

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

**REVIEW PETITION (CRL.) NO. 671 OF 2018
IN
TRANSFER PETITION (CRL.) NO.262 OF 2018**

RAJENDRA KHARE

...PETITIONER(S)

VERSUS

SWAATI NIRKHI AND ORS.

...RESPONDENT(S)

With

Contempt Petition(C)No.1233/2019 in T.P.(Cr1.)No.262/2018

J U D G M E N T

ASHOK BHUSHAN, J.

Bar & Bench (www.barandbench.com)
This review petition has been filed praying that the Order dated 18.05.2018 passed in Transfer Petition (Cr1.) No. 262 of 2018 and the Order dated 05.06.2018 dismissing the M.A. be reviewed.

2. Brief facts of the case giving rise to this review petition now need to be noted:-

2.1 The review petitioner lodged the First Information Report No.39/2016 in Police Station, Mangol Puri, Delhi under Section 389/34 Indian Penal Code, in which respondent Nos.1 to 5 to this review petition

were made accused. The Investigating Officer after completing investigation submitted a charge sheet against all the accused.

2.2 The learned Metropolitan Magistrate, North-West Delhi took cognizance of the offence and issued summons to all the accused for appearance on 02.03.2018. On 05.03.2018, the accused did not appear, the Court observed that despite service of summon all accused are absent, hence, issue fresh summons all the accused for 02.05.2018. On 02.05.2018, applications were filed for exemption from personal appearance by accused persons. The learned Magistrate allowed the application subject to filing of original medical certificates.

2.3 The respondent Nos.1 to 3 and 5 filed transfer petition on 08.05.2018 being Transfer Petition (Crl.) No.262/2018 under Section 406 of Cr.P.C. seeking transfer of trial of Criminal Case No.3483 of 2017. In the transfer petition, following were

the three respondents, who were impleaded:-

1. State (NCT of Delhi)
Through the Commissioner of Police,
I.P. Estate, New Delhi -110 012.
2. Mohan Srivastava alias
Akahauri Onkar Nath,

S/o Late Sh Akhauri Bholanath,
Resident of Near Bairagi Harijan
Temple, P.S. Delha,
District Gaya (Bihar) 823001.

3. Jugal Kishore Yadav,
S/o Sh Puna Prasad Yadav
R/o 13/137, Sector -16, Rohini,
Delhi - 110 089.

2.4 Transfer petition was taken by this Court and

following order was passed on 18.05.2018:-

"Heard learned counsel for the
petitioner.

Without expressing any opinion on
merits, we direct that proceedings in
Crl. Case No.0003483 of 2017 titled
"State Vs. Swati Nirkhi & Ors." on the
file of Metropolitan Magistrate 461
North West, Rohini Courts, New Delhi
shall stand transferred to the Court of
Metropolitan Magistrate at Allahabad,
Uttar Pradesh, for hearing and disposal
in accordance with law. Records shall be
sent to the transferee Court forthwith.
It will be open to the parties to seek
clubbing of all the matters, if any,
pending between them in accordance with
law.

The Registry to transmit a copy of
this order to the courts concerned.
Parties to appear before the transferee
court on Monday, 9th, July, 2018.

The transfer petition is,
accordingly, allowed with the above
direction.

Since this order being passed ex-
parte, it will be open to the
respondents to approach this Court, if

aggrieved."

- 2.5 The review petitioner, who had filed the F.I.R. No.39/2016 was not made one of the respondents in the transfer petition. The review petitioner after order dated 18.05.2018 filed M.A.No.1589 of 2018 praying for recall of the Order dated 18.05.2018 passed by this Court in Transfer Petition (Crl.) No.262 of 2018. This Court dismissed the M.A. by passing following order:-

"No further order is called for.
M.A. is, accordingly, dismissed."

- 2.6 After rejection of the M.A. No.1589 of 2018, the review petitioner has filed this Review Petition (Crl.) No. 671 of 2018 praying for review of orders dated 18.05.2018 and 05.06.2018. In this review petition, order was passed on 24.10.2018 allowing the application for open court hearing and notice was issued by this Court. This Court passed following order on 24.10.2018:-

"Application for Open Court hearing
is allowed.

Delay condoned.

