

(2008) 09 OHC CK 0020
In the Orissa High Court
Case No : Writ Petition (C) No. 4593 of 2008

Orissa Explosive Pvt. Ltd. and Others	APPELLANT
Vs	
State Bank of India and Another	RESPONDENT

Date of Decision : 26-09-2008

Acts Referred:

Banks and Financial Institutions Act, 1993 — Section 19(1)
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 114

Citation : (2008) 09 OHC CK 0020

Hon'ble Judges : I.M. Quddusi, J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : Niranjana Panda and T.K. Meher, for the Appellant; Himanshu Patnaik Advocate and J. Pattnaik, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—This review petition has been filed by the Petitioners with a prayer to review/recall the order dated 25.4.2008 passed by this Court in W.P.(C) No. 4593 of 2008.

2. The background facts of this case are that the Petitioner No. 1- M/s. Orissa Explosive Pvt. Ltd. availed financial assistance of Rs. 40.00 lakhs on certain terms and conditions from the State Bank of India, R.I.E. Branch, Rourkela. Since the Petitioner violated the terms and conditions of loan and did not repay the bank's money, the financier-SBI filed an application under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter called "the Act", 1993) before the Debts Recovery Tribunal, Cuttack (hereinafter called "DRT") for realization of Rs. 1,77,56,690 with interest at the rate of 14.5% per annum which was registered as O.A. No. 108/2003. In the said O.A., the Company-Orissa Explosive Pvt. Ltd. and other five Directors were impleaded as Defendants. Since Defendants 1 to 6 did not contest the case before the Tribunal, they were set ex parte. The Debts Recovery Tribunal vide its order dated 30.11.2004 held that Defendants 1 to 6 are liable to pay the said amount of Rs.

1,77,56,690 to the applicant-Bank with future interest from the date of application till the date of realization and directed for issuance of certificate of recovery and forwarded the same to the Recovery Cell for further action as per law.

3. While O.A. No. 108/2003. was pending before the DRT, the S.B.I. issued notice dated 7.4.2004 u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act").

4. The Petitioner filed M.A. No. 270/2004 on 22.12.2004 before the DRT to set aside the ex parte order dated 30.11.2004 passed in O.A. No. 108/2003. The DRT vide its order dated 11.2.2005 dismissed the said application (M.A. No. 270/2004) with cost of Rs. 1,000. Thereafter, the Petitioner filed W.P.(C) No. 6728/2005 on 18.5.2005 for quashing of order dated 11.2.2005 passed by the DRT in M.A. No. 270/2004 arising out of O.A. No. 108/2003.

5. this Court vide its order dated 17.10.2005 disposed of the writ petition with the observation that the bank will not take any action pursuant to notice issued u/s 13(2) of the SARFAESI Act till permission is obtained from DRT u/s 19(1) of the Act, 1993. this Court, on the request of the Petitioners seeking leave of this Court, further granted liberty to Petitioners to file an appeal against the order dated 11.2.2005 before the appropriate forum.

6. Thereafter, the Petitioner filed second writ petition being W.P.(C) No. 4593 of 2008 for quashing of notice of auction dated 26.2.2008 issued by the Tax Recovery Officer adjourning the date of auction to 25.3.2008 from 26.2.2008. this Court vide order dated 25.4.2008 dismissed the writ petition on the ground of non-disclosure of the facts relating to filing of the previous writ petition being W.P.(C) No. 6728 of 2005 with cost of Rs. 50,000 to be paid by the Petitioners in favour of the Orissa High Court Legal Services Committee. For better appreciation of the case, the order of this Court dated 25.4.2008 is reproduced below:-

Date: 25.04.2008 "Heard Learned Counsel for the parties.

This writ petition has been filed by M/s Orissa Explosive Pvt. Ltd. and Ors. namely, Bijaya Kumar Rath, Basasnti Ratha, Meeta Ratha, Polak Pati and B.K. Engineering Pvt. Ltd. The prayer in the writ petition is to quash Annexure-1, which is a notice issued by the Debts Recovery Tribunal for sale of the properties in auction in Recovery Proceeding No. 022/2005/CTC arising out of O.A. No. 118/2003. Previously another writ petition being W.P.(C) No. 6728 of 2005 was filed before this Court, which also arose out of same O.A. filed by the bank. In that writ petition M/s. Orissa Explosive Pvt. Ltd., Bijay Kumar Rath, Smt. Basanti Rath and Polaka Pati were the Petitioners. In this writ petition the Petitioners have given a declaration that the matter out of which the present writ petition arises was never before this Court in any other form whatsoever. But we find from the previous writ petition that the said petition was filed by the persons most of

whom are parties to the present writ petition and an order was passed by this Court giving liberty to the Petitioners to file an appeal against the order of the DRT before the appellate authority. There is total suppression of previous proceeding in the present writ petition.

