

14 SCOB [2020] HCD**HIGH COURT DIVISION****(STATUTORY ORIGINAL JURISDICTION)**

COMPANY MATTER NO. 163 OF 2017.

Pankaj Roy

..... Petitioner

-Versus-

Alliance Securities & Management Limited and others.

..... Respondents.

Mr. Mejbahur Rahman, Advocate

.....For the respondent nos. 2& 3

Mr. Tanjib-UI-Alam, senior Advocate

.....For the respondent no. 4.

Mr. Akther Imam, senior Advocate

Mr. Mahbub Alam, senior Advocate with

Mr. Reshad Imam, Advocate.

..... For the petitioner.

Heard on 10-07-2019, 11-07-2019, 14-07-2019

and judgment on 14-07-2019.

Present:**Mr. Justice Md. Mozibur Rahman Miah****Company matter, Article 45 of the Articles of association; Interim order, Board of directors, Modify the judgement, Administration of Justice;****Invariably, under no circumstances, this court can interfere with its own judgment which was even affirmed by the Honb'le Appellate Division. ... (Para 35)****JUDGMENT****Md. Mozibur Rahman Miah, J:**

1. This matter has been referred by the Honb'le Chief Justice of Bangladesh vide his order dated 03-03-2019 on the heels of feeling embarrassed by another bench of this division in the event of filing applications by Respondent nos. 4 and Respondents nos. 2-3 after an order was passed on 13-12-2019 modifying the judgement passed by another bench on 05.2.2018 basing on a compromise petition filed by the petitioner and Respondent nos. 2 to 3.

2. This company matter stemmed from an application filed by the petitioner, Pankaj Ray under section 233 of the companies Act, where he amongst others made 2 principal prayers:

“Order the respondent no. 2-4 to jointly or severally purchase the shares of the petitioner at a fair valuation

or

in the alternative, order respondent nos.2-4 jointly or severally sell their share to the petitioner at a fair valuation.

3. To contest the said application, the respondent, no. 2,3 and 4 entered their appearance and initially this court on 22-05-2017 admitted the application and passed an interim order in the following manner :

“Accordingly, the respondent no. 2 and 3 are hereby directed to comply at once with the provision of Article 45 of the Articles of association of the company and to consult

with the petitioner in discharging in performing his function as the Managing Director and also in the operation of the bank accounts”.

The respondent no. 2 and 3 having exclusive control in the board and in the managing affairs of the company and apparently acting as a group against the petitioner therefore, respondent nos. 1,2 and 3 are hereby further directed to make arrangement with the banks of the company for signing of all cheques and for operation of the bank account, jointly under signature of 2(two) directors, one to be the petitioner himself and another to be any one from the respondent nos. 2 or respondent no. 3.

4. Against that interim order an appeal was preferred being civil petition for leave to appeal no. 545 of 2017 before the Hon’ble Appellate Division and the said interim order was upheld.(As found in the “Order” portion of the Judgement dated 05.02.2018).

5. Eventually, the company matter was heard and disposed of by the company bench on 05-02-2018 and in the operative portion of the judgment following directions were given:

I. “The respondent nos. 2 and 3 are directed to purchase the share of the petitioner within 30th June,2018 for Tk.151177431-490400/= Tk. 150,68,703/= and shall submit an affidavit of compliance with in one month thereafter”

The interim direction dated 22-05-2017, upheld in Civil Petition for Leave to Appeal no. 545 of 2017 shall continue until filing of the affidavit of compliance.

II. The respondent no. 4 can sell his share in the manner prescribed herein above.

6. Long after passing the judgment, the petitioner on 10-05-2018 filed an application for correction of the judgment passed on 05-02-2018 and on that very date, the company bench took up the said application and allowed the same.

7. Record depicts, on 13-12-2018 a judgment was passed by another company bench of this Division on the basis of an application jointly filed by the petitioner and respondent no.2 and 3. In the judgment dated 13-12-2018 the learned company bench upon considering the joint application ultimately held the following :

“ having been agreed with some terms and conditions, this court is of the view that, there is no need to comply with the direction passed by this court in the judgment dated 05-02-2018. Instead, the parties are directed to comply with the following direction”.

(i) The petitioner and Respondent nos. 2 & 3 are directed to implement /execute/comply with all the terms of their joint agreement, which are incorporated hereinbefore in this judgment under-paragraph nos. (a) to(j)

(ii) Respondent nos. 5 & 6 (the banking institutions) are hereby directed to change/modify the signatory requirements of Alliance Securities & Management Limited (company) in relation to all the bank accounts of the Company, including Fixed deposit receipt (FDR) accounts, in accordance with the terms and condition of the instant joint application with 24 (twenty four) hours of receipt of this Order.

