

CASE NO.:
Appeal (civil) 1818 of 2007

PETITIONER:
Bhagubhai Dhanabhai Khalasi & Anr

RESPONDENT:
The State of Gujarat & Ors

DATE OF JUDGMENT: 05/04/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 1818 2007
[Arising out of S.L.P. (C) No. 6257 of 2006]

S.B. SINHA, J.

Leave granted.

An order of preventive detention was passed against the appellant under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "COFEPOSA Act"). He had properties at Bhadarwal, in the district Jaipur and a fixed deposit receipt of Dena Bank. The said properties were forfeited under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (for short, "SAFEMA"). He filed a Writ Petition in the Gujarat High Court questioning the said order of detention as also the order passed under SAFEMA. The said Writ Petition was allowed. A Special Leave Petition filed thereagainst by the competent authority was also dismissed. Representations were made by him for return of the said properties. An order was passed by the competent authority on or about 30.1.1996 canceling the Order dated 24.9.1979 whereby and whereunder the properties were directed to be forfeited. Allegedly, whereas the fixed deposit receipt was returned to him, the immovable properties were not. A Writ Petition was filed by the appellant. Allegations made in the said writ petition were denied and disputed. Respondent No. 4 who was impleaded as a party thereto contended that the appellant had transferred the said property in his favour. A learned Single Judge of the High Court by a Judgment and Order dated 17.1.2005 dismissed the said writ petition, holding;

"6. I have gone through the petition, documents annexed with the memo of petition, affidavits and other documents which have been shown to me by the learned counsel for the respective parties. The facts of the present petition are peculiar as during the pendency of the proceedings, certain changes have been taken place. It is the case of the other side that the property in question has been sold by the Petitioners to the third party by way of registered sale deed, before finalization of the proceedings, but the Petitioner has denied the same. It is the case of the Petitioners that the Petitioners have not sold the property in question, but some persons have forged and fabricated documents and the property has been transferred by way of registered sale deed, behind the back of the Petitioners illegally and fraudulently. It has also been established that during the course of the proceedings, the property has been vested to the Jaipur Urban Development Authority. Thus, the questions which arise for consideration of this Court in this Petition is disputed questions of facts. It

is the case of the Petitioners that they are owners of the property and it is the duty of the Respondent authorities to hand over the possession of the property in question to them and on the other hand, it is prima facie established that third party interest has created by way of sale deed since long and same has not been challenged by the Petitioners on anybody else and the said registered sale deed is in operation as on today. Therefore, whether the aforesaid sale-deed is legal and the same has been executed by the Petitioners or the same is false and fabricated, cannot be decided in this proceedings initiated by the Petitioners under Article 226 of the Constitution of India. The Petitioners are required to initiate appropriate proceedings before appropriate Court.

So far as the decisions, upon which the learned counsel for the Petitioners has placed reliance, are concerned, I am in total agreement with the ratio laid down in the said decisions. But as stated earlier, in this petition disputed questions of facts have been arisen and therefore, the Petitioners cannot get benefits of the said judgment."

The learned Single Judge, therefore, did not go into the question, as to whether the appellant had transferred the said property in favour of the respondent No. 4 herein or not. An intra-court appeal preferred thereagainst under the Letters Patent of the Bombay High Court was preferred thereagainst by the appellant. Apparently, a question was raised therein as to whether the same in effect and substance was filed by the appellant or some other person.

A handwriting expert opined that two signatures on the application dated 4.4.1997 and two signatures on a certified Photostat copy of affidavit dated 13.1.2003 were not that of the appellant. Appellant was directed to appear before the Division Bench and he purportedly admitted that he had executed a deed of sale in favour of the respondent No. 4. A prayer was made for withdrawal of the appeal by the learned counsel appearing on the behalf of the appellant reserving right to agitate the grievances before an appropriate forum. The Division Bench while granting permission to withdraw the appeal refused to grant such permission stating;

"At this juncture, Shri Sanjanwala submitted that his right to pursue other remedy be reserved. But, looking to the peculiar facts and circumstances of the case and the seriousness of the matter, we made it clear to Shri Sanjanwala that we may not pass this order and may not grant simple permission to withdraw the Appeal, but we may like to decide this Appeal on merits and ultimately the person concerned in the matter may have to even face the consequences. Thereupon, Shri Sanjanwala gave up his request."

Mr. Ashok Desai, learned senior counsel appearing on behalf of the appellant would submit that the Division Bench of the High Court committed a manifest error in passing the said order, insofar as it failed to take into consideration that by preferring the appeal, the appellant could not have been put in a worse condition.

Mr. Sushil Kumar Jain, learned counsel appearing on behalf of the respondent, however, had drawn our attention to the counter affidavit affirmed by respondent No. 4 to contend that the appellant was guilty of

making a misrepresentation before the Division Bench of the High Court and filed a large number of forged documents. In any event he, having admitted the execution of the sale deed in favour of the respondent No. 4 herein cannot be permitted to litigate before any other forum.

Allegations made in the said counter affidavit are denied and disputed by the appellant in his rejoinder thereto.

