PETITIONER:
NORTHERN INDIA CATERERS (INDIA) LTD.

Vs.

RESPONDENT:
LT. GOVERNOR OF DELHI

DATE OF JUDGMENT21/12/1979

BENCH:
PATHAK, R.S.
BENCH:
PATHAK, R.S.
KRISHNAIYER, V.R.
TULZAPURKAR, V.D.

CITATION:
1980 AIR 674 1980 SCR (2) 650
1980 SCC (2) 167
CITATOR INFO :
R 1981 SC1751 (1,2)
R 1983 SC1125 (7)

ACT:
Review of judgments of the Court-When undertaken.

HEADNOTE:
HELD : (per Tulzapurakar and Pathak, JJ.) (Krishna Iyer J. concurring)

It is well-settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision in the case. Normally the principle is that a judgment pronounced by the Court is final and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. If the attention of the Court is not drawn to a material statutory provision during the original hearing the Court will review its judgment. The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice. [656H]

Sajjan Singh v. State of Rajasthan [1965] 1 S.C.R. 933, 948; G. L. Gupta v. D. N. Mehta [1971] 3 S.C.R. 748, 760; O. N. Mahindroo v. Distt. Judge Delhi & Anr. [1971] 2 S.C.R. 11, 27 referred to.

Power to review its judgment has been conferred on the Supreme Court by Article 137 of the Constitution read with the provisions of a law made by Parliament or the rules made under Article 145. In a civil proceeding an application for review is entertained only on a ground mentioned in O. XLVII, Rule 1 of the Code of Civil Procedure and in a criminal proceeding on the ground of an error apparent on the face of the record (Order XL r. 1, Supreme Court Rules 1966). Whatever be the nature of the proceedings a review proceeding cannot be equated with the original hearing of a case and the finality of the judgment delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility." [657C-D]

Chandra Kanta v. Sheikh Habib, [1975] 3 SCR 933 referred to.

Apart from the fact that the material placed before the Court in the review petition was never brought to its notice when the appeals were heard, the judgment does not suffer from an error apparent on the face of the record. Such an error exists if of two or more views canvassed on the point it is possible to hold that the controversy could be said to admit of only one of them. If the view adopted by the Court in the original judgment is a possible view having regard to what the record states, it is difficult to hold that there is an error apparent on the face of the record. [657E-F]

In the instant case the appellant prepared and served food both to residents in its hotel as well as to the casual customers who came to eat in the restaurant. In both cases it remained a supply and service of food not amounting to a sale. The facts alleged by the appellant were never disputed at any stage. No attempt
651
was made by the taxing authorites to enquire into the truth of the facts so accepted. It was in that factual context that this Court examined the question whether any liability to sales tax was attracted. The earlier judgment rested on that factual foundation and must be understood in that light. [658H]

Krishna Iyer, J. (concurring)

A case is decided on its particular conspectus of facts. When the facts materially vary the law selectively shifts its focus. The factual setting in which the decision in the judgment was founded becomes critical. The appeal proceeded on the admitted footing that the visitor to the restaurant who sat at the table and was served the dishes he desired, had no right to carry home what he wanted. The basic assumption was that victuals as such were not sold and the consideration was for the complex of activities which included eating and drinking. On these facts the conclusion arrived at was impeccable. [652G]

If circumstances differ the decision too will be different. But no alternative situations were presented. If counsel defaults in the submission he cannot find fault with the Court for the decision. [653A]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Review Petition Nos. 111-112 of 1978.

(Application for Review of this Court's Judgment dated 7-9-1978) In the matter of :-

Civil Appeal Nos. 1768-69 of 1972.

Soli J. Sorabjee, Addl. Sol. Genl. and P. A. Francis and B. B. Ahuja, M. N. Shroff, R. S. Chauhan and R. N. Sachthey for the Petitioners.

F. S. Nariman, Lalit Bhasin, M. N. Karkhanis, Mrs. S. Bhandare and Miss Malini Poduval for the Opposite side.

FOR INTERVENERS :

S. T. Desai and M. N. Shroff for the State of Gujarat.

Soli J. Sorabjee Addl. Sol. General and M. N. Shroff for the State of Maharashtra.

Badridas Sharma for the State of Rajasthan.

T. V. S. N. Chari and M. S. Ganesh for the State of Andhra Pradesh.

Soli J. Sorabjee Addl. Sol. Genl. and G. S. Chatterjee for the State of West Bengal.