(iii) The petitioner and respondent Nos. 2 &3 are directed to execute/implement the terms and conditions of their mutual agreement, which are paragraphed hereinbefore as paragraph nos. (a) to (j) within 30(thirty) days and, thereafter, submit an affidavit-in-compliance within 10 (ten) days of the expiry of the aforesaid thirty days.

8. In view of the said directions, the terms and conditions which had been incorporated in the joint application filed by the petitioner and respondent no. 2 and 3 dated 13-12-2018 was asked to comply with instead of the judgment passed on 05-02-2018. In pursuance of the said

order dated 13-12-2018, a meeting of the board of directors comprising the petitioner and respondent nos. 2-3 was held on 19-12-2018 where the petitioner was given absolute authority to operate day to day affairs of the company and to operate all banking transaction by the petitioner as sole signatory. However, the dispute evolves in implementing the said order dated 13.12.2018 when respondent no. 4 and respondent no. 2 and 3 filed several applications chiefly thus filed for restraining the petitioner from implementing the said order and to re-call the same. In such a situation, the company bench then vide its order dated 06-02-2019 felt embarrass and referred the matter to the Honb'le Chief Justice of Bangladesh and then the Honb'le chief Justice sent the matter before this court as stated hereinabove.

9. Mr. Tanjib-Ul-Alam, the learned senior counsel appearing for the Respondent no.4 by placing the application dated 04.02.2019 at the very out set submits that, a gigantic fraud has been committed in obtaining the order dated 13.12.2018 by the petitioner and respondent no. 2 and 3 in the name of modifying the judgement dated 05.02.2018 upon filing a joint application for compromise which was passed behind the back of the knowledge of the respondent no. 4.

10. By referring to Article 45 of the Articles of association, the learned counsel contends that, that very articles clearly stipulates that all the transaction of the company is to be held with the joint signature of two directors and in line with the said provision an interim order was also passed by this court on 22-05-2017 which was also upheld by the Honb'le Appellate Division in Civil petition for leave to appeal no.545 of 2017 and it was ultimately confirmed in the judgement dated 05.02.2018 but by the aforesaid compromise and modified order dated 13.12.2018 the said article has grossly been violated.

11. By referring to Article no. 15 of the Articles of Association, the learned counsel further contends that, this respondent reserves preemption right to have the proportionate share held by respondent no. 2 and 3 in the company but that very condition provided in Article of Association has also been infringed in arriving at alleged compromise by the petitioner and respondent no. 2 and 3.

12. So far as it relates to the propriety of the order of modification dated 13.12.2018, held on the basis of compromise after passing the judgment by another bench dated 05-02-2018, the learned counsel further avers that, under no circumstances can earlier judgement be modified after the same is disposed of on contest among the parties and in that regard the learned counsel has placed his reliance on the decision so have been reported in 64 DLR (AD)- 100 as well as 7 BLT (HC) 18. With such submission, the learned counsel finally prays for allowing the application and recall the order of this court dated 13-12-2018.

13. In contrast, Mr. Mejbahur Rahman, the learned counsel appearing for the respondent nos. 2 and 3 upon placing the application dated 06.02.2019 filed for recalling the order dated 13-12-2018 just contends that, in view of exerting coercion and threat and also under duress the respondent nos. 2 and 3 had been compelled to file joint application with the petitioner on 13-12-2018 and also sat in a meeting of board of directors dated 19-12-2018 where some resolutions was passed giving absolute authority to the petitioner in running the company and to operate Banking transaction for the company and therefore the said compromise cannot be sustained in the eye of law and thus the order passed dated 13.12.2018 in liable to be recalled.

14. On the other hand, Mr. Rashed Imam, the learned counsel appearing for the petitioner upon placing the joint applications dated 13-12-2018 and the Affidavit-in opposition so filed

against the applications of Respondent no.4 and Respondent no. 2-3 and on taking me to the judgment passed dated 05-02-2018 and order dated 13-12-2018, as well as other materials on records at the very onset submits that, respondent no. 4 has got no *locustandi* to file any application for recalling the order dated 13-12-2018 as in the judgement dated 05-02-2018 no direction has ever been made either to of the petitioner or to respondent no. 2 and 3 to purchase share of respondent no. 4 so there appears no scope to recall the said order.

15. The learned counsel further contends that, the respondent no. 2 and 3 are bound by the terms and conditions so embodied in the joint application they filed with the petitioner because upon conceding with all the terms and conditions thereof, the respondent nos. 2 and 3 as well as their learned counsel put their respective signature in it so there has been no scope to deviate from the joint application dated 13-12-2018 and order passed thereof.

