

(2009) 06 BOM CK 0138

In the Bombay High Court

Case No : Writ Petition No. 3349 of 2001

The Executive Engineer, Lower Wana Project Division, The
Sub-Divisional Officer, Lower Vena Canal Project, Sub-
Division No. 3, Sindi Railway and The Sub-Divisional
Engineer, Lower Vena Project Sub-Division No. 4

APPELLANT

Vs

Vasant Nattuji Kosare and The Member, Industrial Court

RESPONDENT

Date of Decision : 08-06-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 114

Citation : (2009) 4 BomCR 653 : (2009) 111 BOMLR 2716 : (2009) 122 FLR 1011

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : P.B. Patil, for the Appellant; F.G. Issac, for the Respondent

Final Decision : Allowed

Judgement

C.L. Pangarkar, J.—By this writ petition, the petitioners challenge the order passed by the Industrial Court whereby he allowed the review application and set aside his own order.

2. The facts giving rise to the petition are as follows.

The petitioner was the original respondent in a complaint before the Labour court. The petitioner is an Executive Engineer of Lower Wana Project. Respondent Vasant was working as a workman with the petitioner. A domestic enquiry was instituted against the respondent Vasant for a misconduct. The enquiry Officer held respondent - Vasant guilty of the misconduct. Upon consideration of the report of enquiry, the petitioner passed an order dismissing the respondent Vasant from service. It was alleged that while respondent Vasant was working as a watchman a theft of eight tyres had taken place in the establishment of the petitioner and therefore said domestic enquiry was held. Respondent Vasant, therefore, filed an application before the labour court alleging unfair labour

practice. The labour court allowed the complaint filed by respondent Vasant and directed the petitioner to resist from indulging unfair labour practice. He also directed reinstatement of respondent Vasant with full back wages. Being aggrieved by that, the petitioner preferred a revision before the Industrial Court. The Industrial Court initially allowed the revision and dismissed the complaint. Later respondent Vasant preferred a review application. The said review application was allowed and the revision came to be dismissed and being aggrieved by that this writ petition is preferred.

3. The review of the order passed in revision on 28/9/2000 was challenged by respondent-complainant on the ground that court had remanded the matter on wrong assumption that no opportunity was given to the petitioner to tender evidence and contest the proceedings properly. The learned judge of the Industrial Court upon reconsideration of the record found that the contention of the petitioner that no opportunity was given was not proper and in fact sufficient opportunity was given and therefore his first order remanding the matter was not proper. The learned judge gives reasons to do so. He in fact quotes all that had happened in the proceedings before the labour court. He justifies that the petitioner was given opportunity to cross-examine the complainant upon application of the petitioner but petitioner itself did not make request to tender his own evidence in the matter though the matter was adjourned from time to time. He, therefore, found that there was no need to remand the matter. He says that through inadvertence he failed to note this and therefore recorded the order and set aside the order in revision of the lower court. He allowed review and set aside his own order in revision.

4. I have heard the learned Counsel for both the parties.

5. Mr. Issac, learned Counsel for the respondents, submits that in order to do proper justice to the parties, the learned judge rightly recalled the order of remand and rectified the mistake. He relied upon the decision of the Supreme Court in *S. Nagaraj and Others Vs. State of Karnataka and Another*, . The Supreme Court observes as under -

18. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the court should not be prejudicial to any one. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the

mistake is of the Court. In Administrative Law the scope is still wider. Technicalities apart, if the Court is satisfied of the injustice, then it is its constitutional and legal obligation to set it right by recalling its order. Here as explained, the Bench of which one of us (R.M.Sahai,J.) was a member did commit an error in placing all the stipendiary graduates in the scale of First Division Assistants due to State's failure to bring correct facts on record. But that obviously cannot stand in the way of the Court correcting its mistake. Such inequitable consequences as have surfaced now due to vague affidavit filed by the State cannot be permitted to continue.

