BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH
NEW DELHI
.....

R.A. NO. 02 OF 2015
IN
APPEAL NO. 106 OF 2013
(M.A. NO. 93 OF 2015)

IN THE MATTER OF:

Mrs. Libertina Fernandes
C/o Blue Waves,
Morjim, Pernem, Goa

.....Appellant/Review Petitioner

Versus

1. Goa Coastal Zone Management Authority,
   Through its Member Secretary, having its office at
   C/o Department of Science, Technology & Environment,
   Government of Goa, Opposite Saligao Seminary,
   P.O. Saligao, Bardez, Goa – 403511

2. The Village Panchayat Morjim
   Through its Secretary, Morjim
   Pernem, North Goa - 403572

.....Respondents

Counsel for Applicant:
Ms. Amrita Panda, Advocate.

Counsel for Respondents:
Appearance not marked

ORDER

PRESENT:
Hon'ble Mr. Justice Swatanter Kumar (Chairperson)
Hon'ble Dr. Justice P. Jyothimani (Judicial Member)
Hon'ble Dr.D.K. Agrawal (Expert Member)
Hon'ble Mr. B.S. Sajwan (Expert Member)
Hon'ble Mr. Ranjan Chatterjee (Expert Member)

Reserved on: 9th February, 2015
Pronounced on: 26th February, 2015

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1. Whether the judgment is allowed to be published on the net?
2. Whether the judgment is allowed to be published in the NGT Reporter?

Hon'ble Mr. Justice Swatanter Kumar, Chairperson

The appeal filed by the present Review Applicant came to be dismissed by a detailed judgment dated 13th January, 2015.

2. The applicant has filed the present Review Application under Section 19(4)(f) of the National Green Tribunal Act, 2010 (for short 'the NGT Act') read with Rule 22 of the National Green Tribunal (Practice and Procedure) Rules, 2011 (for short 'Rules of 2011') praying for review of the above judgment.

3. The review is primarily sought on the ground that material provisions of the Environmental Protection Act, 1986 (for short 'Act of 1986') and the NGT Act had not been brought to the notice of the Tribunal during the course of hearing, resulting in miscarriage of justice. It is also averred in this application that the Review Petitioner stands constrained to change her advocate and file the present petition in view of the extreme emergency, as the respondents are proposing to demolish the structure.

4. The ground for seeking review of this judgment is that Respondent no.1 has no jurisdiction to direct demolition of the property. It is the case of the applicant that power of such serious consequences cannot be exercised as an incidental or ancillary power.

5. While placing reliance on *S. Jagannath v. Union of India and Ors.* (1997) 2 SCC 87, it is contended that the Act of 1986 which has been enacted under Entry 13 of List I of the VII Schedule of the

Constitution of India, within which the entire statute operates, would not provide repository for such drastic powers. It is also contended in this application that directing demolition of property by Respondent no.1 is a colourable exercise of power which lacks competence and jurisdiction. The contention raised is that the Village Panchayat, i.e. Respondent no. 2, is the competent authority to direct demolition of a property by following the course of action contemplated under Section 66 read with Section 67 of the Goa Panchayat Raj Act, 1994 (for short 'Act of 1994'). A contention is also raised that the Tribunal vide its order dated 21st February, 2013 had directed demolition in the case of *Reva Beach Resort Pvt. Ltd. v. Goa Coastal Zone Management Authority*, 2013 ALL (I) NGT REPORTER (2) (DELHI) 72. On appeal, the Hon'ble Supreme Court, vide order dated 4th March, 2013 had directed status quo to be maintained.

6. We had not issued any notice to the respondents. The matter was directed to be listed on 9th February, 2015 when mentioned for hearing before the Tribunal. On 9th February, 2015, the Bench that had passed the judgment dated 13th January, 2015 was not available for hearing the matter [Hon'ble Chairperson, Hon'ble Mr. Justice U.D. Salvi (JM), Hon'ble Mr. D.K. Agrawal (EM) and Hon'ble Prof. A.R. Yousuf (EM)]. However, the learned counsel appearing for the applicant prayed for hearing of the case. With the consent and upon statement of the learned counsel appearing for the applicant, the matter was heard by a different Bench [Hon'ble Chairperson, Hon'ble Mr. Justice P. Jyothimani (JM), Hon'ble Mr. D.K. Agrawal

(EM), Hon'ble Mr. B.S. Sajwan (EM) and Hon'ble Mr. Ranjan Chatterjee (EM)].

