
(1992) 10 GUJ CK 0025
In the Gujarat High Court

Navinbhai Bhogilal Soni

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 16-10-1992

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 226, 32

Citation : (1993) 1 GLR 836

Hon'ble Judges : N.J. Pandya, J;B.J. Shethna, J

Bench : Division Bench

Judgement

N.J. Pandya, J.—This is an application for review of an order which came to be passed in Special Criminal Application No. 35 of 1992 on 31-7-1992 by us. The order passed in Special Criminal Application No. 35 of 1992 which is sought to be reviewed reads as under:

After arguing the matter for quite some time, Mr. Jain, learned Advocate for the petitioner seeks permission to withdraw this petition. Permission is granted. The petition is disposed of as withdrawn. Rule discharged.

2. The fact that the order was passed in Special Criminal Application No. 35 of 1992 and further fact that a criminal application has been filed for getting it reviewed prima facie itself may appear to be non-maintainable because so far as the Criminal Law is concerned, there is no provision for review. However, neither the learned A.P.P. Mr. Rawal appearing for the State nor learned Advocate Mr. B. B. Naik appearing for the Union of India has raised this point and very correctly so, because the matter involves liberty of a citizen and Special Criminal Application No. 35 of 1992 was in any case under Article 226 of the Constitution of India. We are therefore, proceeding on the basis that an order passed therein can be reviewed.

3. However, before doing so, we should specify one thing namely that this question has been decided by a Full Bench of this Court in Gujarat University, Ahmedabad and etc. Vs. Sonal P. Shah, The learned Judges in that decision, have

laid down that the provisions of the CPC in Order 47 are not applicable to the High Court's power of review in proceedings under Article 226 of the Constitution and that the said powers are to be exercised by the High Court only to prevent miscarriage of justice or to correct grave and palpable errors, which means that an error which could be felt by simple touch of an order and not which could be dug out after a long drawn out process of argumentation and ratiocination. It has been laid down that the inherent powers, though *ex facie* plenary are not to be treated as unlimited or unabridged as they are to be invoked on the ground analogous to the grounds mentioned in Order 47 Rule 1, namely (1) discovery of new and important matter or evidence which the party seeking the review could not produce at the time when the earlier order sought to be reviewed was made, despite exercise of due diligence; (2) existence of some mistake or error apparent on the face of the record; and (3) existence of any analogous grounds. When we turn to Order 47 itself, so far as the aforesaid third eventuality is concerned, the actual words are "any other sufficient cause". However, in view of the preceding two fact situations envisaged by O. 47(1)(c), the learned Judges of the Full Bench have referred to the third fact situation as existence of any analogous ground.

4. Not only that we are bound by this decision of the Full Bench, but also, we are in wholehearted agreement with the views expressed therein. In view of the aforesaid legal position, when we turn to the order, which is sought to be reviewed, it is quite clear that the order is as short as one could imagine. The order in fact is only that of "dismissed as withdrawn". Now if this is the order to be reviewed, *per se* there is no question of discovery of new or important matter of evidence. Nor is there possibility of existence of any mistake or error much less, therefore, apparent on record.

5. From the order quoted in extenso, it is quite obvious that withdrawal was sought by the learned Advocate appearing for the petitioner and therefore, on the matter being thus withdrawn, it was declared as "dismissed as withdrawn". So far as the Court is concerned, therefore, the order is only that much.

6. Learned Advocate Shri Ahuja appearing for the petitioner had very vehemently tried to make out a case that discovery of new material or evidence has to be considered in light of the evidence when it was dealing with the earlier matter, i.e., Spl. Criminal Application No. 35 of 1992. Had it been considered fully, there was no question of withdrawing the matter and therefore, that should be treated as a ground for review.

In our opinion, this submission cannot be accepted, because the exercise, of power has to be in reference to an order which has been passed on earlier occasion and it is sought to be reviewed on the basis of discovery of new and important matter or evidence which of necessity has to take place after the order was passed. In the instant case, there was no question of considering any material that was produced along with the said Special Criminal Application No. 35 of 1992, obviously, there is no scope of consideration of any new material

after the order was passed. As per the submission itself, the material was already there before the Court when the order came to be passed.

7. Learned Advocate Shri Ahuja then turned to the second ground of existence of some mistake or error apparent on the face of the record and for this purpose he laid emphasis on the word "record" to the extent that material was there forming part of the record of Petition No. 35 of 1992. Shri Ahuja was indeed, right that material was there, but when it is related to the order, which is sought to be reviewed, obviously there is no question of there being any error at all, because the order is only that of "dismissed as withdrawn". The order is obviously not on merits. Therefore, there is no question of error having been committed by the Court with reference to the record of the matter where the order came to be passed and as such, it is quite clear that this ground is not available to him.

8. The review jurisdiction is to be exercised as indicated by Order 47 only when there is no other remedy available and for this purpose, reference may be made to Sub-clause (1) and (2) of Rule 1 of Order 47. There indication is as to appeal rather than review. So far as the Civil Procedure Code, 1908 is concerned, there is provision either for Appeal or for Revision. However, power of review is restricted only in cases where an appeal is permissible. At the same time, care has been taken by the framers of the Code to see that only either of the remedies have been availed of and not both.

9. In this background and when as per the aforesaid Full Bench Judgment, Order 41 Rule 1 is to be referred to as an analogous provision, if we recollect, that this being a petition under Article 226 of the Constitution of India for setting aside a detention order, under the Constitution itself there is a remedy available to the petitioner namely that of Article 32 of the Constitution for approaching the Honourable Supreme Court. For this reason also, in our opinion, there is no scope for review.

Apart from this, the order which is sought to be reviewed itself being the one indicated above, there is no possibility whatsoever of there being a review of the same.

10. Learned Advocate Shri Ahuja had drawn our attention to certain observations made in a Supreme Court pronouncement in Sarguja Transport Service reported in Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, of that decision, the learned Judges have clearly expressed the opinion about permissibility of filing a second petition after the earlier one was withdrawn. In the course of discussion at the end of said para 9 at page 92, the following observations are made:

We however make it clear that whatever, we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Article 21 of the Constitution since such a case stands on a different footing

altogether. We however, leave this question open.

Otherwise also, had there been no last line namely, we however, leave this question open, it is obvious that by way of caution the decision is confined only to the matters other than the one relating to habeas corpus or enforcement of fundamental right guaranteed under the Constitution of India. The learned Judge, however, have abundantly made it clear that this question is left open. In our opinion, therefore, this part of that paragraph which was sought to be relied on by learned Advocate Shri Ahuja in an attempt to make out a case in favour of the petitioner, because, his case is also that of a habeas corpus as also seeking to enforce the fundamental right guaranteed under Article 21 of the Constitution of India but then, we are not dealing with a matter of filing second writ petition on the same subject-matter which again has to be understood with reference to Order 23 of Civil Procedure Code.

11. All told, therefore, in our opinion, there is no case made out whatsoever and hence, the application is dismissed. Rule is discharged.