

(2005) 02 AHC CK 0098

In the Allahabad High Court

Case No : Civil Miscellaneous Review Application No. 89584 of 2004 in Special Appeal No. 534 of 2003

Smt. Krishna Pathak

APPELLANT

Vs

Vinod Shankar Tiwari

RESPONDENT

Date of Decision : 25-02-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 114, 151

Citation : (2005) 3 AWC 2601 : (2005) 2 ESC 1116

Hon'ble Judges : Dilip Gupta, J;B.S. Chauhan, J

Bench : Division Bench

Advocate : H.N. Singh, S.K. Singh, Manoj Kumar, R.K. Srivastava and B. Narain Singh, for the Appellant; Sudhakar Pandey, P.N. Ojha and C.S. Singh and S.C., for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, J.—This is an application for review of the judgment and order dated 4/3/2004, by which the special appeal filed by the present applicant stood dismissed against the judgment and order dated 21/6/2002 of the learned Single Judge, by which the writ petition of the respondent No. 1 stood allowed, quashing the order dated 30/9/1995, impugned in the writ petition, with a direction to the other respondents to pay the salary to the said respondent No. 1 month by month.

2. There has been an inter se dispute between the applicant and Shri Vinod Shanker Tiwari, respondent No. 1 as petitioner had also put her claim for the same post. However, the writ petition filed by the respondent No. 1 stood allowed. Being aggrieved, applicant filed the special appeal, which stood dismissed by the aforesaid judgment and order. Hence this review application.

3. We have heard learned counsel for the applicant and have perused the materials available on record.

4. This review application has been filed not by the counsel who had argued the matter earlier, but by a different counsel which is not generally permissible in view of the decision of the Hon'ble Supreme Court in Tamil Nadu Electricity Board and another Vs. N. Raju Reddiar and another, . Thus, we are very much doubtful regarding the maintainability of the review petition itself.

5. Shri H.N. Singh, learned counsel appearing for the applicant has raised large number of issues and tried to persuade the Court that the matter requires to be heard de-novo. As the Court while deciding the appeal failed to take into consideration issues involved in the appeal. In the review application it has been urged as under:-

(a) The learned Single Judge as well as Division Bench failed to appreciate that the order of appointment of respondent No. 1 Vinod Shanker Tiwari dated 26/6/1993 was a forged document.

(b) The Court failed to notice that before issuing the order of appointment dated 26/6/1993, no prior approval as envisaged under Regulation 101 of Chapter III of Regulation framed in Intermediate Education Act had been obtained from the District Inspector of Schools.

(c) The mistake had occurred in considering the letter of appointment of Vinod Shanker Tiwari dated 26/6/1993 as it was an appointment for a short term till the regular selected candidate joins the service.

(d) The learned Single Judge as well as the Division Bench misread the order dated 15/10/1994 passed by Shri Ram Ganesh, City Magistrate, Ballia/ In charge District Inspector of Schools, Ballia and treating the same that it had declared the appointment of Shri Vinod Shanker Tiwari to be a valid appointment, Though the order had been obtained with collusion and causing conspiracy with the office of D.I.O.S., Ballia.

6. For this purpose Shri H.N. Singh, was confronted with the memo of appeal and no such ground had ever been taken by the applicant/appellant in the appeal. Nor there is anything on record to show that the aforesaid issues had been agitated before the appeal Court. Thus, the question does arise as to whether, a review petition can be entertained on a ground not urged at the time of hearing of the main petition/appeal.

7. Section 114 read with Order 47 Rule 1 of the CPC (hereinafter called C.P.C.) prescribes the limitations for entertaining a review petition. The same 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 its knowledge or could not be produced by it 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."

8. 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. "Due" means just and proper in view of the facts and circumstances of the case (vide A.K. Gopalan Vs. The State of Madras,

9. 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 demarketing 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.

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

11. 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 Hafis Ahmad Ali Khan and Anr. AIR 1957 Nag. 97.

12. In S. Nagraj and Ors. v. State of Karnataka and Anr. 1993 (4) SCC 595, 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 mis-apprehension of true state of circumstances has been held to be sufficient ground to exercise the power."

