Supreme Court of India
Smt. Meera Bhanja vs Smt. Nirmala Kumari Choudhury on 16 November, 1995
Equivalent citations: AIR 1995 SC 455, 1995 (43) BLJR 892, JT 1994 (7) SC 536, 1995 (0) MPLJ 494, 1994 (4) SCALE 985, (1995) 1 SCC 170, 1994 Supp 5 SCR 503
Author: S Majmudar
Bench: B J Reddy, S Majmudar
ORDER S.B. Majmudar, J.

1. Special leave granted. We have heard learned Counsel for the contesting parties finally in this appeal. Accordingly, this appeal is being finally disposed of by this judgment.

2. This appeal by special leave under Article 136 of the Constitution involves a short question about the review jurisdiction of the High Court in setting aside the earlier decision of the High Court in Second Appeal No. 569 of 1973. A few relevant facts leading up to this appeal are required to be noticed at the outset. The appellant is the original plaintiff who had filed a title suit No. 67 of 1970 in the second Court of the learned Subordinate Judge at Midnapore in West Bengal. In that suit, the appellant- plaintiff claimed partition and separate possession of two plots, namely, C.S. Plot Nos. 73 and 74. Her case was that her husband Dr. Umaprasanna Bhanja and respondent-defendant's husband Dr. Phanindra Nath Choudhury were close friends, that by two registered documents they had purchased the aforesaid two plots and that the plaintiff- appellant became entitled to the northern halves of the two plots totalling. 10 decimals. Her case is that the parties dug a well in the middle portion of the respective plots. It was further contended that the defendant-respondent in disregard of the plaintiff-appellant's interests, started construction of some buildings, encroaching upon her area. Consequently, he aforesaid suit was filed claiming partition of two plots by metes and bounds. The plaintiff-appellant alternatively prayed for declaration of title and sought permanent injunction in respect of C.S. Plots Nos. 73 and 74.

3. The learned trial Judge by his judgment and decree dated 15th March, 1971, held that the plaintiff-appellant was entitled to partition of C.S. Plot No. 73 and so far as C.S. Plot No. 74 was concerned the appellant was held entitled to a decree of declaration of title in respect of specific 5 decimals of land and permanent injunction against the defendant to that extent.

4. Being aggrieved by the judgment and decree of the trial court, the respondent-defendant preferred Title Appeal No. 322 of 1971, while the appellant filed cross objections against dismissal of her suit for partition of C.S. Plot No. 74. The learned Additional District Judge by his order dated 29th June, 1972, directed that the appellant would get a declaration of title, confirmation of possession and injunction, but so far as the appellant's prayer for partition of C.S. Plot No. 74 was concerned, the appellate Court confirmed the learned Subordinate Judge's judgment.

5. The appellant being aggrieved by the order of the learned Additional District Judge preferred a Second Appeal to the High Court of Calcutta, being Appeal from Appellate Decree No. 569 of 1973. The Division Bench of the High Court by its judgment and order dated 3rd August, 1978, allowed the Second Appeal and held that the plaintiff-appellant was entitled to partition of C.S. Plot No. 74 also. The respondent-defendant being aggrieved by the said judgment dated 3rd August, 1978, filed a

Review Petition under Order 47, Rule 1 of the CPC, challenging the findings of the Division Bench of the High Court. The Review Petition was heard on 5th September, 1984 by another Division Bench of the High Court, and was partly allowed so far as the C.S. Plot No. 74 was concerned. It set aside the decree for partition as granted by the earlier Division Bench in Second Appeal and directed that the Second Appeal be re-heard so far as the question of partition of C.S. Plot No. 74 was concerned. The Review Petition was, however, dismissed so far as the partition decree for C.S. Plot No. 73 as passed by the trial Court and as affirmed by the High Court, went. Thereafter, by a later order dated 8th July, 1986, Second Appeal No. 569 of 1973 was ordered to be dismissed in respect of C.S. Plot No. 74. It is this decision of the latter Division Bench of the High Court dismissing Second Appeal of the appellant qua C.S. Plot No. 74 as passed pursuant to the earlier review order, that has been brought in challenge before this Court by special leave as noted earlier.

