

jsn

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION (L) NO.11893 OF 2022
IN
SUIT NO.664 OF 2019

The Bombay Presidency Radio Club Ltd. & Ors. ...Applicants/Ori.
Defendants

In the matter between

Ravi Goenka ... Plaintiff

Versus

The Bombay Presidency Radio Club Ltd. & Ors. ...Defendants

Dr. Abhinav Chandrachud with Archit Jaykar, Pooja Yadav and Dhawni Parekh i/b. Jayakar and Partners for the Plaintiff.

Rajendra Raghuvanshi with Sandeep Bhagwat and Deepali Kedar i/b. Ratnesh Dube for the Applicant / Original Defendants.

CORAM : R.I. CHAGLA J.
DATE : 9TH JUNE, 2022.

ORDER :

1. By this Interim Application, the Defendants are seeking appointment of Mr. Ravindra Malik, Ex-Principal District & Session Judge, and Ex-Vice Chairman of Maharashtra Administrative Tribunal Ex-Principal Government Law College, Mumbai as new Inquiry Officer to conduct the inquiry with reference to the facts in issue as new Inquiry Officer. Further consequential relief, has been sought.
2. The Interim Application has been taken out in the above

disposed of Suit. In Notice of Motion (L) No.979 of 2019 filed in the said Suit, an order dated 15th April, 2019 was passed by the Single Judge of this Court, recording that by consent of parties Mr Justice S.J. Vazifdar (Retd.), former Chief Justice of Punjab and Harayana High Court and a former Judge of this Court, is appointed as Inquiry Officer. In view thereof, counsel appearing for the Plaintiff had stated that the Plaintiff shall not question the jurisdiction of the inquiry officer but all other rights and contentions be kept open including the stand that Plaintiff has not indulged in any misconduct. Accordingly all rights and contentions of both the parties were kept open. The Senior Counsel appearing for the Plaintiff in the Suit sought leave to withdraw the said Suit and Notice of Motion. The Suit and Notice of Motion stood dismissed as withdrawn.

3. It is the case of the Applicants that, Justice S.J. Vazifdar (Retired) by a letter dated 3rd May, 2019 expressed his inability to accept appointment by the Court by the said Order dated 15th April, 2019. The Advocates for the Applicant herein had sought consent of the Plaintiff for appointment of a substituted Inquiry Officer and had suggested the names of two Senior Counsels of this Court by their letter dated 20th June, 2019. This was responded to by the

Advocates for the Plaintiff by letter dated 26th June, 2019 wherein it was stated that in view of the Inquiry Officer who was appointed by consent of parties under the said order of this Court being a retired Judge of this Court, the Applicant herein should suggest the name of another retired Judge of this Court for appointment as Inquiry Officer. There was no reply to this letter by the Applicant. Hence, there was no appointment of any Inquiry Officer.

4. It is only in the year 2022, first by way of praecipe and thereafter by way of the present Interim Application filed on 11th April, 2022 that an application has been made for appointment of substituted Inquiry Officer. The complaints which have been referred to in the Interim Application were made in the year 2018 and 2019 against the Plaintiff in respect of his conduct as member of the Applicant No.1 Club. The Plaintiff is alleged to have assaulted employees of the Club on two occasions. The Applicant has accordingly stated that it is necessary to inquire the allegations made against the Plaintiff in the complaint which were of serious nature. The inquiry had been commenced against the Plaintiff by appointment of a former Judge of this Court and after inquiry the report was submitted to the Club recommending dismissal of the

Plaintiff from the Club. This was to be put forth before the members of the Club and accordingly special EOGM was called for. Being aggrieved the Plaintiff had filed the Suit No.664 of 2019 i.e. prior to the members of the Club casting their vote either accepting their recommendations or rejecting the same. In the Notice of Motion taken out in the said Suit, the aforementioned order dated 15th April, 2019 was passed.

5. The Applicant has sought to rely upon Covid 19 pandemic as well as certain deliberations on the list of inquiry officers to be appointed for justifying the delay in making this application for appointment of new Inquiry Officer. Reliance is also placed on this High Court taking only matters which were of extreme urgency in view of the Covid Pandemic and accordingly the application could not be made before this Court earlier for substituting the Inquiry Officer. The Applicant has submitted that the delay in approaching this Court is not deliberate and / or intentional but the same can be attributed to the circumstances which were beyond the control of the Applicants, namely Covid 19 Pandemic and the same be condoned. Accordingly, the present Interim Application has been filed.

