

(2012) 10 MP CK 0167
In the Madhya Pradesh High Court
Case No : W.A. No. 33 of 2011

Shri Suprabhat Chauksey and Another	APPELLANT
Vs	
State of M.P. and Others	RESPONDENT

Date of Decision : 17-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 25, Order 41 Rule 27
Constitution of India, 1950 — Article 226, 227
Madhya Pradesh Societies Registrikaran Adhiniyam, 1973 — Section 26, 32(3)(a), 40
Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 — Section 2(1), 2(1)

Citation : (2012) 4 MPJR 137

Hon'ble Judges : Sheel Nagu, J;Brij Kishore Dubey, J

Bench : Division Bench

Advocate : Rohit Arya, with Mr. Anil Mishra, Mr. Tapan Trivedi and Mr. Purushottam Rai, for the Appellant; R.P. Rathi, Govt. Advocate for Respondent Nos. 1, 2 and 3, Mr. V.K. Bharadwaj with Mr. Anand Bharadwaj, Advocate for Respondent Nos. 6 to 8, Mr. Ravindra Dixit, Advocate for Respondent No. 9 and Mr. H.D. Gupta with Mr. Santosh Agrawal, Advocate for Respondent No. 10 and None for Respondent No. 4 and 11, for the Respondent

Judgement

Sheel Nagu, J.—This writ appeal filed u/s 2 (1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam 2005 assails the final order dated 22.11.2010 passed in W.P. No. 6019/2009 whereby while allowing the said petition the writ court has quashed the order dated 07/11/2009 of the State (Annexure P-1) by which allowing an appeal filed u/s. 40 of MP Society Registrikaran Adhiniyam 1973 (Adhiniyam for brevity) by quashing the order of the Registrar dated 19.06.2008 and remanding the matter to the Registrar for reconsideration of the issue concerned. Learned counsel for the rival parties are heard at length.

2. Since the issue involves a checkered history it would be apt to deal with the factual matrix of the case in chronological manner;-

3. On the anvil of the abovesaid factual matrix, this Court is required to decide the legality, validity and propriety of the impugned order passed by the learned Single Judge, whereby the order of the State Government dated 07.11.2009 has been quashed.

4. The State Government while passing the order dated 07.11.2009 in exercise of its powers u/s 40 of the M.P. Society Registrickaran Adhiniyam, set aside the order of the Registrar dated 19.06.2008 and remanded the matter for reconsideration by the Registrar after perusal of relevant documents for adjudication of the dispute of the Society relating to the membership.

5. While arriving at the decision dated 07.11.2009, the State Government assigned the following two reasons:-

i) It appears that the High Court while passing the final order dated 31.01.2008 in WP No. 545/2008 was not made aware of the fact that on the request of the Society in its letters dated 14.01.2008 and 18.01.2008 for conducting Elections under the supervision of Assistant Registrar, the said authority (Assistant Registrar) had declined the said request by its letter dated 25.01.2008 for the reason that the power to appoint an Election Officer for conduction of Election is vested not with the Assistant Registrar but with the Registrar/State Government.

(ii) The Registrar before rejecting the appeals on the ground of want of record ought to have first recorded a finding that availability of record is not sufficient to decide the point involved in the matter despite exercise of due diligence.

6. On the other hand, a perusal of the order of Registrar dated 19.06.2008 reflects that the rejection of the appeals, apart from the appeal of Rajiv Gupta, which was rejected on the ground of want of prosecution, the reason assigned by the Registrar was failure of the appellants to produce the record in support of their claim, Thus, the Registrar in fact did not deal with the dispute about membership of the Society on merits and rejected the appeals for want of record.

7. The earlier round of litigation, which commenced with filing of WP No. 545/2008 and culminated in passing of the order dated 13.05.2008 in WA No. 244/2008, resulted into the findings and direction rendered by the Division Bench forming the foundation for the Registrar to adjudicate and decide the appeal pending before it against different orders passed by the Assistant Registrar on 19.03.2008 (publication of final voters list after deleting the name of Suprabhat Chouksey) and the order dated 29.03.2008 (holding elections to the governing body of the Society by the Assistant Registrar). Importantly, the Division Bench while deciding WA No. 244/2008 upheld the order of the learned Single Judge passed on 20.07.2008 in WP No. 1438/2008, but to allow elbow-room to the Registrar to decide the appeals observed that the Registrar will not be influenced by the orders passed by this Court from time to time while deciding the appeals in accordance with law, rules and bye-laws of the Society. The Division Bench further held that in case the Registrar comes to the conclusion that Elections held by the Assistant Registrar on 29.03.2008 are not in

accordance with law, then the Registrar is free to pass appropriate order directing the Assistant Registrar to hold fresh Elections so that the functioning of the Society is maintained on democratic principles.

