
(2013) 03 AHC CK 0237

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 10384 of 2013

Smt. Urmila Jaiswal

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 04-03-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (2013) 4 ADJ 205 : (2013) 4 ALJ 388 : (2013) 3 AWC 3068 : (2013) 119 RD 437

Hon'ble Judges : Ashok Bhushan, J; Abhinava Upadhyaya, J

Bench : Division Bench

Advocate : S.S.P. Gupta and Anil Pandey, for the Appellant; Akhilesh K. Dwivedi, for the Respondent

Final Decision : Allowed

Judgement

1. Heard learned counsel for the petitioner, Shri Ramesh Rai, learned counsel for the respondent No. 4 and learned Standing Counsel for the respondent Nos. 1 to 3. By this writ petition, the petitioner has prayed for quashing the order dated 28.12.2012 passed in the review application filed by the respondent No. 4 as well as the consequential order dated 12.2.2013 restoring the supply of respondent No. 4.

2. We have heard learned counsel for the parties.

3. The issue which has been raised for consideration in the petition is legal in nature, therefore, with the consent of the parties, the writ petition is being finally disposed of at the stage of admission.

4. The brief facts of the case as on record are that the respondent. No. 4 was allotted fair price shop of Gram Phulwariya. He has been running his shop since 1993. By order dated 26.2.2011, the fair price shop of the respondent No. 4 was

cancelled. Against the said order, the respondent No. 4 filed an appeal being appeal No. 90/88/173/G-2011, which appeal was also dismissed by the Commissioner on 13.4.2012. After the appeal was dismissed by the Commissioner on the basis of resolution of Gaon Sabha dated 20.9.2012, fresh allotment was made in favour of petitioner Smt. Urmila Jaiswal by order dated 12.10.2012. The respondent No. 4 after dismissal of his appeal has filed a review application on 1.6.2012, which review application was allowed by order dated 28.12.2012 and the matter was remitted to District Supply Office for passing a fresh order. After the order of the Appellate Authority dated 28.12.2012, the District Supply Officer has passed an order on 12.2.2013 by which fair price shop agreement of respondent No. 4 was restored, Consequently, the petitioner's fair price shop agreement was cancelled.

5. The petitioner has come up in the writ petition challenging the order of the Commissioner dated 28.12.2012 allowing the review application as well as the consequential order dated 12.2.2013.

6. Learned counsel for the petitioner challenging the aforesaid orders contended that the Commissioner having once dismissed the appeal by order dated 13th April 2012, had no authority or jurisdiction to review the order and pass subsequent order on 28.12.2012, which is without jurisdiction and all the consequential proceedings are vitiated accordingly. He has submitted that the appeal of the Commissioner is provided under Clause 28 of U.P. Scheduled Commodities Distribution Order, 2004, and there is no provision for review nor any such power has been conferred on the Appellate Authority. He submits that statute having not conferred any power of review on the commissioner, the review application could not have been entertained, therefore, the orders passed are without jurisdiction.

7. Learned counsel for the petitioner has placed reliance on Full Bench judgment of this Court in Smt. Shivraji (Decd.) through L.Rs. and Others Vs. Dy. Director of Consolidation and Others, ; Sudha Sharma Vs. State of U.P. and Others, and Division Bench judgment of this Court in Syed Madadgar Husain Rizvi and Tulsiani Construction and Developers Limited Vs. State of Uttar Pradesh and Others, .

8. Sri Ramesh Rai, learned counsel for the respondent No. 4 refuting the submission of the petitioner contended that the petitioner has no locus to challenge the orders passed by the Commissioner in review being subsequent allottee. It is submitted that the review application was entertained and pending on the date when allotment was made in favour of the petitioner. Hence, the petitioner has no right or locus to challenge the orders. It is further submitted that the Appellate Authority has inherent power to correct the earlier order on 13.4.2012. He submits that every judicial or quasi-judicial authority has inherent power to correct the mistake. It is further submitted that setting aside the order dated 28.12.2012 has resulted in restoration of earlier order dated 13.4.2012, which was an illegal order. Hence, this Court shall not exercise its discretion in

setting aside the order of the Appellate Authority even though the same may be without jurisdiction. The result of which is to restore the illegal order.

