Sonal V. Shah Vs. M.P. Thakkar and ors.

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Court : Gujarat

Decided On : Sep-09-1981

Reported in : AIR1982Guj52; (1981)22GLR1038

Judge : P.D. Desai,; S.B. Majmudar and; D.H. Shukla, JJ.

Acts : Constitution of India - Article 226; Bombay High Court (Appellate Side) Rules, 1960

Appeal No. : Special Civil Appln. No. 3594 of 1981

Appellant : Sonal V. Shah

Respondent : M.P. Thakkar and ors.

Advocate for Pet/Ap. : B.R. Shah and; K.N. Raval, Advs.

Judgement :

P.D. Desai, J.

1. This writ petition under Art. 226 of the Constitution challenges the validity of Rule 6 of Part 1, Chapter I of the Rules of the High Court of Judicature at Bombay, Appellate Side. 1960, which are the law in force, and the order dated September 1, 1981 passed by the learned Chief Justice in exercise of the powers conferred by the said rule where under a review application, being Miscellaneous Application No. 434 of 1981, which was pending for admission before a Division Bench, was referred to a Full Bench consisting of himself, N. H. Bhatt, J. and a third learned Judge. Be it stated at the outset that though we have referred above to Rule 6, in the course of the impugned order as well as in the petition, the said rule has been erroneously referred to as Rule 2 (6). In order to appreciate the merit of the important questions which arises for consideration, a few facts require to be stated.

2. The petitioners herein had instituted Special Civil Appln. No. 2530 of 1981 which was heard and finally decided, on 18-8-1981 by a Division Bench consisting of the then learned Chief Justice Mr. B. J. Divan and N. H. Bhatt. J. The Gujarat University, which was the main respondent in the said writ petition, instituted Misc. Civil Appln. No. 434 of 1981 seeking review of the judgment and order passed on 18-8-1981 in the said writ petition. At the time when the review application was filed. one of the Judges constituting the Division Bench which heard the main petition namely, Divan, C. J. had retired. The review application was, therefore, posted for bearing be fore a Division Bench consisting of the learned Chief Justice Mr. M. P. Thakkar and N. H. Bhatt, J. While the review application was pending for admission before the said Division Bench and after it was heard for sometime, the learned Chief Justice passed

the order which is impugned herein. Pursuant to the said order, the review application was posted for hearing before the Full Bench consisting of the learned Chief Justice and N. H. Bhatt and A. M. Ahmedi, JJ. Subsequently, however, the learned Chief Justice withdrew from the said case and V. V. Bedarkar, J. joined the Full Bench. The Full Bench reconstituted accordingly has been hearing the review application for admission since yesterday and the hearing is actually in Progress even now.

3. The impugned order is challenged on several grounds. Briefly stated the challenged is:-

(1) that the administrative power under Rule 6 could not have been exercised when the Division Bench was seized of and was, actually proceeding with the preliminary hearing of the review application:

(2) that the withdrawal of a matter pending for judicial decision before a Division Bench of this Court and its assignment to a Full Bench in the purported exercise of the administrative powers conferred by rule 6 would undermine the judicial power conferred on and exercised by the High Court through its different Benches:

(3) that if the said rule were construed as conferring such powers on the learned Chief Justice, the provisions of rule 5 of Part I of Chapter I of the Bombay High Court Appellate Side Rules, 1960 would be rendered nugatory and it would also expose rule 6 to the challenge that it is ultra vires the rule-making power conferred Power the High Court by various constitutional and statutory instruments,. And

(4) that if such construction of rule 6 is inevitable, the rule requires to be struck down as ultra vires.

4. When the matter was called on for preliminary hear in a before us, we Pointed out to the learned Counsel appearing on behalf of the petitioners that there were two initial difficulties in his Way, one affecting the maintainability of the petition and the other the right to relief therein, and that unless those difficulties were resolved, it would not be possible to entertain the present writ petition. The difficulties, which were pointed out, are as follows: -

(1) The Full Bench, which is in seizin of the review application and which is actually hearing the same for admission. -is entitled and competent to deal with and decide the question of the validity or otherwise of the reference of the matter to a Full Bench because the issue touches upon its Jurisdiction to hear and pass appropriate orders on the review application and such an issue cannot be collaterally decided by a different Bench in a separate proceeding instituted in the writ jurisdiction; and

(2) Even if, in the exercise of writ jurisdiction, it is open to this Bench to entertain and decide the question as to the validity of the reference, having regard to the fact that there is an effective, appropriate, convenient and beneficial remedy available for seeking the decision of the said question, by raising the same in the review application before the Full Bench no relief is required to be granted in the writ jurisdiction and, in any caw, the interests of justice do not require that such relief should be granted in the present proceeding, in the overall circumstances of the case

We have heard the learned Counsel on both these points and we are not satisfied that

the difficulties have been overcome.

