

IN THE HIGH COURT OF BOMBAY AT GOA**Civil Application (Review) No.8 of 2018
in
Writ Petition No.195/2012**

Shri. Sylvester D'Souza
Major in age,
Son of Late Simon D'Souza,
R/o Saunta Vaddo,
Calangute Bardez Goa.

Applicant

Versus

1 The Goa Coastal Zone
Management Authority,
Through its Member Secretary,
Having its office currently at Alto
Porvorim, Goa.

2 The Additional Collector,
North Goa, Office of Collector
Bld, North Goa District,
Revenue Branch,
Panaji Goa.

3 State of Goa,
Through its Chief Secretary,
At Secretariat,
Porvorim Goa.

Respondents

Shri Vishnuprasad A. Lawande with Ms. A.Kamat, Advocates for the applicant.

Shri A.Gomes Pereira, Additional Government Advocate for the respondent nos.1 to 3.

Shri J.E.Coelho Pereira, Senior Advocate with Shri V.Braganza, Advocate for the Intervenor.

Coram:- NUTAN D. SARDESSAI, J.

Decided on : 13th April, 2018.

ORAL ORDER :

This is an application for review of the judgment passed by this Court dated 22.03.2018 on grounds that there is an error apparent on the face of the records inasmuch as the Court had rendered findings on the merits of the matter when it had clearly observed at paragraph 14 that on consideration of the contentions of the parties, the voluminous material brought on record including the judgments, the Court would restrict itself to the maintainability of the petition before this Court, in view of the alternate remedy available before the National Green Tribunal. The other ground on which a review was sought that in case this Court was of the view that the petition was liable to be dismissed on account of the availability of an alternate remedy, the discussion on merits ought to have been kept open for the Appellate Forum for decision. Inasmuch as this Court has proceeded to render the findings on merits, the impugned order suffers from an error apparent on the face of records and as the applicant had been left remedi-less. This Court having observed that it was confining itself to the maintainability of the petition in view of the alternate remedy before the National Green Tribunal and having concluded to relegate the parties to the alternate remedy, it did not warrant for this Hon'ble Court to enter into the merits of the case as that would prejudice the rights of the petitioner before the alternative

forum. The impugned judgment was, therefore, required to be reviewed and recalled and an appropriate order be passed insofar as the findings on merits were concerned.

2. No reply was filed on behalf of the respondents and also on behalf of the Intervenor. Be that as it may, Shri V.A.Lawande, learned Advocate came to be heard on behalf of the applicant who submitted that the Court having once made up its mind to entertain the preliminary objections, it ought to have refrained from entering on the merits of the case. In that context, he relied in **Tin Plate Co.Of India Ltd. Vs. State of Bihar and others [(1998) 8 SCC 272]** and referred to certain paragraphs of the judgment to substantiate his case. Reliance was also placed by him in **Bahadur Singh Vs. Rai Bahadur Multani Mal Charitable Trust and others in a Review/Recall Application No.77 of 2014** by the Uttaranchal High Court to substantiate his case while pressing for a review of the judgment under challenge.

3. Shri Coelho Pereira, learned Senior Advocate on behalf of the Intervenor submitted that a ground for a review was available in case there was an error apparent on the face of the records. The applicant had invited findings against himself not only on the maintainability of the petition but also on the merits of the case and, therefore, the remedy open to him was to withdraw the

petition. He had, however, submitted himself to the jurisdiction of this Court and, therefore, invited the findings and hence he could not seek for expunction or withdrawal of those findings only because of his claim that he would be left remedi-less in the proceedings before the National Green Tribunal. This Court had in exercise of its plenary powers in terms of Article 226 of the Constitution of India had also considered the merits of the case and discussed the judgment in **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others [1999 O AIR (SC) 22]**, and thus come to a finding both on the non-maintainability of the petition before this Court and the merits of the case. Therefore, there was no question to hold that a review of the impugned judgment was permissible as stipulated under Order XLVII Rule 1 CPC. The appropriate remedy available to the applicant was to move before the Hon'ble Apex Court and assail the judgment passed by this Court and not by invoking its review jurisdiction which was inherent in its plenary jurisdiction under Article 226 of the Constitution of India.