9. Shri Ramesh Rai has placed reliance on the judgment of the Apex Court in Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., . In support of his argument that petitioner has no locus he has placed reliance on a Division Benches judgments in Smt. Kesari Devi Vs. State of U.P., Commissioner, Allahabad Division, Collector/Distt. Magistrate and Chief Development Officer/ Mukhya Adhikari, ; Desh Raj v. State of U.P., 2010 (3) ADJ 685; Amin Khan Vs. State of U.P. and Nirmala Verma, . In support of his submissions that quashing the order dated 28.12.2012, an illegal order shall revive. He has placed reliance on the Apex Court judgment in Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others, .

10. We have considered the submissions of the learned counsel for the parties and have perused the record.

11. Against an order cancelling the fair price shop agreement, the appeal is contemplated in Clause 28 of the 2004 Order (hereinafter referred to as "Order 2004"). Clause 28 of the Order 2004 is quoted below:

28. Appeal--(1) All appeal shall lie before the concerned Divisional Commissioner who shall hear and dispose of the same may by order delegate his/her powers to the Assistant Commissioner Food for hearing and disposing of the appeal.

(2) Any person aggrieved by an order of the Food Officer or the designated authority refusing the issue or renewal of a ration card or cancellation of the ration card may appeal to the Appellate Authority within thirty days from the date of receipt of the order.

(3) Any agent aggrieved by an order of the competent authority suspending or cancelling agreement of the fair price shop may appeal to the Appellate Authority within thirty days from the date of receipt of the order.

(4) No such appeal shall be disposed of unless the aggrieved person or agent has been given a reasonable opportunity of being heard.

(5) Pending the disposal of an appeal the Appellate Authority may direct that the order under Appeal shall not take effect until the appeal is disposed of.

12. Against an order suspending or cancelling the fair price shop agreement, the appeal is contemplated within 30 days. The provision further contemplates that no appeal shall be disposed of unless the aggrieved person or agent has been given a reasonable opportunity of being heard. Power of granting interim order has also been given under Clause 28 of the Statute.

13. In the present case appeal was filed by the respondent No. 4 against an order dated 26.2.2011 by which fair price shop agreement of the respondent No. 4 was cancelled by District Supply Officer. The appeal was dismissed on 13.4.2011 after hearing the respondent No. 4 by detailed order, copy of which

has been annexed as Annexure-2 to the writ petition. The Appellate Authority has placed reliance on the Government Order dated 17th August 2002 and has held that the appellant being not resident of village phulwariya, his fair price shop agreement was rightly cancelled by the District Supply Officer.

14. Now the question which is to be answered as to whether the Appellate Authority can review its order since the respondent No. 4 has filed the review application dated 1.6.2012 taking various grounds of review and one of the ground was that the Government Order issued on 17th August 2002 was not attracted on the respondent No. 4. The Commissioner heard the review on merits and had passed an order allowing the review application and setting aside the earlier order of cancellation. The Order 2004 does not contain any provision empowering the Appellate Authority to review its order. There is no dispute that the Appellate Authority has exercised the quasi-judicial power. The Full Bench relied by the learned counsel for the petitioner in Smt Shivraji (Supra) has laid down following proposition of law. Para 35 of the said judgment is quoted below:

35. Any tribunal exercising judicial or quasi-judicial power, which is not vested with power of review under the statute expressly or by necessary implication, has an inherent power of review of its previous order in any circumstances. In our view the decisions only lay down the proposition that a tribunal exercising judicial or quasi judicial power has the inherent power to correct a clerical mistake or arithmetical error in its order and has the power to review an order which has been obtained by practising fraud on the Court, provided that injustice has been perpetrated on a party by such order. Therefore, these decisions should not be construed as laying down any proposition of law contrary to the well-settled principle of law that any order delivered and signed by a judicial or quasi judicial authority attains finality subject to appeal or revision as provided under the Act and if the authority passing the order is not specifically vested with power of review under the statute, it cannot reopen the proceeding and review/revise its previous order.

