

# SUPREME COURT OF INDIA

Malthesh Gudda Pooja

Vs.

State of Karnataka & Ors.

C.A.No.8525 of 2011

(R.V. Raveendran and H.L.Gokhale,JJ.,)

11.10.2011

## JUDGMENT

**R.V.Raveendran,J.,**

SLP(Civil)No.19954/2010

1. Leave granted.

2. By an order dated 8.11.2006, the Government of Karnataka appointed the Assistant Commissioner, Haveri District as the Administrator of the Malathesh (Sri Mylara Linga) Temple, Devara Gudda, till the formation of a Managing Committee. The appellant along with one Guddanna Gowda claiming to be Panchas (Trustees) filed Writ Petition No.16158/2006 in the High Court of Karnataka challenging the said notification dated 8.11.2006. The third respondent herein got himself impleaded in the said writ petition, as a devotee of the temple. The said writ petition was allowed in part by a learned Single Judge, by order dated 22.12.2006 and the said notification dated 8.11.2006 was quashed, reserving liberty to the State to pass appropriate orders after affording an opportunity to the writ petitioners. The writ petitioners filed an appeal (Writ Appeal No.169/2007) at the Dharwad Circuit Bench challenging that part of the order reserving liberty to respondents 1 and 2 to pass fresh orders. By judgment dated 31.1.2009, a Division Bench of the High Court (V.Gopala Gowda and L.Narayana Swamy, JJ) dismissed the writ appeal.

3. The appellant filed a review petition (R.P.No.1513/2009) for review of the said order, at the Dharwad Circuit Bench. The said review petition was placed before a Division Bench consisting of K.Sreedhar Rao and Ravi Malimath, JJ., at the Dharwad Circuit Bench. The third respondent objected to the hearing of the review petition by the said Bench on the ground that the writ appeal was heard and disposed of by the Division Bench consisting of V.Gopala Gowda and L.Narayana Swamy, JJ. and the review petition should therefore be heard and decided by the same Bench. He also contended that the notification dated 29.12.2008 of the High Court notifying that the review petitions relating to judgments passed by a Division Bench or Single Bench in respect of Circuit Bench, Dharwad will be

posted as per the roster existing in the Circuit Bench, Dharwad, was contrary to Rule 5 of the Karnataka High Court Rules, 1959.

4. A Division Bench consisting of K.Sreedhar Rao and Ravi Malimath, JJ. heard the said review petition and allowed it by judgment dated 17.12.2009 and directed that the appeal should be heard afresh for disposal in accordance with law. With reference to the objection of the third respondent that the learned Judges who disposed of the appeal alone should hear the review petition, it was held as follows :

"3. Rule 5 is not a rigid mandate. The exception to the rule is provided in the rule itself. In the case of death or non-availability of the judge, the review petition is permitted to be heard by the Bench other than the one, which passed the order. The experience has shown that for correcting trivial mistakes in the judgment, the review jurisdiction is invoked by the parties. In the scheme of sitting arrangement for the Circuit Benches, it is difficult to obtain the same combination to hear the review within a reasonable time. Therefore, in order to obviate the hardship to the litigants, the above notification is issued. Even on merits when a judgment or an order is to be reviewed, the similar difficulty of non-availability of the Bench, which passed the order within a reasonable time, is very much felt."

4. The exercise of power of allotment of subjects and cases is the prerogative of the Hon'ble Chief Justice.

5. Keeping in view the practical considerations the above notification is issued. Therefore the notification cannot be termed as arbitrary and illegal."

5. The appellant thereafter filed a memo dated 25.3.2010 for listing the writ appeal (restored by order dated 17.12.2009) for fresh hearing. The said memo came up for orders before a Division Bench consisting of D.V. Shailendra Kumar and N.Ananda, JJ., at Dharwad Circuit Bench. After hearing the parties on the said memo, the said Division Bench passed the impugned order dated 23.4.2010 holding that the judgment dated 17.12.2009 in Review Petition No.1513/2009 allowing the petition in exercise of the review jurisdiction under Order 47 Rule 1 CPC was nothing short of a nullity in the eye of law and was without jurisdiction, having regard to the fact that the Bench which rendered the judgment in writ appeal No.169/2007 (V.Gopala Gowda and Narayana Swamy, JJ) were still Judges in the High Court and were available for hearing; and that therefore a different Division Bench had no jurisdiction to take up a review petition, grant a review and reverse the order made in the writ appeal. Consequently the memo filed by the appellant for listing of restored Writ Appeal No.169/2007 for hearing was dismissed. The Division Bench relied upon the provisions of Order 47 Rules 1 and 5 of Code of Civil Procedure (for short the `Code') and Rule 5 of the High Court of Karnataka Rules, 1959 (`High Court Rules' or `Rules' for short) in passing the order dated 23.4.2010. It held :

“(i) The Division Bench which heard the review petition had no jurisdiction to take up the review petition as the learned Judges who constituted the Bench which heard and disposed of the writ appeal on 31.1.2009 continued to be the Judges of the court.

