IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL MISC. APPLICATION NO. 1481 OF 2003
IN
CRIMINAL APPLICATION NO. 2086 OF 1999
IN
CRIMINAL WRIT PETITION NO. 245 OF 1993

Mr. Anil Prabhakar Naik]
Indian Citizen, residing at]
203, Wilmary, Bamanwada,]
Vile Parle East, Mumbai 400 099]..Petitioner

versus

1. Mr. Chandrakant B. Garware]
Indian Citizen, residing at]
IL Palazzo, B. G. Kher Marg,]
Malbar Hill, Mumbai 400 026]

2. Mr. Vasudev Sabaji Shringare]
Indian Citizen, residing at]
1/78, Tajukaya Mansion,]
3rd floor, Lalbaug,Mumbai 400012]

3. The Senior Inspector of]
Police, General Branch, CID]
Mumbai]

4. The State of Maharashtra]..Respondents

Mr. Rafique Dada, Senior Counsel with Smt. Mohana Nair for the Petitioner.

Mr. H. H. Ponda with Ranjit Shetty, for the Respondent No.1

Mr. A. R. Patil APP for the Respondents - State.

CORAM : D. G. DESHPANDE, J.
DATE : 4TH MAY, 2006

ORAL JUDGMENT (IN CHAMBER) :

1. Heard learned counsel for the parties.

2. Original Writ Petition No. 245 of 1993 was filed by Chandrakant Bhalchandra Garware. The title of the Petition shows that it was filed under Article 226 and 227 of the Constitution of the India and in the matter of Section 482 of the Code of Criminal Procedure. Prayer in this petition was to quash and set aside the Order of the Magistrate dated 24.2.1993 in Case Nos. 1133 to 1135/P/1991 and restraining the Respondent Nos. 1 and 2 or their agents from receiving any dividend which may accrue etc. In this Petition No. 245 of 1993 Anil Prabhakar Naik filed Criminal Application No. 2086 of 1999 for directions. The title of this Criminal Application shows that it was also filed as in the matter of Article 227 of the Constitution of India, and in the matter of Criminal Revision Application under Section 439, 482 of the Code of Criminal Procedure.

3. In both these mattes, i.e. Writ Petition No. 245 of 1993 and Criminal Application No. 2086 of 1999, I have passed an order on 14.2.2000. By that order, the Writ Petition was allowed in terms

of prayer clauses (a), (b) and (c) and Criminal Application was dismissed with costs of Rs.10,000/-. Now, the present Application No. 1481 of 2003 is filed by Anil Naik.

4. Mr. Dada, Senior Counsel for the Petitioner viz. Anil Naik in Criminal Application No. 1481 of 2003 has filed a compilation of the documents, copy of which is served upon Mr. Ponda, counsel for Chandrakant Garware. There is an order dated 28.4.1995 of Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Bombay, in C.C. No. 151/N/95. It was an order passed on the application of Chandrakant Garware to the effect that he does not want to prosecute any of his complaints against Anil Naik and that he has entered into an Agreement and the matter is amicably settled. Accordingly, as per this Order all the share certificates were physically handed over to Anil Naik.

5. Mr. Dada, therefore, states that when share certificates have been handed over to Anil Naik, then my order disentitling Anil Naik to receive dividend warrants, has created complicated situation

because even though the share certificates are with Anil Naik, he cannot get the dividends and the Police Officer has been permitted to collect all the dividends. Mr. Dada also stated that this Order of the Magistrate was passed on 28.4.1995 but none of the parties to the main petition or the application were aware of this order, and, this order was not produced before the court, and, therefore, in the circumstances, the court can interfere.

6. Mr. Ponda relying upon two Judgments of the Supreme Court reported in **(2001)4 Supreme Court Cases 752 State of Kerala vs. M. M. Manikantan Nair, and (2001)1 Supreme Court Cases 169 Hari Singh Mann vs. Harbhajan Singh Bajwa and others,** contended that review of the order is strictly prohibited and it is not permissible, now, for this court to pass any order. Mr. Ponda also stated that nowhere it is stated by Anil Naik that this order of the Magistrate was not available when this Petition and Application was finally decided by me.

