

Dr. Dinesh Kumar vs Shri Askari Hussain And 6 Others on 11 December, 2024

Author: Pankaj Bhatia

Bench: Pankaj Bhatia

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

?Neutral Citation No. - 2024:AHC-LK0:83138

Court No. - 7

Case :- MATTERS UNDER ARTICLE 227 No. - 901 of 2024

Petitioner :- Dr. Dinesh Kumar

Respondent :- Shri Askari Hussain And 6 Others

Counsel for Petitioner :- Uma Shankar Sahai, Vinayajit Lal Verma

Counsel for Respondent :- Rajendra Pratap Singh, C.S.C., Digvijay Singh

Hon'ble Pankaj Bhatia, J.

1. Supplementary affidavit filed today by learned counsel for the petitioner is taken on record.
2. Heard Sri U. S. Sahai along with Sri Vinayajit Lal Verma and Sri Shashwat Srivastava, learned counsel for the petitioner and Sri L.B. Rai along with Sri Askari Hussain and Sri R.P. Singh, learned counsel for the respondents No. 1, 2 & 3 as well as learned Standing Counsel.
3. The present petition has been filed invoking the jurisdiction of this Court under Article 227 of the Constitution of India, challenging the impugned order dated 04.12.20212 passed by the State Consumer Dispute Redressal Commission, U.P. as well as order dated 19.01.2024 passed by the

Hon'ble National Consumer Dispute Redressal Commission, New Delhi (contained in Annexure No 2 & 3 respectively to this petition).

4. The facts in brief as argued by the counsel for the parties are that the petitioner herein was running an institution in the name of Surya Medical Centre which was a Nursing Home and the petitioner was the director of the said institution. The complainant No.2, respondent No.2 herein, was regularly visiting the said Nursing Home i.e. Surya Medical Centre in connection with the pregnancy and was going for the regular check-ups at Surya Medical Centre where she was being given treatment. The documents available on record indicate that her date of expected delivery, as was stated by the doctors, was 15th October, 2005, however, when she visited the Nursing Home on 24.09.2024, as per the version of the respondent No.2, she was examined by Dr. Ranjana Pandey and the medical advice was given to her that a cesarean operation was to be carried out to save the life of the child. It was pleaded that based upon the said opinion, the respondent No.2 underwent a cesarean operation in the said Nursing Home and during the performance of the said operation, she developed complications and oxygen which was required at the time of the operation was not available at the said nursing home because of which she suffered critically.

5. It was further pleaded that the respondent No.2 was taken to another nursing home namely Sanjivani Nursing Home wherein the follow-up treatment was done. It was also pleaded that the respondent No.2 was taken for further advice to SGPGI wherein it was diagnosed that she was suffering from Hypoxia Ischemic Encephalopathy (HIE). It was claimed that the respondent No.2 suffered extensive medical issues for which, a claim was filed by filing a complaint before the State Consumer Forum seeking damages in the negligence in the treatment suffered by the respondent No.2. The State Consumer Forum by means of an order dated 04.12.2012 passed an order in favour of the complainant awarding amount of Rs.95,00000/- (Rupees Ninety Five Lakh Only) against the respondents in the said claim petition. Against the said order, three appeals were preferred before the National Consumer Forum, one by the petitioner and two by the other doctors. During the hearing before the National Commission before a two Judge Bench, there was difference of opinion in between two members, one of the presiding members passed an order on 19.03.2021, finding favour with the appellant and quashed the order passed by the State Commission and the Consumer Complaint No.13 of 2006 as filed before the State Commission was dismissed.

6. The other member, who was part of the Bench, differed with the view taken by the Chairman and passed the separate order on the same date. In the said order, he upheld the contention of the complainant, however, reduced the award from Rs.95,00000/- to Rs.93,00000/- and interest was also reduced from 15 per cent to 12 per cent. In terms of mandate of Section 58(3) of the Consumer Protection Act, a reference was drawn for being referred to the 3rd member. The reference order is on record (Annexure No.6 and 7). In the said reference order as many as five questions were framed for being answered by the member. The five questions are as under:

"1. Whether the Complainant/Respondent had been able to lead satisfactory documentary or oral evidence to link the association of the Appellant Doctor in FA/30/2013 with "Surya Medical Centre" where the Complainants wife was allegedly admitted, and then given improper treatment?

