

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

**RVW 134 of 2021
with
CAN 1 of 2021
in
C. O. No. 3670 of 2019**

**Shri Kaushik Mitra
Vs.
Smt. Indira Ghosh and another**

For the review applicant : Mr. Kallol Basu,
Mr. Rajdeep Bhattacharya,
Mr. Amitava Bhowmik

For the opposite parties : Mr. Probal Kumar Mukherjee,
Mr. Debanik Banerjee,
Mr. Mainak Swarnakar

Hearing concluded on : 27.01.2022

Judgment on : 01.02.2022

Sabyasachi Bhattacharyya, J:-

1. By the present review application, the revisionist petitioner in CO No.3670 of 2019 has sought review of an order dated August 25, 2021 passed in the said revisional application under Article 227 of the Constitution of India.

2. Learned counsel for the review applicant/revisionist petitioner argues that this Court proceeded on a patently erroneous premise in affirming the order impugned in the said revisional application. The basis on which this Court's order was passed, it is submitted, was that the Trial Court had, by an order previous to the impugned order, already dismissed an application for recall of the order dated December 6, 2018 passed in Money Suit No. 115 of 2018. Hence, this Court as well as the Trial Court proceeded to observe that the applicant could not reopen the said order dated December 6, 2018 afresh.
3. However, learned counsel for the petitioner argues that the previous order of the Trial Court, whereby the Trial Court had allowed an application for recall of the earlier order dated December 6, 2018, was only in the context of seeking a re-hearing of an application under Order XXVI Rule 4A of the Code of Civil Procedure, which was different in premises than the subsequent application, rejected by the impugned order, which had also sought for recall of the order dated December 6, 2018, but had prayed for recall of the fixation of the suit itself on the *ex parte* Board.
4. Learned counsel submits that, even apart from the aforesaid logic, this Court's order should be reviewed and the Trial Court's impugned order set aside, since the applicant was erroneously indicted by the courts for the laches of the advocate.
5. Learned counsel places reliance on several judgments on such score as well as on the proposition that the power of review is wide enough

for the court to recall its own order if a mistake was committed by the court, either on fact or on law.

6. The learned Senior Advocate appearing for the opposite party, on the other hand, contends that the Trial Court, in the order impugned in the revisional application, had rightly considered that the petitioner's previous prayer was ultimately for recall of the order dated December 6, 2018, irrespective of the ancillary prayer. Hence, after its rejection, a second application for recall of the said order dated December 6, 2018 would not lie.
7. On the arguments advanced by learned counsel for the petitioner, the learned Senior Advocate for the opposite party contends that there is nothing on record to suggest any fault on the part of the advocate.
8. The learned Senior Advocate further argues that the second application for recall of the order dated December 6, 2018, in any event, was barred by the principle of constructive *res judicata* and the principle incorporated in Order II Rule 2 of the Code of Civil Procedure.
9. Upon considering the cited judgments, it is elicited that the Supreme Court, in *M/s. Mukesh Tempo Service Vs. M/s. National Insurance Company Limited and another*, passed in *Civil Appeal No.2282 of 2019* on February 28, 2019, had opined that the delay in that case was on account of negligence on the counsel's part and the litigant should not suffer due to mistake of his counsel. The court, therefore, condoned the delay in moving the application for restoration of appeal.

- 10.** In *Rafiq and another Vs. Munshilal and another*, reported at AIR 1981 SC 1400 = [(1981) 2 SCC 788], the Supreme Court held that the party to a litigation may be a villager or belong to a rural area and have no knowledge of the court's procedure. At the time of hearing the appeal, the personal appearance of the party is not only not required but hardly useful. The Supreme Court further recorded the submission of counsel appearing in the matter to the effect that a practice had grown up in the High Court from which the matter had been preferred, amongst the lawyers, that they remain absent when they do not like a particular bench. However, the Supreme Court proceeded to observe that even if it did not put its seal of imprimatur on such alleged practice by dismissing the matter which may discourage such a tendency, it would bring justice delivery system into disrepute. Since no fault could be attributed to the party and in view of the court having no material for ascertaining whether the learned advocate absented himself deliberately or intentionally, the Supreme Court proceeded to hold that an innocent party cannot suffer injustice merely because his chosen advocate defaulted and set aside the order impugned before the Supreme Court in the said case.
- 11.** However, in the present case, there is absolutely no material-on-record even to suggest that the litigant was a villager or came from a rural area or was otherwise handicapped in any manner.
- 12.** That apart, the facts of the cited case were entirely different from the present case. In the case at hand, there is no allegation from any