5. The issue as to the validity or otherwise of the reference of the review application to a Full Bench apparently raises a question bearing upon the jurisdiction of the Full Bench, By jurisdiction we mean the authority to deal with and decide the review application and not the initial Jurisdiction to entertain the review application. If, on the facts and in the circumstances of the case, either because of the lack of Power in the learned Chief Justice or because of the condition precedent for the reference is not satisfied or on account of the existence or non-existence, as the case may, of certain material or relevant factors, the reference is illegal or ultra vires and, consequently, the Full Bench is not validly seized of the matter, then, the Full Bench may lack jurisdiction, The moot question, however, is as to what is the remedy of the aggrieved party and which is the authority competent to decide the said issue.

6. In the context of inferior courts or tribunals with limited jurisdiction, it is well settled that only if the legislature has entrusted them with the jurisdiction, including the jurisdiction to determine whether the preliminary state of facts on which the exercise of their jurisdiction depends exists, then such courts or tribunals will have the Power to determine the existence or otherwise of the facts giving the jurisdiction (see Chaube Jagdish Pd. v. Ganga Prasad, AIR 1959 SC 492). In other words, in case of inferior courts, tribunals and authorities who do not possess plenary jurisdiction, the power to decide whether or not the jurisdictional facts or the described situation exists will have to be expressly conferred and, unless it is shown on the face of the proceeding that such matter is within their- cognizance, they will not have the power to consider and decide the question. As regards the superior courts of plenary jurisdiction, however, the Position is entirely different. Prima facie, no matter is deemed to be beyond their jurisdiction unless it is expressly shown to be so. The High Court, therefore, being a superior court of record is entitled to consider the. question of jurisdiction whenever it is raised in a proceeding before it. Unlike a court of limited jurisdiction, such superior court is entitled to determine for itself the question about its jurisdiction, unless it is expressly shown that it is beyond its jurisdiction (see Naresh v. State of Maharashtra, AIR 1967 SC I). Under the circumstances, in the review application, the Full Bench will be entitled to determine, if and when it is called upon to do so, the question as to its jurisdiction, depending upon the validity or otherwise of the reference. The inquiry would comprehend both the existence or otherwise of the power to make the reference and the validity of the impugned order of reference in the light of the facts and circumstances of the case. Such an inquiry would be, in a sense, of a collateral nature, since it has no direct relation with the decision of the actual dispute between the parties. Which has been brought before this Court in the review application. However, the inquiry is substantially and directly connected with the proceeding, inasmuch as it touches upon the jurisdiction of the Full Bench to deal with and decide the review application. Therefore, once the jurisdiction of the Full Bench is challenged before it on the ground of the validity of the reference, the Full Bench will have to try and decide whether the said challenge has merit. Ordinarily, such determination will have to precede the determination of the actual question which the Full Bench has to try unless. Of course, the party raising the challenge gives UP the same at some stage of the proceeding and invites decision on merits, or the. Full Bench considers that the issue is truly a non issue on some such or similar grounds, or postpones its consideration to a later stage, of the hearing on any other relevant ground.

7. Be it stated at this stage that in the affidavit-in-reply dated September 1, 1981 filed

in the review application bv one of the petitioners herein, who is one of the respondents in the said Proceeding, the question as to the reference of the matter to a Full Bench has, in fact, been raised in the , following terms :

'In any case, I submit that reference, of the matter to a Full Bench may not be appropriate as there is no question of any review being referred to a Bench larger than the original Bench which heard the main matter.' Although the contention is not highlighted precisely and adequately in the terms in which it is presented in this writ petition, presumably because the affidavit was filed before the impugned order was actually made, the question as to the validity of the reference would appear to be in issue in the matter. If and when it is precisely raised in the said proceeding, its brooding omnipresence is bound to be felt at the threshhold and at every subsequent stage of the hearing of the review application.