It does not appear that in relation to the purported report of handwriting expert, any order was passed upon taking cognizance thereof, even no proceeding under Section 340 of the Code of Criminal Procedure was initiated.

The Division Bench of the High Court as also the learned Single Judge admittedly did not enter into the merit of the matter. The learned Single Judge noticed the respective cases of the parties and refused to entertain the writ petition on the premise that the same involved disputed questions of fact. He, opined that the appellant may agitate his grievances before an appropriate forum. An intra-court appeal was filed thereagainst by the appellant alone. The respondent did not do so. The jurisdiction of the appellate court, thus should have been kept confined only to the question as to whether the writ petition should have been determined on merit by the learned Single Judge.

A party having a grievance must have a remedy. Access to justice is a human right. When there exists such a right, a disputant must have a remedy in terms of the doctrine *ubi jus ibi remedium*.

In *Dwarka Prasad Agarwal (D) by Lrs. and Another v Ramesh Chander Agarwal and Others* [(2003) 6 SCC 220], this Court held; "22. The dispute between the parties was eminently a civil dispute and not a dispute under the provisions of the Companies Act. Section 9 of the Code of Civil Procedure confers jurisdiction upon the civil courts to determine all disputes of civil nature unless the same is barred under a statute either expressly or by necessary implication. Bar of jurisdiction of a civil court is not to be readily inferred. A provision seeking to bar jurisdiction of a civil court requires strict interpretation. The court, it is well settled, would normally lean in favour of construction, which would uphold retention of jurisdiction of the civil court. The burden of proof in this behalf shall be on the party who asserts that the civil courts jurisdiction is ousted. (See *Sahebgouda v. Ogeppa*) Even otherwise, the civil courts jurisdiction is not completely ousted under the Companies Act, 1956."

In *Dwarka Prasad Agarwal (D) by Lrs. and Another v B.D. Agarwal and Others* [(2003) 6 SCC 230], this Court held; "38. There is another aspect of the matter which must also be taken notice of. A party cannot be made to suffer adversely either indirectly or directly by reason of an order passed by any court of law which is not binding on him. The very basis upon which a judicial process can be resorted to is reasonableness and fairness in a trial. Under our Constitution as also the international treaties and conventions, the right to get a fair trial is a basic fundamental/human right. Any procedure which comes in the way of a party in getting a fair trial would be violative of Article 14 of the Constitution of India. Right to a fair trial by an independent and

impartial Tribunal is part of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 [See Clark (Procurator Fiscal, Kirkcaldy) v. Kelly]. Furthermore, even if the petitioner herein had filed a writ petition before the High Court in terms of Article 226 of the Constitution of India, the same would not have been entertained as the impugned order had been passed consequent to and in furtherance of the purported consent order passed by the High Court. Ordinarily, the High Court would not have issued a writ of certiorari for quashing its own order. Even in that view of the matter it is apposite that this petition under Article 32 should be entertained."

See Swamy Atmananda and Ors. v Sri Ramakrishna Tapovanam and Others [(2005) 10 SCC 51].

There is nothing on record to show that the Division Bench while entertaining the Letters Patent Appeal intended to enter into any other question. Judges' record as is well known is final and conclusive. Any dispute in relation thereto must be raised before the same Court.

In Messrs. Associated Tubewells Ltd. v R.B. Gujarmal Modi [A.I.R. 1957 SC 742], this Court deprecated the practice of referring to conversation which took place in Court, stating;

"4. We cannot, however, part from this matter without placing on record our very strong disapproval of the course that the Advocate \026 a very senior counsel of this Court \026 has adopted in making this application. In the review application he has referred in detail as to what, according to him, happened in Court on the prior occasion and what each Judge said in the course of the arguments. The review application sets out at length what the presiding Judge said and expressed in the course of the arguments and what his views were and what the other Judges of the Bench said and expressed and what the view of each was. These statements are followed by a confident assertion how and why the application was dismissed."

Yet again in State of Maharashtra v Ramdas Shrinivas Nayak and Another [AIR 1982 SC 1249], this Court opined;

"7. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else."

See also Guruvayoor Devaswom Managing Committee and Another v C.K. Rajan and Others [(2003) 7 SCC 546]

The Division Bench did not go into the correctness or otherwise of the allegations and counter allegations made by the parties before it. Whether appellant was guilty of any forgery or not was not determined.

It is therefore, difficult to accept the contention of Mr. Jain that the Division Bench intended to exercise larger jurisdiction. If it intended to do so, it could have taken recourse to procedure known to law.

It allowed the appellant to withdraw the appeal. By doing so, the parties were relegated to the same position to which they had been viz. when the learned Single Judge dismissed the Writ Petition. Appellant, thus in our view could not have been placed in a worse position.

We, therefore, are of the opinion that the part of the impugned order whereby and whereunder the Division Bench refused to grant leave to the appellant to ventilate his grievances before an appropriate forum cannot be sustained. This appeal is allowed to the aforementioned extent. We, however, make no order as to costs.

JUDIS