IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

ORDER
IN
S.B. Civil Review Petition No.21/2013
(With Stay Application No.680/2013)
In
S.B. Civil Writ Petition No.695/2004

Taruchaya Nagar Ramaram Vikas Samiti Jaipur through its Secretary Dr. Kavita Sharma and Another **Vs.** The State of Rajasthan through the Secretary to the Government, Urban Development and Housing Department, Govt. Secretariat, Jaipur and Others

Date of Order ::: 20.12.2013

Present
Hon'ble Mr. Justice Mohammad Rafiq

Shri Bajrang Lal Sharma, Senior Counsel with
Shri Babu Lal Sharma, counsel for petitioners
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By the Court:-

This review petition has been preferred by petitioners seeking review of order/judgment dated 10.12.2012 by which their Writ Petition No.695/2004 was dismissed.

Writ petition was filed by petitioners Taruchaya Nagar Ramaram Vikas Samiti Jaipur through its Secretary Dr. Kavita Sharma, who too joined as petitioner no.2, with the prayer that a mandamus be issued to respondents to grant a benefit of Circular dated 18.02.1994 and to regularize their possession of the members of the petitioner no.1 Samiti, in terms of Circular dated 10.07.1999 issued by respondent State. They were allotted such plots by Subhash Sindhi Cooperative Housing Society Limited in a housing scheme of 300 plots.

Shri Bajrang Lal Sharma, learned Senior Counsel appearing for petitioners, has cited a judgment of the Supreme Court in **A.R. Antulay Vs. R.S. Nayak and Another – (1988) 2 SCC 602**, and argued that the Supreme Court therein

has held that “per incuriam” decisions are those decisions, which are given in ignorance or forgetfulness of some statutory provision or of some binding authority. This court while deciding the writ petition, has considered only the question of authority binding on the court concerned, but has neither noticed nor decided the question of statutory provision. In this connection, learned Senior Counsel drew attention of the court towards Section 54 of the Jaipur Development Authority Act, 1982, which specifically deals with question of disposal of land by the Jaipur Development Authority by way of allotment, regularization or auction, subject to such conditions as the State Government may from time to time prescribe. What has been prescribed in sub-section (1) of Section 54 has been reiterated in sub-section (4) thereof.

It was argued that Division Bench judgment of this court dated 11.08.2011 in **Special Appeal (Writ) No.342/2007 – Ratan Kumar Sharma Vs. State of Rajasthan and Others**, on which reliance was placed by the respondents, was a judgment per incuriam as it was decided in ignorance of mandatory provision of Section 54 of the JDA Act. When the legislature by Statute has included 'regularization' as one of the modes of disposal of the land, the Division Bench could not describe the same as misadventure. The Division Bench in that case, while rejecting prayer of writ-petitioners/appellants that it may be left open to the government to regularize certain plots in favour of the appellants, observed that the government cannot enter into such misadventure. This observation has been given by the Division Bench without any reasoning and without application of mind.

It was argued that courts cannot go contrary to the mandate of law. If the legislature by Section 54 of the JDA Act, empowered the Jaipur Development Authority to dispose of the lands by way of allotment, regularization or auction,

that would mean that one of the accepted modes of disposal is regularization. The Division Bench was not justified in holding that if the State were to regularize the land, it would amount to misadventure on its part.

Shri Bajrang Lal Sharma, learned Senior Counsel, argued that even if Special Leave to Petition has been dismissed against afore-mentioned Division Bench judgment, that would not amount to approval of the law laid down therein by the **Division Bench**, inasmuch as, the 'doctrine of merger' would not be attracted in such a situation. Fresh writ petition filed by petitioners could still be considered on merits. Neither the Division Bench in aforesaid case nor this Court, while dismissing the writ petition of petitioners, in the present case, has considered the effect of Section 54 of the JDA Act.

Learned Senior Counsel cited judgment of the Supreme Court in **V. Kishan Rao Vs. Nikhil Super Specialty Hospital and Another – (2010) 5 SCC 513**. and argued that the Supreme Court in its Para 54 and 55 held as under:-

> "54. When a judgment is rendered by ignoring the provisions of the governing statute and earlier larger Bench decision on the point such decisions are rendered per incuriam. This concept of per incuriam has been explained in many decisions of this Court. Sabyasachi Mukharji, J. (as his Lordship then was) speaking for the majority in **A.R. Antulay Vs. R.S. Nayak (1998) 2 SCC 602**, explained the concept in the following words:-
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> > "42. ... 'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."
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> Subsequently also in the Constitution Bench judgment of this Court in Punjab Land Development and Reclamation Corporation Ltd. vs. Labour Court, (1990) 3 SCC 682, similar views were expressed in Para 40 at P.705 of the report.
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> 55. The two-Judge Bench in D'Souza has taken note of the decisions in Indian Medical Association and Mathew, but even after taking note of those two decisions, D'Souza (2009) 3 SCC 1, gave those general directions in Para 106 which are contrary to the principles laid down in both those larger Bench decisions. The larger Bench decision in J.J. Merchant (Dr.) (2002) 6 SCC 635, has not been noted

> in D'Souza (supra). Apart from that, the directions in Para 106 in D'Souza (supra) are contrary to the provisions of the governing statute. That is why this Court cannot accept those directions as constituting a binding precedent in cases of medical negligence before consumer Fora. Those directions are also inconsistent with the avowed purpose of the said Act."