8. The question then is whether the present writ petition, which seeks to raise the selfsame question. is maintainable. Article 226 of the Constitution, in so far as it is relevant for the present purposes, empowers the High Court to issue to any person or authority directions, orders or writs, including writs in the nature of mandamus, prohibition and certiorari, or anv of them for the enforcement of any of the rights conferred by part III and for any other purpose. Ordinarily, the writs, orders and directions are not available against any person' or 'for-any purpose but are available against 'any person to whom' and for 'any purpose for which' the various writs therein mentioned can be issued according to the well-settled rules governing the issue of such writs. In the instant case, the prayers, in substance, inter - alia, seek a writ of or in the nature of mandamus against the learned Chief Justice, in so far as the impugned order of reference is concerned, and a writ of or in the nature of prohibition against the Full Bench seized of the review application so as to restrain it from dealing any further with the matter. of course, so far as the latter part of the relief is concerned, what has been sought in express terms is, only an interim relief staying the further hearing of the review application before the Full Bench, How, it is apparent 'that the foundation seeking the interim relief is the Posed lack of jurisdiction in the Full Bench to deal with and decide the reapplication. That apart the question of jurisdiction of the Full Bench be inherently in issue once the relief against the impugned order of reference is claimed. The question for consideration is whether the petition seeking such reliefs is competent.

9. A writ of or in the nature of mandamus can issue to the Chief Justice regard to his administrative orders requiring him to do some particular thing which pertains to his office and is in the nature of a public duty in accordance with law. Theoretically, therefore, an order of reference made by the Chief Justice in the Purported exercise of his administrative powers under Rule 6 can be brought into question in a writ petition and a writ of or in the nature of mandamus can issue requiring him to perform his Public duty in accordance with law, if proper grounds are made out. However, the question will have to be examined M each case not from an academic point of view but in the light of the circumstances of the case. In the instant case, as earlier held, the aid of this Court is already invoked and/or can be legitimately invoked in, the pending review application to question the validity of the reference and the Full Bench dealing with the said proceeding is fully empowered to deal with the question. Under such circumstances, it is difficult to appreciate - as to how the selfsame issue can be raised in an independent proceeding by invoking the writ jurisdiction of this Court. It is true that justice is administered in this Court in different jurisdictions by different Benches of this Court. However, the functions

discharged in different jurisdictions are ultimately in the exercise of the judicial power inherent in or vested in this Court under the Constitution and the laws. If there are two modes of invoking the jurisdiction of this Court to seek the same relief, an aggrieved party cannot simultaneously or consecutively invoke both, no matter that the jurisdictions are different. Parallel or successive exercise of iurisdiction by the same Court in its different divisions in regard to the same subject matter is not contemplated, especially when the entertainment of and grant of relief in one proceeding would not be possible unless the area of dispute covered in another proceeding is trenched upon or traversed. The decision in Shankar v. Krishnaji, AIR 1970 SC 1, which holds that once the High Court has dismissed a revision application against an appellate order, another set of proceedings under Article 226 or 227 cannot be instituted to challenge the same appellate order because of the doctrine of merger. supports this view in principle. Under the circumstances, the writ petition, in so far as it seeks a writ of or in the nature of mandamus against the learned Chief Justice in regard to the impugned order of reference is not maintainable.

10. Viewed in the context of the writ of or in the nature of prohibition, the situation is still worse. The Full Bench seised of the review application is not an inferior court but a court of 1co-ordinate jurisdiction. It is a division of the superior court of record of which this Bench is also a part. The Full Bench is competent to consider and decide in the pending proceeding the question of its jurisdiction, depending upon the validity or otherwise of the reference. The Full Bench cannot be restrained from proceeding further with the hearing of the review application by a writ of or in the nature of prohibition issued by another Bench of this Court on the basis that it lacks jurisdiction, including the jurisdiction to decide the question of its own jurisdiction. The very basis for the grant of relief of or in the nature of writ of prohibition is that an inferior court is exceeding its jurisdiction. In the context of things and in the situation above outlined, it would be impossible to hold that a writ petition would lie seeking such a relief.

11. It was urged on behalf of the petitioners, however, that since the Full Bench owes its constitution to an order made in exercise of the powers conferred by Rule 6, it might not be competent to decide the validity of the impugned order of reference or the validitv of the rule itself. The submission is apparently misconceived. We have held above that the validity of the order making the reference which has resulted in the constitution of the Full Bench is a jurisdictional fact and that the Full Bench being a court of Plenary jurisdiction it would undoubtedly be entitled to deal with and decide the same and, if and when it decides the same, its determination would be open to challenge only in an appeal and not in a collateral proceeding. So far as the validity of the rule is concerned, the analogy drawn from the decisions such as K. S. Venkatraman & Co. v. State of Madras, AIR 1966 SC 1089 given in the context of provisions of the taxing statutes is wholly inapplicable. The basis of those decisions is that authorities under a taxing statute are not concerned with the validity of the taxing provisions and the question of ultra vires is foreign to the scope of their jurisdiction. Any point relating to the constitutional validity of a taxing Provision could not be raised before the income-tax authorities and, therefore, neither the High Court nor the Supreme Court would go into those matters in a reference from the decisions of those authorities because the advisory power of the High Court and/or Supreme Court as also the appellate power of the Supreme Court is itself derived from the statute and also because such a question could not be said to arise out of the orders of those authorities., Such is not the situation in the context of the review application referred to the Full Bench under Rule 6. The respective powers of the