8. The Registrar, as seen above, failed to decide the appeals on merits and by its order dated 19.06.2008 dismissed the appeals primarily on the ground of the appellants having failed to produce any records to substantiate their claim and that the orders under challenge in appeal, i.e., dated 12.03.2008 and 19.03.2008, were interim in nature not having any effect on the Elections conducted on 29.03.2008.

9. The finding recorded by the Registrar in its order dated 19.06.2008 that the orders dated 12.03.2008 and 19.03.2008, which was assailed in the appeals are interim in nature and, therefore did not have any effect on the Elections held on 29.03.2008, is erroneous. The Elections dated 29.03.2008 were based solely upon the final voters list published on 19.03.2008 and also the earlier exercise dated 12.03.2008 by which the objections were invited to the provisional voters list. In case, the orders dated 12.03.2008 and 19.03.2008 were found by the Registrar to be bad, then the Elections held on 29.03.2008 would necessarily become ipso facto null and void.

10. The other reason assigned by the Registrar in its order dated 19.06.2008 of non-availability of records is further not tenable in view of ample powers vested in the Registrar under Sections 26 and 32 (3) (a) of the Adhiniyam to summon the record from the Society, which could have been exercised by the Registrar for deciding the dispute about membership, on merits. The Registrar not having done so, failed to exercise the jurisdiction vested in it.

11. In the background of the abovesaid dual reasons assigned by the Registrar, the State Government, while testing the validity, legality and propriety of the order of Registrar, remanded the matter for reconsideration after setting aside the order of the Registrar dated 19.06.2008 with the observations that relevant record should be examined before deciding the dispute of membership.

12. The reason assigned by the State in its order dated 07.11.2009 of non-availability of record and the failure of the Registrar to find out as to whether due diligence had been exercised by the appellant or the opposite party in producing the record before dismissing the appeal, cannot be said to be unreasonable. Every dispute deserves to be decided on merits, is a salutary principle deserving strict adherence while undertaking the exercise of adjudication by judicial or quasi-judicial authorities. Thus, the said reasons assigned by the State while setting aside the order of the Registrar of non-availability of the record, cannot be found fault with.

13. So far as the other reason, assigned by the State that the High Court while deciding WP No. 545/2008 having not been informed about the earlier decision of the Assistant Registrar of having declined the request of Society to hold Elections for want of jurisdiction, is concerned, this Court is of the considered view that

this reason is irrelevant to the issue involved in the present matter.

14. The State, in the very first place, had no authority to go behind the order of the High Court passed in WP No. 545/2008 and to base its conclusion on a presumption which did not lie within its domain. By observing that the High Court was not informed of a certain factual situation while deciding WP No. 545/2008, the State impliedly meant that if the factual situation as contained in para 5 (1) of order dated 07.11.2009 was known to the High Court, then the result of WP No. 545/2008 could have been different. This attempt on the part of the State of doubting the correctness of the order passed in W.P. 545/08 despite having failed to successfully assail the same, borders on contempt.

15. Learned Single Judge while passing the impugned order has primarily been persuaded to take the view for the following reasons:-

(i) The order of the State Government dated 07.11.2009 was politically motivated as one of it's Ministers had recommended/directed in the note-sheet, while the appeals were pending before the State Government, that stay should be granted in favour of the appellants; and

(ii) Testing the order of the Assistant Registrar and the Registrar dated 19.06.2008 on the anvil of the principle of proportionality, no fault could be found.

(iii) The order of remand of the State Government dated 07.11.2009 was not in accordance with the law laid down by the Apex Court in the case of Municipal Corporation for Greater Bombay Vs. Lala Pancham of Bombay and Others, whereby the Apex Court while adjudicating the order of remand in context of Order 41 Rule 27 of C.P.C. held that remand can not be for purpose of fresh trial, and since the State Government by its order dated 07.11.2009 without considering the merits remanded the matter to the Registrar for a fresh inquiry, the said order of the State Government is unsustainable.

16. As regards, the ground of the order of the State Government dated 07.11.2009 being politically motivated is concerned, the record indicate that the Minister for Commerce, Industry and Employment, Information Technology, Science and Technology, Public Undertakings, Village Industry and Parliamentary Affairs on a note sheet directed for grant of stay till final decision in the appeal preferred against order dated 19.06.2008 of the Registrar and for issuance of order for the erstwhile undisputed Governing Body to manage and run the affairs of the society till the final decision in the appeal. Subsequently, it appears that when the said note sheet reached the Principal Secretary, Industries the said officer on 02.02.2009 (vide page 20 of the writ appeal) clarified the legal position by opining that the direction of the Minister can not be given effect to in view of the expiry of the term of three years of the erstwhile Governing Body/Managing Committee, specially when fresh elections have already been held on 29.3.2008 by the Assistant Registrar pursuant to the directions of the High Court. The Principal Secretary further noted that since the Registrar has rejected all the