Learned Senior Counsel also cited judgment of the Supreme Court in **State of Orissa and Another Vs. Mamata Mohanty – (2011) 3 SCC 436**, and referred to its Paras 64 and 65, which read as under:-

> "PER IN CURIAM - Doctrine:
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> 64. "Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. The Courts have developed this principle in relaxation of the rule of stare decisis. Thus the "quotable in law", is avoided and ignored if it is rendered, in ignoratium of a Statute or other binding authority.
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> 65. In Mamleshwar Prasad v. Kanahaiya Lal - AIR 1975 SC 907, this Court held: "7. .....where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission." (emphasis added)

Learned Senior Counsel also relied on judgment of the Supreme Court in **A.R. Antulay**, supra, especially the observations made in Paras 47 to 51 and 75 and it was argued that the Supreme Court in that case held that an order of the court, which is given per incuriam and in violation of certain constitutional limitations and derogation of principles of natural justice can always be remitted by the court ex debito justitiae. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application. It was held that basic fundamental of administration of justice is that no man should suffer because of the mistake of the court. Per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding

on the Court concerned so that in such cases some part of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong.

Learned Senior Counsel also cited judgment of the Supreme Court in **State of Madhya Pradesh Vs. Narmada Bachao Andolan and Another – (2011) 7 SCC 639**, on the question as to which judgments are per incuriam. Learned Senior Counsel laid emphasis in particular on observations made in paras 65 to 69 of the report and argued that the Supreme Court therein held that the courts are not to perpetuate an illegality, rather it is the duty of the courts to rectify mistakes. It was argued that this court, while dismissing the writ petition, has wrongly relied on the judgment of the Supreme Court in **Commissioner of Central Excise, Nagpur Vs. Gurukripa Resins Private Limited – (2011) 13 SCC 180**, which is wholly distinguishable on facts.

Learned Senior Counsel thus submitted that judgment passed by this court in Writ Petition suffers from error apparent on the face of record, justifying its review and recall.

I have given my anxious consideration to the submissions made by learned Senior Counsel and also respectfully studied the cited case law.

What is, in substance, argued is that this court while dismissing the writ petition has wrongly not held the judgment of the Division Bench per incuriam as that judgment was rendered in ignorance of statutory provision contained in Section 54 of the JDA Act, which empowered the Jaipur Development Authority to dispose of land even by regularization, apart from allotment or auction. In fact the **Review Petition No.342/2011** was also filed in **Special Appeal (Writ) No.342/2007**, seeking review of DB Judgment dated 11.08.2011 raising similar grounds. The Division Bench in review petition held that review is neither a re-hearing

nor an appeal. Even an erroneous decision cannot be reviewed, as review is by no means an appeal in disguise, whereby an erroneous decision is corrected. In taking that view, the Division Bench relied on a judgment of the Supreme Court in **State of West Bengal and Others Vs. Kamal Sengupta and Another – AIR 2009 Suppl. S.C. 476**, in Para 15 of which the Supreme Court observed as under:-

> "The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1, CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court/Tribunal on a point of fact or law. In any case, while exercising the power of review, the concerned Court/Tribunal cannot sit in appeal over its judgment/decision."

Even if Section 54 of the JDA Act was not specifically mentioned in the judgment of Division Bench, the core question, which it has decided in negative, was whether the JDA can regularize plots of the petitioners. Incidentally, though it may be noted that Section 54, supra, does not find mention anywhere in the pleadings of the review petition filed before the Division Bench. Entire emphasis in the pleadings of the writ petition, out of which aforesaid Special Appeal arose and also in the memorandum of special appeal was on the Regularisation Rules of 1981 and the Circulars issued by the Government and no mention of Section 54 of the JDA Act whatsoever was made in either of them. There is no such mention in the pleadings of writ petition of the present matter either. But this question nonetheless lead to the Rajasthan Land Revenue (Allotment, Conversion and Regularisation of Agricultural Land for Residential Purposes in Urban Areas) Rules, 1981, and Circulars dated 01.03.1982 and 31.12.1983, which were

referred to in the judgment of the present matter. Those Rules and Circulars were obviously issued by the State Government with a view to conferring power upon the Jaipur Development Authority for regularisation. Therefore, mere non-mention of the provision in judgment of Division Bench, would not make the judgment per incuriam, and for that reason, judgment passed by the Single Bench in the present matter can be said to suffer from any error apparent on the face on record. It is trite that a judgment, even if erroneous in law, cannot be sought to be corrected by a review, inasmuch as re-hearing of the main case, which has been heard and decided, cannot be sought in the guise of review petition.

All what has been argued only seeks to point out illegalities in the judgment, which cannot be described as errors apparent on the face of record.

In view of the above discussion, I do not find any merit in this review petition, which is accordingly dismissed. This also disposes of stay application.

(Mohammad Rafiq) J.

//Jaiman//

All corrections made in the judgment/order have been incorporated in the judgment/order being emailed.

Giriraj Prasad Jaiman
PS-cum-JW