IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.07.2023

Pronounced on : 04.10.2023

CORAM : JUSTICE N.SESHASAYEE

W.P.No.2187 of 2022
and WMP.Nos.2355 & 14320 of 2022

S.Gurumurthy
Editor, Thuglak Tamil Magazine
No.166, Greenways Road
Crescent Avenue,
Kesavaperumalpuram
Raja Annamalaipuram
Chennai - 600 028. ... Petitioner

Vs

S.Doraisamy ... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorari to call for the records and quash the order dated 27.09.2021 passed in Recall Petition No.1 of 2021 in Consent Petition No.1 of 2021 by the learned Advocate General, High Court, Madras.

For Petitioner : Mr.Mahesh Jethmalani, Senior Advocate
Assisted by Mr.Ramaswamy Meyyappan
& Mr.Ravi Sharma

For Respondent : Mr.S.Doraisamy
(Party-in-Person)

ORDER

1. This is a petition filed under Article 226 of the Constitution, assailing an order dated 27.09.2021, passed by the present Advocate General of Tamil Nadu recalling an order dated 31.03.2021 passed by his predecessor by which the latter had declined consent for initiating contempt proceedings under Sec.15(2) of the Contempt of Courts Act, 1971.

2.1 The petition arises in the backdrop of the following facts:

a) Thiru S. Gurumurthy, the petitioner herein, is stated to have made a speech in a public meeting on 14.01.2021 on the occasion of the anniversary of the Tamil political weekly *Tughlak*', in which, he is alleged to have remarked that the judges in the Supreme Court and other courts are appointed by politicians by extraneous means.

b) The respondent herein, a senior member of the Madras Bar, considered the said speech of the petitioner to be an affront to the majesty of the Court, and filed a petition under Sect. 15(1) of the

Contempt of Courts Act, 1971 and sought leave to initiate proceedings for criminal contempt of court against the petitioner. This petition was taken on file as Contempt Petition 1 of 2021, by the then learned Advocate General. Upon issuance of notice, the respondent therein entered appearance and filed a counter affidavit dated 11.03.2021, contending that his speech was not contumacious.

c) By a detailed order dated 31.03.2021, the learned Advocate General, declined sanction and, has inter alia observed as under:

> "*Applying the law laid down in the above judgments, if one views the statements made by the respondent in its entirety, it would be seen that the statement was made impromptu at a question and answer session and the very next day, the respondent issued a clarification which has been referred to above. If the statement is read in its entirety, it would be seen that there was no intention to either scandalise the court or to interfere with the administration of justice. Though some of the remarks pertaining to the judiciary could have been avoided, the statement taken in its entirety, was meant to explain the systematic flaws and delays in the enquiry, investigation, administrative, executive and legal process and it was also based on the personal experience of the respondent in pursuing certain cases against politicians.*
>
> *On the facts and circumstances of the case and by application of*

the law laid down in the three judgements cited above, I do not think any case is made out to initiate criminal contempt proceedings against the respondent.

Accordingly the consent sought for is not granted."

2.2 On the very next day, on 01.04.2021, the respondent herein filed I.A 1 of 2021 before the Advocate General for recalling the order dated 31.03.2021, fundamentally on five grounds and they are as under:

a) The learned Advocate General had relied upon three judgments of the Supreme Court which are no longer good law.

b) The learned Advocate General has not taken into consideration 12 decisions which the respondent claims to have submitted to show that the earlier decisions of the Supreme Court are no longer good law.

c) The third ground is a continuation of the second where the respondent contends that in view of the 12 judgments, cited by him, the earlier order dated 31.03.2021 ought to be recalled.

d) The fourth and the fifth grounds are to the effect that the Advocate General had granted time till 31.03.2021 to produce translations and judgments. However, the learned Advocate General, owing to the pressure of work he might have forgotten it, and had mistakenly passed the order on 31.03.2021.

e) There being no appeal or revision against the order, dated 31.03.2021, the only remedy available to the respondent was to file an application for recall.

2.3 The petitioner opposed this petition of the respondent on two grounds:

a) That the petition to recall the order passed under Sec.15(2) declining leave is not maintainable, as there existed no legal basis for recalling or reviewing the order under the scheme of the Contempt of Courts Act;

b) That at no time the learned Advocate General had passed any order for filing the translation of his speech and hence, dehors the issue of maintainability of the petition for recalling the order, there exists no ground for recalling the order even on facts.