4. Shri Coelho Pereira, learned Senior Advocate further contended that the applicant-petitioner had sought remedy before this Court even after the constitution of the National Green Tribunal. The judgment in Tin Plate (supra) had no application in the facts of the case which was delivered in the peculiar facts of

the case and it was otherwise not a decision for the proposition that a review was permissible of the judgment under consideration. On his part, he placed reliance in **Smt. Meera Bhanja Vs. Smt. Nirmala Kumar Choudhury [(AIR 1995 SC 455)]**, dealing with the powers of a review in terms of Order XLVII Rule 1 CPC. The applicant was attempting to make the judgment of this Court vulnerable by seeking to rely on the judgment of Tin Plate (supra), no case whatsoever had been made out for a review of the judgment under challenge and, therefore, the application was liable for dismissal.

5. Shri A.Gomes Pereira, learned Additional Government Advocate submitted that the maintainability to the petition was raised at the time of filing the reply and yet, the applicant proceeded to canvass his case not only on the maintainability thereof but also on the merits and invited findings of this Court in that regard. It is not now open for the applicant to seek review of the judgment on the specious premise that this Court had given findings on merits and closed his remedy before the Appellate Forum i.e. National Green Tribunal.

6. Shri V.A.Lawande, learned Advocate in reply relied in the observations of the Hon'ble Apex Court in Tin Plate (supra) and canvassed the submission that in the event this judgment was

available to this Court before the passing of the judgment, then probably this Court would not have rendered the findings on the merits and restricted itself to the maintainability of the petition itself. He further placed reliance in **Board of Control for Cricket In India and another Vs. Netaji Cricket Club and others [(2005) 4 SCC 741]**, and submitted that substantial justice had to be done to the party and submitted that the action of the Court could do no harm to the party concerned while pressing for the grant of review.

7. i would consider the submissions, the judgments relied upon, the judgment under review and more importantly the predicates of Order XLVII Rule 1 CPC providing for a review of the judgment by 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 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, and decide the application.

8. There was no dispute at the instance of any of the parties to the scope and ambit of a review as spelt out in Order XLVII Rule 1 CPC and more particularly, the powers of this Court under Article 226 of the Constitution of India being the plenary powers and taking within its sweep the power of a review in terms thereof. Hence, it is to be seen whether from the material on record, the applicant has been successful in making out a case for a review of the judgment passed by this Court.

9. In **Tin Plate** (supra), the appellant had filed its returns for the assessment year 1985-86 and the Commercial Tax Officer assessed the appellant under the Central Sales Tax Act, 1956 for the period 1.4.1985 to 31.3.1986 after disallowing the appellant's entire claim of stock transfer to outside States and treating the same as inter-state sales and thus levied tax @ 10% thereon by his order dated 1.12.1993. A notice of demand was issued on the appellant who challenged the assessment order and the notice of demand by means of a writ petition under Article 226 of the Constitution before the High Court of Judicature at Patna. A preliminary objection was raised in the petition by the respondents to the effect that an alternative remedy being available to the

appellant, the petition deserved to be rejected which found favour with the High Court and dismissed the petition primarily on the ground that the appellant had an equally efficacious alternative remedy. However, the High Court while throwing out the writ petition on the ground of an alternative remedy, made certain observations touching upon the merits of the case. The appellant, in view of the dismissal of his petition on the ground of availability of alternative remedy filed an appeal against the order of assessment before the Joint Commissioner of Commercial Taxes (Appeals) alongwith an application for condoning the delay in view of the pendency of the writ petition before the High Court. The Joint Commissioner of Commercial Taxes (Appeals) rejected the appeal at the stage of admission in view of the observations made by the High Court giving rise to a review by the appellant and which was rejected by the High Court, vide its order dated 27.8.1996 giving rise to the petition by a Special Leave.

