BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH AT NEW DELHI,
NEW DELHI

Review Application No. 9 of 2015
IN
Appeal No. 4 of 2012

In the matter of:

1. Shree Mahuva Bandhara Khetiwadi
   Pariyavaran Bachav Samittee
   Through its General Secretary,
   Mahuva, Taluka Mahuva,
   District Bhavanagar, Gujarat

..... Applicant

Versus

1. Ministry of Environment & Forests
   Union of India
   Through the Secretary
   Pariyavarn Bhavan,
   C.G.O. Complex,
   Lodhi Road,
   New Delhi- 110003

2. Revenue Department
   Through Secretary
   State of Gujarat
   Sachivalaya, Gandhi Nagar
   Gujarat, PIN- 382010

3. Gujarat Pollution Control Board
   Through Member Secretary
   Sector- 10A, Paryavaran Bhawan
   Opp. Bij Nigam
   Gandhinagar- 382010
   Gujarat

4. M/s. Nirma Limited
   Nirma House
   Ashram Road
   Ahmedabad, Gujarat.

.....Respondents

Counsel for appellant:
Mr.Ramesh Singh, Mr. P.C. Sen, Mr. Ashish Goel,
Ms. Anushruti, Mr. Anand Yagnik and
Mr. Abhimanue Shrestha, Advocates for the applicant

Counsel for Respondents:
Mr. VishwendraVerma and Mr. Nilakshi Verma Advs.
for respondent No. 1
Ms. Nupur Kanungo Advfor Ms. Hemantika Wahi, Adv.
for respondent no. 2 & 3.
Ms. Puja Kalra, Adv. for North and South M.C.D

Present:
Hon'ble Mr. Justice Swatanter Kumar (Chairperson)
Hon'ble Mr. Justice U.D. Salvi (Judicial Member)
Hon'ble Dr. D.K. Agrawal (Expert Member)
Hon'ble Prof. A.R. Yousuf (Expert Member)

JUDGMENT

Per U.D. Salvi J.(Judicial Member)

Dated: 18th May, 2015

1. Being aggrieved by the Judgment and order dated 14th January, 2015 passed in the Appeal 4 of 2012 on the premise that there has been no deliberate concealment and/or submission of false misleading information or data to the authorities as regards the nature of land in question by the appellant therein, the project proponent M/s Nirma Ltd. for obtaining the environmental clearance dated 8th December, 2008 to the cement plant and the captive power plant to be established and operated near village Padhiyarka Taluka Mahuva, District Bhavnagar, Gujarat, the respondent no. 4 therein have now preferred this Review Application against it.
2. At the outset parties namely, the applicant and the project proponent M/s Nirma Ltd. the respondent no. 4 herein were heard and the record was perused. A question arose as to the

maintainability of the present Review Application in the present situation when on the same day of presentation of this application i.e. 13-02-2015 before this Tribunal the Statutory Appeal against the impugned order was preferred before the Hon'ble Supreme Court of India. Our attention was invited to the provision in CPC 1908 Order 47 of Rule 1, which is reproduced hereunder to urge before us that the Review Application can lie only in the situations as specified in the said provision and for the limited purposes stated therein.

Order XLVII Rule 1 of the CPC:

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

(a) By a decree or order form which an appeal is allowed, but from which no appeal has been preferred,

(b) By a decree or order form which no appeal is allowed, or

(c) By a decision on a reference form 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 are view 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.

2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

[Explanation.- The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.]

3. Learned Counsel appearing for the applicant submitted that though the Appeal and the Review Application were filed on the same date i.e. 13-02-2015 the Review Application preceded the appeal by few hours. In support of his submission he filed an affidavit dated 6th April, 2015 of Ld. Adv. Mr. Abhimanue Shrestha with the extract of dairy no. 5275/15 bearing record of the filing of the appeal in Supreme Court of India on 13th February, 2015 annexed thereto. In support of his submission he also placed before us plethora of the case law and referred only to few of them which are quoted herein in below for quick reference:

   Kunhayammed and others Vs. State of Kerala and another: (2000) 6 SCC 359, Kapoor Chand and others vs. Ganesh Dutt and others: (1993) Supp (4) SCC 432, Board of Control for Cricket vs. Netaji Cricket Club, AIR 2005 SC 592, Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh; AIR 1964 SC 1372.