6. The learned Counsel appearing for the appellant vehemently submitted that though the Review Bench had he'd that there was an apparent error committed by the earlier Division Bench in allowing the Second Appeal in connection with C.S. Plot No. 74, in substance, the latter Division Bench had sat in appeal over the decision of the earlier Division Bench and had passed an order wherein it re-appreciated the evidence, both oral and documentary, while holding that the plaintiff's case for a partition and separate possession of C.S. Plot No. 74 was not maintainable, that this, approach of the Review Bench was beyond the scope and outside the jurisdiction conferred on the Court under Order 47, Rule 1, and that in fact there was no , apparent error which could justify the impugned review judgment and the consequential order of 8th July, 1986. On the other hand, learned Counsel for the respondent submitted that as the earlier Division Bench had not properly considered all the relevant aspects and had left many loose threads to be tied, the latter Division Bench was perfectly justified in taking the view that the earlier decision of the High Court suffered from a patent error of law entitling the Review Bench to interfere with the findings and the order of the earlier Division Bench.

7. Having given our anxious consideration to these rival contentions, we find that this appeal is required to be allowed.

8. It is well-settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, C.P.C. In connection with, the limitation of the powers of the Court under Order 47, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of Aribam Tuleshwar Sharma v. Aribam Pishak Sharma and Ors. , speaking through Chinnappa Reddy, J., has made the following pertinent observations :

It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent mis-carriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of

the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.

Now it is also to be kept in view that in the impugned judgment, the Division Bench of the High Court has clearly observed that they were entertaining the review petition only on the ground of error apparent on the face of the record and not on any other ground. So far as that aspect is concerned, it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. We may usefully refer to the observations of this Court in the case of Satyanarayan Laxmi Narayan Hegde and Ors. v. Mallikarjun Bhavanappa Tirumale , wherein K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record:

An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the power of the superior Court to issue such a writ.

9. In the light of this settled legal position let us try to see whether in the present case the latter Division Bench while dealing with the review petition had over-stepped the limits of jurisdiction under Order 47, Rule 1, and whether it had resorted to re-appreciation of evidence by almost sitting in appeal over the decision reached by the earlier Division Bench.

10. We have to keep in view the fact that the controversy in the present proceedings centers only around portability of C.S. Plot No. 74. So far as C.S. Plot No. 73 is concerned, the decree for partition and separate possession as passed in favour of the appellant has become final as observed by the Review Bench itself, while dismissing the Review Petition for that plot. So far as the disputed Plot No. 74 is concerned, the High Court in Second Appeal, vide judgment dated 3rd August, 1978, clearly observed that the appellate Court has passed a very laconic order, had not considered the cross objections and had disposed of the first appeal and, therefore, the High Court exercised powers under Section 103 of C.P.C. While doing so the Division Bench of the High Court considered the documents of title for both the plots, namely, C.S. Plot Nos. 73 and 74. So far as C.S. Plot No. 74 was concerned, on internal page 8 of the earlier judgment, it was held that in place of C.S. Plot No. 74, three plots had emerged instead during R.S. operations. They were Plot Nos. 1507, 1508 and 1509, the area being .0070, .508 and .0770 respectively. R.S. Khatian showed the joint proprietorship of both the parties in R.S. plots and there had been no separate Khatian in respect of separate ownership of the plaintiff or the defendant. Then the Division Bench considered the documents of title. So far as Plot No. 74 was concerned, the Division Bench considered Exh. 'G', being Kobala executed by Jiten Banerjee in favour of defendant on 11th September, 1940. The plot area was described as .10 decimal. Then the Division Bench considered Exh. 4A, being Kobala dated 14th of April, 1947 executed by respondent-defendant in favour of the appellant in respect of .05

