

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Review No.82 of 2009

IN

MA 168 of 2008

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Dr.Alka Sharan, wife of Shri Ashok Kumar Sinha and daughter of Late Sitabar Sharan, resident of Mohalla-Sheikhpura, P.S. Hawai Adda, District Patna at present Flat No.102, Maa Bindhyavasini Complex, Sheikhpura More, P.O. B.V. College, P.S. Shastri Nagar, District Patna.

.... Petitioner/s

Versus

1. Smt. Kunti Devi, wife of Mr. Surendra Prasad, Dundi Bazar, near South Gate of Mangal Talab, P.O. Chowk Shikarpur, Patna City.
2. Smt. Sumitra Sharan, wife of late Sharda Nandan Prasad, resident of Chhoti Badalpura, P.S. Khagaul, Danapur, District Patna.
3. Smt. Pratibha Sharan, wife of Manoj Kumar Sinha, resident of Kachchi Talab, Saristabad, P.O. Gardanibagh, Patna at present residing at Mohalla Azad Path House No. AP/A2, Saristabad, P.S. Gardanibagh, District Patna.
4. Shri Madan Mohan Sharan, son of late Sitabar Sharan, resident of Sri Kedar Nath Sinha (Ex-Brigadier), at Sheikhpura, P.O. B.V. College, Patna-14
5. Shri Ashok Bihari Sharan, son of late Sitabar Sharan, Flat No.35, Bailey Kunj Apartment (near Maruti Point Garage) Sheikhpura, P.O. B.V. College, Patna
6. Shri Dinesh Bihari Sharan, son of late Sitabar Sharan at present Flat No.203, Ambejee Apartment Sheikhpura, P.O. B.V. College, Patna
7. Shri Rakesh Bihari Sharan, son of late Sitabar Sharan at present Flat No.1D (Ist Floor) Girija Apartment (near Devi Asthan), Brahm Asthan Gali Road at Sheikhpura, P.O. B.V. College, District Patna
8. Shri Deepak Kumar Sinha, son of Shri Shiv Shankar Sinha, Managing Director, Classicon Builders (I) Pvt. Ltd. resident of Keshri Nagar, P.O. Keshri Nagar, P.S. Shastri Nagar, District Patna, Office at 2nd Floor, J.J. Complex, East Boring Canal Road, Patna-1

.... Respondent/s

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Appearance :

For the Petitioner/s :	Mr. R.K.P.SINGH Mr. Bal Bhushan Choudhary Mr. A.N. Vishawas, Advocates.
For O.P. No. 4 :	Mr. Manoj Kumar Ambastha, Advocate.
For O.P. No. 7 :	Mr. Praveen Kumar, Advocate
For O.P. No.9 :	Mr. Md. Waliur Rahman, Mr. Nishant Kumar Sinha, Advocates.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 27-10-2015

Heard the parties.

2. The petitioner has filed the present review application in

connection with order dated 10.2.2009 passed in M.A. No.168 of 2008 by which this Court has refused to interfere with the order of the court below with respect to refusing to grant injunction in connection with Partition Suit No. 470 of 2006.

3. This case has a chequered history as partition suit is pending as well as with respect to the same property two probate cases are pending before this Court for adjudication.

4. Certain facts are relevant for the purposes of disposal of the present civil review application.

5. Sitabar Sharan has acquired substantial land in the Town of Patna vide Plot No. 1291 measuring 41 decimals of land, plot no. 1291/1856 measuring 10 decimals of land and plot no.1289 measuring 30 decimals of land. In plot no.1291 some shops were standing, in plot no. 1291/1856 old house was standing which was under the occupation of the plaintiff petitioner has a pathological lab over it. Sitabar Sharan has four sons and four daughters and present petitioner is youngest child of her parents as has been claimed by the petitioner that plot no.1291/1856 has been given to her through oral gift by her father. When the dispute amongst brother and sister could not be materliased amicably, filed partition suit. After filing of the partition suit three probate cases have been filed, one by her

mother and two probate cases have been filed by two brothers. During the life time of her mother she claimed 1/9th share as they have four brothers and four sisters. The probate case that was filed by the mother was registered as Test Suit No.1 of 2010 but after the death of mother probate case filed could not survive and died out of natural death. Two probate cases filed by brothers are pending are Test Case No. 3 of 2009 and 3 of 2010.