7. We are of the considered view that such a Review Application is not maintainable. The applicant in the garb of review is, in fact, praying for re-hearing of the matter, which is not permissible. It is a settled principle of law that what ought to have been argued and was not argued and/or what was taken on grounds and not argued would be deemed to have been raised and rejected by the Court. The scope of review petition, in its correct perspective, does not permit re-adjudication of the issues as the scope of review jurisdiction is a limited one. The provisions of Order XLVII Rule 1 of the Code of Civil Procedure, 1908 (for short 'CPC') *stricto sensu* are not applicable to this Tribunal as the Tribunal has to evolve its own procedure in consonance with the Principles of Natural Justice in terms of Section 19 of the NGT Act. Even otherwise, the provisions of Order XLVII Rule 1 of CPC requires that an applicant, upon discovery of new or important matter or evidence which even after the exercise of due diligence could not be produced or were not within his knowledge at the time of the passing of decree or order on account of some mistake apparent on the face of record or any other sufficient reason, can invoke review jurisdiction. Thus, exercise of due diligence is the *sine qua non* for an applicant who desires to invoke the provisions of Order XLVII of CPC. It is not a remedy which is free of restriction. The Supreme Court in the case of *Parsion Devi and Ors. v. Sumitri Devi and Ors.* (1997) 8 SCC 715 held as under:

“9. 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 I 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". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

10. Considered in the light of this settled position we find that Sharma, J. clearly over-stepped the jurisdiction vested in the court under Order 47 Rule 1 CPC. The observations of Sharma, J. that "accordingly, the order in question is reviewed and it is held that the decree in question was of composite nature wherein both mandatory and prohibitory injunctions were provided" and as such the case was covered by Article 182 and not Article 181, cannot be said to fall within the scope of Order 47 Rule 1 CPC. 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. While passing the impugned order, Sharma, J. found the order in Civil Revision dated 25.4.1989 as an erroneous decision, though without saying so in so many words. Indeed, while passing the impugned order Sharma, J. did record that there was a mistake or an error apparent on the face of the record which was not of such a nature, "which had to be detected by a long drawn process of reasons" and proceeded to set at naught the order of Gupta, J. However, mechanical use of statutorily sanctified phrases cannot detract from the real import of the order passed in exercise of the review jurisdiction. Recourse to review petition in the facts and circumstances of the case was not permissible. The aggrieved judgment debtors could have approached the higher forum through appropriate proceedings to assail the order of Gupta, J. and get it set aside but it was not open to them to seek a "review" of the order of Gupta, J. on the grounds detailed in the review petition. In this view of the matter, we are of the opinion that the impugned order of Sharma, J. cannot be sustained and we accordingly accept this appeal and set aside the impugned order dated 6.3.1997.”

8. In the present case no specific ground covered within the scope of Order XLVII Rule 1, CPC has been raised. It is contended by the applicant that the grounds now pleaded, ought to have been raised and argued before the Tribunal when the appeal was being heard on merits. But the applicant, even at this stage has failed to even indicate, much less disclose or specifically state the facts that would show exercise of due diligence at the stage of hearing the appeal. Therefore, in our opinion this cannot be a valid ground for seeking review of the judgment on merits. Primarily, it is the change of counsel that has resulted in filing of the present review application. The learned counsel who was not the counsel when the matter was heard on merits would hardly be aware as to what was argued and what was not argued and what exactly transpired during the course of hearing in the main application. Filing of the review application upon change of counsel is not a practice that has found approval with the courts. The Delhi High Court, in somewhat similar situation, in the case of *Anil Kumar Jain and Anr. v. Union of India* & Ors. 122 (2005) DLT 431, held as under:-

> "4. At the very outset, we would mention that the writ petition was argued at great length by Mr. Lala Ram Gupta, Sr. Adv. Assisted by three advocates whicle the present application has been filed by the applicant after changing his counsel. Now, both, the counsel who argued the matter and the counsel who filed the present application were not counsel in the main writ petition. They would hardly be aware what was argued before the Court and what law was cited. We are unable to appreciate this practice and in fact are of the opinion that such practice should be deprecated particularly when the subsequent application is filed without even taking no objection from the previous counsel. In this application the applicant has not even stated that he was present in the Court during the course of arguments and understand the Court

proceedings so as to swear the affidavit in support of the averments made in the application.