4. In kapoor chands case the Hon'ble Apex Court with reference to the Doctrine of Merger held that the review petition could not have been dismissed as not maintainable merely because SLP had been filed against the judgment in question and was pending. In the instant case such issue does not arise as the substantive appeal has been filed in the Hon'ble Apex Court on the same day of filing of the Review application. In Board of Control for Cricket case the Hon'ble Apex Court interpreted the provisions governing the review in CPC- Sec 14 and Order

XLVII Rule 1 to hold that the word 'sufficient reason' in Order XLVII Rule 1 of the Code is wide enough to include misconception of fact or law by a Court or even an Advocate.

5. Referring to the Doctrine of Merger in juxtaposition with the concept of review as discussed at length in *Kunhayammed case,* para 8 of the judgment in *M/s Thungabhadra Industries case (supra*) and facts disclosed in the affidavit of Ld. Adv. MrAbhimanue Shrestha, Learned Counsel appearing for the applicant submitted that the review application having being filed first i.e. prior to the filing of the Appeal deserves to be considered and disposed of on merits and need not be elbowed out at the very threshold merely for technical reasons.

6. Pertinently, the Hon'ble apex Court while delivering the Judgment in *Kunhayammed case* took into account the Judgment delivered in *Thungabhadra Industries case.* para 8 in *Thungabhadra Industries Ltd* case reads as under:

> *(8) Order XLVII R.1(1) of the Civil Procedure Code permits an application for review being filed "from a decree or order form which an appeal is allowed but from which no appeal has been preferred."In the present case, it would be seen, on the date which the application for review was filed the appellant had not filed an appeal to this Court and therefore the terms of O. XLVII R.1(1) did not stand in the way of the petition for review being entertained. Learned Counsel for the respondent did not contest this position. Nor could we read the judgment of the High Court as rejecting the petition for review on that ground. The crucial date for determining whether or not the terms of O. XLVII R.1(1) are satisfied in the date when the application for review is filed. On that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the*

application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition would come to an end.

7. In substance, the Hon'ble Apex Court upon taking into account the Doctrine of Merger held that the crucial date for determining whether or not the terms of Order XLVII Rule 1(1) are satisfied is the date when the application for review is filed. The said view has been reiterated and the Doctrine of Merger discussed in *Kunhayammed* case. The Hon'ble Apex Court in *Kunhayammed* case (Supra) held as follows:

The doctrine of merger and the right of review are concepts which are closely interlinked. If the judgment of the High Court has come up to the Supreme Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of the Supreme Court. In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged with the judgment of the Supreme Court. But here the special leave petition is dismissed- there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review.
(Paras 34 and 40)

Where the review is filed first and the delay in SLP is condoned and the special leave is ultimately granted and the appeal is pending in the Supreme Court, the position then. Under Order 47 Rule 1 CPC is that still the review can be disposed of by the High Court. If the review of a decree is granted before the disposal of the appeal against the decree, the decree appealed against will cease to exist and the appeal would be rendered incompetent. This is because the decree reviewed gets merged in the decree passed on review and the appeal to the superior court preferred against the earlier decree- the one before review- becomes in fructuous. (Para 37)

The review can be filed even after SLP is dismissed is clear from the language of Order 47 Rule 1(a). Thus the words "no appeal" has been preferred in Order 47 Rule 1(a) would also mean a situation where special leave is not granted. Till then there is no appeal in the eye of law before the superior court. Therefore, the review can be preferred in the High Court before special leave is granted, but not after it is granted. The reason is obvious. Once special leave is granted the jurisdiction to consider the validity of the High Court's order yests in the Supreme Court and the High Court cannot entertain a review thereafter. Unless such a review application was preferred in the High Court before special leave was granted. *(para 38)*

8. It can very well be seen that the reviewing Court or Tribunal can interfere with the decree\order sought to be reviewed within limited sphere prescribed by law and principles applicable to interference in the review as enunciated in Order XLVII Rule 1(1) of CPC un-like the power of wide interference both on the issues of facts and law conferred upon the appellate court. Taking a cue from sub clause (2) of O. XLVII R.1 of CPC it is not difficult to see that even the party who has not preferred on appeal could not maintain a review application where the appeal preferred by some other party on the grounds common to the applicant has been pending or when, the applicant being respondent in such appeal could present to the Appellate Court the case on which he applies for the review. Thus, the merger of challenges and outcome in the review petition with those in the appeal has been envisaged and the law thereby discouraged the pursuit of

cause in review when the appeal in that regard has been pending.