decimals of land out of Plot No. 74. It was stated in the Kobala that half of Plot No. 74 was being sold to the plaintiff by the defendant. The Division Bench also noted the fact that the total area of C.S. Plot No. 74 was .10 decimals. The Division Bench then noted that Khatian No. 274 of Mouza Panchberia prepared during the recent revisional settlement had been marked Exh. 3 and Khatian No. 293 related to R.S. Plot Nos. 1510 and 1511. Those two Khatians were in the name of both the plaintiff and the defendant as already mentioned. Thereafter, the Division Bench considered the oral evidence and came to the conclusion that the structures were constructed jointly by the parties and a common wall was raised for the convenience of use, the whole wall being used in common. The Division Bench considered the defendant's version and rejected the same by holding that from the Khatian executed by the defendant in favour of the plaintiff no statement was found or indicated that any structure was sold to the plaintiff as stated by defendant's witness No. 1 or as mentioned in the written-statement. Nothing was shown that any demarcated portion of C.S. Plot No. 74 was sold to the plaintiff. Rather from a reading of the kobala it was quite clear that half share of Plot No. 74 was sold by the defendant to the plaintiff. The story of sale of structure along with the land of C.S. Plot No. 74 could not be accepted. It was further held that from evidence there was no doubt to hold that there is vacant land on Plot No. 74 which is common to both and there is no sign of demarcation. The defendant's husband admitted about the joint possession of at least some portion of C.S. Plot Nos. 73 and 74. Theory of showing marks of demarcation cannot be accepted. It was next held that the evidence showed that at the time of purchase not only the parties but their husbands were best of friends. The nature of the building set up by the parties with a partition wall in between also supports this finding. There was no reliable evidence that the parties purchased any demarcated portions of land. Rather the evidence showed that even at present the parties are in possession at least of some portions of the disputed land in common. It was then found that after the purchase of the land by the parties, they started possessing the same as parts of C.S. Plot Nos. 73 and 74 and the same was sold by their venires treating the same as such and, therefore, the question of accretions subsequently to the C.S. Plots did not arise. It was ultimately held that the parties purchased the properties without partition and that there was no partition by metes and bounds. Accordingly, the plaintiff was found entitled to a decree for partition even for C.S. Plot No. 74.

11. This decision of the Division Bench dated 3rd August, 1978 allowing the Second Appeal of the appellant for C.S. Plot No. 74 was sought to be reviewed by the latter Division Bench as noted earlier. In the impugned review judgment which is the basis of the ultimate consequential decision in Second Appeal after review, curiously enough the Division Bench having noted the limited nature of its jurisdiction under Order 47, Rule 1, reconsidered the entire evidence pertaining to C.S. Plot No. 74 and almost sat in appeal against the findings and judgment recorded by the earlier Division Bench. In the last paragraph of internal page 8 and at page 9, the entire documentary evidence was re-considered and so far as C.S. Plot No. 74 was concerned, the latter Division Bench came to the following conclusions:

In our view the Division Bench, however, committed errors apparent on the face of the record in considering the oral and documentary evidence regarding title and possession of the two parties in respect of R.S. Plot No. 74, Khatian No. 26 of the aforesaid Mouza. This Court did not reverse the findings made by the courts of fact that the plaintiff had failed to prove that she had jointly purchased this plot with the defendant by the Kobala (Exh. G1) dated 17th September, 1940. The two

courts of fact accepted the defendant's case that she alone had purchased from its original owner, Jitendra Nath Banerjee, the entire Plot No. 74. Thereafter, on 16th April, 1947, the defendant out of her said plot No. 74, sold 5 decimals of land in the northern side to the plaintiff. The Division Bench had clearly committed an error of law apparent on the face of the record by overlooking that by her Kobala Exh. r/a dated 16th April, 1947 the plaintiff had purchased a demarcated portion of the Plot No. 74 and not undivided half portion of the said Plot. Mr. Moitra learned Advocate for the applicant, has taken us to both the kobalas (Exhs. 4/a and G1). The said deed in plaintiffs favour inter alia recited:

Sale deed for a House containing three rooms, which brick-walls, doors and windows, one kitchen and a Privy.

The vendor Nirmala in the said kobala also recited:

...With the said Plot on the southern side in my share .05 decimal, excluding that, in the remaining share .05 decimal, homestead land with three brick walled tin shed rooms, a kitchen and a Privy in the north.

The schedule of the said kobala dated 23rd April, 1947 in plaintiffs favour set out the same description of the property conveyed out of plot No. 74 by the defendant in plaintiffs favour. Therefore the Division Bench, with respect, was not right in holding 'We do not (sic) anything so that we may get that any demarcated portion of plot No. 74 was sold to the plaintiff. Rather from a reading of the kobala it was clear that half share of plot No. 74 was sold by the defendant to the plaintiff. We have already set out extracts from the kobala Ext. 4/a in plaintiffs favour which clearly shows that the defendant sold certain structures along the land in the northern portion of plot No. 74 to the plaintiff and the Division Bench had committed an error apparent on the face of the record by declining to accept the defence story of sale of structures along with the demarcated land out of C.S. Plot No. 74. The Division Bench also overlooked the clear finding, by the trial Court that according to the evidence including the Commissioner report the well had been excavated not in the portion, in plaintiffs occupation but in the defendants portion of Plot No. 73. During revisional Survey Settlement Operations the C.S.Plot No. 74 had been split up into three R.S. Plots, namely, R.S. Plot No. 1507 measuring .070 acres, Plot No. 1508 measuring 0508 acres and R.S. Plot No 1509 measuring. .0770 acres. In R.S. Khatian the defendant was recorded as in exclusive occupation of R.S. Plot No. 1509 measuring .0770 acres while the Plot No. 1508 was recorded inoccupation of the plaintiff.