5. Accepted norms of fair practice at the Bar would require that filing of application in the present manner may be avoided unless the facts and circumstances of the case compels the litigant to take recourse to such procedure. Exception to the general practice should be carved out in exceptional circumstances, that too in accordance with law otherwise it is likely to damage the fine fabric of faith in judicial administration. While emphasizing the need for adherence to this salutary rule in the case of Tamil Nadu Electricity Board and Anr. v. N. Raju Reddiar and Anr., AIR 1997 SC 1005, the Supreme Court held as under:

> "Once the petition for review is dismissed, no application for clarification should be filed, much less with the change of the advocate-on-record. This practice of changing the advocates and filing repeated petitions should be deprecated with heavy hand for purity of administration of law and salutary and healthy practice."

Even for this reason, we would not be expected to entertain this review application.

9. The adversarial system of litigation requires adherence to the rules of procedure. The Courts are called upon to adjudicate the rights of the parties and determine the issues to provide finality to the proceedings. The 'doctrine of finality' is an essential feature of administration of justice, and therefore, repeated litigation has to be avoided. It is for this reason that to prevent the abuse of process of court the tribunal and courts have often taken recourse to the principles of *res judicata* and constructive *res judicata* as contemplated under Section 11 and Order II Rule 2 of the CPC.

10. When an issue or a ground "might and ought" to have been raised as a ground of defence or attack, then it must be raised at

the first instance. Object of Explanation IV to Section 11 of CPC is to compel the plaintiff or defendant to take all grounds of attack which were open to him. The purpose is to require a party to bring forward his whole case in the first instance. In the case of *State of U.P. v. Nawab Hussain*, (1977) 2 SCC 806, the Hon'ble Supreme Court held that the principle of constructive res judicata, being a principle of estoppel prohibits re-assertion of a cause of action. This doctrine is based on two theories, the finality and conclusiveness of judicial decisions for final determination of disputes in general interests of community as a matter of public policy' and to 'prevent multiplicity of litigation'. The Supreme Court in the aforesaid case noticed with approval the following observations made in the case of *Greenhalgh v. Mallard,* (1947) 2 ALL ER 255:

> "I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constructive res judicata which in reality, is an aspect or amplification of the general principle."

11. The Hon'ble Supreme Court in the case of *Forward Construction Co. v. Prabhat Mandal,* (1986) 1 SCC 100, held that an adjudication is conclusive and final, not only as to the actual matter determined, but, as to every other matter, which the parties might

and ought to have litigated and had it decided as incidental to or essentially connected with the subject matter of the litigation. The Courts have also held that the word 'and' between the words 'might' and 'ought' is to be read as conjunctive and not disjunctive. While the word 'might' conveys knowledge on the part of the party affected, about the existence of the grounds of attack or defense, there 'ought' obliges a party to make such a ground of attack or defense in the proceedings initiated by him. This would normally be a matter of fact. In the present case, both these facts are evident that if the applicant desired, they might and ought to have raised these grounds and since these grounds were not raised, they would be deemed to have been raised and rejected and the present applicant cannot claim any benefit therefrom.

12. Despite returning the above finding that the present application is for re-hearing of the matter and *ex-facie* is an abuse of the process of Court, and thus not maintainable, we would still proceed to discuss the merits or otherwise of the contentions as raised by the applicant.

13. The principal argument as advanced and as it emerges from the application is that the Goa Coastal Zone Management Authority (for short 'Authority') has no jurisdiction to direct demolition of property which is admittedly constructed in the eco-sensitive area of Coastal Regulation Zone (for short 'CRZ'). It is contended that Section 5 of the Act of 1986 and the CRZ Notifications do not empower the Authority to pass such an order. It is the Village

Panchayat functioning under the Act of 1994 that can direct demolition in terms of Sections 66 and 67 of the Act of 1994. The power to direct demolition cannot be exercised as an incidental or ancillary power. It is only the authorities which are vested with the powers of granting permission/sanction to construct, that can order such demolition.

14. At the very threshold of the discussion, we may notice that the case of the applicant during the hearing of the appeal, as well as in this application is that, the construction/renovation of the building was done in furtherance to the permission to reconstruct/re-erect as granted by the Gram Panchayat, vide letter dated 30th September, 1986 and occupancy certificate which had been issued on 31st March, 1987 and, thereafter, no construction has been done by the applicant. Section 66 of the Act of 1994 and the Rules framed thereunder have no relevancy to the matters in issue before us. The construction, according to the applicant, was raised in the year 1986-1987. At that time, this Act was not in force as it came into force w.e.f 20th April, 1994. No construction is stated to have been done by the applicant under any permission granted or sanction accorded under the Act of 1994. The law in force at the relevant time (1986-1987) was the Goa, Daman and Diu Village Panchayat Regulation Amendment Act, 1969. Section 65 of the said Act read with Section 83, empowered the Government to frame Rules. In exercise of this power, the Government of Goa framed the Goa, Daman and Diu Village Panchayat (Regulation of Building) Rules, 1971 (for short 'Rules of 1971'). These Rules governed the

scheme of submission of building plans the manner in which such plans would be sanctioned and the construction which is carried out strictly in terms of the sanctioned plan. Under Rule 37, of the said Rules any construction/development in contravention to the Rules shall be demolished by the owner on receipt of notice from the concerned authorities within the stipulated time. In the event of default, the authorities would demolish the same at the cost of the owner. The expression 'Authority' had not been defined under the Rules which would obviously mean any authority in accordance with law.