2. Whether the Complainant/Respondent had been able to lead satisfactory documentary Evidence to establish that his wife had at all been admitted or operated upon in the said "Surya Medical Centre"?
3. Whether this Commission would be justified in drawing any conclusions on the basis of any oral explanations or circumstances being narrated by the Complainant which were not referred to in the original Complaint, to overcome the apparent handicap of lack of satisfactory Evidence?
4. Whether the Complainants Submission that all the relevant Medical documents supposed to have been issued to him by "Surya Medical Centre" were withheld from him, or that for some satisfactory reasons he had omitted to obtain such documents from the said Medical Centre?
5. Whether in the given circumstances, in a proceeding of summary nature would it have been proper to accept the uncontroverted oral Affidavit of the Complainant's family Member on the premise that they were not subjected to any cross-examination?"
7. In terms of the said reference, the order impugned came to be passed. While doing so, both the orders passed by the members of the Bench were recorded and from Para 13 onwards, the member, before whom the reference was placed, proceeded to uphold the view taken by one of the members and rejected the view taken by one of the members.
8. Impugning the said order, the submission of the learned counsel for the petitioner is that it was a case of no evidence whatsoever. He further argues that all the factual averments were denied by the petitioners and no evidence whatsoever was there except for the evidence in the form of affidavits by both the parties, he draws my attention to some of the documents filed on behalf of both parties, which according to him, do not indicate or testify the averments as pleaded in the complaint. He thus argues that it was a case of no evidence at all and by passing the impugned order, State Consumer Forum has erred in granting compensation to the complainant.
9. He further argues that the manner of computing the awarded damages has not been specified and to that extent also, the orders are bad in the eyes of law. He further argues that after the difference that arose in between two members, five points were referred for determination and instead of deciding the points as referred to the 3rd member, the 3rd member has concurred with one of the views taken by one of the members, which is contrary to the mandate of Section 58(3) of the Consumer Protection Act and specifically of the proviso of Section 58(3) of the Consumer Protection Act.
10. It is agreed in between the parties that out of the total amount awarded, the substantial amount of about 1/3 of the total amount has been paid by the respondents to the claim petitioner.

11. It is further admitted that two of the persons against whom the complainant were filed have not challenged the appellate order before this Court and have accepted the finding against them. In the light of the said, the submission of the learned counsel of the petitioner is that the impugned award deserves to be set aside as it is a case of no evidence and and is beyond the mandate of Section 58(3) of the Consumer Protection Act.

12. Learned counsel for the respondent, on the other hand, argues that in exercise of the power under Article 227 of the Constitution of India, the scope of interference is very limited as has been held by the Hon'ble Supreme Court in the case of Garment Craft Vs. Prakash Chand Goel (2022) 4 Supreme Court Cases 181 wherein the scope of powers under Article 227 of the Constitution of India were discussed.

13. In reply to the argument of the learned counsel for the petitioner in respect of Section 58(3) of the Consumer Protection Act, he further argues that once the finding of medical negligence has been established, that would be the final and determinative factor for deciding issue and admittedly, this Court cannot appreciate any evidence at the stage of Article 227 of the Constitution of India. He further argues that the respondent No.2 has suffered extensively medical complications and is in a vegetative state and thus the amount awarded is wholly justified and the petition deserves to be dismissed.

14. In the light of the said submissions, it is fairly well settled that the scope of powers under Article 227 of this Court can be exercised against the orders passed by the State/ National Commission as has been held by the Hon'ble Supreme Court in the case of M/s Universal Sompo General Insurance Company Ltd Vs. Suresh Chand Jain 2023 SCC OnLine SC 877. It is also fairly well settled that the scope of the powers under Article 227 of the Constitution of India is mainly to correct the jurisdictional errors, to check the errors in the decision making process and to rectify any glaring error committed by the Tribunal, it is certainly not an appeal entitling this Court to enter into the realm of appreciation of evidence.