On the basis of the aforesaid finding reached by the latter Division Bench on re-appreciation of oral and documentary evidence, the conclusion is reached in the impugned review judgment that the plaintiff's case of jointly purchasing with the defendant Plot No. 74 by the Kobala dated 17th September, 1940 had not been established, that the plaintiff had by his Kobala (Exh. 4/a) dated 16th April, 1947, purchased demarcated 5 decimals of land and structures thereon out of Plot No. 74 and accordingly it was held that the Division Bench earlier had committed an apparent error on the face of the record in passing a preliminary decree for partition in respect of Plot No. 74 and that is how the review petition was allowed. The latter Division Bench also found fault with the reasoning

adopted by the earlier Division Bench in this connection and made the following observations which are at internal page 16 of the judgment:

In our view, while deciding the Second Appeal the Division Bench had failed to consider the real nature of contest between the two parties in respect of the C.S. Plot No. 74. We have already mentioned that the plaintiff had purchased from the defendant a demarcated northern portion including structures and land measuring 5 decimals out of Plot No. 74 which during R.S. Operations were subdivided into three plots, namely, Nos. 1507, 1508 and 1509. The aggregate area of the said three plots was 1348 while the area of C.S. Plot No. 74 was 10 decimals. The plaintiff Occupied R.S. Plot No. 1508 measuring 0508 acres. She and the defendant were recorded as jointly occupying the drain and passage in Plot No. 1507 measuring .0070 acre. The plaintiff cannot have any grievance merely because the R.S.records showed that the defendant was possessing .0770 acres of R.S. Plot No. 1509. The defendant had previously acquired the entire C.S. Plot No. 74 and out of the said plot then sold demarcated .05 decimals to the plaintiff. In fact, there was also increase in the land of plaintiffs occupation.

On internal page 19 in the review judgment, it was further observed that been the learned advocates of both sides and the Division Bench failed to consider the case of the plaintiff regarding Plot No. 74 and this was because of the misconception about Commission's report and other evidence regarding C.S. Plot No. 74 and regarding the stall area.

12. In our view the aforesaid approach of the Division Bench dealing with the review proceedings clearly shows that it has over-stepped its jurisdiction under Order 47, Rule 1, C.P.C. by merely styling the reasoning adopted by the earlier Division Bench as suffering from a patent error. It would not become a patent error or error apparent in view of the settled legal position indicated by us earlier. In substance, the review Bench has re-appreciated the entire evidence, sat almost as Court of appeal and has reversed the findings reached by the earlier Division Bench. Even if the earlier Division Bench findings regarding C.S. Plot No. 74 were found to be erroneous, it would be no ground for reviewing the same, as that would be the function of an appellate court. learned Counsel for the respondent was not in a position to point out how the reasoning adopted and conclusion reached by the Review Bench can be supported within the narrow and limited scope of Order 47, Rule 1, C.P.C. Right or wrong, the earlier Division Bench judgment had become final so far as the High Court was concerned. It would not have been reviewed by re-considering the entire evidence with a view to finding out the alleged apparent error for justifying the invocation of review powers. Only on that short ground, therefore, this appeal is required to be allowed. The final decision dated 8th July, 1986 of the Division Bench dismissing the appeal from appellate decree No. 569 of 1973 insofar as C.S. Plot No. 74 is concerned as well as the review judgment dated 5th September, 1984. in connection with the very same plot, i.e. C.S. Plot No. 74, are set aside and the earlier judgment of the High Court dated 3rd August, 1978 allowing the Second Appeal regarding suit plot No. 74 is restored. The appeal is accordingly allowed. In the facts and circumstances of the case, there will be no order as to costs.