

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

CO 1385 of 2021

Sukla Ghosh
Vs.
Sikha Deb & Anr.

For the Petitioner : Mr Piyush Chaturvedi
Mr. Suman Basu
Mr. Abdul Murshid
Ms. Debanwit Pramanic

For the Opposite parties : Mr. Malay Kumar Das
: Mr. Sourav Chatterjee

Heard on : 05.09.2022

Judgment on : 29.09.2022

Ajoy Kumar Mukherjee, J.

1. Being aggrieved and dissatisfied with the order No. 92 dated 12.02.2018 and subsequent orders thereto passed by learned Additional District Judge, Fast Track, 4th Court at Barasat, North 24 Parganas in O.S. 54 of 2008, present revisional application under Article 227 of the constitution of India has been preferred.

2. Petitioner contended that original owner of property in question, late Surendra Chandra Deb, died leaving behind three daughters and a son who are the opposite parties and petitioner respectively in that O.S. 54/2008. Said Surendra Chnadra Deb died on 5th July 1999. The brother of the petitioner namely Swapan Deb, after 7 years of their father's death, all on a sudden, sometimes in the year 2007 filed an application for probate of purported will, signed by their father late Surendra Chandra Deb. On receipt of summon of the aforesaid probate application, filed by their brother Swapan Deb, all the three daughters of late Surendra Chandra Deb including the present petitioner contested the probate proceeding. Subsequently by a judgment dated 5th February 2018, said OS 54/2008 was dismissed on contest.

3. Petitioner submits during outbreak of pandemic disease, due to travel restrictions and other restrictions, petitioner did not pursuit of the matter however, on perusal of certified copy of orders, it transpires that subsequent to the passing of the judgment on February 5th 2018, by way of a put up petition on behalf of the petitioner of O.S. 54/2008, on February 12, 2018, vide order No. 92, an application for review of the judgment was filed, though no copy of such review application was ever served upon the contesting siblings of the said petitioner and subsequent thereto on February, 28th 2018 vide order No. 93, due to absence of the presiding officer the matter was adjourned to March 7th, 2018 but no order (if any) passed on March 7th 2018 was supplied with the certified copy. On a subsequent date viz. June 1st ,2018, vide next serial order no. 94, order passed by the said court is as follows:-

“plaintiff files court fees of Rs. 50,000/-. Perused the case record. Issue probate certificate accordingly.”

4. Mr. Pijush Chturvedi learned counsel appearing on behalf of the petitioner submits that after passing aforesaid judgment the court below became *fantas officio*. The learned Additional District & Sessions Judge, Fast Track 4th Court, Barasat, (North 24 Parganas), have no authority to pass the impugned order. He further submits that after the disposal order, there arose no occasion for the petitioner herein to challenge the said judgment alleging infirmities therein as the trial court became *fantas officio* after passing the said judgment on 05.02.2018. Learned Court below should have made fresh registration under the heading of miscellaneous application, when the review application was filed and he should have served copy of review application upon all the defendants who contested the earlier proceeding being O.S. 54/2008 and which was dismissed on contest on February 5th 2018. He also submits that the order impugned be quashed and set aside. In this context he relied upon a judgment passed in ***Maji Mohan Kanwar Vs. State of Rajasthan (AIR 1967 Rajasthan 264)*** where different stages of a review application and how it is to be dealt with by a judge has been narrated in paragraph 5 which is as follows:-

“5. It is clear from the said scheme of O. 47 C.P.C. that it provides three stages for hearing, after a review application is filed. The first stage comes when the application for grant of review is placed before the Judge or Judges under Rule 4, sub-rule (1). At that stage, if it appears to the court that there is not sufficient ground for a review, it should reject the application. If, on the other hand, the court is satisfied that one or more of the grounds detailed in Rule 1 is made out prima facie, it should order notice to be issued to the opposite party to enable him to appear and be heard in support of the decree

or order whose review is applied for. Thus, the first one is an ex parte stage because the opposite party is not present before the court at that time. The next stage is reached when the same application for grant of review is placed for hearing before the Judge or Judges. At this stage, if the court comes to the conclusion that the application for review should be granted, it should grant it under sub-rule (2) of Rule 4. If, however, it is of opinion after hearing the opposite party that the application is not covered by Rule 1, it should be rejected. If the Rule is discharged, the matter ends there. If, on the other hand, the rule is made absolute, then the third stage is reached. This stage is arrived under Rule 8 after the original case is registered and the court rehears it on merits. After rehearing, it may either result in repetition, or in reversal or in variation, of the former decree or order. In either case, since the whole matter is reheard, there is a fresh decree or order. The view which we have expressed stands fortified by the following observations made by Sir Lawrence B. Jenkins, Chief Justice of the Bombay High Court, sitting with another learned Judge in Sha Vadilal Hakamchand v. Sha Fulchand Umedram(1)

“An application for review commences ordinarily with an ex parte application under sec. 623 of the Civil Procedure Code. The court then may either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or rejected; and it is obvious that the hearing of this rule may involve, to some extent, an investigation into the merits. If the rule is discharged then the case ends. If on the other hand, the rule is made absolute, then the third stage is reached; the case is reheard on the merits and may result in a repetition of the former decree or in some variation of it. Though, in one aspect the result is the same whether the rule be discharged or on the rehearing the original decree be repeated, in law there is a material difference, for in the latter case, the whole matter having been reopened, there is a fresh decree; in the former case, the parties are relegated to and still rest on the old decree”. (emphasis added)

5. Learned Counsel for the opposite party submits that under section 299 every order made in this context is appealable and accordingly the petitioner has his remedy before the appellate Court and as such the revisional application under Article 227 is not maintainable.