10. In **Tin Plate** (supra), the Hon'ble Apex Court found favour with the arguments canvassed on its behalf that the High Court had committed a grave error in making various observations touching upon the merits of the case while dismissing the writ petition on the ground of alternative remedy and thereby prejudicing the case of the appellant to be taken up before the Appellate Authority who was bound to decide the case in terms of the observations made by

the High Court. In the facts at large, admittedly the appellant had an alternative and equally efficacious remedy by filing an appeal before the Appellate Authority against the order of assessment and in view of such a remedy being available to the appellant, the High Court was right in dismissing the writ petition on that ground. However, the Apex Court did not subscribe to the view of the High Court when it made a number of observations touching upon the merits of the case while dismissing the writ petition on the ground of alternative remedy. It was held that if the writ petition under Article 226 of the Constitution of India is to be dismissed on the ground of alternative remedy, the High Court is not required to express any opinion on the merits of the case which is to be pursued before an alternative forum. It is true that in the present case the appellant's counsel in his effort to get over the objection of the existence of an alternative remedy, addressed the Court on the merits of the case and thereby invited the observations on the merits of the case by the High Court. But, in such a situation, if the High Court is to dismiss the petition on the ground of alternative remedy, it would be a sound exercise of jurisdiction to refrain itself from expressing any opinion on the merits of the case which ultimately is to be taken up by a person before an alternative forum. In that view of the matter, the Apex Court allowed the appeal in part. This judgment is not an authority for the proposition

that a High Court while considering a review can expunge its observations on the merits of the case when it is inclined to hold on a global hearing of the matter that the petition is not maintainable as the petitioner had an alternative equally efficacious remedy before the Competent Forum. Besides, the Hon'ble Apex Court made these observations while dealing with the appeal by a special leave in exercise of its wide appellate powers and the same cannot be said to be applicable to this Court while dealing with an application for a review of the judgment passed by the Court, hence, the respectful departure.

11. In **Bahadur Singh** (supra) a recall of the ex-parte order dated 11.12.2013 was sought whereby the order dated 13.11.2013 passed by the District Judge was set aside. It was also prayed to recall and expunge the findings and observations made in the order dated 11.12.2013 which would be prejudicial to the applicants while adjudicating the matter by the Court below on merits. The review application was vehemently resisted by the petitioner Bahadur Singh. The High Court passed the order that the impugned order passed by the District Judge, Dehradun dated 13.11.2013 was in a routine and mechanical manner and that too without going through the pleadings made in the application moved by the petitioner. No reason had been assigned as to for what reason, the pleadings of the petitioner were not considered and in the

circumstances, the order was set aside and the District Judge, Dehradun was directed to register the petitioner's application and thereafter issue notice to the respondents though the petition was finally disposed off. The learned District Judge as borne out from the order had not taken trouble to hear the petitioner Bahardur Singh on the maintainability of his application, simply signed the order in a routine manner and put his signatures in a mechanical way on the basis of Munsrim's report, spelling out the appeal was time-barred. The Writ Court simply set aside the order asking the District Judge that he would afford an opportunity of hearing to both the parties and then will be at liberty to pass appropriate orders in the matter. In those circumstances, the learned Judge held that there was no need to recall the impugned order, but accepted the second prayer in the review application and expunged the findings and observations made in the order dated 11.12.2013 which may be prejudicial in nature to the Court below on the merits of the matter in issue. This judgment was in the peculiar facts of that case which does not at all advance the case of the applicant.

12 In **Smt.Meera Bhanja** (supra), the Hon'ble Apex Court held at paragraph 8 that 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 XLVII Rule 1 CPC. In connection with the limitation of the powers of the Court under

Order XLVII Rule 1 CPC, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in **Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma [(AIR 1979 SC 1047)]** made the observations as follows:

“It is true there is nothing in Article 226 of the Constitution of India to preclude the High Court from exercising the powers 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 definite 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; it 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 the appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court. It further quoted the observations in

Satyanarayan Laxminarayan Hegde Vs. Mallikarjun Bhavanappa Tirumale (AIR 1960 SC 137), wherein it was observed as: "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."

13. In **M/s.Northern India Caterers** (India) (supra), a Three Judge bench of the Apex Court held that it was a well settled that a party is not entitled to seek a review of the Court's judgment delivered by this Court merely for the purpose of rehearing and a fresh decision of the case. Normal principle is that a judgment pronounced by the Court is final and departure from that principle is justified only when compelling or substantial circumstances make it necessary to do so. If the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment. 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 judgment. Besides, it is beyond dispute whatever be the nature

of the proceeding 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 or like a grave grave error has crept in earlier by judicial fallibility".

14. In **Kerala State Electricity Board** (supra), the Apex Court held that if on appreciation of the evidence produced, the Court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of record or for some reason akin thereto. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise.