15. The most important rule of the Rules of 1971 for purpose of the present case is Rule 3(2)(b), which contemplates various restrictions in relation to construction or development. Significantly, the permission would be granted by the Gram Panchayat only if the cost of construction does not exceed Rs. 20,000/- and the cover area under construction does not exceed the total area of the plot. The construction has to be kaccha, i.e. of mud and no stone should be used in the construction, except for laying foundation, erecting pillars and fixing windows and doors. No pucca masonry wall should be built towards construction. The applicant, despite grant of opportunities, did not produce the sanction plan which was granted by the Gram Panchayat on 30th September, 1986. Even during the course of hearing of the review application, the Counsel was called upon to produce the annexure (sanctioned plan) to the permission dated 30th September, 1986

which, for reasons best known to the applicant, is yet to see the light of the day.

16. Even these rules would not be of any help to the applicant in as much as it is not disputable before us that the present construction is a construction of concrete and iron with 21 + 4 pillars. The total constructed area is approximately 1680.894 sq mtr which is much beyond 60 per cent of the area in question. The cost of these constructions, as noticed in this judgment, runs into crores. Firstly, no sanction plan has been placed on record. Secondly, copy of the letter dated 30th September, 1986 is vague and does not contain its annexures. According to the Gram Panchayat, it had no records to show that such a huge and new construction was permitted by it or any such construction was permitted even in the year 1986-87. The Panchayat, in fact, could not and had no jurisdiction to pass such plans as per the law in force and as afore-indicated. It could only grant permission for repairing of kaccha structures or other permitted structure with the financial restrictions as afore-stated.

As per the object and reasons of the Act of 1986, the same was enacted not only to implement the decisions taken at the United Nations Conference at Stockholm in June, 1972 but also to consolidate various existing laws directly or indirectly dealing with the environmental matters that required enactment of general legislation for environmental protection. Section 5 of the Act of 1986 vests very wide powers in the Central Government, which for

the purposes of exercising its powers and performance of its functions under the Act of 1986, can issue directions to any person, officer or any authority who shall be bound to comply with such directions. These directions could be relating to the closure, prohibition or regulation of any industry, operation or process. Section 3 of the Act of 1986 empowers the Central Government to take measures as it deems necessary or expedient, for the purpose of protecting and improving the quality of the environment, as well as for preventing, controlling and abating environmental pollution. Under sub-Section 2 of Section 3 of the Act of 1986, it can take measures in relation to restriction of areas in which any industries, operations or processes or class of industry, operations or processes shall not be carried out or shall be carried out subject to certain safeguards in terms of Section 3(2)(v). In exercise of its powers, under these provisions, the Ministry of Environment & Forests (for short 'MoEF'), issued a Notification dated 19th February, 1991. It required uniform demarcation of the High Tide Line, as well as, identification of the Coastal Zone Management Plans. The Notification also declared prohibited activities within the CRZ as well as activities which were permissible subject to regulations. The Notification also classified CRZ into different categories i.e. CRZ I, CRZ II, CRZ III and CRZ IV. The area up to 200 metres of the High Tide Line was to be earmarked as 'No Development Zone' and no construction was to be permitted within this zone, except for repairs of existing authorised structures not exceeding existing Floor Space Index (for short 'FSI').

17. On 6th January, 2011, a fresh Notification was issued by MoEF in exercise of its powers conferred by Sub-Section 1 and Clause 5 of sub-Section 2 of Section 3 of Act of 1986 as well as Clause (b) and Sub Rule 3 of Rule 5 of the Rules of 1986. This Notification superseded the Notification of 19th February, 1991 except to the extent that the acts, omissions and actions taken under that Notification were saved by the Notification of 2011. This Notification declared the prohibited activities in CRZ. In CRZ III, the project or activities are undertaken subject to imposition of conditions and regulations. Whether one refers to the Notification of 1991 or 2011, both clearly stipulate CRZ I to IV. These Notifications prohibit as well as provide complete regulatory regime for permitting construction in CRZ, subject to the conditions stipulated in the permissions. We may notice here that construction of hotels/beach resorts can only be raised with prior approval of MoEF even in the areas of CRZ III. It describes area permissible FSI, construction to be consisted with the surrounding landscape, height of the building, prohibition on tapping of ground water, the quality of the treated effluents, solid wastes etc., installation of treatment effluent plants and approval from the concerned authorities. Under 2011 Notification, no construction shall be permitted within the No Development Zone except for repairs or reconstruction of existing authorized structure not exceeding existing FSI, existing plinth area and existing density and for permissible activities under the notification including facilities essential for activities. The construction and reconstruction of dwelling units of traditional