appeals by order dated 19.06.2008, passing of any direction for grant of stay as directed by the Minister may not be appropriate. The Minister thereafter appears to have endorsed the above said opinion of the Principal Secretary, Industries which is evident from the signatures appended by the Minister immediately below (vide page 205 of WA) the noting of the Principal Secretary. The above said note sheet of the Principal Secretary dated 02.02.2009 clearly indicates that the element of political interference that may have existed due to the Minister having directed for grant of stay, evaporated after the said Minister concurred with the contrary opinion of the Principal Secretary Industries. Moreover, if the element of political interference would have categorically influenced the State Government, the State could have very well allowed the appeals on merits which it did not and rather adopted a reasonable approach of remand after finding that the record was not perused by the Registrar before rendering the order dated 19.06.2008. Therefore, it appears that the element of political interference did not have any effect on the decision making process of the State while passing the order dated 07.11.2008.

17. The second ground of passing the impugned order invoked by the learned Single Judge is the principle of proportionality by placing reliance on the decision of the Apex Court in the case of *Chairman, All India Railway Rec. Board and Another Vs. K. Shyam Kumar and Others*, . In the said decision, the Apex Court dealing with the fact situation where in the face of three alternatives held that in the given facts of circumstances the choice of one of the three alternatives, made by the appointing authority, right balance was struck and therefore, there was no need to interfere in the administrative decision taken by the appointing authority by applying the test of proportionality, for the obvious reason that the choice of the authority was a reasonable one which could have been taken by a man of ordinary prudence in the attending factual matrix with no occasion arising of breaking a nut with a sledge hammer.

18. Testing the factual matrix of the instant case on the anvil of the above said law laid down by the Apex Court concerning the principle of proportionality, It is noteworthy that the Suite while passing the order dated 07.11.2009 was not faced with several alternatives. The State was testing the legality and propriety of the order of the Registrar dated 19.06.2008 as an appellate authority exercising its power u/s 40 of the Adhiniyam and the three alternatives available to the State were either to take upon itself the adjudication of the dispute on merits or to remand the matter to the Registrar for doing so or to dismiss the appeals by upholding the order of Registrar. The State chose the second alternative of remanding the matter to the Registrar for hearing on merits after perusal of the record. The choice of the State of remanding the matter, was reasonable. The Registrar admittedly without ensuring production of the record either of the parties or by exercising his statutory powers under Sections 26 or 32 (3) (a) of the Adhiniyam, dismissed the appeals, thereby rendering decision unsustainable while the State by passing the order dated 07.11.2009 intervened by ordering a remand to correct the mistake of the Registrar who had failed to

exercise his jurisdiction vested in him, and therefore, no fault can be found with the order passed by the State especially when tested on the anvil of the judicial review under Article 226 of Constitution of India which was exercised by the writ Court while passing the impugned order. The power of judicial review can be, or rather ought to be exercised where the authority whose order is under challenge decides the matter without ensuring that the record is available and also without looking into the record. Thus, the order of the Registrar was obviously unlawful and the said illegality was set right by the State by remanding the matter for consideration. The fact of the State not deciding the matter at its own level on merits cannot be questioned, as the State was well within its powers under its appellate jurisdiction vested in it u/S. 40 of the Adhiniyam to either remand or to consider on merits, and the action of the State to chose the former alternative is unassailable, under Article 226 of Constitution of India.

19. The decision of the Apex Court referred to by learned Single Judge in the case of the Municipal Corporation Greater Bombay (supra) relates exclusively to Order 41 Rule 27 of CPC which relates to production of additional evidence before the Appellate Court. Importantly the Order 41 Rule 27 CPC does not relate to remand and merely empowers the Appellate Court to allow production of additional evidence which could not be produced before the lower Court, for proper adjudication of the matter by the Appellate Court. The Apex Court, in fact, while passing the judgment in the case of Municipal Corporation Greater Bombay (supra) set aside the order of the High Court by which fresh trial was directed after remitting the case to the Lower Court with direction to receive additional evidence. The Apex Court in this factual situation held that the High Court/Appellate Court was wrong in directing for fresh trial by remanding the case since such a course is not permissible under Order 41 Rule 27 CPC. The Apex Court further found that the High Court while passing the impugned order had not proceeded under Order 41 Rule 25 CPC which in fact relates to remand by the Appellate Court when it comes to the conclusion that the lower Court had omitted to frame or try any issue or to determine any question of fact which appears essential to the right decision of the case upon merits. Thus, the case before the Apex Court was essentially under Order 41 Rule 27 CPC and not under Order 41 Rule 23 or 25 CPC. Therefore, the ratio laid down by the Apex Court in the case of Municipal Corporation Greater Bombay (supra) relates to Order 41 Rule 27 CPC and not in respect of Order 41 Rule 23 or 25 CPC and thus its presidential value is confined to Order 41, Rule 27 CPC.