(ii) The review proceedings are not by way of appeal and have to be strictly confined to the ambit of order 47 Rule 1 CPC.

(iii) The Division Bench which heard the review petition instead of confining itself to the ambit of Order 47 Rule 1 had dealt with the merits of the judgment dated 31.1.2009 as if it was sitting in appeal over the said judgment and allowed the review petition which was contrary to law. The effect of the impugned order dated 23.4.2010 was to declare that the review judgment dated 17.12.2009 was non est and a nullity and consequently the earlier judgment dated 31.1.2009 passed in the writ appeal continued to be in effect. The said order is challenged in this appeal by special leave.”

#### Question for consideration

6. The question for consideration is whether a Division Bench of the High Court, while considering a memo for listing an appeal restored for fresh hearing, on grant of application for review by a co-ordinate bench could refuse to act upon the order of review on the ground that the said order made by a bench different from the bench which passed the original order, granting review is a nullity and that the original order stands. Who can hear applications for review?

7. Order 47 of the Code relates to review. The relevant portions of Rules 1(1), 4, 5, and 8 are extracted below :

"1. Application for review of judgment.--(1) Any person considering himself aggrieved -

(a) by a decree 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 judgment to the Court which passed the decree or made the order. X x x x x

4. Application where rejected.--(1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application. (2) Application where granted.--Where the Court is of opinion that the application for review should be granted, it shall grant the same: Provided that –

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and x x x x x

5. Application for review in Court consisting of two or more judges. Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

x x x x

8. Registry of application granted, and order for re-hearing.-- When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit."

(emphasis supplied)

8. Section 122 of the Code relates to power of the High Courts to make rules. The said section empowers the High Court from time to time, after previous publication to make rules regulating their own procedure, and may by such rules annul, alter or add to all or any of the rules in the First Schedule to the Code. The High Court, in exercise of the powers conferred under Article 225 of the Constitution, section 122 of the Code and other relevant provisions, with the previous approval of the Government of Karnataka promulgated and issued the High Court of Karnataka Rules, 1959 in regard to the practice and procedures to be followed by the High Court. Rule 5 of chapter 3 of the said Rules provides as under :

"5. Every petition or application for review, reconsideration or correction of a judgment, decree, order or sentence shall be posted before the original Bench which pronounced, made or passed such judgment, decree, order or sentence or if the Judge or any of the Judges who constituted the said Bench is not available by reason of death, retirement or absence, before any other Bench constituted in the same manner as the original Bench."

(emphasis supplied)

The Rules made under Rule 122 cannot be inconsistent with the body of the Code (that is sections in the Code), but can be inconsistent with any of the Rules in the First Schedule to the Code. As the Rules under section 122 can alter or add any rule in the First Schedule to the Code, the provisions of Rule 5 of Chapter 3 of the High Court Rules will prevail over Rule 5 of Order 47 of the Code.

9. After the Circuit Bench of the High Court started functioning at Dharwad and Gulberga in July 2008, the Registry faced difficulties in listing the review petitions before the Bench which heard and disposed of the matters due to the fact that both or one of the Judges of the Bench will not be available at the Circuit Bench. Certain number of Judges from the main Bench chosen by the Chief Justice as per a broad roster, hold sittings for 5 to 6 weeks in the circuit benches followed by other batches of Judges and many a time a Judge who had sat during a particular session of 5 to 6 weeks may not sit again in the same circuit Bench for more than six months to one year. Further in case of decisions rendered by division benches, the two learned Judges who constituted the Bench may not sit together in the circuit Bench again as they may be posted during different periods before the Circuit Bench. Therefore the Registry submitted a note dated 19.12.2008 to the learned Chief Justice seeking directions in that behalf. The relevant portions of the said note are extracted below :