15. In the light of the said, power vested with this Court under Article 227 of the Constitution of India, the issue to be decided by this Court is whether the decision making process by the National Consumer Forum is justified or not. It emanates from the record that when the two members heard the matter, there was difference of opinion and the points were drawn and were referred for opinion before the Chairman/3rd member, the points which were referred have already been extracted above. It is essential to notice the mandate of Section 58(3) of the said Act, which is as under:

"(3) Where the members of a Bench differ in opinion on any point, the points shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members and such point or points shall be decided according to the opinion of the majority of the members who have heard the case, including those who first heard it:

Provided that the President or the other member, as the case may be, shall give opinion on the point or points so referred within a period of two months from the date of such reference."

16. In terms of the proviso of Section 58(3), the powers of the President or the other member to whom the points have been referred for opinion can only delve and decide on those questions alone, he cannot act as a 3rd member to decide the lis. In the present case, from the impugned order, it appears that he has decided the lis and has favoured the view taken by one of the members instead of deciding the five questions referred to them, which is clearly not a proper exercise of power specifically relating to proviso of Section 58 (3) of the Consumer Protection Act. It is equally fairly well settled that the reference Court, is in the form of a Court giving opinion and essentially it does not perform the adjudicative function.

17. It is essential to notice the law with regard to jurisdiction of Court of reference. The Hon'ble Supreme Court in the case of Shriram Industrial Enterprises Limited vs. The Union of India and Others; 1994 SCC OnLine All 647 held as under:

"125. There is another aspect of the matter This Full Bench has been constituted under orders of Hon'ble the Chief Justice and as per the terms of the said order, it can only hear and give opinion on the point which has been referred to it. It is not open to this Bench to travel beyond the reference and hear and give opinion on questions which have not been referred to it or to rehear the whole case de novo. In Kesho Nath Khurana v. Union of India, 1981 Supp SCC 38: AIR 1982 SC 1177, it was held that where a question of law arising in a second appeal was referred by a single Judge to a Division Bench, the Division Bench ought to have sent the matter back to learned single Judge, after deciding the question of law referred and it could not proceed to dispose it of on merit.

126. In view of what has been stated above, I am clearly of the opinion that the decisions given by Hon'ble Om Prakash, J. and Hon'ble R.R.K. Trivedi, J. on the question of competence of the State Legislature to enact U.P. Sheera Niyantan Adhiniyam (Act No. 24 of 1964) were merely in the nature of opinion and the point of difference was rightly referred in accordance with Chapter VIII, Rule 3 of H.C. Rules. This Full Bench can only hear and decide the question which has been referred and other points on which there is unanimity of opinion between the two Hon'ble Judges are, therefore, not open to challenge."

18. The Supreme Court in the case of Kesho Nath Khurana vs. Union of India and Others; 1981 (Supp) SCC 38 recorded as under:

" ? Now it is obvious that since only the aforesaid question of law was referred by the single Judge to the Division Bench, the Division Bench should have sent the matter back to the single Judge after deciding the question of law referred to them. But instead the Division Bench proceeded to dispose of the Second Appeal on merits and

dismissed it with costs. We think that the Division Bench was in error in following this procedure. The Division Bench ought to have sent the appeal back to the single Judge with the answer rendered by them to the question referred by the single Judge and left it to the single Judge to dispose of the second appeal according to law."

19. In the case of Commissioner of Income Tax, Delhi & Bansi Dhar and Sons; (1986) 1 SCC 523, the Supreme Court held as under:

"20. These observations, however, will have to be understood in the context in which the same were made. If there was jurisdiction to do certain matter then all powers to make that jurisdiction effective must be implied to the authority unless expressly prohibited. But in references under 1922 Act as well as 1961 Act the courts merely exercise an advisory or consultative jurisdiction while the appeals are kept pending before the tribunal, therefore, nothing should be implied as distracting from the jurisdiction of the tribunals. Power to grant stay is incidental and ancillary to the appellate jurisdiction. What was true of the appellate jurisdiction could not be predicated of the referential jurisdiction. - See the observations of the majority judgment of the Delhi High Court in Narula Trading Agency vs Commissioner of Sales Tax [1981] 47 S.T.C. p.45, though made in the context of different statutory provisions.