3.1 Though I.A 1 of 2021 was filed before the Advocate General on 01.04.2021, this application was taken up for consideration by his successor in September 2021 along with Consent Petition No. 2 of 2021 which was filed by one S.Kumaradevan, Advocate, seeking the consent of the Advocate General for initiation of contempt proceedings against the petitioner for the speech made by him on 14.01.2021.

3.2 By the impugned order dated 27.09.2021, the Advocate General recalled the earlier order dated, 31.03.2021, passed by the previous Advocate General in I.A 1 of 2021, and consequently restored Contempt Petition No 1 of 2021 back to his file. This order dated 27.09.2021 is now assailed in this writ petition. When the matter came up before this Court on 10.02.2022, this Court, while issuing notice, had requested the Advocate General to defer further proceedings in the matter.

4. Heard, Mr.Mahesh Jethmalani, senior counsel for the petitioner. Mr.Duraisamy, the respondent, appeared in person.

Arguments:

5. Shri.Mahesh Jethmalani's arguments are pointed:

a) That the power to recall an earlier order is but an alternative expression for power of review, and inasmuch as the power to review an order is statutory in character, and since the Contempt of Courts Act has not vested the statutory functionary, which the Advocate General is, with the power of review, the learned Advocate General ought not to have recalled the earlier order dated 31.03.2021, passed by his predecessor-in-office, as the very petition for recall is not

maintainable. Reliance was placed on the ratio in ***Naresh Kumar & Others Vs Govt. (NCT of Delhi)*** [(2019) 9 SCC 416].

b) Secondly, in terms of Sec.20 of the Act, even if any leave were granted by the Advocate General, it is still obligatory for the Court to take cognizance of the alleged criminal contempt of court within one year from the date of the alleged commission of the act constituting criminal contempt. In the present case, even if it is presumed that the learned Advocate General has the power to recall the earlier order, still it restores the original complaint to file, and he still may have to take a decision on the leave to be granted, but it is now well beyond the one year time stipulated under Sec.20 of the Act.

c) Thirdly, at any rate, the writ-petitioner has already issued his regret, which aspect has weighed with the then Advocate General when he declined to grant leave.

6. Per contra, appearing in person Mr. Duraisamy contended:

(a) The writ petition is not maintainable as the petitioner has not impleaded the Advocate General, and since the respondent is a private individual, a writ petition may not lie.

(b) That, the nature of power which the Advocate General exercises under Sec.15 is neither judicial power nor any statutory power, but merely an administrative power. Hence there vests in him an inherent power to recall the order to correct its own mistakes and errors. Reliance was made to the ratio in ***Kamalesh Verma Vs Mayawati & Others*** [(2013) 8 SCC 320]

7. In reply, Mr. Mahesh Jethmalani contended:

a) While the law does recognise the existence of inherent jurisdiction to recall an earlier made, it is confined to orders passed without inherent jurisdiction, or where it was obtained in fraud or collusion, or where the Court or tribunal, due to its mistake has prejudiced the interest of a party, or where an order is passed without service of notice about the proceedings to a party whose right was affected by it, but not otherwise. Reliance was placed on the ratio in ***Budhia Swain & Others Vs Gopinath Deb & Others*** [(1999)4 SCC 396], ***Om Prakash Marwaha (dead) through Lrs., & Others Vs Jagdish Lal Marwaha (dead) through Lrs.*** [(2009)1 SCC 510] and ***Narendra Kumar Sharma Vs Nand Kishore Sharma*** [2016 SCC OnLine All 3654].

b) Regarding the maintainability of the petition for not impleading the Advocate General is concerned, the law is settled vide the ratio in ***M.S.Kazi Vs Muslim Education Soceity & Others*** [(2016) 9 SCC 263].

Discussion & Decision

8. The understanding of the contours of this case is the epicentre in Sec. 15 of the Contempt of Courts Act, 1971, and it reads as below:

> "***15. Cognizance of criminal contempt in other cases.—***
> *(1) In the case of a criminal contempt, other than a contempt referred to in section 14, the Supreme Court or the High Court may take action on its own motion or on a motion made by— (a) the Advocate-General, or (b) any other person,* ***with the consent in writing of the Advocate-General****, or (c) in relation to the High Court for the Union territory of Delhi, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf, or any other person, with the consent in writing of such Law Officer.*
>
> *(2) In the case of any criminal contempt of a subordinate court, the High Court may take action on a reference made to it by the subordinate court or* ***on a motion made by the Advocate-General*** *or, in relation to a Union territory, by such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.*

(3) Every motion or reference made under this section shall specify the contempt of which the person charged is alleged to be guilty.