coastal communities, including fisher-folk may be permitted in accordance with a comprehensive plan. Under clause 4 of the Notification, even the dwelling units of traditional coastal communities are not to be used for any commercial activity and are not to be sold or transferred to any non-traditional costal community.

The applicant undisputedly satisfies none of the conditions postulated in these Notifications. As recorded in the order of the authority dated 15th November, 2013, the walls that have been raised at the site, the applicant disowned the same and agreed that it could be demolished. She admitted that the columns and the structures are of steel and concrete. She was even confronted with the photographs of construction of site. Then the authority contended that the construction has been built over a sand-dune and the structure falls in the CRZ. This clearly demonstrates the extent of violation committed by the applicant. Admittedly, the applicants have taken no permission from any concerned authority under any law in force, much less under all laws in force. All the Notifications at all relevant times prohibited construction in the CRZ, wherever and to whatever extent it was permitted, the same is subject to restriction and construction could only be raised after taking permission of the concerned authority. The purpose is to ensure that no unauthorised activity is carried on in the CRZ and the CRZ is protected environmentally and ecologically. Any illegal and unauthorized construction is bound to have adverse impact on this eco-sensitive area. Since, no construction could be raised

without permission of the competent authority, such authority would inevitably have an express and in any case an implied power to remove such unauthorized and illegal structure from the CRZ.

The applicant, undisputedly, raised new and massive constructions in violation of all laws, without any permission or consent of the concerned authorities. The environment and ecology of the area has certainly been thrown to winds by this illegal and unauthorised construction. Therefore, essentially, construction has to be demolished to restore ecology and environment of the area. Nothing prevented the applicant to seek permission and consent from the competent authorities in accordance with the provisions of the CRZ Notification before commencing any construction. Having failed to act in accordance with law and, in fact, doing everything in violation of the law, the applicant cannot be heard on equitable grounds, because one who flouts the law cannot claim aid of law. The Act of 1994 and the CRZ Notification issued under the Act of 1986 are independent legislations and are not in conflict with one another. They operate in distinct and different fields. The purpose of both the Acts is different. They have no commonality in their field of operation. A person may raise construction in accordance with the permission granted by the Gram Panchayat, which would mean that such construction is incapable of impinging on or infringing the CRZ Notification. The permission of the Panchayat would only control the manner, extent and place where construction is permitted to be raised. Panchayat cannot have jurisdiction of waiving other laws in force. If such construction has not been

raised without obtaining CRZ clearance and if it violates the environmental laws in force then, such construction can certainly be demolished for restoration of environment and ecology of the area covered under CRZ. Various laws can parallely operate in relation to the same subject matter and the applicant is expected to comply with all the laws in force. In the present case, the applicant has complied with none.

18. Another very important aspect of the case which has persuaded us in declining the relief to the applicant was that the applicant has not approached the Tribunal with clean hands. He has made misrepresentation before the Tribunal and has failed to produce the most important document which ought to have been in his power and possession (the sanction of building plans by the Panchayat in the year 1986) and particularly when, inspection by the Members of the Respondent Authority and the photographs placed on record clearly shows that it is a large scale new construction where huge quantity of iron, concrete and cement has been used.

On the one hand, the applicant has failed to discharge the onus placed on her and on the other, she has taken incorrect and misleading pleas before the Tribunal. It was obligatory on her to take permission and consent from the concerned authorities before starting any construction. She has miserably failed to comply with the requirements of law. Thus, in our opinion, she cannot claim any equity and her contention has to be rejected.

17. For the afore-stated reasons, we find no merit in this application. The same is dismissed.

Justice Swatanter Kumar
Chairperson

Justice Dr. P. Jyothimani
Judicial Member

Dr. D.K. Agrawal
Expert Member

Mr. B.S. Sajwan
Expert Member

Mr. Ranjan Chatterjee
Expert Member

New Delhi
26th February, 2015