21. This decision of Andhra Pradesh High Court was noticed by this Court in Income Tax Officer, Cannanore vs M.K. Mohammed Kunhi 71 I.T.R. 815. That decision requires a little closer examination. This Court in that decision was dealing with Section 254 of the Act of 1961 which conferred on the Appellate Tribunal powers of the widest amplitude in dealing with appeals before it. This Court held that power granted by implication the power of doing all such acts, or employing such means, as were essentially necessary to its execution. The statutory power under Section 254 carried with it the duty in proper cases to make such orders for staying recovery proceedings pending an appeal before the Tribunal, as would prevent the appeal, if successful, from being rendered nugatory. Section 254 carried with it the appellate powers of the Appellate Tribunal. This Court while interpreting that power referred to the Sutherland's Statutory Construction of third edition, articles 5401 and 5402., in Domat's Civil Law (Cushing's edition), Volume 1, at page 88, Maxwell on Interpretation of Statutes, eleventh edition, and came to the conclusion that where the power was given to an authority, incidental powers to discharge that authority were implied in the grant of that power. This Court noted that the Income-tax Appellate Tribunal was not a court but exercised judicial powers. The Court noted that there were certain decisions in which difficulties were felt that the Appellate Tribunal did not possess the power to stay recovery during the pendency of an appeal. Reference was made to a decision of the Andhra Pradesh High Court in the case of Vetcha Sreeamamurth vs The Income Tax Officer, Vizianagaram and another; 30 I.T.R. 252, where Viswanatha Sastri, J. observed that there was no confinement of an express power of granting a stay of realisation of the tax, nor was there any power allowing the tax to be paid in instalments. The learned judge observed that neither the Appellate Assistant Commissioner nor the Appellate Tribunal was given the power to stay the collection of tax. Therefore, according to the learned judge, whether the law should not be made more liberal so as to enable an assessee who has preferred an appeal, to obtain from the appellate forum, a stay of collection of tax, either in whole or in part, on furnishing suitable security, was a matter for the legislature to consider. Referring to the decision in

Pollietti Narayana Rao vs Commissioner Income Tax (supra), this Court made an observation to the effect that "the same High Court held that stay could be granted by it pending reference of a case by the Appellate Tribunal to the High Court. This power the High Court had under Section 151 of the Civil Procedure Code and under Section 227 of the Constitution". This passage in our opinion cannot be taken as approving the observations of the Andhra Pradesh High Court in Pollisetti Narayana Rao's case (supra). This Court was dealing with the power of the appellate authority i.e. the Appellate Tribunal. Therefore, that would be an entirely different question. The appellate authority must have the incidental power or inherent power- inherent for the disposal of an appeal to grant a stay or not to grant a stay."

20. The Hon'ble Supreme Court had the occasion to consider the scope of jurisdiction of a reference court specifically considering the powers vested by virtue of Article 227 of the Constitution referred to a Calcutta High Court decision to the following effect:

"33. The Allahabad High Court in Sridhar vs Commissioner of Wealth-Tax, 153 I.T.R. 543 at 547, observed that only power that High Court could exercise under Section 27 of the Wealth-Tax Act, 1957 was similar to Section 66 of 1922 Act i.e. to give opinion about the questions referred to it in an advisory capacity by answering the questions in favour of the assessee or the revenue, as the case might be. Even while hearing a reference under a taxing statute, the High Court has certain inherent powers. But the extent and scope of the inherent power which can be exercised by an appellate or revisional court cannot be the extent and scope of the inherent power of the High Court while exercising an advisory jurisdiction such as is conferred by Section 27 of the Act. The inherent power which the High Court can exercise while hearing a reference under Section 27 must be confined to the procedure about the hearing of a reference and to passing such orders as are ancillary or incidental to the advice which the High Court proposes to give while answering the questions. While hearing a reference under Section 27, the Allahabad High Court further held that the High Court did not have the further inherent power to pass interim orders restraining the orders of AAC or by the Tribunal being given effect to. It was further held that what the High Court could not do at the time of passing the final order, it could certainly not do as an interim measure in the purported exercise of its inherent power.