15. The Full Bench held that any Tribunal exercising judicial or quasi-judicial power, which is not vested with power of review under the Statute expressly or by necessary implication, has no power of review except an inherent power to correct the clerical mistake or to correct the order, which has been obtained by practising the fraud on the Court.

16. A Division Bench judgment in Sudha Sharma (supra) as well as Syed Madadgar Husain Rizvi (supra) lays down the same principles. The Division Bench has held that a quasi judicial authority is not permitted to review its order unless it is so expressly conferred by the Statute itself.

17. The Apex Court in Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, , had occasion to consider the issue as to whether the Vice-Chancellor of a University under the provisions of U.P. State Universities Act, 1973 has power of review. The Vice-Chancellor had passed an

order on 24.1.1987 disapproving the order of dismissal of the appellant. Subsequently, the Vice-Chancellor had review the said order on 7.3.1987. While considering the aforesaid case, following was laid down by the Supreme Court in paragraph 11:

It is now well established that a quasi-judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The Vice-Chancellor in considering the question of approval of an order or dismissal of the Principal, acts as a quasi-judicial authority. A is not disputed that the provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power on the Vice Chancellor. In the circumstances, it must be held that the Vice-Chancellor acted wholly without jurisdiction in reviewing her order dated January 24, 1987 by her order dated March 7, 1987. The said order of the Vice-Chancellor dated March 7, 1987 was a nullity.

18. The Apex Court in *Kapra Mazdoor Ekta Union Vs. Management of Birla Cotton Spinning and Weaving Mills Ltd. and Another*, , had again considered the power of review. The Tribunal had reviewed its earlier award dated 12.6.1987. The matter was taken to the High Court, which held that in absence of an express provision in the Industrial Disputes Act, Tribunal could not review its earlier award. The matter was taken to the Apex Court, where one of the submission raised was that even in the absence of an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. Rejecting the submissions following was laid down in paragraphs 17 and 18:

17. The question stilt remains whether the Tribunal had Jurisdiction to recall its earlier "Award dated June 12, 1987. The High Court was of the view that in the absence of an express provision in the Act conferring upon the Tribunal the power of review the Tribunal could not review its earlier Award The High Court has relied upon the judgments of this Court in *Dr. (Smt) Kuntesh Gupta v. Management of Hindu Kanya Maha Vidyalaya, Sitapur (U.P.) and others* and *Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji*, , wherein this Court has clearly held that the pouter of review is not an inherent power and must be conferred by law either expressly or by necessary implication. The appellant sought to get over this legal hurdle by relying upon the judgment of this Court in *Grindlays Bank Ltd. v. Central Government Industrial Tribunal and others* (supra), In that case the Tribunal made an ex parte Award Respondents applied for setting aside the exparte Award on the ground that they were prevented by sufficient cause from appearing when the reference was called on for hearing. The Tribunal set aside the ex parte Award on being satisfied that there was sufficient cause within the meaning of Order 9 Rule 13 of the CPC and accordingly set aside the ex parte Award. That order was upheld by the High Court and thereafter in appeal by this Court.

18. It was, therefore, submitted before us relying upon *Grindlays Bank Ltd. v. Central Government Industrial Tribunal and others* (supra) that even in the

absence of an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. The submission must be rejected as misconceived. The submission does not take notice of the difference between a procedural review and a review on merits. This Court in *Grindlays Bank Ltd. v. Central Government Industrial Tribunal and others* (supra) clearly highlighted this distinction when it observed:

Furthermore, different considerations arise on review. The expression "review" is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a Court or Tribunal to set aside a palpably erroneous order passed under a mis-apprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Court in *Patel Narshi Thakershi* case held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process, and such power inheres in every Court or Tribunal.

19. Again in *Kalabharati Advertising Vs. Hemant Vimalnath Narichania and Others*, , the power of review in the absence of statutory provisions was considered by the Apex Court. Following proposition was laid in paragraph Nos. 12, 13 and 14:

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.

