

(2005) 03 AHC CK 0185
In the Allahabad High Court

Case No : Civil Miscellaneous Review Petition No. 30419 of 2005 in Civil Miscellaneous Writ Petition No. 4450 of 1986 and Civil Miscellaneous Review Petition No. 30421 of 2005 in Civil Miscellaneous Writ Petition No. 4451 of 1986

Mohan Lal Bagla

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 22-03-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Constitution of India, 1950 — Article 141, 226

Citation : AIR 2005 All 308

Hon'ble Judges : S.K. Singh, J

Bench : Single Bench

Advocate : S.C. Tandon, P.K. Jain, R.V. Gupta, R.K. Jain and B.D. Mandhyan, for the Appellant; V.B. Singh, T.P. Singh, A.P. Tiwari, V.B. Upadhyay, R.P. Gupta, Vivek Saran and S.C., for the Respondent

Final Decision : Dismissed

Judgement

S.K. Singh, J.—These are two applications filed by Narendra Kumar and others, respondents in the writ petition.

2. By application No. 30451 of 2005, review of the judgment of this Court dated 11.8.2004 has been sought and by Application No. 29291 of 2005, six months time has been prayed for vacating the properties in question.

3. On the close of arguments, learned counsel who argued the matter from both sides,, submitted that they may give brief note which may facilitate this Court in passing the order and thus, brief note/submission given has not been made part of record and that has been just perused. A brief note given by Sri Singh, learned counsel in support of review petition is clearly reiteration of various facts and details in the light of evidence which is the part of counter affidavit filed in the writ petitions and thus they are reiteration of the facts and details on which

reappraisal and re-hearing appears to be an effort which for the reasons indicated in this order and within limited scope of consideration may not be permissible.

4. Issue in the writ petition was about validity and propriety of the auction sale of three houses i.e. House No. 16/20, 16/20-B and 16/20-C situated in Civil Lines, Kanpur which were auctioned for small dues of the sales tax department for a total amount of Rs. 1,61,000/-. After lengthy arguments from both sides, writ petition was allowed and Auction proceedings were quashed and the respondent-auction purchaser was directed to hand over possession of the properties in question within a period of six months to the petitioner and bid amount along with interest was directed to be returned to the auction-purchaser, within a period of six weeks from the date of moving application as indicated in the judgment. The judgment of this Court was challenged by respondent-auction purchaser by filing SLP before the Apex Court through SLP No. 27062-27063 of 2004 which were dismissed by the Apex Court by judgment dated 24.1.2005. It is thereafter, these applications have been filed by the respondents in the writ petition.

5. Sri V.B. Singh, learned Senior Advocate assisted by Sri Vivek Saran, learned advocate has been heard in support of these applications and Sri Ravi Kiran Jain and Sri B.D. Mandhyan, learned Senior Advocates assisted by their colleagues have been heard in opposition thereof.

6. At the start of arguments, besides other preliminary objection that after dismissal of SLP by the Apex Court, these applications are not maintainable, it was also vehemently pressed by Sri B.D. Mandhyan, learned Senior Advocate that filing of review petition by another advocate who was not counsel at the time of hearing of writ petition, is neither permissible in law nor otherwise it can be said to be proper. Submission is that new counsel cannot be in a position by keeping in mind that in fact what was argued before writ Court and what transpired during course of argument and thus submission is that review application is to be rejected on this short ground. After dismissal of SLP by Apex Court, any change in the judgment of this Court by review petition was also objected.

7. Sri Singh, learned senior advocate who was not a counsel in the writ petition, in response to the aforesaid objection submits that although, he was not counsel when writ petition was heard but on the basis of materials as exists and in the light of finding so given by writ court, he can file and argue review petition and otherwise review petition has been filed on valid grounds.

8. In respect to the question that whether a new counsel can file and argue review petition, learned advocates from both sides placed reliance on the decision given by the Apex Court in the case of Tamil Nadu Electricity Board v. N. Raju Reddiar JT 1997 (1) SC 486.

9. In view of aforesaid rival contention, this Court has examined the matter in

issue.

10. So far the propriety of filing review petition and arguments on it by new Counsel who never appeared in earlier proceedings and hearing of case, the Apex Court has already decided the issue in the case of Tamil Nadu Electricity Board v. N. Raju Reddiar JT 1997 (1) SC 486. The observation of the Apex Court in this regard as quoted in the Tamil Nadu Electricity Board (supra) is quoted:

"..The record of appeal indicates that Sri Sudarsh Menon was the Advocate on Record when appeal was heard and decided on merits. The Review petition has been filed by Sri Prabir Chowdhury who was neither an arguing counsel when the appeal was heard nor was he present at the time of arguments. It is unknown on what basis he has written the grounds in the, Review Petition as it is a rehearing of an appeal against our order He did not confine to the scope of review. It would be not in the interest of the profession to permit such practice. That apart, he has not obtained "No Objection Certificate" from the Advocate-on-Record in the appeal, in spite of the fact that Registry had informed him of the requirement for doing so. Filing of the " No Objection Certificate" would be the basis for him to come on record. Otherwise, the Advocate-on-Record is answerable to the Court. The failure to obtain the " No objection certificate" from the erstwhile counsel has disentitled him to file the Review Petition. Even otherwise, the Review Petition has no merits It is an attempt to reargue the matter on merits."