6. An Affidavit in Reply has been filed to the Interim Application in which it is stated that the Advocates for the Plaintiff had proposed that another retired Judge of this Court be appointed as Inquiry Officer way back on 26th June, 2019. The Applicant has failed to take any steps to have such Inquiry Officer appointed. It is thus submitted that Applicants had clearly abandoned the inquiry process. There have been elections to appoint new Managing Committees and pursuant to which three Managing Committees have been elected subsequent to the said order being passed by this Court on 15th April, 2019 and none of which initiated any inquiry against the Plaintiff. In paragraph 14 of the Affidavit in Reply, it is stated that the excuses for the Applicants delay to pursue the inquiry against the Plaintiff by placing reliance upon the Covid Pandemic and which delay is from June 2019 to April, 2022, is unacceptable. The Club had during the said period held inquiries against staff members. Further, litigations were initiated by the staff which were actively pursued by the Club before various legal forums. It is stated that there is no satisfactory explanation for the delay in substituting the Inquiry Officer and / or revival of the inquiry after a period of three years and thus grave harm and prejudice would be caused to the Plaintiff if such inquiry is revived.

7. Mr. Raghuvanshi, learned Senior Counsel appearing for the Applicant has submitted that by the said order dated 15th April, 2019, this Court had recorded the consent of parties. Justice S.J. Vazifdar (Retired) was appointed as Inquiry Officer for inquiring the complaint against the Plaintiff of misconduct with staff members of the Club. This was by way of fresh inquiry and the prior findings, orders passed by the Inquiry Officer did not survive in view of the statement made by the learned Senior Counsel which was accepted as an undertaking to this Court. The Suit as well as the Notice of Motion filed therein were accordingly withdrawn by the Plaintiff.

8. Mr. Raghuvanshi has submitted that the Applicants have in view of Justice S.J. Vazifdar (Retired) expressing his inability to act as Inquiry Officer, taken steps to appoint a substituted Inquiry Officer which was not accepted by the Advocates for the Plaintiff. Accordingly, there has been non appointment of substituted Inquiry Officer. He has submitted that the application had not been made earlier due to Covid – 19 Pandemic and the Court hearing only extremely urgent matters. The Application now been made is in line with the said order dated 15th April, 2019 which was for fresh inquiry and appointment of Inquiry Officer.

9. Dr. Abhinav Chandrachud, learned Counsel for the Plaintiff has vehemently opposed the Interim Application on the ground that the Interim Application seeks recall of the order dated 15th April, 2019. He has submitted that the Inquiry Officer namely, Justice S.J. Vazifdar (Retired) was appointed by consent of the parties. Considering the appointment of a Retired Judge of this Court and Former Chief Justice of the Punjab and Haryana, High Court, it was necessary for appointment of a person of such stature. In view of the Applicants not suggesting appointment of a person of such stature, there could be no appointment of Inquiry Officer. It is submitted that a period of three years has expired, since passing of order dated 15th April, 2019 and it is only thereafter that the present Application has been made.

10. Dr. Abhinav Chandrachud has relied upon a decision of the Supreme Court in the case of ***Budhia Swain and Ors. Vs. Gopinath Deb and Ors.***¹ The Supreme Court in the said decision has in paragraph 8 considered the power of the Court to recall an order earlier made by it and in that context held as under:

1 (1999) 4 Supreme Court Cases 396.

“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.”

11. It has thus been held that the right to seek vacation / recall of the judgment may be lost by waiver, estoppel or acquiescence. He has placed emphasis on these words in the decision of the Supreme Court and has stated that it squarely applies to the facts of the present case. In the present case there has been a clear waiver, estoppel or acquiescence by the Applicants in their not approaching this Court for appointment of substituted Inquiry Officer

either by seeking recall of the order dated 15th April, 2019 or by way of speaking to the minutes thereof or by way of modification of the said order. He has submitted that in view thereof, the Applicants have given up their rights to appoint an Inquiry Officer in place of Justice S.J. Vazifdar (Retired) who had expressed his inability to act as an Inquiry Officer. He has submitted that the only attempt at justification of the delay mentioned in the Interim Application is that in view of the Covid 19 pandemic, the Applicants had not approached this Court as this Court was only hearing urgent matters. Further, that the Club had not been able to conduct its affairs which includes inquiry against the Plaintiff.