6. The present petitioner in the partition suit has filed an application for ad interim injunction against her family members including the developer with a prayer that they be restrained from changing the nature of the suit premises. In the injunction application allegation has been made that her other family members have entered into agreement on 19.12.20004 with defendant no.9 for construction of multi-storied building over the three plots belonging to Sitabar Sharan.

7. This Court while considering the appeal against the order of the court below refusing to grant the relief of injunction has recorded that defendant no.9 has already constructed major part of the building became main factor for this court to refuse to interfere with the order of the court below refusing to grant injunction. The court has found that the plaintiff will not suffer any irreparable loss if defendant no.9 is permitted to make or



complete the construction works on the suit lands as well as the plaintiff also failed to show her possession over the suit land and as such recorded that plaintiff- petitioner has failed to make out a case of balance of convenience would tilt in her favour but at the end the Court has directed that builder will preserve 1/9th share in the constructed portion of the suit lands will be subject to the result of the partition suit but this Court finally has directed that share of the petitioner in the constructed portion of the suit land would be preserved subject to the result of the partition suit.

8. After disposal of that case petitioner/applicant filed M.J.C. No.1190 of 2010, the same was disposed of vide order dated 18.1.2012 where this Court has recorded that “ in the facts of this case there appears to be a dispute on each and every issue between the parties. The suit has to be adjudicated by the civil court and the order of the court is by way of interim arrangement which obviously would not prejudice to the rights of the parties in the suits of the parties. As a result this Court disposes of the contempt application as substantial compliance of this Court has been done.”

9. This finding was recorded on the strength of the affidavit by the builder that 1/9th share in the built up area has



been protected and later on again petitioner has filed an another contempt application which was registered as M.J.C. No.817 of 2012. In that MJC application the prayer was made that the builder be directed to hand over 1/9th share preserved for her. The Court has said that as the matter is pending before the probate Court and probate Court has stayed the partition suit it would be proper for the petitioner to make such prayer before the probate Court. The Court held, it would not be proper to pass an order for handing over her share as it would amount to interfering with the jurisdiction of the Court hearing the probate matter.

10. On the basis of the observation made in that contempt application vide M.J.C. No.872 of 2012, the petitioner filed an application in Test Suit No.3 of 2009 where claim was made that she should be handed over 1/9th share preserved for her. The Court elaborately dealt with the matter and refused to oblige the petitioner. After disposal of that I.A. No.8119 of 2012 the present review application has come for consideration.

11. In the present review application the grievance has been raised by the petitioner that certain important facts which were material for consideration for granting injunction was not taken into consideration. It has been submitted that through I.A.



3387 of 2008 large number of documents have been filed by him while deciding the case on merit this Court was obliged to deal with those documents. He further submits that if the court does not discuss the material which are germane for the decision of the matter itself creates a ground to review the earlier order whereas counsel for the opposite party has submitted that there is no error apparent on the face of the record. While admitting this case this Court has specifically recorded that the petitioner has not made out any ground for review but notices were issued with respect to preservation of 1/9th share in the building. He has further submitted that the review application cannot be treated to be a forum of appeal only review application can be entertained if the parties who has approached the court will be able to show an error on the face of the record. In support of his contention he has relied on two judgments in the case of Lily Thomas and others V. Union of India and others, reported in 2000(6) SCC 224 and Kamlesh Verma V. Mayawati & others, reported in AIR 2013 SC 3301.

12. Order 47 Rule 1 of the Code of Civil Procedure deals with the provision in what circumstances the Court will exercise the power of review purports that when a new and important fact is discovered for evidences 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 the record, or for any other sufficient reason, are *alma mater* to exercise the power of review. So limited ground has been provided for exercise of power of review.

13. The Hon'ble Supreme Court in the case of Lily Thomas (*supra*) has categorically dealt with the question in what circumstance and in what situation the Court should exercise the power of review. The Court has held that the normal principle is that a judgment pronounced by the Court is final and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. Example has been given that if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court may also reopen its judgment if a manifest wrong has been done. The Court has further held that the jurisdiction and scope of review is not for appeal and it can only be entertained if there is an error on the face of the record. The power of review can be exercised for correction of a mistake done by the court but not to substitute with new view. The review cannot be treated like an appeal in disguise. It will be

relevant to quote paragraph nos. 52, 53 and 56 of the aforesaid judgment:

“52. The dictionary meaning of the word “review” is “the act of looking, offer something again with a view to correction or improvement”. It cannot be denied that the review is the creation of a statute. This Court in Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in a miscarriage of justice nothing would preclude the Court from rectifying the error. This Court in S. Nagaraj v. State of Karnataka held (SCC pp.619-20 para 19)

“19. Review literally and even judicially means re-examination or reconsideration. 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. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai the Court observed that even though no rules had been framed permitting the highest

court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in *Rajunder Narain Rae v. Bijai Govind Singh* that an order made by the Court was final and could not be altered:

‘.... Nevertheless, if by misprision in embodying the judgment, errors have been introduced, these courts possess, by common law, the same power which the courts of record and statute have of rectifying the mistakes which have crept in.... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies.’