16. The learned counsel goes on to submit that, for non-compliance with the judgment passed by this court dated 05-02-2019, the petitioner was compelled to file a contempt petition being contempt petition no.13 of 2018 before a contempt bench of this Hon'ble court which is still pending where both the petitioner and respondent no. 2 and 3 filed a joint application apprising it that they are going to compromise the dispute among themselves having no occasion to go beyond the order dated 13-12-2018.

17. The learned counsel also contends that, there is basic and vital distinction between order no. 1 and order no.2 of the judgement dated 05-02-2018 as by that order this petitioner has got no obligation to purchase share of respondent no.4 so respondent no. 4 is not entitled to any direction from this court asking the petitioner to purchase his share or to recall the order dated 13-12-2018.

18. The learned counsel by drawing my attention to the applications filed by respondent no. 4 dated 02-01-2019 and 24-01-2019 also contends that, by filing those application the respondent no. 4 rather made his stand totally dubious because in one hand, he intended to purchase the share of the petitioner and in the next breath, he wanted to sell his share to the petitioner and upon failing to materialise all his ill intention, he has now come to recall the order which cannot be sustained rather his such stand is barred by principle of approbate and reprobate.

19. So far as it relates to my query pose to the learned counsel as to whether after passing the judgment by this Division on 05-02-2018 and upheld by the Hon'ble Appellate Division on 16-07-2018, whether the petitioner and respondent no. 2-3 can arrive at any compromise and the said judgement dated 05-02-2018 can be modified by subsequent order dated 13.12.2018. In reply to that, the learned counsel readily contends that, since the parties reached an amicable arrangement in the event of not implementing earlier judgment dated 05-02-2018 so in compliance with the direction no. 1 made in the said judgement, there has been no legal bar to settle the matter through compromise with respondent no. 2 and 3 as none of the parties is likely to be prejudiced with the modification order dated 13.12.2018.

20. At this, Mr. Mahbubey Alam, the learned senior counsel starts arguing for the petitioner and submits that, had there appear any mistake on the face of the order dated 13.12.2018 in that case, the judgment would have been recalled but from the order since there having no such mistake, so the modified judgment passed on compromise cannot be recalled.

21. The learned counsel further contends that, if the parties to any dispute reaches any compromise and an order is passed on that basis such order cannot be recalled.

22. The learned counsel goes on to submit that, since the compromise was held on the basis of earlier judgment dated 05-02-2018 in particular, as per direction no. 1 thereof, so there cannot be any reason to recall the order dated 13-12-2018 which was passed on the basis of compromise among the parties.

23. The learned counsel also contends that, there has been no forgery ever committed by the petitioner or the respondent nos. 2 and 3 in arriving at compromise and therefore, this court may not interfere with the order dated 13-12-2018.

24. So far as it relates to my query with regard to the authority of a subsequent bench to modify the judgement of earlier bench dated 05-02-2018 when the same was tested in the appeal and was upheld by the Hon'ble Appellate Division, the learned senior counsel submits that, since the petitioner and respondent nos. 2-3 ultimately agreed to compromise the dispute among themselves so there is no bar to modify earlier judgement that based on compromise as no violation of earlier judgement is made.

25. After wrapping up his such submission, Mr. Akter Imam, the learned senior counsel then by referring to the provision of sub rule (3) of order 23 of the Code of Civil Procedure and that of rule (6) of the companies rules, 2009 very candidly submits that, the parties can arrive compromise at any point of time even after passing the judgment. To buttress the said contention, the learned counsel has also placed his reliance on the decisions reported in AIR 1915 Cal 454, AIR 1966 J & K 13 and AIR 1963, AII 296 but without supplying copy of those decisions. Apart from those decisions, the learned counsel has also placed the provision of section 96 (3) of the Code of Civil Procedure where it has been provided that, if any judgment is passed on compromise that judgment cannot be challenged in appeal. The learned counsel then by referring to the provision of section 233(3) of the Companies Act, 1994 also submit that, the provision has given ample power to this bench to pass any order, direction which it deems fit and proper and therefore the order dated 13-12-2018 modifying earlier judgement on the basis compromise is very much sustainable in law in exercising the authority given under the given section. With such submission, the learned senior counsel finally prays for setting aside the application so filed by the respondent nos. 2, 3 and 4 for recalling the order dated 13-12-2018.