9. Broadly speaking the review application and the appeal have been preferred by the same party on one date i.e. 13.02.2015. However, technically speaking as urged by the applicant, the review application preceded the appeal and thus deserved consideration. Though, we may not like to be too technical in vetting the merits of the affidavit of Ld. Adv. Mr. Abhimanue Shrestha, who is not an Adv. on record in the appeal preferred before the Hon'ble Supreme Court, we can see a very glaring fact that the applicant had taken conscious decision and made up its mind to prefer both the appeal as well as review petition on 13th February, 2015 and had thus orchestrated filing of the said proceedings on that day. Having made up the mind to prefer an appeal invoking wider jurisdiction of the higher forum to re-appreciate the entire gamut of the contentions in the case, it is redundant to initiate review proceedings before the court which had rejected the contentions raised in the case on certain view of the matter. The whole exercise of pursuing this review petition, therefore, smacks of the intention to abuse the process of law and speaks volumes about the unfair conduct of the Review applicant in moving this application. Nonetheless, we may engage ourselves in the exercise of delivering justice which the applicant is yearning for.

10. Learned Counsel appearing for the applicant further raised the plea that this review application cannot be disposed of without issuing Notice to the parties. In this context we may only refer to the object and reasons of the NGT Act, 2010 of which we are the creatures and to the provisions made therein for the purpose of dealing with the review applications. The NGT Act, 2010 was enacted to provide for the establishment of National Green tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

Rule 22 (3) of National Green Tribunal (Practices and Procedure) Rules, 2011 reads as under:

> *(3) Unless otherwise ordered by the Tribunal sitting at the concerned place, a review application shall be disposed of by circulation and the Tribunal may either dismiss the application or direct notice to the opposite party.*

Thus it enables the Tribunal to weigh the merits of the review application at the very threshold and expeditiously dispose of or dismiss the application if no merits to sustain it any further are noticed. Pertinently, we gave patient hearing to the applicant as well as the contending respondents the respondent no. 4 M\s Nirma Ltd, the project proponent before passing this Judgment. We, therefore, do not find any merit in the

contentions of the applicant to direct Notice before any step is taken for disposal of this Review Petition.

11. Prime issue before us in Appeal no. 4/2012 was whether the appellant had deliberately concealed and/or submitted false misleading information or data to the authorities by describing the land in question as 'wasteland' and not as 'wetland'. According to the Learned Counsel appearing for the applicant this Tribunal did not consider the material submissions in respect of mutation in the revenue records concerning the land in question in favour of Department of Irrigation Salinity Division for the purpose of Samadhiyala Bhandara, correspondence between M\s Nirma Ltd. and Government of Gujarat, opinion of Advocate General before allocation of land in question in favour of M\s Nirma Ltd., disclosure regarding Bhandara during public hearing, correspondence between Narmada Water Resources, Water Supply and Kalpsar Department and Advocate General of State of Gujarat and labouring under misconception had delivered the impugned order of allowing the appeal.

12. Review application means re-examination or second examination of a case. It is an act of looking something again- i.e. re-view, with a view to correction and improvement upon the discovery of new and important materials or evidence which after the exercise of due diligence was not within the applicants knowledge or cannot be produced by him at the relevant time when the decree was passed or order made, or on account of

some mistake or error on the face of the record, or for any other sufficient reason. Certainly there can be no substitution of a view once taken on the given material.

