Supplementary
S. No. 79

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

RPC 11/2017, CM (872/2021)

Mehrajud Din Ganie and others

… Petitioner/Appellant(s)

Through: Mr. M. Sultan, Advocate

V/s

Mst. Mymoona and others

… Respondent(s)

Through: Mr. R. A. Jan, Sr. Adv. with Mr. M. Syed Bhat, Adv.

CORAM: **HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE**

O R D E R
12-07-2024

Oral

1. The instant review petition has been filed by the petitioners herein against order dated 03.07.2015 passed in Civil 2nd Appeal no. 26/2013 titled as ***Mehraj ud Din Ganie and others v. Mst. Mymoona and others***.

2. Facts giving rise to the filing of the instant review petition are that one ***Ramzan Ganai*** owned a landed estate of 117 kanals and 17 marlas under khewat no. 37 and 38 being his ancestral property situated at Moza Zainakote. The said Ramzan Ganai had three sons namely ***Samad Ganai***, ***Subhan Ganai*** and ***Habib Ganai***. Upon demise of Ramzan Ganai, each son inherited 39 kanals out of said 117 kanals and 17 marlas. Samad Ganai had four sons namely ***Mohd***., ***Gaffar***, ***Aziz*** and ***Sultan*** out of which Mohd., Gaffar and Aziz died issueless, as such, ***Sultan*** succeeded to the entire share of Samad Ganai. Sultan had two daughters namely ***Mst. Ashmi*** and ***Mst. Noora*** and two sons namely

Ahmad and ***Mohd.*** who all inherited the share of Sultan Ganai of 39 kanals of land.

3. Mst. Ashmi daughter of Sultan Ganai filed a suit for partition and possession on 06.04.1983 wherein she impleaded her brother Mohd. as party defendant as also the legal heirs of her sisters Mst. Noora being Mst. Shama, Mohd. Yousuf and Assadullah besides impleading the legal heirs of her another brother Ahmad being Mohd. Yaqoob, Abdul Hamid and Mst. Khatji as party defendants. In the said suit Mst. Ashmi claimed that the common ancestor of the parties namely Sultan Ganai had been survived by her, her sister Mst. Noora and her two brothers namely Ahmad and Mohd. and her father Sultan Ganai had left 118 kanals of land out of which she is entitled to 19 kanals and 10 marlas of land.
4. The said suit came to be decreed on 13.09.1986, aggrieved whereof a Civil 1st Appeal was filed by the defendants in the suit before this court being CIA no. 76/1986 wherein a remand order came to be passed on 31.03.1988 with the direction to the trial court to hear the parties in respect of the share of the parties including that of respondent 1 being said Mst. Ashmi under their Personal Law and after finding to that effect is returned, submit the same to this court within a month for disposal of the appeal finally.
5. Pursuant to the said direction dated 31.03.1988, the trial court/Additional District Judge, Srinagar in terms of order dated 25.06.1988 submitted a report to this court as follows:

> "Defendant no. 1 will get 39 kanals and 4 marlas. Mst. Ashmi plaintiff will get 19 kanals and 7 marlas. Defendants 2, 3 and 4 will get 3 kanals 16 marlas, 7 kanals and 13 ½ marlas and 7 kanals and 15 marlas respectively. Defendants 5, 6 and 7 will inherit their father Ahmad Ganai. Defendants 5 and 6 being sons will get 17 kanals and 2 marlas each and defendant no. 7 being the widow will get 5 kanals."

6. After the submission of the said report by the trial court - Additional District Judge, Srinagar to this Court, and after hearing the appearing counsel for the parties in the appeal preferred against the judgment and decree challenged in the said Civil 1st Appeal 76/1986, the appeal came to be dismissed on 22.12.1989 upholding the judgment and decree of the trial court.
7. Aggrieved of the said judgment and decree passed by the Single Judge of this Court in the said Civil 1st Appeal no. 76/1986 *supra*, the appellants before the Single Judge preferred an LPA before the Division Bench of this court being LPA No. 01/1990 (Civil). The said LPA came to be dismissed on 30.07.1996 upholding the judgment and decree passed by the Single Judge in the aforesaid appeal.
8. The petitioners 1 to 17 herein claiming to be the successors of Habib Ganai and Subhan Ganai sons of Ramzan Ganai felt aggrieved of the said judgment and decree dated 13.9.1986 obtained by above named Mst. Ashmi and called in question the same in a suit filed by them on 23.07.1997 before the court of City Judge, Srinagar contending therein that said Mst. Ashmi had in her suit wrongly claimed a share of 19 kanals and 10 marlas out of the total landed estate of Ramzan Ganai

which included as well the share of their predecessors-in-interest namely Habib Ganai and Subhan Ganai being sons of Ramzan Ganai along with the father of said Mst. Ashmi being Sultan Ganai and that the said decree and judgment came to be obtained by Mst. Ashmi by suppression and concealment of true facts inasmuch as without impleading them as a party defendant in the suit, stating further in the suit that said Mst. Ashmi and her sister Mst. Noora and her brothers Mohd. and Ahmad would have succeeded their father Sultan Ganai to the extent of his share viz. 39 kanals only.