13. The Court further held that the purpose of review is rectification of an order which stems from the fundamental principle that the 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 in AIR 1941 1 (Federal Court) and Rajunder Narain Rae v. Bijai Govind Singh (1836) 1 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,

14. A Full Bench of the Himachal Pradesh High Court, in The Nalagarh Dehati Co-operative Transport Society Ltd., Nalagarh Vs. Beli Ram etc., considered the scope of review and held that not considering an existing judgment of the Hon"ble Supreme Court may be a ground of review and for the same it placed reliance upon the judgments of the Privy Council in Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao (1900) 27 IA 197 (PC), wherein it was held that the purpose of review, inter alia, is to correct an apparent error which should not have been there when the judgment was given. The Court also placed reliance upon the judgment of the Federal Court in Sir Hari Sankar Pal and Anr. v. Anath Nath Mitter and Ors., 1949 FC 106 wherein it was held as under:-

".....the error could not be one apparent on the face of record or even analogous to it. When, however, the Court disposes of a case without advertting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way, that may amount to an error analogous to one apparent on the face of record sufficient to bring the case within the purview of Order 47 Rule 1, Civil Procedure Code."

15. In Thadikulangara Pylee"s son Pathrose Vs. Ayyazhiveettil Lakshmi Amma"s son Kuttan and Others, , the Kerala High Court considered a review application which was filed on the ground of subsequent judgment of the Court and dismissed the same observing as under:-

"If it is borne in mind that a judicial decision only declares and does not make or change the law, although it might correct previous erroneous views of the law, a review on the basis of subsequent binding authority would not be a review of a decree which, when it was made, was rightly made, on the ground of the happening of a subsequent event."

16. While deciding the said case, the Court placed reliance upon the judgments of the Privy Council in Rajah Kotagiri Venkata Subbamma (supra); Chhajju Ram (supra); AIR 1934 213 (Privy Council) and on judgments of the Hon"ble Supreme Court in A.C. Estates Vs. Serajuddin and Co. and Another, and Moran

Mar Basselios Catholicos and Anr. v. Most Rev. Mar Poulse Athanasius and Ors. AIR 1954 SC 526.

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

".....thus, making it that a review proceeding virtually amounts to a rehearing. 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 subject and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave of error is crept in earlier by judicial fallibility."

18. 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*,

19. Similarly, in *Devaraju Pillai Vs. Sellayya Pillai*, the Hon''ble Apex Court held that if a party is aggrieved of a judgment by 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.

20. 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 bye-pass 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."

21. In *Thungabhadra Industries Ltd. v. The Government of Andhra Pradesh* represented by the *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, but 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."

22. 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 the Hon"ble Supreme Court, the correctness of which had been doubted and the matter had been referred to the Large Bench of the Supreme Court. Subsequently, the Larger Bench had taken a contrary view. The review petition was dismissed on the grounds, inter alia, that the situation had not been pointed out by the counsel to the Bench when the matter was initially heard.

23. In *Subhash Vs. State of Maharashtra and Another*, the Hon"ble Apex Court emphasised 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.

24. Even a higher court does not permit, generally, unless it is a pure question of law, to raise a plea which had not been argued before the court below. While dealing with a similar situation in *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another*, . the Hon"ble Supreme Court held as under:-

"We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Justice cannot be treated as mere counters in the game of litigation. (Per *Somasunderan v. Subramanian* AIR 1926 PC 136). We are bound to accept the statement of the Judges recorded in their judgments as to what transpired in the court. We cannot allow the statement of the Judges to be contradicted by statement at the Bar or by affidavit or other evidence..... If a party thinks that the happening in the court had wrongly been recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the mind of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. (Vide *Madhusudan v. Chandrabeti* AIR 1917 PC 30). That is the only way to have the record corrected."

25. While deciding the said case, the court placed reliance upon a large number of judgments including *Sarat Chandra Maiti and Others Vs. Bibhabati Debi* and

Others, wherein it had been observed as under:-

"It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment."