quarter regarding the advocate appearing in the Trial Court following a general practice of the advocates' abstinence from hearings by choice.

13. Moreover, the Supreme Court has the benefit of Article 141 of the Constitution of India, which specifically enumerates that the law declared by the Supreme Court shall be binding on all courts within the territory of India.
14. Such law making power is not vested either with this Court or the Trial Court. Hence, it would be beyond the jurisdiction of this Court to lay down a general proposition in the above regard, particularly since the facts of the two cases are entirely different.
15. Learned counsel for the applicant also refers to *Board of Control for Cricket of India and another Vs. Netaji Cricket Club and others*, reported at (2005) 4 SCC 741. In the said case, a converse proposition to that advanced by the present applicant was being considered by the Supreme Court, when it held that it was of the opinion that the jurisdiction of the High Court in entertaining a review application cannot be said to be *ex facie* bad in law and Section 114 of the Code empowers a Court to review its order if the conditions precedent laid down therein are satisfied. Considering the scope of Order XLVII Rule 1 of the Code of Civil Procedure as well, the Supreme Court held that such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there is existence of 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. Upon consideration of the facts of the said case, the Supreme Court laid down the above proposition.

16. However, the facts of the present case do not justify application of the same principle, simply because there is no mistake discernible from the face of the order under review or the records.
17. It is also well-settled that, in a catena of cases, the Supreme Court has observed time and again that the expression "or for any other sufficient reason", appearing in Rule 1 of Order XLVII of the Code of Civil Procedure has to be read *mutatis mutandis* with the previous expressions used in the provision. The primary grounds for review, as provided in the provision, are discovery of new and important matter or evidence which was not within the knowledge of, or could not be produced by, the party concerned at the relevant juncture even after the exercise of due diligence or some mistake or error apparent on the face of the record.
18. The arguments advanced in the present review application do not indicate any new and/or important matter or evidence, which was not within the knowledge of or could not be produced by the applicant after the exercise of due diligence, at the relevant point of time when the order of this Court was passed.
19. For a mistake to be an error "apparent on the face of the record", it has to be *ex facie* decipherable on the face of the order itself.
20. However, in order to accept or negate the arguments advanced by the review applicant in the present matter, one has to go through the entire gamut of orders passed in the connected suit, from which the

revision arose. A mere perusal of the order under review or the Trial Court's order are not sufficient to come to such a conclusion.

- 21.** Even upon a consideration of the order-sheet of the suit, it is left to debate as to whether the proposition advanced by the applicant is tenable in law or acceptable. Hence, there is no error or mistake apparent on the face of the record in the present case.
- 22.** Even following the ratio laid down in BCCI (supra), it cannot, by any stretch of imagination, be held that the order under view suffers from any mistake or gross error sufficient to entitle the applicant to a review.
- 23.** Since detailed arguments are necessary to substantiate the applicant's proposition, it cannot be said that the contours of review jurisdiction are satisfied in the present case, even imparting the widest possible connotation thereto.
- 24.** A perusal of the order-sheet and consideration of the arguments of the parties indicate that two applications and three orders of the Trial Court are germane in the context.
- 25.** The first important component of the narrative is the order dated December 6, 2018, which is the genesis of the entire matter.
- 26.** The said order had two ingredients. The Trial Court observed that none appeared for the defendant on repeated calls and no steps were taken by the defendant, although the plaintiff had filed *hazira*. It was further found that the record revealed that no step had been taken by the defendant on the two previous dates. In such circumstantial light,

the suit was directed to be proceeded with *ex parte* against the defendant.