N. Nettar for the State of Karnataka.

A. V. Rangam for the State of Tamil Nadu.

S. C. Manchanda and O. P. Rana for the State of U.P.

V. J. Francis for the State of Kerala.
652
M. C. Bhandare for the Federation of Hotel and Restaurant Associations, of India.
Y. S. Chitale for Hotel Restaurant Association Calcutta and Eastern Region.
Lalit Bhasin, Vinay Bhasin and Vineet Kumar for South Region Fariya Hotel.
Mrs. Shyamala Pappu and A. Minocha for Zonth Club.
A. K. Rao and A. T. M. Sampath for Tamil Nadu Hotel Association.
N. Sudhakaran for Hotel and Restaurant Association, Ernakulam.
Anil Diwan, Ravinder Narain and Sri Narain from Walcom Hotels and Indovilles Hotel Division.
S. K. Gambhir for State of Madhya Pradesh.
The Judgment of V. D. Tulzapurkar and R. S. Pathak, JJ. was delivered by Pathak, J. Krishna Iyer, J. gave a separate Opinion.
KRISHNA IYER, J.-A plea for review, unless the first judicial view is manifestly distorted, is like asking for the moon. A forensic defeat cannot be avenged by an invitation to have a second look, hopeful of discovery of flaws and reversal of result. I agree with my learned brother Pathak J, both on the restrictive review jurisdiction and the rejection of the prayer in this case-subject to the qualifications made below.
Indeed, a reading of the last paragraph of my learned brother, with which I concur, makes it clear that Sri Soli Sorabjee has more or less won the war, although he has rightly lost this battle because of factual constraints. A case is decided on its particular conspectus of facts. When the facts materially vary, the law selectively shifts its focus. Here, the factual setting in which the decision is founded becomes critical. My learned brother has made it perfectly plain that the appeal proceeded on the admitted footing that the visitor to the restaurant who sat at the table and was served the dishes he desired had, in that case, no right to carry home what he wanted, after eating what he wanted, and to pay for the eatables as distinguished from the total blend of services, including supply (not sale) of what he chose to eat. The basic, indeed decisive, assumption was that victuals, as such, were not sold and the consideration was for the complex of activities which included eating and drinking. This sophisticated situation being granted, the conclusion is impeccable.
653
But if circumstances differ, the decision too will be different. But no alternative situations were presented. If counsel defaults in the submission, he cannot find fault with the court for the decision. This is the long and short of it.
It sometimes happens that high-style restaurants or residential hotels render a bungle of special services like ball dance, rare music, hot drinks, ‘viands of high regale’, glittering crockery, regal attention or ‘bikini’ service and even sight-seeing transport or round-the-city visits, shoe-shining, air-conditioning, masage in the room etc., on a consolidated sum. You cannot dissect the items or decode the bill to discover separately the component of goods sold. This situation may obtain even in India with the throng of foreign tourists who want to be taken care of and pay all-inclusively. This may happen in some fashionable restaurants where you cannot, as of right, remove from the table what is left over. In these cases the decision under review squarely

applies. My learned brother has clarified and confined the ratio to the contours so set out. He has also pointed out that counsel, at the earlier hearing, did not contest this factual matrix. A review in counsel's mentation cannot repair the verdict once given. So the law laid down must rest in peace.

The learned Solicitor General took us through English and American legal literature of vintage value and alien milieu. They enlightened us but did not apply fully, as explained by my learned brother. Had they been earlier cited, had been seriously considered. But India is India. It lives in its one lakh villages, thousands of towns, millions of pavement pedlars and wayside victuallers, corner coffee shops and tea stalls, eating houses and restaurants and some top-notch parlours. Habits vary, conventions differ and one rigid rule cannot apply in diverse situations. If you go to a coffee house, order two dosas, eat one and carry the other home, you buy the dosas. You may have the cake and eat it too, like a child which bites a part and tells daddy that he would eat the rest at home. Myriad situations, where the transaction is a sale of a meal, or item to eat or part of a package of service plus must not be governed by standard rule. In mere restaurants and non-residential hotels, many of these transactions are sales and taxable. Nor are additional services invariably components of what you pay for. You may go to an air-conditioned cloth-shop or sweet-meat store or handcrafts emporium where cups of tea may be given, dainty damsels may serve or sensuous magazines kept for reading. They are devices to attract customers who buy the commodity and the price paid is taxable as sale. The substance of the transaction, the dominant object, the
654
life-style and other telling factors must determine whether the apparent vendor did sell the goods or only supply a package of services. Was there a right to take away any eatable served, whether it be bad manners to do so or not? In the case we have, the decision went on the ground that such right was absent. In cases where such a negative is not made out by the dealer-and in India, by and large, the practice does not prohibit carrying home-exigibility is not repelled.

I agree with my learned brother and dismiss the plea for review.

PATHAK, J.-These Review Petitions are directed against the judgment of this Court dated September 7, 1978 disposing of Civil Appeals Nos. 1768 and 1769 of 1972.

