

Tinkari Sen and ors. Vs. Dulal Chandra Das and ors.

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SooperKanoon Citation : sooperkanoon.com/865852

Court : Kolkata

Decided On : Dec-14-1966

Reported in : AIR1967Cal518

Judge : Bijayesh Mukherji, J.

Acts : High Court Rules - Rule 2; ;High Court Orders; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Sections 35 and 151 - Order 47, Rule 1; ;West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 - Sections 2(11) and 9

Appeal No. : Civil Revn. No. 2804R of 1966, Re: Civil Revn. Case No. 3802 of 1964

Appellant : Tinkari Sen and ors.

Respondent : Dulal Chandra Das and ors.

Advocate for Def. : Bimala Charan Deb and ;Anil Kumar Mukherjee, Advs.

Advocate for Pet/Ap. : Chittatosh Mookerjee, Adv.

Disposition : Review allowed

Judgement :

ORDER

Bijayesh Mukherji, J.

1. This is an application 'for review and/or reconsideration' of my two orders dated June 17, 1966 and the other dated June 22 following.
2. By the first such 'order'--really it was a judgment--I made absolute the rule obtained by the landlords under Article 227 of the Constitution against an appellate order of affirmance arising out of proceedings for standardization of rent under Section 9 of the '1950 Act.' So I did, after having heard only Mr. Deb who with Mr. Anil Kumar Mukherjee was appearing in support of the rule. Unfortunately, neither Mr. Murari Mohan Mukherjee nor his pleader. Mr. Apurbadhan Mukherjee, appearing for the opposite party tenants, was present. After the judgment was delivered, making the rule absolute, Mr. Apurbadhan Mukherjee mentioned the matter that very day (June 17, 1966), saying that the case was lost sight of. Thereupon I set it down for hearing on June 22, 1959 so that the matter might be heard in presence of both the parties. On June 22, however I did not find Mr. Apurbadhan Mukherjee nor his learned junior. I, therefore, ordered that the judgment I had rendered on June 17 previous would stand. More, I signed the judgment that day too: June 22. This is the second order that is sought to be 'reviewed and/or reconsidered.'
3. Mr. Chittatosh Mookerjee, it appears, drew up the review petition, moved it before me on August 23, 1966, and obtained the rule which is for decision now and in support of which he appears, though he appeared at no stage during the carriage of the main rule under Article 227 of the Constitution. (Here hangs a point. More of which hereafter in paragraph 6 et seq. infra.)
4. Opposing the rule, Mr. Deb raises a preliminary point which, he submits, goes to the very root of the matter. The point is: the application for review I am seized of contains no certificate by the advocate that the grounds taken in support thereof are good grounds of review, infracting thereby the mandatory provisions of Rule 2, chapter 10. of the Appellate Side Rules of this Court:

'2. Every application for review of judgment shall set forth plainly and concisely the grounds on which a review is sought, and shall contain a certificate by an Advocate of the Court similar, mutatis mutandis, to that prescribed in Appeals from Appellate Decrees (See Chapter V Rule 6)'

Mr. Deb is right. There is no such certificate. But I am unable to accept his submission that the provisions of the rule are mandatory. The use of the auxiliary verb shall, upon which Mr. Deb relies so much, is not conclusive. Similarly the absence of the imperative is not conclusive either. See *Collector of Monghyr v. Keshav Prasad Goenka.* : [1963]1SCR98 . I do not, therefore, place the same accent on shall as Mr. Deb does

5. Again, no universal rule can be laid down for construction of a statute or statutory instrument as directory only or obligatory with an implied nullification for disobedience. Much the best thing to do is to get at the real intention of the maker of the statute or statutory instrument by carefully attending to the whole scope thereof. In saving so. I do no more than adopt, with a little modification, in the context of the case, what has been laid down by Sir Asutosh Mookerjee in *Mathura Mohan Saha v Ram Kumar Sana & Chittagong, District Board.* (1916) 20 Cal WN 370: (AIR 1916 Cal 136) Such being the test, I find no nullification, express or implied for disobedience of the rule, the real intention behind which appears to be that the advocate concerned should take responsibility for the grounds drawn up by him for review, so that frivolous applications might not waste the time of the court. Say, through oversight--and Mr. Chittatosh Mookerjee does plead oversight--the requisite certificate has not been given. Will the Court then throw out the application as barred in limine: just the view Mr. Deb contends for? Or will the Court allow the advocate to supply the omission by appending a certificate which will necessarily speak from the very date of the application? I am clear, the latter view should prevail. Which means that I reckon the rule as directory. Indeed, to hold the rule to be so avoids greater harm, such as injury to a litigant who has otherwise a good case for review, but whose advocate is guilty of a little oversight, and consequential defeat of the very object of the salutary provision of review. After all, a rule as this is a means to an end, not an end in itself. In looking at the rule so. I do not 'scrap it' as Mr. Deb apprehends I only keep it in its proper place.