Explanation.—In this section, the expression "Advocate-General" means,—

(a) in relation to the Supreme Court, the Attorney-General or the Solicitor-General;

(b) in relation to the High Court, the Advocate-General of the State or any of the States for which the High Court has been established;

(c) in relation to the court of a Judicial Commissioner, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf."

In effect Sec.15 provides the procedural mechanism for initiating an action for criminal contempt of court, where the office of the Advocate General acts as a filter to let in only cases where he is *prima facie* satisfied that the public confidence in the institution of Court is imperilled by the alleged act of the alleged contemnor.

9. The genesis of this provision can be traced to the recommendations of the Sanyal Committee, which eventually led to the enactment of the 1971 Act, wherein it was observed as under:

> "*In the case of criminal contempt, not being contempt committed in the face of the Court, we are of the opinion that it would lighten* ***the burden of the court, without in any way interfering with the sanctity of the administration of justice****, if action is taken on a motion by some other agency. Such a course of action would give considerable assurance to the individual charged and the public at large. Indeed, some High Courts have already made rules for the association of the Advocate-General in some categories of cases at least. .* ***.the Advocate-General may, also, move the court not only on his own motion but also at the instance of the court concerned.*** *.... ....."*

10. According to the 1st respondent, he was constrained to file a petition for recall of the order dated 31.03.2021 essentially because there are no alternate remedies such as an appeal or revision. It is no doubt true that a right of appeal is a creature of a statute. The same is true as regards the power of review. Admittedly, Parliament has not provided an appellate remedy or for review of orders passed by the Advocate General within the scheme of the Contempt of Courts Act. Nevertheless, the assertion that the 1st respondent was remediless is clearly untenable for the petitioner has the a right to seek judicial review of the original order of the Advocate General, dated 31.03.2021 under Article 226 of the Constitution. In ***Conscientious Group v. Mohd. Yunus*** [(1987) 3 SCC 89], the Supreme Court has held that

refusal to grant consent by the Solicitor General for initiating an action for criminal contempt of court is judicially reviewable. The opinion of Sabyasachi Mukharji, J (as the learned Chief Justice then was) in ***P.N Duda v P. Shivshankar*** [(1988) 3 SCC 167] supports the aforesaid view. This issue, however, need not engage this Court any longer since the present case is directed only against the order of the learned Advocate General recalling the order of his predecessor dated 31.03.2021, and not against the original order itself.

11. Mr.Duraiswamy also contended that since the Advocate General has not been made a party, the writ petition would not be maintainable. This contention cannot hold water in the light of the following observations of the Supreme Court in ***Hari Vishnu Kamath Vs Syed Ahmad Ishaque and Others*** [AIR 1955 SC 233], wherein it was observed as under:

> "*But then, if the writ is in reality directed against the record, there is no reason why it should not be issued to whosoever has the custody thereof. The following statement of the law in Ferris on the Law of Extraordinary Legal Remedies is apposite:*
>
> > '*The writ is directed to the body or officer whose determination is to be reviewed, or to any other person having the custody of the record or other papers to be certified.*'"

It is necessary to emphasize that the aforesaid observations of the Supreme Court would show that the writ can be issued to "whosoever" who has custody of the record. It is nobody's case that the Advocate General is holding the custody of the file in his personal capacity. That apart, as was pointed out in ***M.S.Kazi v. Muslim Education Society*****, [**(2016) 9 SCC 263**],** in a proceeding for certiorari the Tribunal or authority is not required to come before the Court and defend its order. It was observed:

> "*The appellant instituted a proceeding before the Tribunal to challenge an order of dismissal passed against him in disciplinary proceedings. Before the Tribunal, the legality of the order of dismissal was in question. The lawfulness of the punishment imposed upon the appellant was a matter for the employer to defend against a challenge of illegality in the special civil application. The Tribunal was not required to defend its order in the writ proceedings before the learned Single Judge.* ***Even if the High Court was to require the production of the record before the Tribunal, there was no necessity of impleading the Tribunal as a party to the proceedings. The Tribunal not being required in law to defend its own order, the proceedings under Articles 226 and 227 of the Constitution were maintainable without the Tribunal being impleaded****."*
> *(emphasis supplied)*

Consequently, this contention of the respondent must necessarily fail.