20. From the proposition of law as laid down in the above cases, it is well established that unless the Statute/Rule permit, the review application is not maintainable in case of judicial/quasi judicial orders. In Order 2004, no power of review has been expressly provided nor such power can be read by implication. The Commissioner after dismissing the appeal filed under Clause 28 of Order 2004 has entertained the review application on merits and had allowed the review on merits.

21. The submission on which Shri Rai has much emphasised is that every quasi-judicial or judicial authority has inherent power to correct the mistake. He. has placed reliance on para 23 of the Indian Bank v. M/s Satyam (Supra). The Apex Court laid down following proposition of law in paragraph 23, which is quoted below:

Since fraud affect the solemnity, regularly and orderliness of the proceedings of the Court and also amounts to an abuse of the process of Court, the Courts have been held to have inherent power to set aside an order obtained by fraud practised upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order.... The Court has also the inherent power to set aside a sale brought about by fraud practised upon the Court (Ishwar Mahton and Another Vs. Sitaram Kumar and Others,) or to set aside the order recording compromises obtained by fraud, (Bindeshwari Pd. Chaudhary Vs. Debendra Pd. Singh and Others, ; Tara Bai Vs. V.S. Krishnaswamy Rao,).

22. The proposition of law laid down by the Apex Court in the aforesaid case is that every judicial or quasi-judicial authority has power to set aside the order obtained by fraud practised upon that Court or where the Court is misled by the party and the Court itself commits a mistake which prejudices a party. Emphasis has been laid by the learned counsel for the respondent on the phrase "the Court itself commits a mistake".

23. Learned counsel for the respondent No. 4 submits that the appeal filed under Clause 28 was decided by the Commissioner on 13.4.2012 and was decided after hearing the respondent No. 4 who was the appellant. In deciding the appeal it cannot be said that Appellate Authority has committed any mistake. A decision of the authority--rendered after appreciation of evidence and hearing submission of the parties, even if, on appreciation of evidence and material, two views are possible, the said decision cannot be said to have suffered from mistake. The Government order on which reliance has been placed was considered and even if the decision may be held to be erroneous on interpretation of the Government Order or precision of the fact that exercise shall not be turn to be a mistake committed by the Court. The word "mistake" has been defined in Law Lexicon, which is as follows:

Mistake. An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, or a belief in the present existence of a thing material to

the contract, which does not exist; some intentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence; in a legal sense, the doing of an act under an erroneous conviction, which act, but for such conviction would not have been done.

Misapprehension as to the existence of a thing, arising either from ignorance or from a false belief on the point.

24. The submission of the learned counsel for the respondent No. 4 that the Court committed a mistake in passing an order on the appeal, thus cannot be accepted.

25. Thus, from the proposition of law as noted above, it is clear that when the Statute does not confer any power of review expressly or by necessary implication the power of review cannot be inherent. The distinction which is sought to be raised by the counsel for the respondent No. 4 that a mistake was said to be corrected by Commissioner under the inherent power is not acceptable. The Commissioner expressly exercised the power of review and allowed the review application vide order dated 28.12.2012, which is beyond his jurisdiction.

26. Now much emphasis was laid by the learned counsel for the respondent No. 4 that the petitioner has no locus to challenge the order. He submits that the petitioner was the subsequent allottee and he has no authority to challenge the order restoring the fair price shop agreement. The facts as has been brought on record clearly indicate that the fair price shop agreement of the respondent No. 4 was cancelled on 26.4.2011. The appeal filed against the said order was dismissed by the Commissioner on 13.4.2012. After dismissal of the appeal, the shop was clearly vacant and thereafter resolution was passed in favour of the petitioner for allotment of the shop and allotment was made on 12.10.2012. The submission of the respondent No. 4 is that the petitioner was a subsequent allottee and since the review was entertained on 1.6.2012 the petitioner had no rights cannot be accepted. Admittedly, not even interim order was passed on the review application. We having found that there is no power of review. The proceedings of review were clearly without jurisdiction. Thus, petitioner has right on the basis of the resolution of the Gaon Sabha dated 12.10.2012 and he has every locus to challenge the order dated 28.12.2012 and consequential orders thereafter.