Judges in relation to the administration of justice in this Court and the Power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts are preserved by and derived from the Constitution. The rule in question is thus enacted by this Court in the exercise of its rule-making power flowing from the constitutional and statutory provisions. This Court exercising its judicial powers, in various jurisdictions and its different Divisions is not the offspring of the rules so enacted, but the rules are its off-spring. Its initial jurisdiction to deal with matters presented for its decision in different Divisions is not derived: from those 'rules which are enacted only for the more convenient exercise of its judicial power a besides the matter, before the. Full Bench is a review application arising out of the judgment and order of this Court in a writ petition. The power to entertain and grant relief in such a proceeding inheres in this Court on account of its plenary jurisdiction. It is not conferred by any statute and, save and except the definitive limits to which any review power is subject, it is not circumscribed in any other manner. Subject to the said limitation, the review jurisdiction is co-extensive with the writ jurisdiction exercised by the Court which passed the order of which review is sought. In writ jurisdiction, the question of vires is not out of bounds. Under such circumstances, the doctrine invoked in relation to matters arising before the High Court in its limited advisory jurisdiction under taxing statutes would be wholly inapplicable and the question of ultra vires of the rule would not be foreign to the scope of jurisdiction of the Full Bench.

12. In our considered opinion, therefore, the present writ petition is not competent and it must be rejected on that ground alone.

13. Even otherwise, assuming for a moment that the present writ petition is competent, there is still a further question to be considered, namely, whether, having regard to the facts and circumstances of the case, this Court should entertain the same and grant any relief to the petitioners in the exercise of its discretion. Despite the width and amplitude of the writ jurisdiction. Certain self-imposed limitations in regard to the exercise of such jurisdiction are recognized because the remedies provided by the writs are of an extraordinary nature, Thus a Court will not ordinarily issue a writ of or in the nature of mandamus (1) in favour of a person who has adequate alternative remedy and (2) where the interests of Justice do not require, that the relief should be granted. These are illustrative cases and not exhaustive. In the instant case, even if it is assumed that the Full Bench dealing with the review application is not the only forum in which the question of the validity of the reference can be urged and decided, there is no manner of doubt having regard to what we have stated earlier, that that Bench is *indubitably competent to entertain and decide such a dispute. In other words an equally convenient, effective, appropriate and beneficial remedy is available to the petitioners in a pending proceeding in this Court to which they are parties. Under such circumstances, it would be a wise exercise of discretion not to entertain and grant relief in the present proceeding. Since such an adequate, alternative remedy is available, no injustice is likely to result by our declining to interpose ourselves in the writ jurisdiction. Besides as earlier pointed out, the question as to the reference of the review application to a Full Bench is already raised in the affidavit-in-reply filed in the said proceeding. The question inheres, in the said proceeding. It would be gross abuse of the process of Court to permit the same question to be simultaneously agitated herein. Having regard to the principle of comity and in order to avoid any possible conflict of decisions when two co-ordinate Courts have the power to decide the same question, it would be proper and sound exercise of discretion for one Bench not to interfere when another is

seized of the question in a different jurisdiction (See Shanker's case (AIR 1970 SC 1) (supra). There is also another aspect of the matter. Even though the question as to the invalidity, if any, of the order of reference and the rule permitting the reference are the sole questions herein, they are merely a part of the larger controversy before the Full Bench. Under certain circumstances, the decision on those questions may become academic, so far as the Full Bench is concerned, but not in this proceeding. For example, if the Full Bench is inclined to dismiss the review application on merits, the petitioners might decide not to raise the question of the validity of the order referring the matter to the Full Bench or the validity of the rule where under the reference has been made. Under such circumstances, it would be proper exercise of discretion to decline to entertain this petition and to refuse to enter into wide questions, such as those that are raised herein, in isolation and divorced from the proceeding in which they can be legitimately raised and decided, if necessary.

14. Having regard to all the aspects of the matter and having given our most anxious consideration to the questions arising for our decision. We are of the view that the present writ petition should be rejected on the grounds stated above, without entering into the merits of the questions sought to be raised therein.

15. The writ petition is, therefore, summarily rejected.

16. Petition rejected.