7. Mr. Dada relied upon two judgments of the Supreme Court reported in **AIR 1988 Supreme Court 1531 A. R. Antulay vs. R.S. Nayak and others**,

and **AIR 1994 Supreme Court 1673 Ramchandra Ganpat Shinde and another vs. State of Maharashtra and others**. Mr. Dada, also contended that main Writ Petition No. 245 of 1993 was a Writ Petition under Articles 226 and 227 of the Constitution, and, therefore, the judgments relied upon by Mr. Ponda, did not apply.

8. In Hari Singh Mann's case relied upon by Mr. Ponda, the respondent No.1 who was a practising Advocate had filed a Petition under Section 482 of Criminal Procedure Code for calling for the record and directing to register a case on the basis of the complaint dated 14.12.1998. The said petition came to be disposed of by the High Court on 7.1.1999. The court found that no case for direct registration of the case was made out and the preliminary enquiry was required. The petition was therefore disposed of with the direction to the SSP to look into the allegations of the petitioner and if he comes to the conclusion that some cognizable offence has been made out then to register the offence. Thereafter, the respondent No.1 again filed Misc. petition before the same court, which came to be dismissed on 30.4.1999 by the same Single Judge without notice to

the other side, and it was recorded that he filed Criminal complaint on 9.3.1999 in the Court of Mrs. Neelam Arora JMTC, Kharar, where cognizance was taken and therefore he does not want to prosecute the allegations with the SSP, who may be directed not to take any action. This was an order passed by the Single Judge. The Supreme Court in the background of the matter held that no review of an order was contemplated under Code of Criminal Procedure, and after the High Court has disposed of the main petition on 7.1.1999 there was no lis pending in the High Court wherein the Respondent could have filed any miscellaneous petition. The Supreme Court also observed that there is no provision in the Criminal Procedure Code authorising the High Court to review its judgment passed either in exercise of its appellate or revisional or original criminal jurisdiction and such a power cannot be exercised with the aid or under the cloak of Section 482 of the Code.

9. In the another judgment relied upon by Mr. Ponda (2001)4 Supreme Court Cases 752, as stated above, in that matter the respondent was prosecuted for certain offences of the IPC and under the

provisions of Prevention of Corruption Act. He filed revision before the Kerala High Court for quashing the criminal proceedings on the ground that there was no sanction to prosecute as required under Section 122 of the Kerala Panchayats Act. That Criminal M.C. No. 1137 of 2000 was dismissed by the Single Judge of the Kerala High Court by judgment dated 31.5.2000 on the ground that there was proper sanction to prosecute and a prima facie case was made out. Subsequently, a miscellaneous petition came to be filed in the said case for clarification of the above order. The petition was finally allowed on 13.7.2000 and the same learned Judge held that there was no proper sanction from the competent authority and therefore no cognizance could have been taken. In this background of the matter, the Supreme Court relying upon the judgment of Hari Singh Mann, referred to above, observed that High Court has no powers to review its judgment either in exercise of its appellate or revisional or original criminal jurisdiction.

10. Mr. Ponda therefore contended that in view of these two judgments, the present application filed by Anil Naik, cannot be entertained.

11. As against this, Mr. Dada, firstly contended that the main writ petition No.245 / 1993 was a petition under Articles 226 and 227 of the Constitution and therefore the petition was decided by me under those Articles of the Constitution and as such both the judgments relied upon by Mr. Ponda, were not applicable. Mr. Dada, also drew my attention to paragraph 83 of the said Judgment reported in AIR 1988 Supreme Court 1531, as stated above, wherein the Supreme Court observed :

> **".....We proclaim and pronounce that no man is above the law, but at the same time reiterate and declare that no man can be denied his rights under the Constitution and the laws. He has a right to be dealt with in accordance with the law and not in derogation of it. This Court, in its anxiety to facilitate the parties to have a speedy trial gave directions on 16th February, 1984 as mentioned hereinbefore without conscious awareness of the exclusive jurisdiction of the Special Courts under the 1952 Act and that being the only procedure established by law, there can be no deviation from the terms of Article 21 of the Constitution of India. That is the only procedure under which it should have been guided. By reason of giving the directions on 16th February, 1984 this Court had also unintentionally caused the appellant the denial of rights under Article 14 of the Constitution by denying him the equal protection of law by being singled out for a special procedure not provided for by law. When these factors are brought to the notice of this Court, even if there are any**