".....in case of the Review Petitions relating to judgment, decree, order or sentence pronounced, made or passed by the Division Bench out of which one of the Hon'ble Judge is not available for the reasons stated in Rule 5, it may not be permissible to post the said Review Petition before the Division Bench assigned with the respective subjects at this Circuit Bench even if one of the Hon'ble Judge having sittings at this Circuit Bench was a member of the Division Bench original constituted. X x x x x Because, having regard to Rule 5 of the High Court of Karnataka Rules 1959, it may not be permissible to post such of the Review Petitions before other Single Bench constituted at this Circuit Bench assigned with the concerned subjects. Consequently, either such Review Petitions shall have to be kept pending at this Circuit Bench for being posted before the original Bench, which pronounced, made or passed such judgment, decree, order or sentence as and when it is constituted at this Circuit Bench or such Review Petitions may have to be transferred to the Principal Bench for being posted before the original Bench. In view of the above said Rule 5 of the Karnataka High Court Rules, 1959, kind orders are solicited as to what norms are to be followed, if a Review Petition is filed against the order of Division Bench or a Single Bench on merits before the High Court Circuit Bench, Dharwad."

On the said note, the learned Chief Justice made an order that the review petition may be posted as per the roster. In pursuance of it, the High Court issued a notification No.HCBB.CBD.01/2008 dated 29.12.2008 reading as follows :

"It is hereby notified that the Review Petitions relating to Judgments, Decree, Order or sentence pronounced, made or passed by the Division Bench or Single Bench in

respect of Circuit Bench, Dharwad, will be posted as per the roster existing in the Circuit Bench, Dharwad."

It is in view of the said notification, instead of listing the review petitions before the Judges who passed the order, the review petitions were being listed before the Bench which was currently assigned the subject roster.

10. The validity of the circular dated 29.12.2008 was considered by another Division Bench of the High Court in *Sri Balachandra Vigneshwara Dixit v. H.S. Srikanta Babu* [C.C.C. No.2020 of 2009 (Civil) decided on 26.3.2010]. The said decision held that the circular dated 29.12.2008 directing that the review petitions relating to judgments, decree and orders made by a Division Bench or a Single Bench at Circuit Bench, Dharwad be posted as per the roster existing in the Circuit Bench, Dharwad is ultra vires Rule 5 of the Karnataka High Court Rules, 1959 and quashed the said circular. In that behalf, the Division Bench observed as follows :

"45. In this context, if a review petition is filed and the judges who passed the order are not sitting at the Circuit Benches, then it is open to the parties to file a review petition either at the Circuit Bench where the original order was passed, or at the Principal Bench. Then it is open to the Chief Justice to constitute the bench in accordance with Rules, arrange roster and have the said review petition heard and decided either at the Circuit Bench or at the Principal Bench. The party had the opportunity of full hearing of the case. If the order is against him, without availing the remedy of appeal, if he wants to avail the remedy of review, he cannot plead that his convenience alone should be taken into consideration in arranging hearing of the review petition. If he is really aggrieved, wants review, it should not be difficult for him even to appear before the Principal Bench and argue his case for review.

46. In that view of the matter, the contention that a review petition cannot be heard by the Principal Bench at Bangalore when the original order is passed at the Circuit Benches at Dharwad/Gulbarga, is without any substance. It would be better if those review petitions are also heard at the Circuit Benches, and that is possible only when the original Bench which passed the order, is functioning in the Circuit Benches. If the original Bench is not functioning in those Circuit Benches, and if there is difficulty to constitute such Bench for the purpose of hearing the review petition, it is open to the learned Chief Justice to constitute the Bench at the Principal Bench at Bangalore, and the parties can prosecute the same at Bangalore."

The said order was challenged by the High Court in SLP [C] No.14337/2010 and this court on 13.5.2010 stayed the operation of the said order. Be that as it may. The validity of the order dated 29.12.2008 does not arise for our consideration in this case. It is relevant to note that the impugned order dated 23.4.2010 was made after the decision of the High Court in *Sri Balachandra Vigneshwara Dixit* and before the stay of that decision by this Court.

11. We may now examine the scope of Rule 5 of Chapter 3 of the High Court Rules and Rule 5 of Order 47 of the Code. At the outset it should be noticed that there is no inconsistency between the two provisions. As noticed above Rule 5 of Chapter 3 of the High Court Rules provides that every petition for review of a judgment shall be posted before the original Bench which pronounced the judgment or if the Judges who constituted the such Bench constituted are not available by reason of death, retirement or absence before any other Bench in the same manner as the original Bench. The word 'absence' is not defined and the duration of absence is not indicated in the said Rule. The ordinary meaning of the word 'absence' is "the state of being away from one's usual place". Order 47 Rule 5 of the Code, provides that the review petition shall be heard only by the Judges who passed the order if the said Judges continues or continue attached to the Court (at the time when the application for review is made) and are not precluded by absence or other cause from considering the application for a period of six months. The words "continue attached to the Court" mean available to perform normal duties and has not been transferred or away on deputation. The words 'absence or other cause for a period of six months' in Rule 5 of Order 47 of the Code and the words 'by reason of death, retirement or absence' in Rule 5 of Chapter 3 of the High Court Rules, in essence refer to the same causes, due to which the review application cannot be heard by the same bench which passed the original order. As Rule 5 of Chapter 3 of High Court Rules does not specify the period of 'absence' but it is clear from the context that it does not refer to casual absence. Therefore, it is appropriate to interpret the said words as 'absence for a period of six months next after the application' by taking guidance from Rule 5 of Order 47 of the Code.