6. On perusal of the record it appears that vide order No. 91 dated 05.02.2008 the trial court recorded that the suit be and the same is dismissed on contest against defendants without cost. Accordingly by passing that order dated 05.02.2018, the trial court became *fantas officio* in respect of said OS

54/2008. Surprisingly under the heading of same case No. i.e. OS 54/2008, order No. 92 was passed by the same judge recording that plaintiff has filed an application with a prayer to review the judgment of this suit along with certified copy of judgment of OS 54/2008 and he further recorded in the order that learned advocate for the plaintiff submitted that the review application is required to be allowed for the purpose of proper adjudication of this suit, fixing 28.02.2018 for passing necessary order. It further appears vide order no. 93 dated 28.12.2018 that when the case was fixed for passing order in respect of review application under section 114 of C.P.C, presiding officer was not present and the case was deferred till 07.03.2018 for passing order. Petitioner contended and it appears from serial numbers of order that on 07.03.2018 no order was passed but by the next serial order i.e. order No. 94 which was passed on 01.06.2018, it is recorded that plaintiff files court fees of Rs. 50,000/- and said trial court passed an order for issuance of probate certificate, as quoted above.

7. Aforesaid subsequent orders passed after dismissal of probate proceeding, has certainly been passed by the trial court in a clandestine manner. It is not clear and suspicious also as to how the plaintiff was asked to pay court fees of 50,000/- and direction for issuing probate certificate was made on 01.06.2018, when serial number of orders clearly suggests that no order was passed on 07.03.2018. Petitioner however in her second attempt to get certified copy of order, if any, passed on 07.03.2018, obtained certified copy of another judgment mentioning self-same dates of final hearing i.e. 06.08.2013, 16.08.2013, 29.08.2013, 21.12.2017 and 10.01.2018. It further

appears that by the said judgment dated 07.03.2018, the court surreptitiously “allowed said O.S. 54/2008 on contest”, without mentioning date when the said case was further heard and how defendants contested in connection with the reversal order.

8. Needless to say that the scope of such review under section 114 read with order XLVII of the Code of Civil Procedure is very restricted. Review of judgments may be allowed on the grounds namely

- (i) discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order was made
- (ii) Some mistake or error apparent on the face of the record or
- (iii) For any other sufficient reason (which has been interpreted to be analogous to the other reasons specified above).

9. Accordingly even if the court is to entertain the review application, the court will have to discuss with the reason under which of the aforesaid clause, the review has been allowed. No such order has been recorded by the trial Court. It is also well-settled in view of order XLVII, rule 4(2) (a) of C.P.C. and also in view of the case laws that notice to opposite party is essential before taking up the review application and notice to the affected party should be given before passing order on review. In **Calcutta Properties limited, Vs S.N. Chakrabortty (AIR 1988 Calcutta 131)**, a division Bench of this court in this context was pleased to held as follow:-

“4. Mr. Sengupta appearing for the appellant, has urged that the order dt. 27-1-71 could be passed by the Court in exercise of the inherent power of review under S. 151 of the Code. There are authorities for the view that inherent power cannot be exercised by a Court to reverse its earlier order on the sole ground that it is later found to be erroneous on law or facts. But assuming arguendo that such a power could be exercised, we have no manner of doubt that the same could not be exercised without notice to and thus behind the back of the party in whose favour the earlier order was made. It is now settled law that the principle of natural justice as enshrined in the maxim “Audi Alteram Partem” must always operate in judicial procedure unless its operation is ruled out by express declaration or irresistible implication. As observed by Vivian Bose, J., in the Supreme Court decision in Sangram Singh v. Election Tribunal, AIR 1955 SC 425 at p. 429, “there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their live and property should not continue in their absence and that they should not be precluded from participating in them”. It was observed further that “there must be exceptions and where they are clearly defined they must be given effect to”, but that “taken by and large, and subject to that proviso, our laws of procedure should be construed wherever that is reasonably possible in the light of that principle”. Therefore, even if the provisions of S. 151 of the Code are construed to have preserved inherent power of review apart from and de hors the provisions of S. 114 and O. 47 R. 1 of the Code, they must be so construed as to require notice to the parties or the party affected before such power can be exercised, in accordance with the principle of natural justice which is a fundamental principle of our judicial procedure”.

10. Review proceeding being judicial proceeding the parties must be heard in review. The *maxim audi altarem partem* has to be applied to ensure fair trial and justice to the person who is affected by the order. The procedure which is adopted should be just and fair and defendants, who won the case, should be given an opportunity, so that they can defend themselves before the court of law. The defendants are not supposed to suffer unless and until they had an opportunity of being heard and before any action is taken against the defendants. A notice must be provided to them in order to present a cause

against the proposed action and if any order is passed without giving notice then it is against the principle of natural justice.

11. Having considered the above facts and circumstances of the case and in view of materials available in the record, it appears that impugned orders passed by the trial Judge is not only illegal but also perverse and is not at all sustainable. Accordingly the impugned order No. 92 dated 12.02.2018 and all subsequent orders passed in OS 54/2008 by Additional District Judge , Fast Track 4th Court,, Barasat , North 24 Parganas are hereby set aside. However, this order will not preclude plaintiff/petitioner of O.S. 54 of 2008 to file fresh review application and in the event such application is preferred before the trial Court, the Trial Court will deal with the same strictly in accordance with law, in the light of aforesaid observations.

12. C.O. 1385 of 2021 is accordingly allowed.

However there will be no order as to costs.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)