

(2017) 02 AHC CK 0056
In the Allahabad High Court
Case No : Company Appeal No. 2 of 2017

Sri Durga Bansal Fertilizer Ltd.	Vs	APPELLANT
Zaitek Polyblends Pvt. Ltd.		RESPONDENT

Date of Decision : 10-02-2017

Acts Referred:

Companies Act, 1956 — Section 433

Citation : (2017) 3 ADJ 307

Hon'ble Judges : Amreshwar Pratap Sahi and Hon''ble Sanjay Harkauli, JJ.

Bench : Division Bench

Advocate : Devendra Mohan Shukla, Advocate, for the Appellant; Shraddha Agarwal, Rajesh Kumar Verma and Shailendra Srivastava, Advocates, for the Respondent

Final Decision : Allowed

Judgement

1. Heard Shri Ashish Chaturvedi, learned Senior counsel for the appellant, Ms. Shraddha Agarwal, learned counsel for the first respondent, Shri Shailendra Srivastava, learned counsel for the respondent no.2 - Official Liquidator and Shri R.K. Verma, learned counsel for the respondent no.3.

This appeal under Section 483 of the Companies Act, 1956 has been filed contending that the learned Single Judge has proceeded to reject the recall application on the principles of a review application which does not appear to be the correct approach inasmuch as a recall application has to be dealt with on different principles.

2. The learned Single Judge, according to the appellant, has relied on the judgement relating to the principles of review which was not applicable more so when the learned Single Judge himself has recorded that the application is for a recall application for the order dated 22.7.2014.

The contention of the appellant is that the order dated 22.7.2014 is ex parte and consequently, it deserved to be recalled.

3. The order dated 22.7.2014 had proceeded to observe that since the Official Liquidator had been appointed, therefore, there was no need to pass an interim order.

4. Learned counsel for the parties are at variance on the issue that debts have been admitted, but that is a matter to be considered by the learned Company Judge himself.

5. Learned counsel for the appellant submits that the entire matter can be disposed of on merits itself as the respondents have filed counter affidavit.

Learned counsel for the respondent no.1, Shraddha Agarwal submits that the appellants had been continuously avoiding the hearing of the Company petition and had been seeking unnecessary and unwarranted adjournments as such the refusal of the learned Single Judge to recall the order is fully justified. It is further submitted that the appellants themselves having failed to appear before the Court, should not be granted any interim orders in exercise of jurisdiction under Section 483 of the Companies act, 1956.

6. We have considered the submissions raised and we have also heard learned counsel for the Official Liquidator as well as the learned counsel for the third respondent.

7. In the present case, the appellant had filed a recall application on 9.9.2014. The said application recites that the case was listed on 21.7.2014 in the daily cause list and the junior colleague of the counsel for the appellant had been instructed to seek an adjournment as the learned Counsel had to go for some personal work. According to the recall application, the junior colleague of the Counsel could not gather as to whether the case was called out for being taken - up and was under the expectancy that the matter would be rotated the next time but the matter appears to have been posted for the very next day on 22.7.2014. It is stated in the recall application that no notice was given to the appellant's counsel about the case being taken up the very next day in an additional supplementary cause list, and therefore the counsel could not appear on 22.7.2014. Consequently, the order dated 22.7.2014 was passed ex parte and it was prayed that the appellant should not be made to suffer on account of there being no deliberate default of the counsel for the appellant. An explanation about the time span consumed in moving the recall has also been furnished.

8. The counsel for the respondent Ms.Shraddha Agarwal moved an objection to the recall application by stating therein that there is no substantive provision under the Companies Act under which a recall or review application could be filed in a Company Petition, and therefore the learned Company Judge had no jurisdiction to allow the recall application. A copy of the said objection dated 22.9.2014 has also been filed on record.

Hearing on the recall application proceeded on 9.9.2014 and the order passed on that date is already extracted in the impugned order. When the matter was taken

up on 24.1.2017, the same issue of maintainability was raised. The order dated 9.9.2014 also records the objection of the respondent that the only remedy available to the appellant was to file an appeal and not a recall application.

9. The learned Single Judge, instead of entering into the contents of the recall application and its merit and the objections raised thereto, has proceeded to conclude that since there is no power of review available under the Statute, therefore, there does not appear to be any inherent power to recall the order dated 22.7.2014 and has accordingly rejected the recall application. There is no other reason given in the impugned order including any allegation that the appellant had been seeking unnecessary adjournments as was urged by Ms. Shraddha Agarwal, learned Counsel for the respondent during the course of argument. It is thus clear that the only objection that the respondent had to the recall application was that there was no authority with the learned Company Judge to recall or review the order passed on 22.7.2014, and therefore the learned Company Judge had no jurisdiction to entertain the same.

10. The aforesaid facts therefore clearly indicate the issue of jurisdiction raised by the respondent on the entertaining of a recall application by the learned Company Judge.