13. The Hon'ble Apex Court in Kamlesh Verma vs. Mayawati and others; (2013) 8 SCC 320 made distinction between the appeal and the review in following words:

> *15 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. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error. This Court in Parsion Devi v. Sumitri Devi held as under: (SCC pp. 718-19, paras 7-9)*
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> *"7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In Thungabhadra Industries Ltd. Govt. of A.P this court opined: (AIR p. 1377, para 11)*
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> *"11. What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an "error apparent on the face of the record". The fact that on the earlier occasion the court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an "error apparent on the face of the record". For there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.*
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> *"8. Again in Meera Bhanja v. Nirmala Kumari Choudhury while quoting with approval a passage from Aribam Pishak Sharma this Court once again held that 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 CPC.*
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> *"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 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'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'."

14. In the instant case after having gone through the submission and the material placed before us we find that no new or important matter or evidence other than the one in the said appeal has been placed before us for our appreciation. With respect we must observe that the revenue records despite having being mutated in favour of Samadhiyala Bhandara continued to depict the nature of land in question as waste land.

15. At this juncture, it is not out of place to consider the scenario which the facts existing at the site presented to any common prudent man having confronted with the contradictions and ambiguities pointed out to this Tribunal in four Expert Members reports regarding the subject matter i.e. the nature of the land in question on 28th May, 2013. This Tribunal in order to know exact state of affairs on the site, particularly, with reference to wet lands, water bodies bundhs/bundharas and adverse effect of the project on them, if any directed the visit to the site by its two Expert Members for local inspection in the first week of June, 2013 vide order dated 28th May, 2013. The applications were moved by the present Review applicant as well as the MoEF (M.A. No 497/13 and 504/13 respectively) praying for stay of operation

of the Tribunal's Order dated 28th May, 2013. The present Review applicant contended:

A. Inspection by the Expert Committee would create embargo on their valuable right of appeal against the order dated 28th May, 2013 and opinion of the Expert Members would frustrate the entire issue before the Tribunal.

B. Order was passed without informing any of the parties.

C. The time of visit being the drought season the visit of the Expert Members will not give the correct picture about the existing feature and there is possibility of mistake in understanding the existing facts.

D. There is no contradiction or ambiguity in various reports of the Committees.

16. Learned Counsel appearing on behalf of the MoEF reiterated the contentions raised by the Review applicant saying that no useful purpose will be served by the local inspection to be carried on by the Expert Members, and the time chosen for the visit was improper and it needed to be in post monsoon season to arrive at proper conclusion. Upon hearing the parties this Tribunal noticed that the contradictions and ambiguities pointed out during the course of the hearing in the Expert Members report were very material in nature and the proposed inspection would not only narrow down the scope of controversies but also put the matter in clear perspective in the interest of justice vide order dated 6th June, 2013. Both these orders were not disturbed in the appeal

preferred by the parties against the said orders before the Hon'ble Apex Court.

17. On the first visit of the Expert Members in the first week of June, 2013 it was noticed that the Bhandara was totally dry despite good rains over short period and on the second visit it was noticed that Bhandara was almost at full level with shallow water depth spread all over in the submergence zone and no part of the proposed project land was under submergence and the adjoining area beyond the boundaries of the proposed project land was having shallow water accumulation. Expert Members also noticed during their second visit that there was growth of aquatic vegetation and presence of few migratory birds around the water body. Interestingly the second visit to the land in question for local inspection was directed by this Tribunal upon common prayers made by the Learned Counsel appearing for the parties in order to assess the complete and comprehensive suggestions with regard to wet land and likely damage to the water bodies' wide order dated 23th August, 2013. The Expert Members apart from these visual impressions also gave thought to the data as regards month wise rainfall, patterns over the years, month wise water level in the Bhandara, month wise irrigation area provided by the reservoirs, soil type and its characteristics in the project area and adjoining area, lay out map of the area in question along with superimposition of project boundaries. Expert Members

thereupon arrived at an opinion that Samadhiyala Bhandara served as a temporary storage of water, which gets used by farmers or gets evaporated due to its large spread or gets percolated due to fairly high porosity of soil and as such cannot be called as a productive wetland having all perennial features of a wetland.