12. Dr. Abhinav Chandrachud has relied on paragraph 14 of the Affidavit in Reply and submitted that in fact the Club very much conducted its affairs and inquiries were held against staff members as well as litigations initiated by the staff members which were actively pursued by the Club before various legal forums. He has submitted that after the passing of the said order dated 15th April, 2019, the Managing Committees which have changed on three occasions. None of the new Managing Committees initiated any inquiry against the Plaintiff though several inquiries were held

against the other members / staff members during the said period. He has submitted that the present Application appears to be at the instance of Applicant No.2 as none of the other Managing Committee members are party to this Application.

13. Dr. Abhinav Chandrachud has further relied upon the decision of this Court in the case of ***Chembur Trombay Education Society & Ors. Vs. D.K. Marathe & Ors.***² in support of his contention that the Interim Application could not have been taken out in a disposed of Suit as after the passing of the decree by the Court, the Court become *Functus Officio* and has no jurisdiction or authority to entertain any Interim Application filed in the Suit. He has submitted that the present Inteirm Application has been taken out in a disposed of Suit and thus should not be entertained by this Court.

14. Having considered the rival submissions, in my view there has been no satisfactory explanation as to the delay in taking out the present Interim Application for substitution of Inquiry Officer, namely Justice S.J. Vazifdar (Retired) appointed by this Court on 15th April, 2019. The Interim Application has been filed only on

² 2001 SCC Online Bom 842.

11th April, 2022. Prior to the filing of the present Interim Application, the Applicants had moved by way of praecipe which was not accepted by this Court vide order dated 29th March, 2022. This Court had also taken note of the fact that the Application has been made in the disposed of Suit and hence it was necessary for the Applicants to file an appropriate Application in the event they sought appointment of a new Inquiry Officer.

15. The explanation of the Applicants in the present Interim Application for not approaching this Court earlier for substitution of Inquiry Officer appears only to be that due to the pandemic, this Court was only hearing urgent matters and accordingly such application could not be made. This explanation cannot be accepted. This Interim Application for substitution of Inquiry Officer amounts to a recall of order dated 15th April, 2019. Such application for recall is required to be made at the earliest. In view of the Inquiry Officer having been appointed by consent of parties, the substituted Inquiry Officer could only have been by consent of parties. Hence, it was necessary for the Applicants to make an application for recall of this Order at the earliest in view of the consent to the substituted Inquiry Officer not having been obtained.

It is clear from the decision of the Supreme Court in the case of ***Budhia Swain (Supra)*** that the right to seek vacation / recall of a judgment / order is on limited grounds and may be lost by waiver, estoppel or acquiescence. In the present case, apart from there being no ground for recall of the said order dated 15th April, 2019 being made out, there has been a waiver on the part of the Applicants for recall of order dated 15th April, 2019. It is further necessary to note that the Advocates of the Plaintiff had refused to consent to the appointment of a Senior Counsel of this Court as substituted Inquiry Officer as suggested by the Advocates for the Applicants. It was the Plaintiff's view that since the retired Judge of this Court appointed as Inquiry Officer by consent having expressed his inability to act as Inquiry Officer, names of other Retired Judges of this Court for appointment as Inquiry Officer be suggested. This was way back on 26th June, 2019. This letter of the Advocates for the Plaintiff has not been responded to by the Applicants and thus they have waived / given up their rights to appoint a new Inquiry Officer in substitution of the Inquiry Officer appointed by this Court.

16. The disposal of the above Suit by the order dated 15th April, 2019 is required to be taken into consideration. This

Court in *Chembur Trombey Education Society (Supra)* has considered the filing of an Interim Application in a disposed of Suit. This Court held that after passing of a decree, the Court becomes *Functus Officio* and has no jurisdiction or authority to entertain any Application in the disposed of Suit. The present Interim Application seeks prayer of appointment of a new Inquiry Officer in a disposed of Suit without any prayer for recall of order dated 15th April, 2019 by which the Suit was dismissed as withdrawn. The present Interim Application having been filed in a disposed of Suit (L) No.444 of 2019, in any event cannot be entertained by this Court, which has become *Functus Officio*.

17. In view thereof, the Interim Application filed by the Applicants is rejected. There shall be no order as to costs.

[R.I. CHAGLA J.]