6. Thus, I see no difficulty in getting the requisite certificate even now from Mr. Chittatosh Mookerjee with a view to making my record complete. Mr. Deb. however, submits, that that will not be the right thing to do. So he does on the

strength of two ancient decisions of this Court: (1) *Rousseau v. Pinto*, (1868) 10 Suth WR 54: Civil Rulings, and (2) *Toog Oung v. British India Steam Navigation Co. Ltd.*, (1876) 24 Suth WR 430: Civil Rulings. The first is a case which has features all its own and distinguishes it from the facts in hand. That litigation was before the Court on several former occasions. More, it was argued by able counsel. The Court bestowed much time in considering it, and expressed its reasons fully on two occasions to come to the decision it did that the plaintiff was not entitled to possession. In this background an application for review came to be made on the basis of a certificate, not of either of the learned counsel who argued the case originally, but of a raw recruit to the Bar, who certified that there were good grounds for reviewing the judgment. Worse still, the senior counsel had had ample time to grant the requisite certificate, before leaving the country as he did. And 'the vakeel, learned, able, and independent' who had assisted his leader told the Court, hearing the review matter, that he had advised the plaintiff about there having been no good grounds for review.

7. These, then, are the circumstances which led Peacock C.J. (sitting with Hobhouse J.) to caution junior pleaders to be slow to certify for a review, when they would find that the case had been in the hands of the members of the Bar more experienced than they. How the principle of this decision can be translated here beats me. The case before me was argued on behalf of the petitioners only. I had not had the advantage of hearing the arguments on behalf of the opposite party, Mr. Chittatosh Mookerjee is certainly not a raw recruit, but an advocate, learned and able, though less experienced man Mr. Apurbadhan Mukherjee the benefit of whose assistance. however, I had not the good fortune to have.

Furthermore, an error is writ large upon the judgment I had delivered on June 17, 1966 and signed on June 22 following. (More of which hereafter in paragraph 12 et seq. infra.) Then, in spite of the certificate given by one who should not have given it: 'a very young gentleman', Sir Barnes Peacock observed:

'I am always most anxious, when I commit a mistake, to be set right; and if I believed that in the present case I had fallen into an error. I should not have been ashamed to admit it, but I should have agreed entirely with Lord Hardwicke, who

stated that 'he always considered it to be a greater reproach to a Judge to continue in error than to retract it.' The argument which I have heard today has failed to convince me that I came to an erroneous conclusion on the first occasion.'

Thus, it is clear that the ratio of the decision is not the certificate of a callow lawyer who was not there in the original hearing, but the absence of an error. But, in the case in hand, an error apparent on the face of the record is very much to be seen. (See paragraph 12 et seq. *infra*.) So. by the ratio of the very decision Mr. Deb relies upon. I am free to review my judgment sought to be reviewed, if I believe, as I do that I had fallen into an error apparent on the face of the record.

8. Toog Oung's case, (1875) 24 Suth WR 430, the other authority Mr. Deb relies upon, also reveals absence of an error in the judgment the review of which was prayed for. The original judgment was based on the assumption that it was part of the duty of the defendant company to land the disputed goods into the cargo-boat. There was an admission on behalf of the defendant company that one Mr. Cotton was the person generally hired by them to provide cargo-boats for the landing of goods when they would not come along side of the wharf. More, the learned Recorder had observed that Mr. Cotton was so hired and employed on the occasion, so that he and his crew were, for the purposes of the case, the servants of the company. This observation of the Recorder, not expressly overruled in the judgment under review, was made the ground for review--a ground which was certified to be good. Upon these facts. Markby J. (Lawford J. agreeing) held that what the learned Recorder had meant was that Mr. Cotton and his crew were to be considered for the purposes of the litigation as the servants of the company. In other words, in estimating the liability of the defendant, it was the same thing as if they had been servants of the company. Not that they were in reality the company's servants. Having found so. Markby J. concluded:

'And that observation (of the Recorder), so far as it affects the case, falls to the ground as soon as it is conceded, as the ground of review concedes, that the duty of the Company terminated when the goods were passed over the ship's side.'

In sum, no error was there apparent on the face of the record, foredooming the application for review to failure.