20. It is noteworthy that the order of remand under Order 41 Rule 23 or 25 CPC can be passed only after the Appellate Court considers the matter on merits. The order of the State when tested on the anvil of the principle of remand enshrined in Order 41 Rule 23 or 25 CPC, reveals that the State in Para 5 has rendered its findings in Clause (1) (2) (3) of Para 5 of the order dated 07.11.2009, after noting the factual scenario attending the case and the submissions of the rival parties. From the reading of the findings rendered in para-5 (1) (2) (3) of the order dated 07.11.2009, it cannot be said that the State has not considered the

merits of the matter. The order for remand after quashing the order of the Registrar dated 19.6.2008 has been passed by the State after considering the matter on merits, no matter how brief it may be. Thus, the decision of the Apex Court in the case of Municipal Corporation Greater Bombay (supra) which essentially relates to the power of Appellate Court under Order 41 Rule 27 CPC and not to the power of remand under the Order 41 Rule 23 or 25 CPC, is not applicable to the instant case and, therefore, the reliance placed on the said decision of the Apex Court by the learned Single Judge is misplaced to that extent.

21. This Court will be failing in its duty, if the submission of the learned counsel for the respondent regarding the effect the Elections held in the year of 2011 has over, the outcome of this litigation, is not considered. It is stated at the Bar by the learned/counsel for the respondents that fresh elections to the Managing Committee/Governing Body of the Society have again been held in the year 2011 after expiry of three years tenure since the last election was held in the year 2008 which is the subject matter herein. Admittedly, the present case relates to the election held in the year 2008 in terms of the directions passed by the Division Bench of this Court while deciding W.A. No. 244/08 on 13.5.2008 whereby the Division Bench had while upholding the order of the Single Bench passed in W.P. No. 1438/08, extended liberty to the Registrar to decide the appeals pending before it with the observation that in case the Registrar after hearing the appeals comes to the conclusion that elections held by the Assistant Registrar are not in accordance with law or illegal then Registrar may pass appropriate orders by directing the Assistant Registrar to hold fresh elections within a period of two months from the date of order to ensure the functioning of the Society on democratic principles.

22. It is undisputed that the said order of Division Bench dated 13.5.2008 passed in W.A. No. 244/08 has attained finality and has binding effect on all concerned, as none of the parties have assailed the said judgment. As the Division Bench afforded liberty to decide the appeals as well as to hold fresh election, accepting the objection of the election of the year 2011 having been held, would not only nullify the directions of Division Bench but would also be against the doctrine of *lis pendens*. Resultantly, this objection of respondents pales into insignificance.

23. The learned counsel for the respondents has raised another objection of maintainability of this writ appeal by contending that since the order of the learned Single Judge is an order passed under Article 227 of the Constitution of India, no writ appeal would lie in view of the bar contained in Section 2(1) of the Madhya Pradesh Uchha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam 2005. A perusal of the impugned order of the learned Single Judge indicates that W.P. No. 6019/09 was titled as petition under Article 226 of the Constitution India and primarily prayed for writ of mandamus or any other suitable writ including writ of certiorari for quashment of the order of State dated 07.11.2009. Article 227 of Constitution of India does not relate to or empowers the High Court to

issue any kind of writ but merely bestows the High Court with the power of superintendence over Subordinate Courts and Tribunals situated within its territorial jurisdiction. Further, the learned Single Judge while passing the impugned order has quashed the order of the State dated 07.11.2009 by issuing writ of certiorari while exercising original writ jurisdiction. Thus, by no stretch of imagination the impugned order of the learned Single Judge can be termed as an order passed under Article 227 of Constitution, thereby rendering the present writ appeal maintainable.

24. The decision of Full Bench of this Court in the case of Dr. Jaidev Siddha and Others Vs. Jaiprakash Siddha and Others, cited by the learned counsel for the respondents is of no avail to the petitioner since W.P. No. 6019/09 was a petition under Article 226 of the Constitution, not only in form but also in substance without even an iota of suggestion of supervisory jurisdiction under Article 227 of the Constitution being sought to be invoked.

25. In view of the above said conspectus of facts and legal position, this Court is of the considered view that the order of the State dated 07.11.2009 is sustainable while the impugned order of the learned Single Judge passed in W.P. No. 6019/2009 on 22.11.2010 is unsustainable.

26. Accordingly, this writ appeal deserves to be and is hereby allowed and the order of the learned Single Judge dated 22.11.2010 passed in W.P. No. 6019/2009 is hereby set aside. In the facts and circumstances of the case, there shall be no order as to costs.