11. Otherwise also for a new counsel it may not be proper to move for the reasons as indicated below. In respect to question involved and to the argument which were advanced by learned counsel appearing for the party and in respect to queries which were made by the Court whether were satisfactorily replied or not, it can not be possibly in the knowledge of another counsel who was not appearing at the time of first hearing of case. Take a case that a question was put to a counsel but he was not in a position to answer it, a particular document in support of claim was asked to be placed but learned advocate is not in a position to show and refer to the relevant document, and on a particular aspect, he might have virtually surrendered for the reason that he probably had no valid reply and thereafter, judgment comes, dealing with all the aspects. Now review petition is filed on the ground that something was not considered which was argued or there is wrong observation about certain facts or on alike ground then it has to be said that a new counsel is debarred from raising all these objections or objection of a like nature. The review petition appears to have been filed by new counsel mainly on the ground that some letters written by Mohan Lal Bagla to the Deputy Collector, Sales Tax and to the Commissioner have not been taken note and bid sheet has not been considered by this Court in respect to which suffice it to say that it cannot be said by Sri Singh, who is new counsel for the purpose of arguing review petition that whether the aforesaid letters were referred in the argument and they were relied by the then counsel and whether any effort was made by learned advocate to lay emphasis on those documents as they have any relevance in the matter in issue and thus the question touching

with the proceedings of the Court and discussion during course of argument by a new counsel who was neither arguing counsel nor assisting counsel at the initial stage, cannot be permitted. To argue same details as a question of fact in second inning of the matter cannot be permitted. It is under very exceptional circumstance where it can be demonstrated that on the finding and reasoning so given, there is error apparent on the face of record which can be termed to be a mistake within the meaning of error apparent as that can be discovered without any argument, it may be filed by a new advocate but that too after obtaining no objection from earlier counsel. If a case is to be argued on the same set of facts by change of counsel , at several occasion, it may be possible that with imminence of the counsel, a new dimension to the augment may come on same set of facts. Skill in the argument and advocacy is to vary always from counsel to counsel. Although earlier two senior advocates of this Court namely Sri R.N. Singh and Sri V.B. Upadhyaya argued the matters on behalf of applicant at length with full vehemence at their command but now Sri V.B. Singh, learned senior advocate wants to argue the matter in his own way by placing the same record and same pleadings. On the facts of present case, this Court is of the view that filing of review petition on the ground so taken in the application cannot be said to be just and proper so as to entitle Sri Saran, learned advocate and Sri Singh, learned senior advocate to file and argue this review petition.

12. Be as it may, as the matter has come before this Court by way of this review petition and there is an, issue between the parties that whether after dismissal of SLP by the Apex Court against the judgment of this Court, this review petition can be entertained or not, Court feels inclined to decide this issue also. About the right of party to file a review petition , this Court is just to refer the law as the Apex Court has already declared in the decision given in the case of Kunhayammed v. State of Kerala (2000) 6 SCC 360. The observation of Apex Court, in the case of Kunhayammed (supra) as made in para 40 will be useful to be quoted here as under:

"A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being defective presentation (iii) the petitioner having no locus standi to file the petitioner, (iv) the conduct of petitioner disentitling him to any indulgence by the Court, (v) the question raised by the petitioner for consideration by this Court being not fit consideration or deserving being deal with by the Apex Court of the country and so on. The expression often employed by this Court while disposing of such petitions are - " heard and dismissed", "dismissed", " dismissed as barred by time" and so on. May be that at the admission stage itself the opposite party appears op caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the meritworthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no

law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the SLP only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 CPC or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 CPC act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of a SLP does not take away the jurisdiction of the Court, tribunal or forum whose order forms the subject matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial "discipline and an affront to the order of this Court. However, this would be so not by reference to the doctrine of merger."

13. At the same time, observation of the Apex Court in the judgment above as made in paragraphs 33 and 34 will also be useful to be here as under:

Doctrine of merger and review

Para 33. This question directly arises in the case before us.

Para 34: The doctrine of merger and the right of review are concepts which are closely interlinked. If the judgment of the High Court has come up to this Court by way of special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of this Court. In that event, it is not possible to move the High Court by review because the judgment of the High Court has merged with the judgment of this Court. But where the SLP is dismissed- there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. But the High Court if it exercises a power of review or deals with a review application on merits- in a case where the High Court's order had not merged with an order passed by this Court after grant of

special leave- the High Court could not, in law, be said to be wrong in exercising statutory jurisdiction or power vested in it."