26. It is not permissible for a counsel to argue a review petition when the initial petition had not been argued by him in view of the law laid down by the Hon''ble Supreme Court in Tamil Nadu Electricity Board and another Vs. N. Raju Reddiar and another,

27. It is settled legal proposition that the Court is not permitted to deal with an issue which has not been agitated by the counsel for the simple reason that the issue may be decided in favour of one party and against the other. In such eventuality, the party aggrieved would not have the opportunity to meet the issue, therefore, in law such a course is not permissible. (Vide New Delhi Municipal Committee Vs. State of Punjab, etc. etc.,

28. In Union of India (UOI) and Others Vs. N.V. Phaneendran, , the Apex Court held that if a large number of contentions have been raised on merit but the Tribunal has dealt with only some of the issues, the Writ Court/Appellate Court may remand the case for reconsideration, provided it is satisfied that the left-out submission had been specifically agitated/ argued before the Authority/ Tribunal and in case the controversy was limited to the particular point before the Tribunal, there can be no justification to remand/ remit the matter.

29. Same view has been reiterated by the Hon''ble Supreme Court in Kanwar Singh Vs. State of Haryana and Others,

30. In Soosai Anthony D''Costa Nicholas D''Costa Vs. Francis Roche Anthony Kurush Roche (Died) and Others, , it was held that if a counsel did not raise a particular point though he was instructed to do so, he cannot apply for review because it cannot fall within the ambit of "sufficient reason".

31. Even if it may be a case of omission to raise a point of law, the party cannot be permitted to file review (Vide Sabapathi v. Subraya (1878) 2 Mad. 58; Bindra Prasad v. Raghubir (1916) 37 All. 440; and Kamla Prasad v. Kunj Behari 1920 (5) Pat.L.J. 340).

32. In Mst. Ayesha Bai and Others Vs. Daleep Singh, the Court held that unless the party filing the review satisfies the Court that they have discovered a new matter which was not possible for it to discover by due diligence, the review is not maintainable and if the issue had not been agitated before the court, that cannot be a ground for review.

33. In Union of India (UOI) Vs. Sudhir Kumar Ray and Others, , a Division Bench of the Orissa High Court considered this aspect and held as under:-

"Failure to argue a point is not an envisagable ground for review under Order 47

Rule 1 CPC, according to which in only three cases mere review is permitted. Those cases are where new material has been overlooked by excusable misfortune, mistake or there is an error apparent on the face of record and where there is "any other sufficient reason". The present case is not covered by the first two classes of cases. No new material has been overlooked by excusable misfortune or mistake; it is a case of an existing material being overlooked by the counsel and not a case of excusable misfortune nor a mistake. There is also no error apparent on the face of record."

34. While deciding the aforesaid case, the Court placed reliance upon the judgment of the Privy Council in *Chhajju Ram (supra)* and held that not agitating a point by the lawyer at the initial stage cannot be analogous to other required conditions in the Statutory provision providing for review.

35. In *Pitambar Mallik and Another Vs. Ramchandra Prasad and Others*, , it has been held that review petition cannot be filed by another counsel only on the ground of misapprehension that at initial stage, the counsel engaged therein had not argued a particular point. Thus, the apprehension that the said counsel could not have referred to a document and did not make a submission on a particular issue, is not a ground to maintain the review application. A Division Bench of the Calcutta High Court, in re: *In Re: Mahamaya Banerjee*, held that a review under Order 47 Rule 1 of the Code is permissible if there had been misconception of fact and/ or law by the counsel, as it will fall within the ambit of expression "sufficient reason" in Order 47 Rule 1 of the Code. The Calcutta High Court proceeded with the presumption that in order to do justice, which has been denied to a party owing to patently wrong step taken by its counsel, the Court can exercise its inherent power to come to its rescue and to do justice. With all due respect, the said judgment does not lay down the correct law for the reason that it is settled legal proposition that inherent powers cannot be used by the Court where a Statute provides for a specific remedy.

