme Court. Referring to the provisions section 34 of the Code of Civil Procedure, 1908, it is submitted by Mr. Mukherjee that where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit. According to Mr. Mukherjee no rate was adjudged by virtue of the judgment delivered in the writ application. According to Mr. Mukherjee pursuant to the order passed by the Hon'ble Supreme court, the refundable amount was settled together with the additional interest @9% because of non-payment of the settled amount within two months. Therefore, according to Mr. Mukherjee this proceeding is not maintainable.

9. According to Mr. Mukherjee the petitioner company no.17 did not file any claim before the authority and as a result it was not entitled to refund of the amount.

10. Mr. Mukherjee relies upon the decisions of Gour Krishna Sircar and Another Vs. Nilmadhab Saha and Others, Khatemannahsa Bibi Vs. Upendra Chandra

Mandal and Others, , Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, , J. Parihar Vs. Ganpat Duggar and others, , Mahananda Banerjee Vs. Hon"ble Hasim Abdul Halim, Speaker of West Bengal Legislative Assembly, reported in 1997(2) CHN 562, Bachhittar Singh Vs. The State of Punjab, in support of his submissions.

11. On the other hand, it is submitted by Ms. Vineeta Meharia, learned advocate appearing on behalf of the petitioner companies that the appeal preferred against the judgment in the writ application was dismissed by a Division Bench of this court. Admittedly, the appeal arising out of the aforesaid judgment was dismissed by the Hon"ble Supreme Court. Therefore, according to Ms. Meheria, the judgment delivered in the writ petition was violated by the alleged contemnors on the ground of non-payment of interest till August 10, 2011.

12. It is submitted by Ms. Meheria that in the matter of Ashoka Smokeless Supreme Court declared "e" Auction Scheme illegal and in the matter of Somal Pipes(P) Ltd. Vs. Coal India Ltd., reported in (2009) 16 SCC 721 the Hon"ble Supreme Court laid down four step measures for refund of excess amount along with interest @ 12 per cent per annum. The above direction was followed by the Hon"ble Supreme Court in a number of subsequent judgments. According to Ms. Meharia, the directions were given in the writ application following the aforesaid four step adopted by the Hon"ble Supreme Court.

13. It is further submitted by Ms. Meharia that the doctrine of merger is not a doctrine rigid and absolute application. Whether an order of Trial Court has merged in the order of the appellate Court depends upon the facts and circumstances, the nature of the order, nature of appellate jurisdiction etc. It is also submitted by Ms. Meharia that the order passed in the writ application was not modified. According to Ms. Meharia, the doctrine of merger has no manner of application in this case. According to Ms. Meharia, it was a case where the matter was carried in appeal and the Division Bench merely conformed the order without any modification. The Hon"ble Supreme Court was also not inclined to interfere with the aforesaid judgement. Therefore, it was the observations or directions recorded in the judgment of the writ application which constituted the basis for wilful disobedience or wilful breach for initiation of proceeding of contempt and in such situation it was the learned Single Judge who could take cognizance of the proceedings for contempt.

14. Ms. Meharia reliance upon the decision of State of Madras Vs. Madurai Mills Co. Ltd. reported in (1967) 1 SCR 681, Kunhayammed and Others Vs. State of Kerala and Another, and K.K.R. Nair Vs. Mohan Das and Another,

15. I have heard learned counsels appearing for the respective parties as also I have considered the facts and circumstances of this case I find that it is not in dispute that a Division Bench of this court considered the appeal arising out of the judgment delivered in the writ application on merit and dismissed the same without any modification of the judgment. It is also not in dispute that the Hon"ble Supreme Court after granting leave in connection with the SLP disposed

of the Civil Appeal on its merit with a slight modification of judgment delivered in the writ application. In the matter of Gour Krishna Sarkar(supra) a Division Bench of this High Court observed as follows:

Three points now required to be emphasised. In the first place when the Judge decided to grant the application for review, he should have recorded an order to that effect, and a note thereof, should have been made in the register under O.47, R. 8; the order should have stated clearly whether the decree was vacated in its entirety or not. In the second place, the decree in the present case must have been set aside in its entirety, though the judgment states that the review was granted on two specified grounds. There were two points in controversy, namely, first, whether the rent of the tenure was enhanceable, and secondly, if enhanceable, how should fair and equitable rent be assessed. Though the ground for granting the review, as specified in the judgment, relates only to the second of these points, it is clear that the first question also was reinvestigated. Such reconsideration would be permissible, only if the original decision had been vacated in its entirety. In the third place, the judgment concluded with an order for modification of the decree, and this language is reproduced in the decree subsequently drawn up. But, plainly, there was no decree to modify. The original decree had ceased to exist as the result of the decision of the Judge to grant the application for review. The appeal was, in fact, restored and re-opened, and if the Judge arrived at a conclusion different from what he had reached at the original hearing, the decree made was a new decree. Indeed, as pointed out by Sir Lawrence Jenkins, C.J. in *Vadilal V. Fulchand* (3), even if the Judge had adhered to his former opinion, the final decree after review would have been a new decree. (Emphasis supplied)