- 27.** Only after such detailed observations, the Trial Court further proceeded to hear an application filed by the plaintiff under Order XXVI Rule 4A of the Code of Civil Procedure and ultimately to allow the same. We find the said order at page 76 of the review application.
- 28.** Coming to the prayer of the first application for recall filed by the applicant, appearing at page 70 of the present review application, it is seen that the applicant had prayed for recall of the order dated December 6, 2018. As a consequential prayer, though, it was also prayed that a date may be fixed for hearing of the application under Order XXVI Rule 4A of the Code of Civil Procedure.
- 29.** The said application was dismissed on merits *vide* order dated January 22, 2019 passed in Money Suit No.115 of 2018. Such order is annexed at page no.79 of the present review application and reveals that the Trial Court clearly observed that it appeared from Order No.9 dated December 6, 2018 that the suit was proceeding *ex parte* against the defendant and, under such circumstances, there was no scope for the defendant to move or place any application before the court. The court further went on to observe that it was significant to point out that no objection against the petition under Order XXVI Rule 4A of the Code of Civil Procedure had been filed by the defendant, which was one of the grounds for rejection of the recall application.

30. In the order dated January 22, 2019 at page no.79, it is reflected that both parties were heard at length and the case records were perused by the Civil Judge (Senior Division).
31. The second application, which is relevant in the context, also prayed for recall of the order dated December 6, 2018, but this time with a consequential prayer for removal of the suit itself from the *ex parte* Board to the interlocutory Board, as it appears from page no.84 of the present review application.
32. The said application was rejected on contest *vide* order dated August 31, 2019, which was challenged before this Court in C.O. No.3670 of 2019.
33. A careful scrutiny of the order dated August 31, 2019 shows that the defendant in the suit had prayed for setting aside the order dated December 6, 2018 by setting up miscommunication by the advocate's clerk on the relevant date as a ground. The court took note of the objection of the plaintiff that a similar petition had been heard and rejected by the Trial Court on January 22, 2019. The court also elaborately considered that the suit had been filed for defamation against the defendant and that a similar petition of the defendant was rejected on contest *vide* OrderNo.9 dated January 22, 2019. It was further observed by the Trial Court on August 31, 2019 that it had carefully perused the order dated January 22, 2019 where the predecessor-in-chair had already rejected the defendant's "prayer for recall of Order No.9 dated 06.12.2018 on contest". "So, therefore", the Trial Court could not refuse its own order, since it was held

tantamount to abuse of power of the court. On such ground, the recall application was rejected and the suit was reverted back to the previous stage, fixing the subsequent dated for submission of the commissioner's report.

34. A careful examination of the nature of the two recall applications filed in the Trial Court and the averments made in each of them reveals that the grounds made out therein were not only confined, respectively, to the application under Order XXVI Rule 4A of the Code of Civil Procedure and to the suit itself. General explanations were given in both the recall applications for the absence of the applicant on December 6, 2018. It was averred in each of the said recall applications that unless the order dated December 6, 2018 was recalled, the defendant would suffer irreparable loss and injury. The prayer portion of both the applications specifically sought recall of the order dated December 6, 2018. Only consequentially, the first application sought re-hearing of the application under Order XXVI Rule 4A of the Code of Civil Procedure and the second application sought for a removal of the suit from the *ex parte* Board. However, irrespective of the consequential reliefs sought, the primary prayer in both the recall applications was substantially the recall of the order dated December 6, 2018.

35. Since both the components, that is fixation of the suit for *ex parte* hearing and disposal of the application under Order XXVI Rule 4A of the Code of Civil Procedure were implicit in the order dated December 6, 2019, the first recall application filed by the applicant, which was

dismissed on merits on January 22, 2019, itself closed the chapter of seeking a recall of the order dated December 6, 2018 as a whole.