9. Having held so, on merits, Markby J. dwell on the undesirability of an application for review 'where some other pleader than those who argued fee case originally' came forward and certified that there was ground for the review: just what was pointed out by Sir Barnes Peacock, as noticed already. Thus from neither of these two cases, you can spell out that an application for review the grounds of which are certified by an advocate other than those who appeared in the case originally, is so patently illegal that it deserves to be thrown out at the very threshold. Undesirability is one thing, and a manifest illegality going to the root of the matter is another And whether it is even undesirable or not will depend on the facts and circumstances of each case.

10. Mr. Deb contends that Mr. Apurbadhan Mukherjee could not present himself before the court on two occasions to argue the case on behalf of the opposite party who cannot, therefore, be given the indulgence of a third hearing under the pretext of a review. What counts however is an error apparent on the face of the record, not the number of times a learned advocate fails to appear in court. More, I see a genuine application, nothing like any pretext anywhere.

11. In the course of argument at the Bar, I initiate discussions in another way. If I am convinced, as indeed I am, that I have fallen in error apparent on the face of the record, can I not review my erroneous judgment suo motu? Mr. Deb submits. I cannot, in support of his submission, he relies on (i) Kanai Lal Ghose v. Jatindra Nath Chandra, (1918) ILR 45 Cal 519: (AIR 1918 Cal 925), where the appeal before the District Judge from execution proceedings arising out of a suit under Section 9 of fee Specific Relief Act 1 of 1877 having been incompetent, the application for review of the appellate order was rendered equally incompetent and the use of inherent power in the circumstances, it was held, would be 'a patent misapplication' of Section 161 of the Procedure Code;

(ii) Asutosh Ghose v. Indu Bhusan Ghose : AIR1927 Cal158 , where it was held that an order under Order 11, Rule 21, of the Code, dismissing a suit, being appealable a court cannot review such order in exercise of its inherent power; and on that class of cases which lay down the law that, a specific provision being there in the Code, it is not for the court to exercise its inherent jurisdiction under Section

151. More, Mr. Deb dies a direct case on the point: *Jiwan Das v. Rakhmat Din*, AIR 1941 Lah 212, where it has been held that a court cannot review its judgment suo motu when neither party prays to, Mr. Chittatosh Mookerjee points out that fee application is not only for review, but also for reconsideration. But fee distinction between review and reconsideration, in fee context of facts in hand, appears to be a distinction without difference. I need not, however, pursue the matter further, because I find a clear case for review under Order 47, Rule 1, of the Code. The only omission that is there is absence of a certificate about the grounds for review I shall supply that omission by calling upon Mr. Chittatosh Mookerjee to file the requisite certificate.

12. Now, to the mistake, I am not ashamed to confess. I am guilty of. The contractual tenancy of the present petitioners before me (the opposite party in the main rule) was determined by an appropriate notice to quit, from the last moment of the last day of Jaistha 1360 B.S.. corresponding to a certain date in mid June 1953 But the tenants applied to the Rent Controller for standardization of rent under the '1950 Act' months after, such termination, to wit. on February 5, 1954 This led me to hold that they had no locus standi to do so tenants as they were not any more, and that the Rent Controller had, therefore, no jurisdiction to entertain this application as he did. In having held so, I fell into what appears to be an error apparent on the face of the record The Special Bench decision in *Krishna Prosad Bose v. Sarajubala Dassi*, (1961) 65 Cal WN 293: AIR 1961 Cal 506 (FB) Mr. Chittatosh Mookerjee refers me to, shows as much. No doubt, all that the Special Bench was concerned with was whether or no the statutory tenant under the '1950 Act' could sublet. But, in having answered the point in the affirmative, the law laid down is that a tenant as defined in Section 2, clause 11, of the '1950 Act' includes an ex-tenant, that is, a tenant whose contractual tenancy has come to an end. but who is still in possession of the demised premises a description which fits the petitioners before me in this review application nicely enough. See also *Deoki Prasad Khaitan v Dulichand Asopa*, : AIR1954 Cal532 , a decision of a Division Bench of this Court referred to and approved by the Special Bench.

13. Such being the law laid down by the Special Bench, in vain does Mr. Deb contrast the definition of tenant in Section 2, Clause 11 of the '1950 Act' with the

definition of tenant in Section 2, Clause 11. of the '1948 Act' or Section 2, Clause (h) of the '1956 Act', which provides inter alia that tenant means or includes a person continuing in possession after the termination of his tenancy. Surely these are words the like of which you do not find in the '1950 Act' So what? In fee very scheme of the '1950 Act' the word tenant does include an ex tenant And that is fee law laid down by the Special Bench.