Northern India Caterers (India) Ltd. run a hotel in which besides providing lodging and meals to residents it also operates a restaurant where meals are served to non-residents or casual visitors. In a reference made to the High Court of Delhi under s. 21(3) of the Bengal Finance (Sales Tax) Act, 1941 as extended to the Union Territory of Delhi, the High Court expressed the opinion that the service of meals to casual visitors in the restaurant was taxable as a sale. On appeal, this Court took a contrary view and held that when meals were served to casual visitors in the restaurant operated by the appellant the service must be regarded as providing for the satisfaction of human need and could not be regarded as constituting a sale of food when all that the visitors were entitled to do was to eat the food served to them and were not entitled to remove or carry away uneaten food. Supporting considerations included the circumstance that the furniture and furnishings, linen, crockery and cutlery were provided, and there was also music, dancing and perhaps a floor show.

Mr. Soli J. Sorabjee, the learned Additional Solicitor General, who has been briefed by the respondent to appear at this stage in the case has, with his usual thoroughness and ability, succeeded in putting together a mass of legal material which we greatly wish had been before the Court when the appeals were originally heard. On the basis of that material, he submits that the judgment delivered by this Court ought to be reviewed. We have no hesitation in saying that had this material been available earlier, it would have enabled the Court to consider still further aspects of the problem and examine it more comprehensively. But having regard to the basis on which the appeals proceeded, we are unable to say that the result would necessarily have been different.

655

The learned Additional Solicitor General contended that the judgment of this Court is amendable to review because, he says, it proceeds on the erroneous assumption that a restaurant can, for the purposes of the point of law decided by us, be likened to an inn. We have been referred to Halsbury's Laws of England(1) and the Hotel Proprietors Act, 1956 mentioned therein. Our attention has also been invited to a statement in Benjamin's "Sale of Goods"(2) that when a meal is served to a customer in a restaurant there is a sale of goods, the element of service being subsidiary. As regards judicial opinion in England, reliance has been placed on Rex v. Wood Green Profiteering Committee; Boots Cash Chemists (Southern) Lim-Exparte, (3) Rex v. Birmingham Profiteering Committee; Provincial Cinematograph Theatres, Lim. Exparte(4) and Lockett v. A. & M. Charles, Ltd.(5) It appears, however, that the first and third of these three cases cannot be said to bear directly on the point. It was also urged that Merrill v. Hodson(6) and Mary Nisky v. Childs Company,(7) on which this Court relied, represent the Connecticut-New Jersey rule, but the opposite view embodied in the Massachusetts-New York rule and expressed in Friend v. Childs Dining Hall Co.(8) represents the true law. It was said that the subsequent enactment of the Uniform Commercial Code(9) in the United States has preferred the Massachusetts-New York rule "by providing that for the purpose of the implied warranty of merchantibility, the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale."(10) We were invited to consider Vishnu Agencies (Pvt.) Ltd. v. Commercial Tax Officer & Ors.(11) for the proposition that the concept of "sale of goods" as understood in the legislative entry in List II of the Seventh Schedule of our constitutional enactment should be enlarged to take into account a meaning not intended earlier but necessitated by an environment of social control measures. Finally, reference has been made to certain observations in State of Punjab v. M/s. Associated

656

Hotels of India Ltd.(1) and Municipal Corporation of Delhi v. Laxmi Narain Tandon etc. etc.(2)

Learned counsel for the intervener States generally adopted the submissions of the learned Additional Solicitor General.

The review petitions have been vigorously opposed by Mr. F. S. Nariman, appearing for the appellant, who has urged that no ground for review has been made out and that, in any event the judgment of this Court does not suffer from error. He pointed out that the decisions based on the Massachusetts-New York rule holding that the service of meals to customers in a restaurant constitutes a sale of food turned on the need for the importing an implied

warranty that the food was fit for eating. That consideration, it was said, need not influence the courts in India because the lacuna had been filled by law such as the Food Adulteration Act aimed at ensuring the supply of wholesome food to consumers. The submission is that whether the service of meals is or is not a sale must be determined by the nature of the transaction and not be the need to import an implied warranty of fitness. In other words, it is said, the factor of implied warranty must follow on the transaction being a sale and not that the transaction is a sale because an implied warranty is a necessary guarantee for public health. We are reminded that the true basis of our judgment is that no title in the food passes to the consumer as is evidenced by the circumstance that the unconsumed portion of the food cannot be carried away by him. It is pointed out that there never was any dispute by the respondent that customer in a restaurant who orders food for consumption by him on the premises is not entitled to take away the unconsumed portion of the food. The essential nature of the transaction, he reiterates, is that it is a service afforded for the satisfaction of a bodily need, and the service is provided by supplying food for eating. In the end, he has emphasised the limited scope of the power of review and the strict conditions in which it can be invoked. Dr. Y. S. Chitale and Mr. Anil Dewan, appearing for some intervenors, adopt the same line of argument.