16. The Hon'ble Supreme Court held in the matter *Gojer Brothers*(supra) that where a decree was confirmed and the appellate court disposed of the appeal after a contesting hearing, the decree to be executed is the decree of the appellate court and not the Trial Court. The relevant portions of the above judgment is quoted below:

15. In cases where the decree of the trial court is carried in appeal and the appellate court disposes of the appeal after a contested hearing, the decree to be executed is the decree of the appellate court and not of the trial court. In *Jowad Hussain vs. Gendan Singh & Ors.*,⁽¹⁾ the Privy Council while holding that the limitation of three years within "which an application for a final decree must be made runs from the date of the decree of the appellate court, quoted with approval the statement of law contained in the judgment of a learned judge of the Allahabad High Court to the following effect : "When an appeal has been preferred, it is the decree of the Appellate Court which is the final decree in the cause".⁽²⁾ The Privy Council also adopted the statement contained in a judgment of Tudball J. to this effect : "When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred,, the final decree is the decree of the Appellate Court of final

jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties." Thus, when the decree of the court of first instance is confirmed by the High Court and the latter decree is confirmed by the Privy Council the decree capable of execution is the decree of the Privy Council. (3) In that case the decree passed by a District Judge in 1887 awarded "future mesne profit" to the plaintiff. That decree was reversed by the High Court but was confirmed by the Privy Council on May 11, 1895. When the matter came back in execution proceedings the Privy Council held that the decree which the courts had to execute was the one Passed by it in 1895 and since by that decree the District Judge's decree- was confirmed, the decree of 1895 clearly carried the mesne profits up to its own date. (Emphasis supplied)

17. Upon consideration of the judgment delivered by a Division Bench of this court in the appeal preferred by the Eastern Coal Fields Ltd in this matter I find that the same was dismissed on merit without any modification addition or alteration of the judgment delivered in the writ application. But the judgment delivered in the writ application by this court was absolved or extinguished or swallowed up following the doctrine of the merger due to the reason of considering the judgment delivered in the writ application on its merit. So far the judgment delivered by the Hon"ble Supreme Court in the Civil Appeal under reference is concerned I find the Supreme Court did not merely exercised its discretionary jurisdiction refusing to grant leave to appeal but exercised appellate jurisdiction granting leave to proceed with the civil appeal. The applicability of the doctrine of merger depends on the nature of jurisdiction exercised by the superior forum. In the instant case the superior jurisdiction, i.e. the Hon"ble Supreme Court, was capable of reversing modifying or affirming the order put in issue before it under article 136 of the Constitution of India. The above contingency was taken into consideration by the Hon"ble Supreme Court in the matter of Kunhayammed(supra) amongst other contingencies to lay down the following principles:

43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.

44. To sum up our conclusions are :-

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and SLP is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimite application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv).An order refusing special leave to appeal may be a non- speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting SLP or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C.

(Emphasis supplied)

18. Admittedly, leave was granted in the instant case and the appellate jurisdiction of the Hon"ble Supreme Court was invoked and the order passed in

appeal attracted the doctrine of merger, in view of the settled principles of law laid down by the Hon''ble Supreme Court in the above decision.

19. The decision of Kunhayammed(supra) does not help the petitioner company in view of applicability of the settled principles of law laid down by the Hon''ble Supreme Court in the above decision taking into consideration the facts and circumstances of this case as discussed hereinabove. Though the decision of K.K.R. Nair(supra) has its persuasive value before this court but upon consideration of the same I find that the above judgment was delivered taking a contrary view of the settled principles of law laid down by the Hon''ble Supreme Court as also that of this High Court. In view of the settled principles of law as discussed hereinabove, the principle, that the observations or directions originally issued by the learned Single Judge constitute the basis for wilful disobedience from wilful breach for initiation of the proceeding for contempt or the learned single judge could take cognizance of the proceeding for contempt even after conformation of those directions by a Division Bench in an appeal after consideration on merit, cannot be considered as the law of the land in view of the settled principles of law as decided by the Hon''ble Supreme Court in the decision of Kunhayammed(supra) amongst other decisions.

20. In view of the above the contempt rule issued in this matter is discharged and the contempt application is dismissed accordingly. This will not, however, prevent the petitioner companies from initiating appropriate proceedings before the appropriate forum in accordance with law as discussed hereinabove.

21. There will be, however, no order as to costs. Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.