12. This court in *Reliance Industries Ltd. vs. Pravinbhai Jasbhai Patel & Ors*<sup>1</sup>. explained the object and scope of review applications as under:

"It has to be kept in view, that review petitions are not by way of appeals before the superior Court but they are by way of requests to the same Court which decided the matter, for persuading it to recall or reconsider its own decision on grounds which are legally permissible for reviewing such orders. As laid down by O. XLVII R. 5, CPC as far as possible the same two learned Judges or more Judges who decided the original proceedings have to hear the review petition arising from their own judgment. Thus in substance a review amounts to reconsideration of its own decision by the very same Court. When the Court sits to review its own order, it obviously is not sitting in appeal over its judgment but is seeking to have a fresh look at its own judgment of course within the limits of review powers, but still invoking for that limited purpose the very same jurisdiction which it exercised earlier. It is axiomatic that if a Division Bench of two learned Judges deciding the appeal had exercised appellate powers and when its decision is sought to be reviewed it can be said to be required to reconsider its own decision within the limits of review jurisdiction but still in exercise of the same appellate jurisdiction which it earlier exercised. Similarly when a decision rendered in exercise of original jurisdiction by a Bench of two learned Judges is sought to be reviewed the learned Judges exercising review jurisdiction subject to the limitations inhering in such an exercise, can be said to be called upon to reconsider their decision earlier rendered in exercise of the very same

original jurisdiction. In that review jurisdiction takes colour from the nature of the jurisdiction exercised by the Court at the time when the main judgment, sought to be reviewed, was rendered. Review jurisdiction, therefore, cannot be said to be some independent jurisdiction sought to be exercised by the Court de hors the nature of the jurisdiction exercised by it when the judgment sought to be reviewed was rendered by it."

13. Order 47 Rule 5 of the Code and Rule 5 of the Chapter 3 of the High Court Rules require, and in fact mandates that if the Judges who made the order in regard to which review is sought continue to be the Judges of the court, they should hear the application for review and not any other Judges unless precluded by death, retirement or absence from the Court for a period of six months from the date of the application. An application for review is not an appeal or a revision to a superior court but a request to the same court to recall or reconsider its decision on the limited grounds prescribed for review. The reason for requiring the same Judges to hear the application for review is simple. Judges who decided the matter would have heard it at length, applied their mind and would know best, the facts and legal position in the context of which the decision was rendered. They will be able to appreciate the point in issue, when the grounds for review are raised. If the matter should go before another Bench, the Judges constituting that bench will be looking at the matter for the first time and will have to familiarize themselves about the entire case to know whether the grounds for review exist. Further when it goes before some other Bench, there is always a chance that the members of the new bench may be influenced by their own perspectives, which need not necessarily be that of the Bench which decided the case. Benjamin Cardozo's celebrated statement in the Nature of Judicial Process (page 12) is relevant in this context:

"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; .....In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eye except our own."

Necessarily therefore, when a Bench other than the Bench which rendered the judgment, is required to consider an application for review, there is every likelihood of some tendency on the part of a different bench to look at the matter slightly differently from the manner in which the authors of the judgment looked at it. Therefore the rule of consistency and finality of decisions, make it necessary that subject to circumstances which may make it impossible or impractical for the original bench to hear it, the review applications should be considered by the Judge or Judges who heard and decided the matter or if one of them is not available, at least by a bench consisting of the other Judge. It is only where both Judges are not available (due to the reasons mentioned above) the applications for review will have to be placed before some other bench as there is no alternative. But when the Judges or at least one of them, who rendered the judgment, continues to be members or member of the court and

available to perform normal duties, all efforts should be made to place it before them. The said requirement should not be routinely dispensed with.