6. There is no doubt that in order to do complete justice the court can do it. The main anxiety, however, should be to avoid injustice being caused. In this case, to my mind, there was no reason to recall the order at all and no injustice in fact was caused to either party. It is only to avoid injustice being caused the court can recall the order. Here the matter was remanded for fresh trial. In any case the petitioner had not led its own evidence on issue No. 7 which it was supposed to. May be due to fault on the part of the lawyer but the fact was that there was no evidence in rebuttal by the petitioner. In the circumstances, the first order of remand could not be said to be unjustified and had not resulted into causing any injustice. The learned Counsel for the petitioners submits that the Industrial Disputes Act makes no provision for review and hence review on merits was not maintainable. According to him, this was not a case of procedural defect. I agree that, this was in fact not a procedural defect as such and it was review on merits. Review is not provided in the Act. The Supreme Court in *Kapra Mazdoor Ekta Union Vs. Management of Birla Cotton Spinning and Weaving Mills Ltd.* and Another, dealing with the provisions of the Industrial Disputes Act makes following observations with regard to the power of review.

14. The core question which arises for consideration is whether the Industrial Tribunal was justified in recalling the earlier award made on 12/6/1987 and in framing an additional issue for adjudication by the Tribunal. According to the appellant the recall of the order was fully justified in the facts of the case, while the respondents contend to the contrary. Two issues arise for our consideration while considering the legality and propriety of the order of the Tribunal in recalling its earlier award. Firstly, whether the Tribunal had jurisdiction to recall its earlier order which amounted virtually to a review of its earlier order; and secondly, whether the Tribunal had no jurisdiction to entertain the application for recall as it had become functus officio. The High Court answered the first question in favour of the respondent Management and the second in favour of the appellant.

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 (sic ascertains whether it has committed) 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, in as much as 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 reheard 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 Govt. Industrial Tribunal* 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 reheard and decided again.

20. The facts of the instant case are quite different. The recall of the award of the Tribunal was sought not on the ground that in passing the award the Tribunal had committed any procedural illegality or mistake of the nature which vitiated the proceeding itself and consequently the award, but on the ground that some matters which ought to have been considered by the Tribunal were not duly considered. Apparently the recall or review sought was not a procedural review, but a review on merits. Such a review was not permissible in the absence of a provision in the Act conferring the power of review on the Tribunal either expressly or by necessary implication.

7. It is apparent that the party will have to establish that the procedure adopted by the court or quasi judicial authority suffered from such illegality and that it vitiated the proceedings and invalidated the order. In the instant case, there is no procedural illegality which could vitiate the earlier order. In the case at hand, the Tribunal had not committed any illegality or mistake which could vitiate the order. It had a power to remand. An erroneous decision cannot be corrected assuming that the court failed to take into consideration the facts on record. To my mind, if at all the learned judge found that he did not consider the particular facts on record, the judgment will at the most be said to be erroneous and

erroneous judgment cannot be set aside in review. The present review was on merit and on merit no review is permissible for want of provision as is held by the Supreme Court in Kapra Mazdoor Ekta Union Vs. Management of Birla Cotton Spinning and Weaving Mills Ltd. and Another, .

8. Shri Izaac, learned Counsel for the respondent has placed before me another decision reported in 1994 Mh.L.J.1829 (Nathu Yeshwantrao Bhusari v. Sonabai Jagannath Ganar) in which this Court observes as follows -

16. The statement of law relating to the scope and amplitude of power of review u/s 114 read with Order 47, Rule 1 of the Code Procedure Code which emerges from the aforesaid derisions is that an error which may be corrected in review must be an error apparent on the face of record. The error should be so glaring and manifest that no court would permit such an error to remain on record. An erroneous view or erroneous judgment is not a ground for review, but the judgment or order which completely ignores a positive rule of law and the error is so patent that it admits of no doubt or dispute, such an error must be corrected in the review. In other words, as the Supreme Court has said, where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of record would be made out.

9. It is observed by the court that an erroneous judgment is no ground for the review. If this decision is to be followed then in the instant case the learned judge of the Tribunal committed an error in reviewing decision and setting aside its own order.

10. I need not refer to other decisions cited to me by Shri Issac, learned Counsel for the respondent, since they relate to question of award of back wages. I find that the judgment recalling the earlier order of remand was not proper and the order of the remand was correct. In view of this, this petition must succeed. The Judgment of court below dated 12/3/2001 is, therefore, set aside and the judgment dated 28/9/2000 is restored. The petition is allowed. No order as to costs.

Parties shall maintain status quo until the labour court decides the petition before it finally. Labour court shall as far as decide the said petition within a period of four months.