15. In **Kamlesh Verma** (supra), a Two Judge Bench of the Apex Court held at para 15 that an error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the records justifying the Court to exercise its power of review. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It considered the judgment in **Thungabhadra Industries Ltd. Vs. Govt. of A.P. (AIR 1964 SC 1372)**, which held that a review is by no means an appeal in

disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It also considered the judgment in Meera Bhanja (supra) and Aribam Tuleshwar Sharma (supra), where it was held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII Rule 1 CPC. It further held at para 16 that an error contemplated under the Rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The power of review can be exercised for correction of a mistake but not to substitute a view. The mere possibility of two views on the subject is not a ground for review. It further summarised the principle on a review not being maintainable where unless the material error manifest on the face of the order undermines its soundness or results in miscarriage of justice.

16. In **Board of Control For Cricket In India** (supra), the Apex Court held at paragraphs 89 and 90 as below:

“89. Order XLVII of Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on

account of some mistake or for any other sufficient reason.

90. Thus, a mistake on the part of the Court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in Order XLVII Rule 1 of the Code are wide enough to include a misconception of fact or law by a Court or even an advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae" neminem gravabit".

17. It is a matter of record that the arguments were canvassed on behalf of the petitioner at length on the merits of the case and the learned counsel had also addressed himself to the preliminary objections raised on behalf of the respondents and the intervenor to the very maintainability of the proceedings. It is otherwise a matter of the record that despite it being brought to the knowledge of the petitioner that the preliminary objections were being considered, the petitioner still chose to invite the findings in the matter by pressing it wholly and substantially on the merits and the preliminary objections. A reference was also made

to the judgment of the Apex Court in Whirlpool (*supra*) and in that context were the findings recorded by this Court that none of the predicates of the said judgment were shown to be attracted to the case of the petitioner in order to exercise the powers in his favour under Article 226 of the Constitution. Moreover, even at the time when the applicant-petitioner had moved this Court by his petition, the National Green Tribunal was already constituted and the remedy was available to him before the said authority constituted under the National Green Tribunal Act, 2010.

18. When the petitioner has invited findings on the totality of the case from this Court, it is not available to him now to canvass by way of a review and by placing strong reliance in Tin Plate (*supra*) that this Court ought to have exercised restraint while rendering its finding also on the merits of the case. It may be that the applicant may stand to be prejudiced while pursuing his appeal before the National Green Tribunal in view of the observations of this Court passed on the merits of the case on the principle of natural justice, the quorum and/or factual aspects but that cannot at all be a ground for reconsidering the judgment by invoking the powers of review available in this Court also while exercising the powers under Article 226 of the Constitution of India. Even, at the time when this matter was being heard, it was nowhere the case of

the applicant that he had filed an appeal before the National Green Tribunal muchless obtained any orders therefrom as would prejudice his status in the said proceedings.

19. Considering the law laid down by the Hon'ble Apex Court on the powers of review and clearly distinguishing the judgment in in Tin Plate (supra), there is no scope to re-appreciate the judgment muchless to expunge the observations, as claimed on behalf of the applicant. The appropriate remedy available to the applicant is to move the Hon'ble Apex Court to challenge the findings rendered by this Court before pursuing its remedy before the National Green Tribunal. Even a broad canvass that a review should be permitted to prevent miscarriage of justice or to take the benefit of the proposition that an act of the Court can do no harm to a party would not substantiate the case of the applicant to seek for a review of the judgment which unhappily for the applicant has been rendered on the basis of the arguments canvassed before this Court. The arguments of Shri Lawande, learned Advocate for the applicant that had the Court been seized with the judgment in the Tin Plate (supra) before rendering the judgment under review as to withhold its findings on merits is an argument in the abstract when the judgment was not at all relied upon nor was it canvassed before this Court that the arguments on merits was not required to

be looked into in case the Court was inclined to deal with the preliminary objections to the maintainability of the petition alone. Looked at from every angle, the application is found lacking in merits and is, therefore, dismissed with no order as to costs.

*Addition is carried
out as per Order
dated 25.04.2018*

The period of six weeks of stay is granted in favour of the applicant which shall take effect from 19.4.2018.

NUTAN D. SARDESSAI, J.

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