14. When the provision for review by the same Judge/s was made, it was made on the assumption that the Judges will be available at the same place. The Rules did not contemplate the court having Benches outside the main seat or Circuit Benches and Judges moving from Bench to Bench or Judges and coming back after three months or six months. A Judge who sits and hears a matter in a Circuit Bench away from the main seat, may not be available in that particular Circuit Bench for a considerable time which may vary from three to six months or even more. Further, when two Judges heard the matter at a Circuit Bench, the chances of both Judges sitting again at that place at the same time, may not arise. But the question is in considering the applications for review, whether the wholesome principle behind Order 47 Rule 5 of the Code and Rule 5 of Chapter 3 of the High Court Rules providing that the same Judges should hear it, should be dispensed with merely because of the fact that the Judges in question, though continue to be attached to the Court are sitting at the Main bench, or temporarily at another bench. In the interests of justice, in the interests of consistency in judicial pronouncements and maintaining the good judicial traditions, an effort should always be made for the review application to be heard by the same Judges, if they are in the same court. Any attempt to too readily provide for review applications to be heard by any available Judge or Judges should be discouraged. With the technological innovations available now, we do not see why the review petitions should not be heard by using the medium of video conferencing. Or an appropriate rule can be made, if such a rule is not already available, for consideration of the application written submissions alone. For example Order XL Rule 3 of the Supreme Court Rules provides that unless otherwise ordered by the court, an application for review shall be disposed of by circulation without any oral arguments but with written arguments. That will not in any way violate section 114 of the Code providing for review. The solution may not be to send the review petition to the place where the concerned Judges are holding their sitting in view of the fact that would involve travel, engaging of new counsel, additional cost etc. and defeat the very purpose of having circuit benches. Every effort should be made to achieve the object of review by ensuring that the matter is considered by the Judge or the Bench which rendered the judgment. Be that as it may.

#### Finality of decisions

15. But the crucial question is this: The review application having been placed before the bench holding the roster, as per the standing instructions of the Chief Justice, and the said bench having heard and granted the review application, whether before another bench a request is made for early hearing can say it will ignore the order granting review as it is a nullity?

16. In this case, the review petition was placed before different bench (bench holding the roster for hearing writ appeals) as per the Notification dated 29.12.2008 issued by the High Court under the directions of the learned Chief Justice requiring the review petition to be placed before a bench assigned to hear writ appeals as per the then existing roster. As on

17.12.2009, when another bench heard and decided the matter, the listing of the case before that bench and hearing by that bench was valid as per rules. The Judges constituting the original bench were not sitting at Dharwad. The review petition was filed on 2.3.2009 and for more than six months, the original Bench either did not sit or dispose of the review petition. When the review petition was placed for hearing before the roster bench, it was possible that for six more months there was no likelihood of the Judges constituting original bench being together at Dharwad. The bench before which the review application was placed held the writ appeal roster. The said bench considered and rejected the contention that the same bench which passed the order should hear the review application, in view of the Notifications dated 29.12.2008 and that bench also held that the Chief Justice had the power and authority to issue the notification dated 29.12.2008. The order dated 17.12.2009 was therefore neither a nullity nor one lacking of inherent jurisdiction, nor obtained by fraud. Even assuming it to be erroneous, it was final as it was not challenged.

17. Once the application for review was granted on 17.12.2009, the order reviewed stands recalled. Consequently the review appeal stood revived and restored. Therefore when the appellant filed a memo for listing the writ appeal for hearing, he was not really seeking a judicial order for restoration but only a direction for fixing a date for hearing the writ appeal. When an application or memo is filed in a matter where review has been granted, the Bench dealing with such memo or application is bound to proceed on the basis of the said order granting review, in view of the principles of finality and res judicata. Even a wrong decision between parties which has attained finality is binding and cannot be re-agitated or re-opened at a later stage. As noticed above, the review order dated 17.12.2009 considered the statutory provisions relating to review and consciously arrived at a decision that the provisions thereof did not prevent it from hearing the application for review. It should be noted that neither party was aggrieved by it and the order dated 17.12.2009 was not under challenge. Therefore when the memo for posting was filed by one of the parties, the court, being bound by its final decision rendered on 17.12.2009 ought to have listed the writ appeal for hearing and could not have examined the correctness or validity of review order dated 17.12.2009.

18. We therefore allow this appeal, set aside the impugned order dated 23.4.2010 and direct the Writ Appeal No.169/2007 be listed for final hearing. Our observations as to who should hear review applications, will not affect the validity of orders made on review applications by roster benches as per notification dated 29.12.2008 and which have attained finality.

Judgment Referred.

<sup>1</sup>(1997) 7 SCC 0300