14. As this Court is informed that the SLP was dismissed before grant of leave, doctrine of merger may not be applied and review petition if it is otherwise maintainable can be said to be maintainable if grounds are covered within the scope of Order 47 Rule 1 of Code of Civil Procedure. At this stage, it will be useful to quote Order 47 Rule 1 C.P.C. which reads as under:

"1. Application for review of judgment-(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed or

(c) by a decision on a reference from a Court of Small Causes,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."

15. A reading of the aforesaid makes it clear that review petition can be filed if from the discovery of new materials which after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made or on account of some mistake or error apparent on the face of record, or for any other sufficient reason. Here is not the case where review petition has been filed by discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge of party or could not be produced at the time when the judgment was given. Here is the Case where the applicant wants review of the order on the ground that on the facts and evidence, conclusion arrived at by this Court is wrong. Exactly on the same ground that on the facts and evidence which exists on record, conclusion arrived at by this Court: is wrong, applicant approached the Apex Court but SLP was dismissed. Permission to entertain the review petition and permission to argue on that cannot mean that the Court is to provide re-hearing in the matter just like the hearing at the first instance. Effort by placing same evidence, same document and same averments for taking different view than taken at earlier stage, can never be the scope of review petition otherwise, there may not be any end of the matter as the losing party will always try to get review petition filed and that too, may be by some more eminent advocate according to his expectations for the purpose of vehement re-arguments in the matter in the hope of getting some changed opinion favouring

him. This cannot be the spirit of the provision as contained under Order 47 Rule 1 C.P.C.

16. The scope of review petition has already been explained by the Apex Court besides this Court in several decision. In the decision given by Apex Court in the case of Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury, scope of review has been explained. The observation of this Court as made in para 8 of the judgment of the Apex Court can be quoted here:

"It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1 CPC. In connection with the limitation of the powers of the Court under Order 47, Rule 1 while dealing with similar jurisdiction available to the High Court while seeking review the orders under Article 226 of the Constitution of India, this Court, in the case of Aribam Tuleswar Sharma v. Aribam Pishak Sharma, speaking through Chinnappa Reddy, X, has made the following pertinent observations (SCC p.390, para 3)

" It is true as observed by this Court in Shivdeo Singh v. State of Punjab, there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; that may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court."

17. In respect to error apparent in the judgment of Apex Court in the case of Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, , following observation was made:

"An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ"

18. Therefore, it is clear that error apparent on the face of record, has to be such an error which must strike on mere looking at the record and would not require

any long drawn process of reasoning on the point whether they may conceivably two opinion. The power of review is not to be confused with the power of appeal. It cannot exercise on the ground that decision is erroneous on merits as that would be in the province of Court of appeal who can be in a position to correct the errors committed by subordinate courts:

19. On the facts, there is no dispute that when the writ petition was argued before this Court, lengthy arguments and hearing took place on number of dates and both sides had ample opportunity and time to meet to each others contention, pleadings and evidence as existed on record. On behalf of petitioners, two learned senior advocates appeared and on behalf of respondents who are applicants in these review petition, Sri R.N. Singh, learned senior advocate and Sri V.B. Upadhyaya, learned senior advocate appeared and argued the matter at full length, upon which considered judgment by this Court has come against which SLP has also been dismissed by the Apex Court. Entire effort by these review applications is to get re-hearing in the matter, in the light of same set of evidence, same pleadings which cannot be permitted.

20. In view of aforesaid, this Court is of the firm view that review petitions by the applicants merits dismissal.

21. At this stage, other application filed by the applicants for grant of six months further time to vacate the properties in question is also to be disposed of. This Court while allowing writ petitions on 11.8.2004 granted six months time to the applicants to hand over the possession of the properties in question. The time was not so short that the applicant can be said to be able to manage for their own place and to remove the goods. At the same time, when the matter was heard by the Apex Court and it was decided if the applicants were to seek any extension of time for any good reason, it was open for them to have requested the Apex Court for grant of some time in this respect. This Court is not aware that whether time was prayed and refused by the Apex Court or it was not prayed, but in any view of the matter, as this Court has already granted six months time for vacating the premises in question, it appears that no ground has been made out for extension of time. In the application which has been filed by the applicants in this respect, no reason whatsoever has been given for extension of time. Nothing has been said that how within a period of six months, applicants were not able to do the needful. The only averment in the application is that the applicants tried to find a building in the locality so that they may shift but to the misfortune, no suitable building could be found. No detail of making efforts has been given, therefore, the sole averment in this respect is apparently for the purposes of this application. Thus for the reasons indicated above, extension of time, as prayed can not to be allowed.

22. For the reasons indicated and the analysis as made above, both applications filed by the applicants i.e. is for review and extension of time are hereby rejected.