9. In the said suit filed by the present petitioners said Mst. Ashmi and the others who were defendants in the suit filed by Mst. Ashmi were impleaded as party defendants. The said suit after contest and trial came to be decreed by the court of City Judge, Srinagar on 09.03.2007 and Mst. Ashmi was held not entitled to 19 kanals and 10 marlas of land, as such, holding the judgment and decree obtained by Mst. Ashmi as ineffective and illegal to the extent of the share of the plaintiffs, petitioners herein.

10. The said judgment and decree dated 09.03.2007 came to be called in question in an appeal before the court of Additional District Srinagar by the successors in interest of the defendants in the said suit and the appellate court after adjudicating upon the said appeal allowed the same on 13.08.2013 and while upholding the judgment and decree dated 13.09.1986 obtained by Mst. Ashmi, consequently, set aside the

judgment and decree dated 09.03.2007 obtained by the petitioners herein.

11. The petitioners herein being respondents in the aforesaid appeal wherein judgment and decree dated 13.08.2013 came to be passed dissatisfied with the said judgment and decree filed Civil Second Appeal before this court being C2A No. 26/2013 on 06.11.2013. The said C2A came to be dismissed by this Court on 03.07.2015 holding that no substantial question of law is involved in the appeal, aggrieved whereof the petitioners have maintained the instant review petition, *inter alia*, on the premise that the observation made in the order under review that the suit of Mst. Ashmi came to be decreed to the extent of her share measuring 19 kanals and 10 marlas carved of land measuring 39 kanals and 6 marlas is not borne out from the records, but is contrary to the record having wrongly resulted into dismissal of the Civil Second Appeal and being an error on the face of the record, thus, warranting review of the order.

Heard learned counsel for the parties, perused the record and considered the matter.

12. Before proceeding to advert to the petition in hand, it would be appropriate and advantageous to refer to the ambit and scope of doctrine of review.

The normal rule of law is that once a judgment is pronounced or an order is made, the Court becomes functus officio, i.e., ceases to have control over the matter and the judgment or order pronounced and made becomes final and cannot be altered, modified, varied or changed,

however, the review of a judgment or order is an exception to this general rule and the doctrine can be invoked and allowed in certain circumstances and on certain grounds only. A consistent view of the courts in the matter of doctrine of review is that a right of review, in law, is both substantive and procedural and as a matter of procedure, every Court can correct an inadvertent or unintentional error, which has crept in the judgment or order either due to the procedural defect or mathematical and clerical error or by misrepresentation or fraud of a party to the proceedings, however, the power of review vested in a Court is not inherent power and has to be conferred on a Court either expressly or by necessary implication.A reference to the following judgments of the Apex court in regard to the doctrine of review also would be advantageous being case titled as **Inderchand Jain vs. Motilal** *reported in* **2009 (14) SCC 663**, wherein at para 7 following has been observed and noticed:

> "7. Section 114 of the Code of Civil Procedure (for short "the Code") provides for a substantive power of review by a civil court and consequently by the appellate courts. The words "subject as aforesaid" occurring in Section 114 of the Code means subject to such conditions and limitations as may be prescribed as appearing in Section 113 thereof and for the said purpose, the procedural conditions contained in order 47 of the Code must be taken into consideration. Section 114 of the Code although does not prescribe any limitation on the power of the court but such limitations have been provided for in Order 47 of the Code; Rule 1 whereof reads as under:
>
> "17. The power of a civil court to review its judgement/ decision is traceable in Section 114 CPC. The grounds on which review can be sought are enumerated in Order 47 Rule 1 CPC, which reads asunder: 1. Application for review of judgement
>
> (1) Any person considering himself aggrieved-
>
> (a) by adecree 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

> (c) 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 judgement of the court which passed the decree or made the order."