27. Learned counsel for the respondent No. 4 has placed reliance on a Division Bench judgment in *Kesari Devi v. State of U.P.* (Supra). In the said judgment the Court considered the word "person aggrieved". The Upadhyaksha of Zila Panchayat was held to be not necessary party and having no locus. The said case is clearly distinguishable. Since in the present case the petitioner allotment of fair price shop agreement was made after dismissal of the appeal. The said case does not help the respondent No. 4 in the present circumstances.

28. Learned counsel for the respondent No. 4 has placed reliance on the

judgment of *Desh Raj v. State of U.P.*, 2010 (3) ADJ 685. In the said case the subsequent allottee who was allotted the shop after cancellation of the agreement was held to have no locus to challenge the subsequent order. There cannot be any dispute to the proposition as laid down in the above case, but in the present case the appeal against the cancellation order was dismissed and the shop of the respondent No. 4 was restored on the basis of review order which was without jurisdiction. The said case is clearly distinguishable and not applicable.

29. Another judgment is *Sri Pal Yadav v. State of U.P. and others*, 2008 (1) ADJ 718, where on account of cancellation of fair price shop of respondent, the petitioner of that writ petition was allowed to run the shop as stop-gap arrangement during the pendency of the appeal. The license was restored. Hence, the petitioner has no locus of being heard. There cannot be any dispute to above proposition. But facts of the present case are different since the allotment was made in favour of the petitioner when appeal was dismissed and the shop has been restored on the basis of the review order which is held without jurisdiction.

30. Last submission of the respondent No. 4 is that this Court shall not quash the order dated 28.12.2012 of the Commissioner since the consequences of the order would be revive an earlier order dated 13.4.2012, which is an illegal order.

31. In *Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar and others* (Supra) the compensation was determined to the appellant and thereafter on a redetermination additional compensation was paid. The member of Board of Revenue took a suo motu action and reopen the compensation. Consequently a notice was issued for refund of the compensation. Challenging the action it was contended by the petitioner on that petition that Board of Revenue has no jurisdiction to pass any order and only an appeal should have been filed in the said context. The Apex Court laid down following in paragraph 15 and 37.

15. Therefore, in view of the above ratio laid down by this Court, we hold that even if the Member of Board of Revenue had no power to issue direction for giving notice for refund of the excess amount paid, no exception can be taken to the said order if it is not found that legally the appellant was paid excess compensation under the Act.

37. For what has been stated above we hold that the order of the learned Member of Board of Revenue directing the action to be taken for refund of the excess compensation was valid and proper though he had no jurisdiction to pass the order. In the event it is set aside it would amount to reviving an invalid order of payment of excess compensation to the appellant.

32. The Apex Court in the said case held that the order of the Board of Revenue, even if, without jurisdiction cannot be set aside since the consequences would be that there will a revival of invalid order of payment of excess compensation to the appellant. The determination of compensation was made under Bihar Land

Reforms Act, 1950. It was held by the Apex Court that excess payment was paid to the appellant and payment of compensation was clearly against the statute. Hence, the Apex Court held that the order although without jurisdiction would not have been reviewed. Present is the case where it cannot be said that the order of the Commissioner earlier deciding the appeal on 13.4.2012 was illegal or without jurisdiction. Counsel for the respondent No. 4 contended that Commissioner has wrongly interpreted the Government Order dated 17th August 2002 and applied the same, After referring the Government Order the Commissioner has taken one view of the matter, which cannot be said to be without jurisdiction or illegal. We make it clear that in this writ petition since the order passed by the Commissioner on 13.4.2012 has not been challenged nor we are required to express any opinion on the merits of the said order, hence, we refrain ourselves in expressing any opinion on correctness or otherwise of the said order on merits.

33. We confine ourselves to the issue that subsequent order of the Commissioner reviewing the order being without jurisdiction, all consequential proceedings falls on the ground. We leave it open to the respondent No. 4 to question the order dated 13.4.2012 in appropriate proceedings.

34. With the above observations, the writ petition is allowed. The order dated 28.12.2012 passed on the review application by the respondent No. 2 as well as the consequential order dated 12.2.2013 passed by the respondent No. 3 are set aside.