12.1 Turning to the issues involved and raised, if the provisions of the Contempt of Courts Act, 1971 are examined, it makes it clear that the Advocate General has not been conferred with any express power to review an order passed by him under Sec. 15(1) of the Contempt of Courts Act, 1971. It is perhaps for this reason that the petition has been styled as one for '*recall'* and not as *'review'*. The distinction between review and recall has been the subject matter of several decisions of the Supreme Court. In ***Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal*****,** [1980 Supp SCC 420], where the Hon'ble Supreme Court drew a distinction between procedural and substantive review and proceeded to observe as under:

> "*The expression "review" is used in the two distinct senses, namely (1) 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 (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record."*

In ***Budhia Swain v. Gopinath Deb*** [(1999) 4 SCC 396]**,** the Supreme Court has enumerated the list of circumstances under which a Tribunal or a Court may recall its order. It has observed thus:

> " ***8.****In our opinion a tribunal or a court may recall an order earlier*

made by it if,

(i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,

(ii) there exists fraud or collusion in obtaining the judgment,

(iii) there has been a mistake of the court prejudicing a party, or

(iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.

The power to recall a judgment will not be exercised ***when the ground for reopening the proceedings or vacating the judgment was available to be pleaded in the original action*** *but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence*."

In ***Kapra Mazdoor Ekta Union v. Birla Cotton Spg. and Wvg. Mills Ltd.,***[(2005) 13 SCC 777], the concept of "procedural review"/ recall was explained as under:

"*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, inasmuch 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 a still more recent decision in ***Ganesh Patel v Umakant Rajoria***, [2022 SCC Online SC 2050], the Supreme Court has clarified that what is contemplated by a recall is only a procedural review as contra-distinguished

from a substantive review of the matter. The Court has observed:

> "*This application for recall of the order was maintainable as it was an application seeking a procedural review, and not a substantive review to which Section 362 of the Criminal Procedure Code, 1973, would be attracted. On the aspect of the difference between recall and review and when an order of recall can be passed reference can be made to Budhia Swain v. Gopinath Deb.*"

12.2 A prayer for recall is but a prayer for review in disguise. From the aforesaid authorities it would be evident that where a statute does not provide for review of its order, in may review and recall its order, provided it is only a procedural review and not substantive review and must also fall within the ***Budhia Swain*** [(1999) 4 SCC 396] principle. This is the plane on which this Court needs to test the case of the respondent for recall of the order of the then Advocate General, dated 31.03.2021.

13.1 If the grounds taken in the petition filed by the respondent before the learned Advocate General for recalling the order dated 31.03.2021 are now evaluated for their merit and sustainability, it is evident that none of them can even remotely be termed as one seeking a procedural review/recall. The primary ground on which the respondent sought recall of the earlier order is

that the then learned Advocate General had over looked 12 judgements relied on by the respondent, and chose to rely on three judgments of the Supreme Court which are no longer good law. This cannot possibly bring the case within the parameters of the four grounds for recall set out in the dictum in ***Budhia Swain case*.** Even if this contention is taken at face value, this can, at the best, amount to an error of law on merits, which is clearly outside the scope of a petition for recall. The third ground seeking recall (see paragraph 2.2(c) above) is a continuation of the second ground. This too must, consequently, be held to as falling outside the scope of procedural review. Here, this Court consciously refrains from examining the merits of the contention since the scope of this writ petition is confined to the propriety and legality of the order of recall, and is not engaged in the judicial review of the original order of the learned Advocate General dated 31.03.2021, on merits.

13.2 The fourth and fifth grounds go together. See paragraph 2.2(d) above. In his petition for recall the order passed in I.A 1 of 2021, the petitioner has contended that the Advocate General had granted time to the counsel for the respondent to produce the English translation of the speech made by the

respondent on or before 31.03.2021, and had also granted liberty to the petitioner to file any objection to the translation within two days from the date of receipt of the copy of the English translation. It is stated that the learned Advocate General by mistake, owing to the pressure of work, had forgotten this outer time limit and passed the order. And, this is the sole ground that appears to have found favour in the impugned order dated 27.09.2021. However, on a close reading of the impugned order dated 27.09.2021 passed by the Advocate General, one finds the following statement:

> "*Though there was no record to reflect that time was granted to file Tamil to English translation of the speech, Thiru V. Elangovan, Counsel for the Petitioner produced an email communication from the counsel for the Respondent to the Learned Advocate General of Tamil Nadu with the copy marked to the Counsel for the Petitioner.*"