26. Anyway, I have heard the learned senior counsels for the petitioner and that of the learned counsels for the respondent nos. 2, 3 and 4 at length. It is worthwhile to mention here that, after pronouncement of the judgment dated 05-02-2018, the petitioner at first filed an application on 26-11-2018 for clarification of the said judgment and order which remains unresolved. Then, petitioner and respondent no. 2 and 3 filed a "joint application" on 13-12-2018 seeking three different remedies. After that, respondent no. 4 on 02-01-2019 filed an application for modification of the order dated 13-12-2018 passed in company matter no.163 of 2017 where he sought a direction upon petitioner to purchase his share he held in respondent no. 1 company. Subsequently, Respondent no. 4 filed another application on 24-01-2019 seeking direction upon petitioner to sell his share to him (respondent no. 4). Thereafter, the respondent no. 4 filed another application on 04-02-2019 praying for injunction restraining the petitioner from diverting fund of the company and restore all the funds so diverted and lastly to recall the order dated 13-12-2018. Finally, respondent no. 2

and 3 filed an application on 06-02-2019 praying for recalling the order dated 13-12-2018 and allow them to purchase shares of the petitioner as per the judgment dated 05-02-2018.

27. Against these applications so filed by respondent no. 4 and respondent no. 2 and 3 ostensibly for re-calling the order of this court dated 13-12-2018, the petitioner also filed two sets of affidavit-of-opposition on 10-07-2019 and 11-07-2019 denying all the material allegations so made in those petitions of the Respondents.

28. In view of the above material facts, I have given my anxious thought to the submission so placed by the learned senior counsels for the petitioner and that of the learned senior counsel for the respondent no. 4, the learned counsel for respondent no. 2 and 3. There has been no gainsaying of facts that, this petitioner originally filed an application under section 233 of the Companies Act literally seeking two alternative prayers. On going through the judgment passed by this court dated 05-02-2018, I find that, by that judgment the court allowed prayer no. 1 of the petitioner through which the petitioner sought direction upon the respondent nos. 2-4 to purchase his share and by judgment dated 05-02-2018, the respondent no. 2 and 3 were directed to purchase share of the petitioner at a value which has been evaluated by audit report dated 20.11.2017 and in the said judgement, option was also given to respondent no. 2 and 3 to purchase the share of respondent no. 4 or by their nominee in the manner as has been stipulated in paragraph no.22 of the judgement.

29. In the operative portion of the judgment dated 05-02-2018 an interim order was also passed in line with the order while admitting the matter on 22.05.2017 and was ordered to continue the same until filing of the Affidavit-of-compliance.

30. Record shows, after passing the said judgment an application was filed on 10.5.2018 by the petitioner for correction of the judgment dated 05-02-18 and it was allowed. After the order dated 10.5.2018, I only find the order passed on 13-12-2018 in the order book of this company matter through which the joint application filed by the petitioner and respondent no. 2 and 3 was allowed. And in between those two orders, I don't find any order whatsoever as regard to filing any application either by the petitioner or by respondent no. 2- 3 and 4. Now question remains, whether after pronouncement of the judgment by this court dated 05-02-2018 and upheld by the Honb'le Appellate Division, the petitioner and respondent nos. 2-3 reserve any right to file joint application for modifying that judgement and this court assumes any jurisdiction to act beyond the said judgment making it any modification.

31. It is admitted that, challenging the judgment and order passed by this court dated 05-02-2018, two sets of appeal were preferred before the Honb'le Appellate Division one, by respondent no. 2 and 3 being civil petition for leave to appeal no. 1960 of 2018 and another by respondent no. 4 being Civil Petition for Leave to Appeal no. 2099 of 2018 and both the appeals were dismissed finding those barred by limitation. So there has been no denying that, the judgment dated 05-02-2018 was upheld by the Honb'le Appellate Division. Moreover, on going through the judgment dated 05-02-2018 I also find that, in its ordering portion it was held that, the direction dated 22-05-2017 and upheld in Civil Petition for Leave Appeal no. 545 of 2017 shall continue until filing of affidavit-of-compliance. So by judgment dated 05.02.2018 in fact the order of the Honb'le Appellate Division has been made enforceable by the parties. From the trend of argument it appears to me that, the chief contention, of the learned counsel for the petitioner is that, since the petitioner has complied with the direction no. 1 of the judgment dated 05-02-2018 by arriving at a compromise with Respondent no. 2-3 so there has been occurred no violation of the said judgment. To counter the said contention

the learned counsel for respondent no. 4 very robustly contends that, the direction given in judgment dated 05.02.2018 has got no existence in the following order dated 13-12-2018 because in earlier judgment the respondent no. 2 and 3 were directed to purchase the share of petitioner but in the subsequent modified order dated 13-12-2018 rather the petitioner was ordered to purchase share of the respondent no. 2 and 3 upon performing several absurd terms and conditions and accordingly order was passed on 13-12-2018 into to in accordance with the joint application so that very direction no. 1 has never been upheld in subsequent modified order and there cannot be any scope to say that as per order no. 1 of judgement dated 05.02.2018 subsequent compromise was held and modified order was passed.