We are distressed about the conduct of the Petitioners. The Learned Counsel for the Petitioners tried to argue that the present petition arises out of different cause of action. It may be true that there is different cause of action, but both the writ petitions arise out of the same O.A. filed before the DRT. It is incumbent upon the Petitioners to indicate in the present writ petition about their approaching this Court previously and the parties who want to invoke the extraordinary jurisdiction of this Court must come with clean hands disclosing the facts with sufficient clarity. The fact relating to filing of previous writ petition having not been disclosed in the present writ petition, this Court has been kept in dark and is of the impression that filing of tile present writ petition by non-disclosure of such facts is an abuse of process of Court.

Following the age-old principles, this Court dismisses the writ petition without passing any order on merits but with costs, which is assessed at Rs. 50,000 (Rupees,fifty thousand) to be paid by the Petitioners in favour of the Orissa High Court Legal Services Committee. The costs must be paid by the Petitioners within a period of six weeks from today.

Misc. Case No. 4237 of 2008 is also dismissed.

7. The present Review Petition has been filed for review of the above order dated 25.04.2008. In the Review petition, it is averred by the Petitioners that there was a communication gap between the Petitioners and the conducting advocate earlier, for which the Petitioner was ignorant about the said order.

Mr. Jagannath Pattnaik, learned senior counsel appearing on behalf of the Petitioners, submitted that there is No. suppression of facts in the second writ petition since cause of action for the earlier and subsequent writ petitions are different. He strenuously argued that the previous writ petition being W.P.(C) No. 6728 of 2008 was filed before this Court for quashing of the order dated 11.02.2005 passed by the Debts Recovery Tribunal in M.A. No. 270/2004 arising out of O.A. No. 108/2003, whereas the present writ petition has been filed for quashing of the notice issued by the DRT for sale of the properties in auction in Recovery Proceeding No. 022/05-CTC arising out of O.A. No. 108/2003. He further submitted that the loanee is more than seventy years old and, if some time will be allowed, the loanee shall clear up the entire dues.

8. Per contra, Mr. Himanshu Patnaik, Learned Counsel appearing on behalf of the Bank and Mr. Jaydeep Pal appearing for intervenor-Petitioner submitted that No. case for review has been made out by the Petitioners. It was further submitted that the possession of auction property has already been delivered to the auction purchaser. Mr. Pattnaik, Learned Counsel, appearing on behalf of the Bank also submitted that the Review Petitioners did not comply with the observation made

by this Court in previous W.P.(C) No. 6728 of 2005 affording leave to them for filing statutory appeal provided under the law.

9. Before proceeding further, it will be useful to have an idea about scope of review. Section 114 read with Order 47, Rule 1 of the Code of Civil Procedure, 1908 (hereinafter called "the Code of Civil Procedure") prescribes the limitations for entertaining a review petition. These limitations are that the party filing the application for review has discovered a new and important matter or evidence after exercise of due diligence, which 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."

The aforesaid limitations are prescribed in a crystal clear language and before a party submits that it had discovered a new and important matter or evidence which could not be produced at the earlier stage, the condition precedent for entertaining the review would be to record the finding as to whether at the initial stage, the party has acted with due diligence. The word "due" means just and proper in view of the facts and circumstances of the case in *A.K. Gopalan Vs. The State of Madras*, .