We may first discuss the principles relating to the distinction between the power of review and the scope of a review application as against that of a recall application. This need not detain us as the matter is no longer *lis integra*. In the case of *Asit Kumar Kar v. State of West Bengal and others* [(2009) 2 SCC 703 para - 8] the Apex Court ruled as under:-

8. There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party. ..."

11. The aforesaid judgment was followed by the Apex Court again in the case of *Vishnu Agarwal v. State of U.P. and another* [AIR 2011 SC 1232] and the ratio of the judgment in the case of *Asit Kumar Kar* (supra) was reiterated as follows:-

Apart from the above, we are of the opinion that the application filed by the respondent was an application for recall of the Order dated 2.9.2003 and not for review. In *Asit Kumar v. State of West Bengal and Ors.* 2009(1) SCR 469, this Court made a distinction between recall and review which is as under:-

"There is a distinction between a review petition and a recall petition. While in a review petition, the Court considers on merits whether there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in *All*

Bengal Licensees Association v. Raghabendra Singh & Ors. [2007(11) SCC 374] cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences."

12. There is yet another shade of distinction which deserves to be mentioned. The power of a review on merits is known as the power of substantive review. There is therefore a distinction in the exercise of a power of review when such powers exercised to alter a judgment or decision or order passed on merits. When that is done, then it is a matter of substantive review for which a specific power needs to be conferred under the Statute.

However, when it is a matter of procedural review without entering into the merits of the case, then this includes within it's fold the power of recall.

13. The power of a procedural review inheres in a Tribunal or an authority that has been explained in detail by the Apex Court in the case of Grindlays Bank Ltd. v. Central Government Industrial Tribunal and others [AIR 1981 SC page 606]. The same has been reproduced and followed by a learned Single Judge of this Court in the case of Central Bureau of Investigation v. State of U.P. and others reported in 2015 (11) ADJ 739 para - 20 as follows:-

20. In the case of Grindlays Bank Ltd. v. Central Government Industrial Tribunal and others, 1981 AIR SC 606, the Hon"ble Supreme Court has observed as under:

"The order setting aside the ex parte award, in fact, does not amount to review. The expression "review" is used in two distinct senses, namely, (i) a procedural review which is either inherent or implied in a Court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (ii) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. 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...."

14. The power to recall in the light of what has been described as procedural review has been acknowledged in relation to the proceedings under the Criminal Procedure Code vis-a-vis Section 362 Cr.P.C., Section 401 Cr.P.C. and 482 Cr.P.C. as has been noticed by a learned Single Judge of this Court in the case of Rakesh Srivastava "Nyayik" v. State of U.P. [2014 (3) ACR page 2736], where the learned Single Judge has in turn relied on the Full Bench decision of the Rajasthan High Court in the case of Habu v. State of Rajasthan [AIR 1987 Raj page 83].

However, the distinction between a procedural review and a review on merits was further explained by the Apex Court in the case of Kapra Mazdoor Ekta Union v. Management of Birla Cotton Spinning and Weaving Mills Ltd. and another [(2005) 3 SCC 777 where the Apex Court following the ratio of the case of Grindlays Bank

Ltd. (supra) held in para - 19 as follows:-

"19. Applying these principles it is apparent that where a Court or quasi judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or the quasi judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the Court or quasi judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the Court or quasi judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the Court or the quasi judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be re-heard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In *Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors.* (supra), it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be re-heard and decided again."

15. The aforesaid subtle distinction has also escaped the notice of the learned Single Judge who appears to have proceeded on the premise of the reasoning that is applicable to proceedings of a substantive review.

Apart from this, Rule 6 and Rule 9 of the Company Rules framed under Section 433 of the Companies Act, 1956 read with the procedure prescribed in the Code of Civil Procedure, 1908 confers inherent powers on the Company Court to secure the ends of justice. The contention therefore of the learned Counsel for the respondent that there was lack of jurisdiction with the Company Judge to entertain the recall application does not appear to be justified. However, the merits of the recall can still be considered but in our opinion it would be more appropriate to dispose of the entire matter on merits itself, instead of granting

any unnecessary adjournments to either of the parties. Learned Counsel for the respondent Ms. Shraddha Agarwal has urged that the appellant has succeeded in avoiding hearing of the Company Petition. In order to allay any fears of any such indulgence, the learned Company Judge may not grant any adjournments to the parties unnecessarily and may proceed to pass appropriate orders in accordance with law.

16. Consequently, for all the reasons aforesaid, the impugned order dated 24.1.2017 cannot be sustained and is accordingly set aside. The matter stands remitted to the learned Company Judge before whom the Company Petition shall be placed on Tuesday, i.e., 14.2.2017 for appropriate orders. It shall be open to the parties to apply for orders that may be necessary in respect of the contentions raised by the parties.

Allowed with the said observations.