Basis for exercise of the power was stated in the same decision as under:

‘ It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard.’

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualize the efficacy of such provisions expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And Clause © of Article

145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order 47 Rule 1 of the Civil Procedure Code. 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. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice".

The mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength.

53. This Court in Northern India Caterers (India) Ltd V. Lt. Governor of Delhi considered the powers of this Court under Article 137 of the Constitution read with Order 47 Rule 1 CPC and Order XL Rule 1 of the Supreme Court Rules and held: (SCC pp.171-72 para 8)

"8. It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so; Sajjan Singh v. State of Rajasthan, SCR at p.948. For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment: Girdhari Lal Gupta v. D.H. Mehta, SCR at p.760. The Court may also reopen its judgment if a manifest wrong



has been done and it is necessary to pass an order to do full and effective justice: O.N. Mohindroo v. Distt. Judge, Delhi, SCR at p.27. Power to review its judgments has been conferred on the Supreme Court by Article 137 of the Constitution, and that power is subject to the provisions of any law made by Parliament or the rules made under Article 145. In a civil proceedings, an application for review is entertained only on a ground mentioned in Order 47 Rule 1 of the Code of Civil Procedure, and in a criminal proceeding on the ground of an error apparent on the face of the record (Order XL Rule 1, Supreme Court Rules, 1966). But whatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except 'where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility': Sow Chandra Kante v. Sk Habib".

56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practiced. However, this Court in exercise of its powers under Article 136 or Article 32 of the Constitution and upon satisfaction that the earlier judgments have resulted in deprivation of fundamental rights of a citizen or rights created under any other statute, can take a different view notwithstanding the earlier judgment."

14. In the case of Kamlesh Verma (supra) the Hon'ble

Supreme court has considered large number of judgments with respect to exercise of jurisdiction and maintainability of review application and catalogued the situation on which ground the Court can exercise the power of review. It will be relevant to quote paragraph 16 of the aforesaid judgment:

“ 16. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

(A) When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the fact of the record;

(iii) Any other sufficient reason.

The words “ any other sufficient reason” has been interpreted in *Chhajju Ram v. Neki*, AIR 1922 PC 112 and approved by this Court in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius & Ors.*, (1955) 1 SCR 520: (AIR 1954 SC 526), to mean “a reason sufficient on grounds at least analogous to those specified in the rule”. The same principles have been reiterated in *Union of India v. Sandur Manganese & Iron Ores Ltd. & Ors.*, JT 2013 (8) SC 275: (2013) AIR SCW 2905).

(B) When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the

material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negated.”

15. The Hon’ble Supreme Court has also considered the scope of power of review in the case of Meera Bhanja (smt) V. Nirmala Kumari Choudhury (smt), reported in (1995) 1 SCC 170 reiterated the same principle, held that the review petition can only be entertained on the ground of error apparent on the face of the record and not on any other ground. An error apparent on the face of record is such an error must strike on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. The power of review can be exercise on the ground mentioned in Order 47 Rule 1 of the Code of Civil Procedure.

16. In such situation in the present case counsel wants to review the order dated 10.2.2009 where the Court has taken care that when substantial portion of building has been made and still her right in the suit land involved the partition suit has been protected is dependent on the out come of the pending of two probate cases only reason to this Court to refuse to hand over her share but while refusing to grant injunction for the ends of justice the Court has directed the builder to preserve 1/9th share after death of her mother, now petitioner is claiming 1/8th share. If she succeeds in the partition suit then certainly her share will be increased in view of the provision of the Hindu Succession Act but that is dependent on the outcome of probate cases. Other sufficient reasons are not made out for consideration. The construction has been made only part of dispute and not the entire portion of the suit property.

17. This Court does not find any merit in this review application as the petitioner does not make out a case for review.

18. Accordingly this review application is dismissed.

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(Shivaji Pandey, J)