The Hon'ble Supreme Court in *Haridas Das Vs. Smt. Usha Rani Banik and Others*, held that a perusal of the Order 47, Rule 1 shows that review of a judgment or an order could be sought: (a) from the discovery of new and important matter or evidence which after the exercise of the due diligence was not within the knowledge of the applicant; (b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; (c) on account of some mistake or error apparent on the face of record or any other sufficient reason. Therefore, some mistake or error, if made ground for review, it must be apparent on the face of record and if a party files an application on the ground of some other sufficient reason it has to satisfy that the said sufficient reason is analogous to the other conditions mentioned in the said rule i.e. discovery of new and important matter or evidence which it could not discover with due diligence or it was not within his knowledge and, thus, could not produce at the initial stage. Apparent error on the face of record has been explained to include failure to apply the law of limitation to the facts found by the Court or failure to consider a particular provision of a statute or a part thereof or a statutory provision has been applied though it was not in operation. Review is permissible if there is an error of procedure apparent on the face of the record e.g. the judgment is delivered without notice to the parties, or judgment does not effectively deal with or determine any important issue in the case though argued by the parties. There may be merely a smoke-line demarcating an error simplicitor from the error apparent on the face of record. But there cannot be a ground for entertaining the review in the former case. "Sufficient reason" may include disposal of a case without proper notice to the party aggrieved. Thus, if a person comes and satisfies the Court that the matter has been heard

without serving a notice upon it, review is maintainable for the "sufficient reason" though there may be No. error apparent on the face of record.

The expression "any other sufficient reason" contained in Order 47 R.I CPC means "sufficient reason" which is analogous to those specified immediately to it in the provision of Order 47 Rule 1 Code of Civil Procedure.

In Chhajju Ram v. Neki and Ors, AIR 1922 PC 112, it was held by the Privy Council that analogy must be discovered between two grounds specified therein namely; (i) discovery of new and important matter or evidence; and (ii) error apparent on the face of record, before entertaining the review on any other sufficient ground. The same view has been reiterated in Debi Prasad and Others Vs. Khelawan and Others, ; and Mohammad Hasan Khan v. Ahmad Hafiz Ahmad Ali Khan and Anr., AIR 1957 Nag. 97.

In S. Nagaraj and Others Vs. State of Karnataka and Another, , the Hon"ble Apex Court explained the scope of review observing as under:-

Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice..... The expression, "for any other sufficient reason" in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power.

The Court further held that the purpose of review IS rectification of an order which stems from the fundamental principle that justice is above all and it is exercised only to correct the error which has occurred by some accident without any blame. While deciding the said case the Hon"ble Supreme Court placed reliance upon a large number of judgments including AIR 1941 1 (Federal Court) ; and Rajunder Narain Rai v. Bijai Govind Singh (1836) 1 MOO PC 117. The same view has been reiterated by the Hon"ble Apex Court in The Oriental Insurance Co. Ltd. and Another Vs. Gokulprasad Maniklal Agarwal and Another, .

In Sow Chandra Kante and Another Vs. Sheikh Habib, the Hon"ble Apex Court dismissed a review application observing as under:-

...thus, making out that a review proceeding virtually amounts to are-hearing. May be... a review thereof must be subject to the rules of the game and cannot be lightly entertained. A review of a judgment is a serious stop and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.

Similar view has been reiterated by the Hon"ble Supreme Court in Sajjan Singh Vs. State of Rajasthan, ; Girdhari Lal Gupta Vs. D.H. Mehta and Another, ; Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, ; Babboo alias

Kalyandas and Others Vs. State of Madhya Pradesh, ; and Green View Tea and Industries Vs. Collector, Golaghat and Another, .

Similarly, in Devaraju Pillai Vs. Sellayya Pillai, , the Hon"ble Apex Court held that if a party is aggrieved by a judgment of a Court, the proper remedy for such party is to file an appeal against that judgment. A remedy by way of an application for review is entirely misconceived and if a Court entertained the application for review then it has totally exceeded its jurisdiction in allowing the review merely because it takes a different view in construction of the document.

In Delhi Administration v. Gurdip Singh Uban and Ors., AIR 2000 SC 3737, the Hon"ble Apex Court deprecated the practice of filing review application observing that review, by No. means, is an appeal in disguise and it cannot be entertained even if application has been filed for clarification, modification or review of the judgment and order finally passed for the reason that a party cannot be permitted to circumvent or bypass the procedure prescribed for hearing a review application. The Court also rejected the argument that review application should be entertained to do justice in the case, observing as under:-

The words "justice" and "injustice", in our view, are sometimes loosely used and have different meanings to different persons, particularly to those arrayed on opposite sides.....Justice Cardozo said, "The Web is tangled and obscure, shot through with a multitude of shades and colours, the skeins irregular and broken. Many hues that seems to be simple, are found, when analysed, to be complex and uncertain blend. Justice itself, which we are wont to appeal to as a test as "Well as an ideal, may mean different things to different minds and at different times. Attempts to objectify its standards or even to describe them, have never wholly succeeded.

In Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh, , the Hon"ble Apex Court held as under:-

A review is by No. means an appeal in disguise whereby an erroneous decision is reheard and corrected, hut lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could Point to the error and say here is a substantial Point of law which stares one in the face, and there could reasonably be No. two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

In Union of India and Ors. v. Mohd. Nayyar Khalil and Ors. reported in, (2000) 9 SCC 252 , the Hon"ble Apex Court rejected the review application which was filed on the ground that the High Court had decided the case placing reliance upon the decision of the Hon"ble Supreme Court, the correctness of which had been doubted and the matter had been referred to the Larger Bench of the Supreme Court. Subsequently, the Larger Bench had taken a contrary view. The review petition was dismissed on the ground, inter alia, that the situation had not been

pointed out by the counsel to the Bench when the matter was initially heard.

In *Subhash Vs. State of Maharashtra and Another*, , the Hon''ble Apex Court emphasized that Court should not be misguided and should not lightly entertain the review application unless there are circumstances falling within the prescribed limits for that as the Courts and Tribunal should not proceed to re-examine the matter as if it was an original application before it for the reason that it cannot be a scope of review.

The first and foremost requirement of entertaining a review application is that the order, review of which is sought (a) suffers from any error apparent on the face of the record, and (b) permitting the order to stand will lead to failure of justice. (Vide *Rajender Kumar and Others Vs. Rambhai and Others*, ; *Green View Tea and Industries Vs. Collector, Golaghat, Assam and Another*, ; and *Des Raj (Deceased) through L.Rs. and Others Vs. Union of India (UOI) and Another*,).

In *Zahira Habibullah Sheikh and Another etc. Vs. State of Gujarat and Others etc.*, the Apex Court referred to its earlier judgments in *P.N. Eswara Iyer etc. v. Registrar Supreme Court of India* (1980) 4 SCC 680; *Suthenthiraraja @ Santhan and Others etc. etc. Vs. State Through DSP/CBI, SIT, Chennai etc. etc.*, ; *Ram Deo Chauhan @ Raj Nath Vs. State of Assam*, ; and *Devinder Singh and Others Vs. State of Himachal Pradesh*, ; and observed that review applications "are not to be filed for pleasure of the parties or even as a device for ventilating remorselessness, but ought to be resorted to with a great sense of responsibility as well".

In *Bhagwati Singh Vs. Deputy Director of Consolidation and Another*, , the Allahabad High Court rejected the review application filed on a ground which had not been argued earlier because the counsel, at initial stage, had committed mistake in not relying on and arguing those points, observing as under:-

"It is not possible to review a judgment only to give the Petitioner a fresh inning. It is not for the litigant to judge of counsel's wisdom after the case has been decided. It is for the counsel to argue the case in the manner he thinks it should be argued. Once the case has been finally argued on merit and decided on merit, No. application for review lies on the ground that the case should have been differently argued.

The power of review is to be exercised within the definitive limits. More so, a person who seeks equity must do equity and he should approach the Court with clean hands, clean mind and with clean objective. The perception of justice varies from person to person, and a litigant who succeeds in Court, claims that justice has been done to him but the litigant who loses, though may not have a case at all, raises grievance that justice has not been done to him.

10. In view of the above discussion the law of review can be summarized that it lies only on the grounds mentioned in Order 47 Rule 1 of the Code of Civil Procedure. The party must satisfy the Court that the matter or evidence