A further reference to the judgment of the Apex Court passed in case titled as '***Shri Ram Sahu (Dead) through LRs and others v. Vinod Kumar Rawar***, reported in ***2020 Online SC 896***' wherein following has been laid down:

> "33. In the case of State of West Bengal and Others vs. Kamal Sengupta and Anr., (2008) 8 SCC 612, this Court had an occasion to consider what can be said to be "mistake or error apparent on the face of record". In para 22 to 35 it is observed and held as under:
>
> "22. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not selfevident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.
>
> .
>
> .
>
> .
>
> 26. In Moran Mar Basselios Catholicos v. Mar Poulose Athanasius (supra) this Court interpreted the provisions contained in the Travancore Code of Civil Procedure which are analogous to Order 47 Rule 1 and observed:
>
> 32. … Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein.
>
> It may allow a review on three specified grounds, namely,
>
> (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not

within the applicant's knowledge or could not be produced by him at the time when the decree was passed,

(ii) mistake or error apparent on the face of the record and

(iii) for any other sufficient reason. It has been held by the Judicial Committee that the words "any other sufficient reason" must mean „a reason sufficient on grounds, least analogous to those specified in the rule."

27. In Thungabhadra Industries Ltd. v. Govt. of A.P. (supra) it was held that a review is by no means an appeal in disguise whereof an erroneous decision can be corrected.

28. In Parsion Devi v. Sumitri Devi (Supra) it was held as under: (SCC p. 716) "Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. 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 record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be „reheard and corrected". There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise."

34. To appreciate the scope of review, it would be proper for this Court to discuss the object and ambit of Section 114 CPC as the same is a substantive provision for review when a person considering himself aggrieved either by a decree or by an order of Court from which appeal is allowed but no appeal is preferred or where there is no provision for appeal against an order and decree, may apply for review of the decree or order as the case may be in the Court, which may order or pass the decree. From the bare reading of Section 114 CPC, it appears that the said substantive power of review under Section 114 CPC has not laid down any condition as the condition precedent in exercise of power of review nor the said Section imposed any prohibition on the Court for exercising its power to review its decision. However, an order can be reviewed by a Court only on the prescribed grounds mentioned in Order 47 Rule 1 CPC, which has been elaborately discussed hereinabove. An application for review is more restricted than that of an appeal and the Court of review has limited jurisdiction as to the definite limit mentioned in Order 47 Rule 1 CPC itself. The powers of review cannot be exercised as an inherent power nor can an appellate power can be exercised in the guise of power of review."

13. Keeping in mind the aforesaid principles and position of law and reverting back to the case in hand, record bears testimony to the fact that Mst. Ashmi in the suit for partition and possession filed by her on 6.4.1983 had specifically claimed a share of 19 kanals and 10 marlas in the estate claimed to have been left behind by her father Sultan Ganai measuring 118 kanals and 9 marlas against her brothers and sister namely Mohd. Ahmad and Mst. Noori. Admittedly, said Mst. Ashmi in the said suit did not implead the present petitioners as party though being successors-in-interest of Subhan Ganai and Habib Ganai, the uncles of Mst. Ashmi and sons of Ramzan Ganai, the grand father of Mst. Ashmi. The present petitioners when challenged the judgment and decree obtained by Mst. Ashmi in her suit *supra* had specifically pleaded that the father of Mst. Ashmi namely Sultan Ganai had succeeded his father Ramzan Ganai along with other two brothers Samad Ganai and Habib Ganai and upon the death of their father Ramzan Ganai each of them inherited 39 kanalas out of the total of 117 of land and while Mst. Ashmi, her sister Mst. Noora and her two brothers Mohd. and Ahmad inherited their father Sutlan Ganai to the extent of his share 39 kanals, the present petitioners being successors-in-interest of Subhan Ganai and Habib Ganai also inherited them to the extent of their respective shares of 39 kanals and that Mst. Ashmi had by misrepresentation and without impleadment of the present

petitioners as party in the suit wrongly claimed the share of 19 kanals and 10 marlas out of total land of 118 kanals and 10 marlas over which Mst. Ashmi had no right except 39 Kanals, i.e., share of her father, Sultan Ganai. The present petitioners in the said suit had nowhere admitted or pleaded that the share of 19 kanals and 10 marlas of Mst. Ashmi was carved out of 39 kanals and 16 marlas which had fallen to the share of Sultan Ganai. A closer examination of the order under review reveals that while considering the Civil Second Appeal filed by the present petitioners, a patent and manifest factual error has crept in the order in this regard being apparent on the face of the record. The said error in fact has resulted into dismissal of the said appeal by this Court in terms of the order under review and as such warrants to be corrected being an error apparent on the face of the record.

14. Viewed thus, for the aforesaid reasons the instant petition succeeds and consequently order under review is set aside and the Civil Second Appeal no. 26/2013 is restored to its original number for its reconsideration.

15. Registry is directed to list the C2A No. 26/2013 on 07.08.2024.

(JAVED IQBAL WANI)
JUDGE

Srinagar
11-07-2024
N Ahmad

Whether the order is reportable: Yes

Whether the order is speaking: Yes