32. In view of such submission I have also very meticulously gone through the operative portion of the judgment dated 05-02-2018 and that of the modified order passed subsequently dated 13-12-2018. On going through the operative portion of the order dated 13-12-2018 I find that this court by order dated 13.12.2018 passed directions exactly in line with the terms and condition incorporated in the joint application for compromise filed by the petitioner and respondent no. 2 and 3.

33. On the contrary, in the original judgment dated 05-02-2018, there are only 3 directions, given to respondent no. 2, 3 and respondent no. 4 including a direction to comply with an interim order passed at the time of admitting the company matter. So on plain reading of both the judgement and order, I find that, vide order dated 13-12-2018 the judgement dated 05-02-2018 has been totally reversed.

34. Now question evolves, whether after closing a matter in other words, after passing a judgment on merit and on contest by a bench that very judgment can be modified or reversed or altered by another bench by subsequent order when such contesting judgment was upheld by the Hon'ble Appellate Division. In such a panorama, the learned senior counsel for the petitioner very candidly submits that, under the provision of order 23 rule 3 of the Code of Civil Procedure, and that of rule (6) of the companies rules, 2009, the High Court Division can modify the judgement at any point of time on the basis of compromise. But on going through the provision so have been enunciated in those two different statutes. I find that, nothing denotes therein specifying that after adjudication of any dispute on contest and on merit a compromise can be made so those provision has got no application here.

35. Further, in the interim portion of the judgment dated 05-02-2018 there has been also an order giving authority to petitioner and any of the respondent nos. 2 and 3 to make all sorts of transaction in running the company as well as its bank and that very order was upheld by the Honb'le Appellate Division as well. But by giving subsequent order dated 13-12-2018 amongst others absolutely a diverse decision was passed giving sole authority to the petitioner which clearly runs counter to the direction given in the judgement dated 05.02.2018 including interim order thereof. Invariably, under no circumstances, this court can interfere with its own judgment which was even affirmed by the Honb'le Appellate Division.

36. It is the contention of the learned counsel for the respondent no. 4 that, while filing joint application for compromise by the petitioner and respondent no. 2 and 3 no copy of the same was served upon him. On the contrary, the learned counsel for the petitioner vehemently opposes the said contention saying that, since a copy of the application he filed for clarification of judgment dated 26-11-2018 had been served on him so the learned counsel for the respondent no. 4 essentially had knowledge about the compromise. But on going through the entire order sheet lying with the order book of the company matter, I find

that after passing the order of correction of the judgment dated 10-05-2018 there has been no other order in the entire record, reflecting entry of any application filed either by the petitioner or by respondent no. 2,3 or respondent and 4. However, it is admitted that, the copy of the joint application dated 13-12-2018 has not been served upon the respondent no. 4 though by that very compromise and order passed thereby dated 13.12.2018 the judgment passed on 05-02-2018 is found to have totally reversed so the respondent no. 4 who admittedly holds 25% share in the company was very much entitled to have a copy of the said application.

37. Be that as it may, in view of the above discussion and observation now I conclude the paramount question as to whether a bench of this division can interfere with any judgment passed by another bench which was up held by the Honb'le Appellate Division. In view of the forgiving discussion, It is of my considered view that, under no circumstances, this court can pass any order whatever manner it be, that makes a judgement passed earlier redundant one. Because, if such trends is allowed to entertain then there would have no chain of command in the administration of justice-here, the highest seat of judiciary.

38. Regard being had to the above deliberations and observation, the applications so filed by respondent no. 4 and 2 to 3 is hereby allowed and the order dated 13-12-2018 passed by this court is recalled.

39. All steps, actions taken and made by the petitioner and respondent nos. 2-3 in pursuance of the order dated 13-12-2018 is thus declared illegal consequent to the judgement passed by this court dated 05-02-2018 is thus put in its place.

40. The petitioner and respondent no. 2 and 3 are hereby directed to revert to the position of the company and all its Banking status at it remained at the time of passing the judgment dated 05-02-2018.

41. The petitioner and respondent no. 2, 3 and 4 are further directed to comply with their respective obligation in implementing the judgement dated 05-02-2018 within 30th September, 2019 without any fail and file affidavit-of-compliance within 31st October, 2019.*