discovered by it at a subsequent stage could not be discovered or produced at the initial stage though it had acted with due diligence. A party filing a review application on the ground of any other "sufficient reason" must satisfy that the said reason is analogous to the conditions mentioned in Order 47 Rule 1 of the Code of Civil Procedure. In the garb of review a party cannot be permitted to re-open the case and to gain a full fledged inning for making submissions, nor review lies merely on the ground that it may be possible for the Court to take a view contrary to what had been taken earlier. Even the judgment given subsequent to the decision in a case can be No. ground for entertaining the review. Review lies only when there is error apparent on the face of the record and that fallibility is by the over-sight of the Court. If a counsel has argued a case to his satisfaction and he had not raised the particular point for any reason whatsoever, it cannot be a ground of review for the reason that he was the master of his case and might not have considered it proper to press the same or could have thought that arguing that point would not serve any purpose. If a case has been decided after full consideration of arguments made by a counsel, he cannot be permitted, even in the garb of doing justice or substantial justice, to engage the Court again to decide the controversy already decided. If a party is aggrieved by a judgment, it must approach the Higher Court but entertaining a review to re-consider the case would amount to exceeding its jurisdiction, conferred under the limited jurisdiction for the purpose of review. Justice, as explained above, connotes different meaning to different persons in different contexts. Therefore, courts cannot be persuaded to entertain a review application to do justice unless it lies only on the grounds mentioned in the statutory provisions.

11. Non-disclosure of the fact of filing of previous writ petition in the subsequent writ petition, when both the writ petitions arise out of the same case, is nothing but abuse of process of the Court. This practice has been always strongly condemned by the Hon''ble apex Court. It is the settled legal position that suppression of material fact amounts to abuse of process of the Court. [See *Agricultural and Processed Food Products v. Oswal Agro Furane*, 1996 (85) ELT 3 (SC)]. It is indeed fatal to the petition [See (2001) 3 SCC 92 *Union of India and Ors. v. Muneesh Suneja*].

In *Welcom Hotel and Others Vs. State of Andhra Pradesh and Others*, , the apex Court held that the Petitioners who obtained stay order from the Supreme Court by suppressing a material fact would disentitle them from obtaining any relief on the petitions.

The Hon''ble apex Court in *The State of Andhra Pradesh and Another Vs. T. Suryachandra Rao*, held that suppression of martial fact or misrepresentation amounts to a fraud on the Court. Again the Hon''ble Supreme Court in *Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education and Others*, , held that fraud is a conduct either by letter or words, which induces the other persons or authority to take a definite determinative stand as a response

to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud.

12. In the present case, the Petitioners' first ground for review is that the cause of action of both the writ petitions is different. This ground was raised at the time of hearing of the writ petition being W.P.(C) No. 4593 of 2008 and decided by this Court vide order dated 25.04.2008 which has been quoted at paragraph six above. Out of the said order, the present Review petition has been filed.

Thus, this cannot be a ground for review. The issue, which has already been dealt with in an order, cannot be taken as a ground for review of the said order.

The other submissions of Mr. Pattnaik, learned senior counsel for Petitioners are that there was communication gap between the Petitioners and the previous conducting advocate, for which, the Petitioners were ignorant about the said order and that the Petitioners being old couple residing in their dwelling house are ready to repay the arrear dues. These submissions cannot also be grounds for review of the impugned order.

In Tamil Nadu Electricity Board and another Vs. N. Raju Reddiar and another, the Supreme Court held that filing successive misconceived and frivolous applications for clarification, modification or for seeking a review of the order interferes with the purity of the administration of law and salutary and healthy practice. Such a litigant must be dealt with a very heavy hand.

The Hon'ble the Supreme Court in Jain Studios Limited through its President Vs. Shin Satellite Public Co. Ltd., held that the power of review cannot be confused with appellate power which enables a superior Court to correct all errors committed by a subordinate Court. It is not rehearing of an original matter. A review of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases. The Hon'ble Apex Court in Haridas's case (supra) held that the parameters are prescribed in Order 47 of the Code of Civil Procedure. The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulates a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable verdict. This is amply evident from the explanation in Rule 1 of the Order XLVII which states that the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be ground for the review of such judgment. Where the order in question is appealable, the aggrieved party has adequate and efficacious remedy and the Court should exercise the power to review its order with the greatest circumspection.

13. It is a settled position of law that review lies when there is error apparent on

the face of record and such an error crept in inadvertently or otherwise and it is in the interest of justice, such a mistake should be rectified. In the instant case, after hearing elaborate deliberation, the Court had been of considered opinion that the Petitioners/applicants have suppressed the material facts. The suppression of material facts disentitles them all the equitable reliefs. In such a fact situation, the question of entertaining review application does not arise.

14. In view of the above, it is clear that No. case for review under Order 47, Rule-1 of the CPC is made out in this case. The well known parameters of review as indicated above having not been fulfilled, there is No. scope for review and, accordingly, the review petition is dismissed.

I.M. Quddusi, J.

15. I agree.