14. Equally ineffective is Mr. Deb's reference to. In re, Agricultural Holdings (England) Act 1883; Gough v. Gough, (1891) 2 QB 665, where Lord Esher M. R., observed at page 674:

The definition says that 'landlord' 'means' (it does not say 'includes') any person for fee time being entitled to receive the rents and profits of any holding. I doubt whether the executors of a landlord would come within that definition. It is a hard and fast definition, and you cannot give any other meaning to the word 'landlord' in the Act than that which is mentioned in the definition.

Mr. Deb likes me to read so the definition of tenant in Section 2, Clause 11. of the 1950 Act--a definition which starts with the word means. Hence, it is a hard and fast definition into which. Mr. Deb concludes. I must not read an ex-tenant I cannot agree. In the first place, such a contention militates against the Special Bench decision which I must govern myself by In the second place, as Mr. Chittatosh Mookerjee submits, if the definition of tenant opens with the word means, it almost concludes with the word includes--a word the lack of which in the English statute Lord Esher was commenting on

14A. Mr. Chittatosh Mookerjee also refers me to Srikuar Mohta v. Nripen Bhattacharjee, : AIR1957 Cal333 . But there the application for standardization of rent under Section 9 of the '1950 Act' was made on April 30, 1953 And the contractual tenancy was terminated thereafter. It was held, in the circumstances, that standardization of rent was within the exclusive jurisdiction of the Rent Controller and that neither the cessation of contractual relationship of landlord and tenant during the pendency of the proceedings for standardization, nor the decree of the civil court for rent or mesne profits at a rate different from that eventually standardized by the Rent Controller. could rob the latter of its exclusive jurisdiction

Such are not the facts before me. So I leave this case alone

15. Mr. Deb's last submission is that mistake of law is no ground for review. This is a sound submission as far as it goes. But it does not go far enough. The mistake, be it of fact or law, has got to be patent or, in the words of the Code, apparent on the face of the record. A mistake in interpreting the law correctly will not do. But when the clear legal position established by a binding authority is overlooked, as it has been overlooked by me, clearly it becomes an error within the rule: Order 47 Rule 1. None of the two cases Mr. Deb relies upon negate this proposition. *Chhajju Ram v Neki*, (1922) 26 Cal WN 697; 49 Ind App 144 AIR 1922 PC 112, reveals that the Division Bench sitting in review, considered the decision under review having 'proceeded upon an incorrect exposition of law.' And the Privy Council reversed the Division Bench. I do not say I made merely an incorrect exposition of law. I say instead: I overlooked a settled law, having fallen thereby into an error apparent on the face of the record. In *Kanshi Ram v Diwan Chand*, AIR 1933 Lah 169, a subordinate judge dismissed a suit for non-prosecution under Order 9, Rule 8, of the Code, and rejected too an application for the suit's restoration. Thereafter he allowed an application for review. This, it was held, he was not entitled to do, even if he thought that he had made some mistake on a point of law. I say as much. A mistake simpliciter, either in the realm of fact or of law, is no ground for review. But overlooking a proposition of law, well settled and beyond controversy, does furnish a very good ground for review. And that is what faces me here

16. Consider, in this context, *Sir Hari Sankar Pal v. Anath Nath Mitter*. Mr. Chittatosh Mookerjee refers me to *Mukherjee J.* (as his Lordship then was), observed, *Rania C J.*, *Fazl Ali*, *Patanjali Sastri* and *Mahajan JJ* (as their Lordships then were) agreeing:

'That a decision is erroneous in law is certainly no ground for ordering review. If the Court has decided a point and decided it erroneously the error could not be one apparent on the face of the record or even analogous to it. When, however, the Court disposes of a case without adverting 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 the record sufficient

to bring the case within the purview of Order 47, Rule 1 of the Civil Procedure Code.'

Just so here, save that I have not applied my mind to a law settled by the Special Bench in Krishna Prosad's case : AIR1961 Cal505 . supra, nothing to say of other cases.

17. Of take the law laid down by Mahajan J. (as his Lordship then was) speaking for the Court in Mt Jamna Kuer v. Lal Bahadur AIR 1950 FC 131, a case I consider on my own:

'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.'

It is an oversight I have been guilty of. I am, therefore, unable to accept Mr. Deb's contention that the mistake I have committed is no ground for review I hold instead that it is a mistake apparent on the face of the record. railing for a review.

18. Having regard to the foregoing considerations. I allow the application for review and make the rule absolute. Since I have my. share of the blame I make no order as to costs.

19. As desired by the learned advocates for both parties, the main rule under Article 227 of the Constitution, treated as a partheard one after this restoration, do appear in my list for hearing at 2 p.m. on January 5. 1967

20. Mr. Chittatosh Mookerjee will pleaserecord here and now the requisite certificateat the foot of the application for review witha view to making my record complete.