36. The Trial Court had clearly, in the order dated January 22, 2019, recorded its reasons for refusing the applicant's prayer for recall, as per the grounds argued and pleaded by the applicant in the said application. It was beyond the jurisdiction of the Trial Court to traverse beyond such reasons or sit in judgment over the same subsequently, since the cardinal relief sought in both recall applications was the same.
37. The applicant could not, in law, resile from that position and reopen the chapter of recalling the order dated December 6, 2018 afresh, by filing a fresh recall application with the same prayer, merely by altering the ancillary prayer from re-hearing of the interlocutory application under Order XXVI Rule 4A of the Code of Civil Procedure to removal of the suit from the *ex parte* Board. Irrespective of such replacement and substitution of ancillary relief, the plinth of the averments and prayer in both the recall applications were self-same, being the recall of the order dated December 6, 2018. Merely choosing one and relinquishing the other consequential prayer in the first recall application would only debar the applicant from taking such other ground again in a second recall application, both on the principles of constructive *res judicata* and that laid down in Order II Rule 2 of the Code of Civil Procedure, as rightly contended by the opposite party.
38. Merely replacing the ancillary prayer would not alter the primary complexion of the recall application, which was the recalling of the

order dated December 6, 2018. Hence, the Trial Court was absolutely justified in rejecting the second recall application on the ground that a similar petition had been dismissed on contest by its previous order dated January 22, 2019.

- 39.** That apart, a perusal of the order of this Court dated August 25, 2021, which is under review, clearly shows that this Court had not only considered the specific reason given in the impugned order dated August 31, 2019 but had also considered that no steps had been taken by the defendants on two previous dates as well as on December 6, 2018 itself, thereby taking the tally of being absent to three successive occasions.
- 40.** Based on such considerations as well, this Court had held categorically that the defendant/petitioner was continuously negligent in attending/contesting the suit and that the convenient shifting of blame on the erstwhile advocate for the petitioner in the Trial Court merely amounted to passing the buck and did not serve any useful purpose, since the erstwhile advocated was not before the Trial Court or this Court to vindicate or controvert such allegations. In the circumstances of the case, it was also observed by this Court that, unless the contrary is proved, counsel act as agents of the litigants and, by mere shifting of blame to the erstwhile advocate, the petitioner cannot take unnecessary advantage, thereby giving a go-by to the provisions of law.
- 41.** Unlike the cited judgments on the proposition of the binding effect of counsel's acts on the litigants, the observations in the present order

under review clearly indicated that the litigant himself was at fault for having occasioned delay on several previous occasions, which was a finding on the basis of the records available before this Court.

- 42.** It is also relevant to note that the present applicant, as the revisionist petitioner, was duly represented by counsel, who had advanced arguments *in extenso* at the time of disposal of the revisional application. The points argued in connection with the present review application, although fully available to the applicant/petitioner at that juncture as well, were not advanced by learned counsel for the applicant when the revisional application was dismissed on August 25, 2021. The nature of such arguments is primarily factual and not purely legal, and thus could be waived by learned counsel for the applicant at the relevant point of time. Having kept silence on such purported grounds at the relevant time of disposal of the revision, it does not now lie in the mouth of the applicant to agitate such contentions afresh in a review application, thereby stretching the borders of the review jurisdiction, as contemplated under Order XLVII and Section 114 of the Code of Civil Procedure, to limits beyond recognition.
- 43.** In the particular circumstances of that case, the Supreme Court had observed in *BCCI* (supra) that the court can also consider its mistakes while deciding a review application.
- 44.** However, even a detailed enquiry of the materials-on-record presented before the revisional court clearly indicates that the

petitioner/ applicant cannot show beyond all other possibilities, that the order under review should have been passed in the converse.

45. In the absence of any mistake on the part of this Court as discussed above, let alone gross or obvious or apparent on the face of the record, and/or discovery of any new matter which was not available to the revisionist petitioner at the relevant juncture, the propositions as laid down in the cited judgments, relied on by the learned counsel for the applicant, are not applicable in the circumstances of the present case to justify the prayer for review made in the instant application.
46. In such view of the matter, R.V.W. 134 of 2021, along with CAN 1 of 2021, is dismissed on contest without, however, any order as to costs.
47. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)