> technicalities this Court should not feel shackled and decline to rectify that injustice or otherwise the injustice noticed will remain forever a blot on justice. It has been said long time ago that "Actus Curiae Neminem Gravabit" an act of Court shall prejudice no man. This maxim is founded upon justice and good sense and affords safe and certain guide for the administration of the law."

My attention was also drawn to paragraphs 100, 105 and 106 of the said judgment, particularly, the following portion:

> "100. ....One of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and when the expression act of the court is used, it does not mean merely the act of the primary court, of any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case. It is the duty of the aggregage of those Tribunals, if I may use the expression, to take care that no act of the court in the course of the whole of the proceedings does an injury to the suitors in courts."
>
> "105. ...Quite apart from Section 151, any court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made."
>
> "..Where substantial injustice would otherwise, result, the court has, in their Lordships' opinion, an inherent power to set aside its own judgments of condemnation so as to let in bonafide claims by parties..."

106. To err is human, is the oft quoted saying. Courts including the apex one are no exception. To own up the mistake when judicial satisfaction is reached does not militate against its status or authority. Perhaps it would enhance both."

12. Another judgment relied upon Mr. Dada, reported in AIR 1994 Supreme Court 1673, as stated above, and my attention was drawn to paragraphs 13 and 14, which reads thus:

"13. Respect for law is one of the cardinal principles for an effective operation of the Constitution, law and the popular Government. The faith of the people is the source and succour to invigorate justice intertwined with the efficacy of law. The principle of justice is ingrained in our conscience and though ours is a nascent democracy which has now taken deep roots in our ethos of adjudication - be it judicial, quasi-judicial or administrative as hallmark, the faith of the people in the efficacy of judicial process would be disillusioned, if the parties are permitted to abuse its process and allowed to go scot free. It is but the primary duty and highest responsibility of the Court to correct such orders at the earliest and restore the confidence of the litigant public, in the purity of fountain of justice; remove stains on the efficacy of judicial adjudication and respect for rule of law, lest people would lose faith in the Courts and take recourse to extra-constitutional remedies which is a death-knell to the rule of law.

14. In M. V. Venkataramana Bhat v.

Returning Officer, C.A. No. 3607 of 1993 this Court by judgment dated July 30, 1993, set aside the election. The facts were that one Jaiprakash Rai filed a writ petition in the High Court of Karnataka one day prior to the date of election of the Pradhan of the Samithi, obtained ad interim order and prevented two members to participate and exercise their franchise in the election of the Pradhan. His candidate was elected with a margin of one vote. The writ petition was, ultimately, dismissed. The writ petition under appeal was filed to declare the election as illegal, void etc. The High Court dismissed it. On appeal, this Court taking notice of the background of these facts and circumstances held that ad interim order was obtained by abuse of the process of the Court to help the successful candidate. Even if the remedy by election petition was available, the Tribunal had no jurisdiction to sit over the correctness of the order passed by the High Court. Therefore, the High Court alone had to correct it by exercising its power under Art. 226 to prevent such abuse of judicial process and should exercise its power of high responsibility to undo injustice done to the adversary undoing the effect of the order obtained in abusing the process of the Court. The ratio would apply with equal force to the facts of this case. Therefore, the High Court should have exercised its power under Art. 226 and would have modified the order as prayed for."