18. Not only the local inspection brought forth the facts concerning the land in question but also demonstrates how complex was the assessment of the nature of land in question. Pertinently, the Review applicant while seeking stay to the operation of the order dated 28th May, 2013 conceded that in given situation there would be a possibility of mistake in understanding the exact facts. One can therefore imagine the difficulties of an individual confronted with the facts and the record concerning the nature of the land in question and how it was fraught with the risk of falling in confusion leading to an aberration.

19. This Tribunal considered the every material contention of the Review applicant and the submission of the project proponent i.e. the applicant in the Original Appeal that there being a room for confusion in understanding the nature of the land, particularly when the land was described as a wet land in the revenue record and not identified as wet land by the authorities concerned they cannot be held liable for an act of deliberate concealment and or false submission of misleading information or data to the authorities. As a matter of fact the

observation made by the Expert Members regarding the nature of the land outweighs all other views as such observations are designed to bring acuity to the judicial view in relation to the evidence placed before it. These observations do support the contentions of the project proponent that in given circumstances there could not have been any deliberate concealment of the fact on the part of the project proponent before the authorities granting Environment Clearance.

20. The Review applicant has quoted opinion of the Learned Advocate General expressed in the letter dated 17th February, 2007 to urge before us that the project proponent though aware of the facts regarding the nature of the land had deliberately suppressed or concealed such facts for seeking Environmental clearance. For better understanding of the impact of the said opinion which it would have had on an individual, we reproduce the said opinion herein below:

> *"Though one would not readily find the definition of the words 'water-body' under any law, technically one may describe Samadhiyala Bhandara as an artificial water-body. However, it is clear from the papers supplied to me that the lands demanded by the company, viz. lands bearing Survey Nos. 80/A, 80/B, 80/C, 67/1/Part, 67/2/Part, 67/3/Part, 200/A and 200/B of villages Padhiyarka, Dodia and Vangar, respectively are not shown in the revenue record to have any Bandhara, much less any water-bodies, and that the said lands are shown either as Gaucher land or as Government waste land. Thus, neither the Development Plan nor the Town Planning Scheme/s if any, nor any of the Government records, suggests the existence of any water-bodies on the lands in question.*
>
> *As discussed above, the lands in question do not find place in the revenue record as having any lake, ponds or any other water-bodies nor are they notified as such, so as to encompass them within the purview of the directions contained in the aforesaid judgment of the High*

Court. In my view, therefore, there can be no objection in transferring the lands in favour of the company for the purpose of setting up the cement plant project, especially when the company has agreed for making an alternative provision for storage of the rainwater by excavation in the other part of the Bandhara area which will be equivalent to or more than the quantum of water likely to be lost due to the allotment of the lands in question. The aforesaid proposal, in my view, will serve the triple purpose of complying with the spirit of the judgment of the High Court of conservation of water as well as maintenance of environmental balance in the area in the larger public interest, vis-à-vis acceleration of the growth of industrialization in the State."

It can be seen that the Learned Advocate General acknowledged the fact that technically one may describe Samadhiyala Bhandara as a artificial water body, but the lands demanded by the company (Project Proponent) were not shown in the revenue record as water bodies but were shown as either Gaucher land or Government waste land. In our view this opinion is bound to further confound the nature of the land in question.

21. Deliberation involves careful thinking and anything done deliberately cannot be the product of confusion. We, therefore, found it difficult to hold in the impugned Judgment that there was deliberate concealment and/or submission of false or misleading information or data on the part of the applicants, the respondent no. 4 project proponent herein to the authorities according environmental clearance.

22. In our considered opinion, there is no mistake or error apparent on the face of the record or any misconception of either fact or law in appreciating the said material, and to take any other view than the one taken by us while allowing the

appeal would obviously mean substitution of our view with such a contrary view which cannot be arrived at except by further struggle with the process of reasoning. Virtually, such struggle with the process of reasoning would amount to hearing of appeal in the garb of Review.

23. In view of the aforesaid discussion we do not find any merit worthy of further debate in present application. We, therefore, dismiss this review application with no order as to cost.

……., CP
(Swatanter Kumar)

……., JM
(U.D. Salvi)

……., EM
(Dr. D.K. Agrawal)

……., EM
(Prof. A.R. Yousuf)