Thus, from the record, it is evident that there was no material before the Advocate General to conclude that his predecessor had passed an order granting time to the parties till 31.03.2021 to produce a translation. In the absence thereof, it would be impermissible to impute the then Advocate General, something which does not form a part of the record. Despite this, the impugned order goes on to conclude:

"*The filing of physical copy of 31.03.2021 probablize the version of Thiru V. Elangovan that translation was asked for passing orders as the then Learned Advocate General of Tamil Nadu was not able to read Tamil."*

The statements and conclusions made in an order passed by a statutory authority cannot be supplemented by additions, improvements or contradictions through affidavits or by oral versions submitted by the counsel. It is a timeless rule of the common law that the correctness of a judicial or quasi-judicial record cannot be impeached by allegations made in the pleadings (See *Green & Green v Ovington et al. 16 Johns. Rep. 55).* In ***Mohinder Singh Gill v. Chief Election Commissioner*** [(1978) 1 SCC 405], the Hon'ble Supreme Court had observed:

"***8.*** *The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji[Commr. of Police, Bombay v.Gordhandas Bhanji, 1951 SCC 1088: AIR 1952 SC 16] :*

"*Public orders, publicly made, in exercise of a statutory*

authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Thus, in the face of the admitted facts, there existed no order of the Advocate General on record directing the furnishing of a translation and fixing time till 31.03.2021, the observations extracted supra in the impugned order to the effect that filing of physical copies by the counsel for the respondent on 31.03.2021 probablises the version of counsel that the Advocate General had directed the filing of the same by 31.03.2021 is clearly unsustainable.

13.3 Consequently, none of the grounds raised in the petition bring the case within the four grounds for procedural review set out in ***Budhia Swain,*** supra. The impugned order dated 27.09.2021 is, therefore, clearly without jurisdiction and this Court necessarily needs to intervene.

14. Before parting with this case, this Court considers it appropriate to observe that in a democracy driven by free speech, the Court cannot seek the comfort of the cocoon or aim to insulate itself from criticisms, just or otherwise. Contempt power is not a shield to choke the voice of the citizen in a free country. The foundational basis for contempt jurisprudence lies in preserving the public confidence in the institution of Courts, and upholding the majesty which, it must be stated, is the result of the public confidence. Contempt-power is not a privilege for the Court to roam free, but is a tool to trim the social psyche in meddling with the public confidence in the institution. Public confidence is the anchorage on which the majesty of the courts rests, and the public confidence will be best served only when the Courts realised its Constitutional obligations to the people of this country, and pass the scrutiny of its citizens with the quality of its performance. The judiciary should let its performance speak, and it has always spoken through its performance. The power to initiate an action for contempt, therefore, can hardly provide a defence stronger than the quality of judicial performance. Therefore, unless any action or inaction obstructs the course of justice, there is hardly a need to resort to the power of contempt in a democracy. If one turns to social media and TV shows, statements are often made, and views

are shared on the judiciary by those uninformed citizens, who know very little about the way the legal system functions. They lavish criticisms on the judiciary even where there is a space for being charitable. Where expectations on the judiciary are high, and the dreams the citizens hold are big, the judiciary as an institution cannot escape encountering free speech of lesser quality, content or responsibility. Courts therefore cannot, and should not be hyper-reactive to every statements hurled at the institution, and waste its time on it. Here it is necessary to remind ourselves of the wise observations of Mr. Justice Frankfurter in ***Pennekamp Vs Florida*** [328 US 331] wherein the learned judge observed:

> *"Judges should be foremost in their vigilance to protect the freedom of others to rebuke and castigate the bench and in their refusal to be influenced by unfair or misinformed censure. Otherwise, freedom may rest upon the precarious base of judicial sensitiveness and caprice. And a chain reaction may be set up, resulting in countless restrictions and limitations upon liberty."*

15. And now the time has come to draw the curtains. The result of the aforesaid discussion is that the order dated 27.09.2021 passed by the learned Advocate General of Tamil Nadu will stand set aside. The writ petition is allowed. In the circumstances, there will be no order as to costs.

Consequently, connected miscellaneous petitions are closed.

04.10.2023

Index : Yes / No

Internet : Yes / No

Speaking order / Non-speaking order

ds

N.SESHASAYEE.J.,

ds

Pre-delivery order
in W.P.No.2187 of 2022

04.10.2023