13. In view of the aforesaid observations of the Supreme Court, Mr. Dada contended that when the Writ petition No. 245 of 1993 along with Criminal Application No. 2086 of 1999 was decided by me by common order dated 14.2.2000, none of the parties had brought to my notice that Chandrakant Garware

applied to the Magistrate for withdrawing all his criminal cases against Anil Naik and also an order that came to be passed on his application. From the order of the Magistrate dated 28.4.1995 (hereinafter referred to as "the Order of the Magistrate"), it will be clear that Chandrakant Garware had appeared before him and prayed that all cases arising out of C.R. No. 66/1990 be allowed to be withdrawn as the matter being settled between him and accused Mr. A. P. Naik & others. Chandrakant Garware also informed that he has moved the Home Department, Government of Maharashtra on 6th March 1995 seeking permission to withdraw all the complaints against the accused Mr. A. P. Naik. Mr. Chandrakant Garware also prayed that all the documents such as shares, papers relating to purchase of flat and papers like bank papers, share brokers purchase and sale contracts which were taken charge of by police under panchnama from the residence of Mr. Anil P. Naik, be released, and returned to the rightful owner. After noting these submissions of Chandrakant Garware and after noting that as per the principles of Criminal law if the property was seized during investigation, then, normally it was to be returned to the owner of the property. The

Court also noted that all the share certificates etc. were recovered from the house of accused A.P. Naik and has also noted that Chandrakant Garware in his application has mentioned that property be returned to A.P. Naik from whom it was seized and therefore passed an order returning all the documents to A.P. Naik. Operative part of the Order of the Magistrate is as under:-

> **" P. I. Shri Jadhav, Applicant, Representative and Respondent present. There is allegation against the police officer in respect of missing some documents and shares seized on 1st May, 1990 and so I directed Mr. Jadhav to produce all the original documents shares Certificates, share broker purchase, bank broker, sale contracts, blank papers, loose papers seized from the residence of respondent Mr. A. P. Naik. In compliance of this Mr. Jadhav produced all the documents and property in the Court at 11.30 a.m. and Respondent Mr. A. P. Naik, representative of Garware and P. I. Jadhav directed to complyed the panchnama and documents in presence of all these abovesaid persons and verify it properly, they compare it and satisfied with documents. As mentioned above documents are seized from Mr. Naik on 1st May, 1990 is the proper person to take possession of the said property and so I directed P.I. Mr. Jadhav to return all the above said property and documents to Mr. Anil P. Naik on execution of bond of Rs.5,00,000/- with all usual terms and conditions. While delivery of these original documents I.O. to return xerox copies of all these documents and property mentioned above with the police till pendency of this case or its withdrawal."**

14. Mr. Dada contended that when I heard the main Writ Petition No. 245 of 1993 and Application No. 2086 of 1999 filed by Anil Naik, this important fact was not brought to my notice by anybody, but, now, pursuant to the enquiry made by the Magistrate regarding his discharge application, this document has come on record i.e. the order of the Magistrate, referred to above, and if this is so, then, by my order dated 14.2.2000 wherein the claim of Anil Naik was rejected and Writ Petition was allowed in terms of prayers (a), (b) and (c) was required to be modified. Mr. Dada contended that since the original share certificates are lying with the petitioner pursuant to the order of the Magistrate and since that order of the Magistrate was not challenged by Chandrakant Garware, obviously because the order came to be passed by the Magistrate at the instance of Garware, then, this was a case where the order dated 14.2.2000 was required to be modified.

15. Prayers (a), (b) and (c) of the Writ Petition No. 245 of 1993 were as under:

(a) "calling for the records in cases Nos. 1133 to 1135/P/1991 pending before the Additional Chief Metropolitan Magistrate, Court No. 37, Esplanade, Bombay, pertaining to the impugned order dated 24th February 1993 and to quash and cancel the said order under Article 227 of the Constitution of India to correct and rectify the errors apparent on the face of the record in respect of the impugned order;

(b) "to issue Writ of Mandamus or any other writ etc. restraining respondent No. 1 i.e. Anil Naik and respondent No.2 i.e. Vasudeo Shringare and their agents from receiving any dividend etc. on the shares and if already received to deposit / pay the same to respondent No.3 i.e. Senior Inspector, GB, CB, CID, Bombay;

(c) "to issue writ of Mandamus or any other writ etc. authorising respondent No. 3 and 4 to receive the accrued and future bonus shares, dividends and benefits on the shares of the companies and keep the same in their custody and to deposit the amount of the dividends received in a Savings Bank Joint account;"

Prayer (b) which was allowed has resulted in restraining Anil Naik from receiving dividends and if he had received it then direction to him to deposit the same with the respondent No.3 i.e. Senior Inspector, GB, CB, CID, Bombay.