38. The Calcutta High Court in the case of Dwarka Prasad Baja vs Commissioner of Income Tax, West Bengal-I 126 I.T.R. 219, observed that in exercising its Jurisdiction under Section 256 of the Income-Tax Act, 1961, the High Court did not act as a court of appeal, as the Income-tax Appellate Tribunal does under Section 254 of the Act. The High Court, in disposing of the reference, could only answer the questions actually referred and could not raise any question by itself. The findings of fact by the Tribunal were final so far as the High Court was concerned and only on limited grounds such findings of fact could be challenged. After the judgment of the High Court is delivered, the Tribunal has to pass necessary orders to dispose of the case in conformity with the judgment under Section 260 of the Act. The High Court exercised a very limited jurisdiction. It did not dispose of the entire matter but its

decision was confined only to the questions of law as arise from the order of the Tribunal. Therefore, it could not be said that the High Court exercised its general jurisdiction under Article 227 of the Constitution in dealing with a reference. If the High Court could in such case exercise its powers under equity jurisdiction and grant a temporary injunction or a stay it would have to ascertain and to go into facts for which the Income Tax Act, 1961 did not make any provision. Moreover, issuance of orders permitting collection or recovery of tax or staying such collection or recovery if made under exercise of inherent power would result in extension of the jurisdiction of the High Court under Section 256 of the Act of 1961. The Calcutta High Court, further, was of the view that a court could not vest itself with such additional jurisdiction by invoking its inherent powers. Hence, the Court, in seisin of a reference under the I.T. Act could not issue an order of temporary injunction, according to the Calcutta High Court, or stay of proceedings which was an injunction in an indirect manner in respect of recovery of taxes.

39. In an appropriate case, if the assessee feels that a stay of recovery pending disposal of the reference is necessary or is in the interest of justice, then the assessee is entitled to apply before the appellate authority to grant a stay until disposal of reference by the High Court or until such time as the appellate authority thought fit. But in case the appellate authority acted without jurisdiction or in excess jurisdiction or in improper exercise of the jurisdiction, then decision of such appellate authority can be corrected by the High Courts by issuing appropriate writs under Article 226 and 227 of the Constitution.

40. It has to be borne in mind that in answering questions or disposing of references either under Section 66 of 1922 Act or Section 256 of 1961 Act, the High Courts do not exercise any jurisdiction conferred upon them by the Code of Civil Procedure or the Charters or by the Acts establishing respective High Courts. In respect of certain matters jurisdictions exercised by the High Court, must be kept separate from the concept of inherent powers or incidental powers in exercising jurisdiction under Section 66 of 1922 Act or 256 of 1961 Act. Section 66 of Income-Tax Act of 1922 or Section 256 of Income-Tax Act of 1961 is a special jurisdiction of a limited nature conferred not by the Code of Civil Procedure or by the Charters or by the special Acts constituting such High Courts but by the special provisions of Income Tax Act, 1922 or 1961 for limited purpose of obtaining High Court's opinion on questions of law. In giving that opinion properly if any question of incidental or ancillary power arises such as giving an opportunity or restoring a reference dismissed without hearing or giving some additional time to file paper book, such powers inhered to the Jurisdiction conferred upon it. But such incidental powers can not be so construed as to confer the power of stay of recovery of taxes pending a reference which lie in the domain of an appellate authority. Therefore, the concept of granting stay in a reference *ex debito justitiae* does not arise. That concept might arise in case of the appellate authority exercising its power to grant stay where there is not express provision. *Ex debito justitiae* is to do justice between the parties."

21. In the present case, the order impugned has gone in excess of the powers conferred on the referring member. On the said limited ground, there being an improper exercise of jurisdiction by the member, to whom the question has been referred, the impugned order cannot be sustained and is quashed. The matter shall now be heard afresh by the 3rd member who shall give his opinion on the questions referred and send the matter back to the Division Bench of the National Commission to be decided accordingly.

22. The writ petition stands allowed to that extent.

(Pankaj Bhatia,J.) Order Date :- 11.12.2024 (Manoj K.)