36. Undoubtedly, inherent powers conferred upon the Court either u/s 151 of the Code or any other analogous provision, can be exercised by the Court to do justice or to further the cause of justice. (Vide *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, ; *Union of India (UOI) Vs. Ram Charan and Others*, ; and *Vikas Aggarwal Vs. Anubha*, . However, inherent powers cannot be used by a Court where Statute itself provides for a remedy as held by the Hon"ble Supreme Court in *Manorial Lal Chopra (supra)*; *Arjun Singh Vs. Mohindra Kumar and Others*, ; *Ram Chand and Sons Sugar Mills Pvt. Ltd. Vs. Kanhaya Lal Bhargava and Others*, ; *Nain Singh Vs. Koonwarjee and Others*, ; and *State of West Bengal and Others Vs. Karan Singh Binayak and Others*, .

37. 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."

38. The Court also considered the judgment of the Federal Court in *Mt. Jamna Kuer v. Lal Bahadur and Ors.* AIR 1950 FC 131, wherein an observation has been made that review is permissible if mistake has been committed by a counsel. The Court did not follow the said judgment, observing that it was a case in which a mistake had crept in the judgment of the High Court owing to an over-Sight, Therefore, it was a case wherein review was maintainable on other grounds also and the ratio of that judgment is certainly not that review lies if a counsel commits mistake.

39. Even otherwise, the law laid down in *Mt. Jamna Kuer* (supra) is not an authority laying down that even if a counsel has not raised a point, review is maintainable, for the reason that such a mistake would not be apparent on the face of record. The whole paragraph of the judgment is to be read and it is of no use to rely upon a sentence thereof. The said case is to be understood in the context of the facts involved therein as the said case does not lay down the law of universal application. The Federal Court held as under:-

"There can be no doubt that this appeal must be allowed. The mistake as to the items of property regarding which *Mt. Jamna Kuer* had laid claim is apparent on the face of the record. The trial Judge had clearly stated in his judgment that *Jamna Kuer's* claim related to properties 3 to 37 of the gazette notification. In para 15 of her amended objection petition, she had laid claims to all the properties left by *Kunj Behari*. On 29th April, 1942, it was admitted by the pleader of the applicants that all these properties related to the estate of *Kunj Behari* and that so far as the debtors were concerned, they were owners of only two properties mentioned in the gazette notification. In this situation it would have been appropriate if the High Court had corrected this error on the review petition and saved the appellant the trouble and expense of an appeal to the Privy Council or to this Court. Whether the error occurred by reason of the counsel's mistake or it crept in by reason of an oversight on the part of the Court was not a circumstance which could affect the exercise of jurisdiction of the Court to review its decision. We have no doubt that the error was apparent on the face of the record and in our opinion the question as to how the error occurred is not relevant to this enquiry, mere look at the trial Court's decision indicates the error apart from anything else."

40. More so, the expression "discovery of new and important matter of evidence" contained in the provisions of Order 47 Rule 1 CPC means, discovery of an evidence or any material which may be adduced in evidence. It cannot take it in its ambit an argument which could have been advanced by the counsel.

41. In view of the above discussion, the law of review can be summarised that it lies only on the grounds mentioned in Order 47 Rule 1 CPC. 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 CPC. Under 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 under the garb of doing justice or substantial justice, to engage the court again to decide the controversy already decided. If a party is aggrieved of 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.

42. The instant case requires consideration in view of the aforesaid settled legal propositions.

43. Undoubtedly, a party can be permitted to raise a pure legal plea, not requiring investigation of fact, at any stage of proceeding but review is, generally, not a part of proceedings in that sense as it lies in exceptional circumstances. The submission made by Mr. H.N. Singh may be relevant only where the issue was raised before the writ court or in special appeal. Admittedly, the grounds on which Shri H.N. Singh, tried to argue the review petition had not been taken in the memo of appeal, nor the same had been agitated earlier. No explanation could be furnished as to why these grounds had not been taken therein. It cannot be the case that these facts were not in applicant's knowledge and could be discovered later on There is no error apparent on the face of the record, nor there is any sufficient ground, on the basis of which the application can be entertained. It is not a case where interference at this stage is required in the interest of justice. Therefore, the question of entertaining such pleas does not arise. Review petition is totally misconceived. Application lacs merit and hence rejected.