16. Mr. Dada contended that by his order dated

28.4.1995 the Magistrate has passed the impugned order and allowed all the shares to be given to Anil Naik and when Chandrakant Garware wanted to withdraw all his complaints against Anil Naik, then grant of prayer (b) of the main petition is coming in the way of Anil Naik in getting the dividends etc.

17. The only contention that was raised by Mr. Ponda, as stated above, was that the court had no power of review.

18. It is an admitted fact that this order of the Magistrate dated 28.4.1995 was not challenged by Chandrakant Garware before any court. It is also a fact that this order dated 28.4.1995 of the Magistrate was not the subject matter of the Writ Petition No. 245 of 1995, however, that petition was under Articles 226 and 227 of the Constitution, because in prayer (a) there was a reference that the particular order of the Magistrate dated 24.2.1993 be quashed and cancelled under Article 227 of the Constitution.

19. It will therefore be clear that the Writ Petition No. 245 of 1993 was filed by Chandrakant

Garware under Articles 226 and 227 of the Constitution. Criminal Application No. 2086 of 1999 was filed by Anil Naik in that Writ petition. In that application also there is reference that it is under Article 227 of the Constitution. It is true, that both, in the Writ Petition, as well as, in Criminal Application there is a reference to Sections 439 and 482 of the Criminal Procedure Code, but petition was registered as a Criminal Writ Petition. Prayer in the Criminal Petition was with reference to Article 226 of the Constitution. In the title of both the Writ Petition No. 245 of 1993 and Application No. 2086 of 1999 Articles of the Constitution were cited, and, the prayer, which I granted as per prayer (a) of the Petition was with reference to Article 227 of the Constitution. Therefore, it is clear that at no point of time Writ Petition No. 245 of 1993 and the consequent Application No. 2086 of 1999 were treated by me as a matter purely under Criminal Procedure Code in the exercise of jurisdiction of this Court appellate or revisional or original criminal jurisdiction. Both these matters were dealt with as Writ Petition and Application under Constitution of India and therefore, the judgments cited by Mr. Ponda, are,

of no help. My order dated 14.2.2000 is an order in exercise of the constitutional provisions and not under any provisions of the Criminal Procedure Code.

20. Apart from that, the Magistrate's order gives right to Anil Naik to hold all the shares. That order as observed earlier came to be passed at the instance of Chandrakant Garware - complainant who had entered into a settlement agreement with Anil Naik, and, who took no objection for returning the shares to Anil Naik by giving express consent in that regard. It is also an admitted fact that none of the parties to the Writ Petition or the Criminal Application, brought to my notice this order of the Magistrate of 28.4.1995. If this order was brought to my notice then the petition would not have been allowed at all or at any rate prayer (b) of the petition reproduced hereinabove, could not have been granted.

21. Now, the factual position is Anil Naik holds all the shares, he cannot get the dividend nor Chandrakant Garware is getting dividend and all the dividend is authorised to be collected by the Senior Inspector GB CB CID, Bombay. When Chandrakant

Garware by applying to the Magistrate gave his consent that he has no objection for the shares to be given to Anil Naik and he wanted to withdraw all his cases against Anil Naik then it is Anil Naik who had become entitled to the subsequent dividends.

22. Since both the parties did not bring to my notice this order of the Magistrate dated 28.4.1995, it has resulted in serious miscarriage of justice. Inspite of being armed with the order of the Magistrate in his favour Anil Naik is not able to get dividends because of the grant of prayer (b) of the main petition. The judgment cited by Mr. Dada, clearly shows that patent injustice is caused to a party on account of an order of the court. The court has power to rectify the mistake. No other submissions were made by the parties, apart from the above.

23. In the result, I, pass the following order :

ORDER

. Criminal Application No. 1481 of 2003 is allowed in terms of prayer clause (b). It is

clarified that Anil Naik will be entitled to receive all the dividends on all the shares in his possession, for all the period, for which he has not received any dividends. C.C. expedited.

(D.G. DESHPANDE, J.)