The question is whether on the facts of the present case a review is justified.

It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is

657

that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. Sajjan Singh v. State of Rajasthan.(1) For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment. G. L. Gupta v. D. N. Mehta.(2) The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice. O. N. Mahindroo v. Distt. Judge Delhi & Anr.(2) Power to review its judgments has been conferred on the Supreme Court by Art. 137 of the Constitution, and that power is subject to the provisions of any law made by Parliament or the rules made under Art. 145. In a civil proceeding, an application for review is entertained only on a ground mentioned in XLVII rule 1 of the Code of Civil Procedure, and in a criminal proceeding on the ground of an error apparent on the face of the record. (Order XL rule 1, Supreme Court Rules, 1966). But whatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility." Chandra Kanta v. Sheikh Habib.(4)

Now, besides the fact that most of the legal material so assiduously collected and placed before us by the learned Additional Solicitor General, who has now been entrusted to appear for the respondent, was never brought to our attention when the appeals were heard, we may also examine whether the judgment suffers from an error apparent on the

face of the record. Such an error exists if of two or more views canvassed on the point it is possible to hold that the controversy can be said to admit of only one of them. If the view adopted by the Court in the original judgment is a possible view having regard to what the record states, it is difficult to hold that there is an error apparent on the face of the record.

What were the considerations on which this Court held that the transaction was not a sale? The Court said, and this was emphasised in no small degree, that the supply and service of food to a customer to be eaten in the restaurant was not a sale for the reason that he was merely entitled to eat the food served to him and not to remove

658

and carry away the unconsumed portion of the food. Had that amounted to a sale, the unconsumed portion would have belonged to the customer to take away and dispose of as he pleased. Besides, the Court noted, there were other amenities and services of considerable materiality which were also provided. That was the case set up by the appellant before the assessing, appellate and revisional authorities, and it was apparently also the case pleaded before the High Court. It was summarised thus in the petition under Article 136(1) of the Constitution filed in this Court:

> "(1) The Hotelier and Catering industry is a service oriented industry unlike and as distinguished from other sale oriented industries. The purpose of a Hotelier and Caterer is not to sell food, but to service it in proper atmosphere so as to make the service and consumption of food enjoyable for the guests. In the dining hall, the petitioner provided certain basic facilities and amenities, such as, air-conditioning services, music, facilities for dancing (i.e. dancing floor) specially designed crockery, special lighting, etc. The petitioner had built up a reputation for providing the aforesaid services and people patronise the dining halls as a result of these amenities.
>
> (2) Though the customer pays for the food, he can enjoy only that much of food as can be consumed by him at one particular time. The guest is not entitled to carry away the unconsumed portion of his food. There is thus no passing of property for a stipulated money consideration, which would imply the guests' right to carry away the unconsumed portion of his food.
>
> (3) The amount received by the petitioner is not the price of any goods. On the other hand, it represents the petitioner's charges for looking after the convenience and enjoyment of the customer including his needs for food and rendering him various kinds of other services and providing him with various facilities and comforts."

The appellant prepared and served food both to residents in its hotel as well as to casual customers who came to eat in its restaurant, and throughout it maintained that having regard to the nature of the services rendered there was no real difference between the two kind of transactions. In both cases it remained a supply and service of food not amounting to a sale. It is important to note that the facts alleged by the appellant were never disputed at any stage. and we

659

find no attempt by the taxing authorities to enquire into the truth of the facts so asserted. It is in that factual

context that this Court examined the question whether any liability to sales tax was attracted. Our judgment rests on that factual foundation, and must be understood in that light.

It appears from the submissions now made that the respondent as well as other States are apprehensive that the benefit of the judgment of this Court will be invoked by restaurant-owners in those cases also where there is a sale of food and title passes to the customers. It seems to us that having regard to the facts upon which our judgment rests-undisputed as they have remained throughout the different stages of the litigation-and the considerations which they attract, no such apprehension can be reasonably entertained. Indeed, we have no hesitation in saying that where food is supplied in an eating-house or restaurant, and it is established upon the facts that the substance of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidential, the transaction would undoubtedly be exigible to sales-tax. In every case it will be for the taxing authority to ascertain the facts when making an assessment under the relevant sales tax law and to determine upon those facts whether a sale of the food supplied is intended.

We are of the view that these review petitions must fail. They are, accordingly, dismissed. There is no order as to costs.

P.B.R. Review petitions dismissed.

660