Issue notice."

2.7 After issuance of notice, reply has been filed to the review petition by respondent Nos. 1 to 3 as well as by respondent No.5 - Jugal Kishore Yadav. A short affidavit on behalf of respondent No. 3 dated 11.01.2021 as well as an affidavit on behalf of review petitioner dated 19.01.2021 has also been filed.

3. We have heard Shri Rajendra Khare, the review petitioner appearing-in-person. Shri Rahul Shyam Bhandari, learned counsel has appeared for respondent Nos.1, 2 and 3 and Shri Kaustubh Shukla, learned counsel has appeared for respondent No.5.

4. The petitioner appearing-in-person submits that review petitioner, who was informant of the First Information Report was not made party to the transfer petition filed under Section 406 Cr.P.C. He submits that the review petitioner was not impleaded in the transfer petition so as to deny him the right to oppose the transfer petition. It is submitted that the review petition was taken by this Court on 18.05.2018 for preliminary hearing and without issuing any notice review petition was allowed. It is submitted that as per Order XXXIX of the Supreme Court Rules, 2013, after

preliminary hearing of the transfer petition, notice is required to be issued, which notice has not been issued in the present transfer petition and on the first day of hearing the transfer petition was allowed. The Miscellaneous Application was also summarily dismissed without giving an opportunity of hearing to the review petitioner to file a counter affidavit. The orders passed by this Court dated 18.05.2018 as well as 05.06.2018 were passed violating the principles of natural justice. It is further submitted that there were no good grounds to transfer the Criminal Case pending in the Rohini Court. It is submitted that out of 24 witnesses, which are cited, 21 witnesses belong to Delhi and transfer of criminal trial will cause immense prejudice. It is further submitted that even after order of this Court dated 18.05.2018 in which this Court directed parties to appear before the transferee court on 09.07.2018, the respondents did not appear before the Court. Review petitioner submits that there is an error apparent on the face of the record in the judgment dated 18.05.2018, which deserves to be reviewed by this Court and the transfer petition be heard on merits after giving an opportunity to review petitioner also.

5. Shri Rahul Shyam Bhandari, learned counsel appearing for respondent Nos. 1 to 3 contends that no ground have been made out to review the judgment dated 18.05.2018. Referring to reply filed on behalf of respondent Nos.1 to 3, learned counsel submits that in fact in the Registry when the transfer petition was submitted, the review petitioner was impleaded as respondent No.2 but on objection raised by the Registry, the name of respondent No.2 was deleted from the transfer petition and there was no attempt on part of transfer petitioners not to implead the review petitioner as one of the respondents. It was only due to objection by Registry the name of respondent No.2 was deleted. It is further submitted that this Court in its order dated 18.05.2018 had granted liberty to file an application since the order was being passed ex-parte and review petitioner has exhausted his liberty by filing M.A. No.1589 of 2018, which was rejected on 05.06.2018. It is submitted that all grounds, which are now sought to be raised in the review petition were already taken in the M.A. No.1589 of 2018. This Court having rejected the M.A., there is no occasion to consider the review petition and the review petition

being not maintainable deserves to be rejected.

6. Learned counsel for the respondent No.5 opposing the review petition has also made similar submissions as raised by learned counsel for the respondent Nos. 1 to 3.

7. We have considered the submissions of the parties and have perused the records.

8. There is no dispute that the criminal case which has been sought to be transferred in T.P. (Cr1.) No.262 of 2018 was criminal case, which was registered on First Information Report filed by review petitioner in which FIR after investigation charge sheet has been filed and accused were summoned. It is also a fact that in the Transfer Petition (Cr1.) No.262 of 2018, the review petitioner was not a party. The learned counsel for the respondent Nos. 1 to 3 has stated in his reply affidavit that initially when petition was filed in the Registry, review petitioner was respondent No.2 but on objection raised by the Registry, the name of respondent No.2 was deleted from the transfer petition. We have no reason to doubt the above statement on behalf of the counsel for the respondent Nos.1 to 3, but the fact remains that Order dated 18.05.2018 was passed in the transfer petition where the review petitioner was not a party

respondent. It is also not disputed that M.A. No.1589 of 2018 filed by review petitioner came to be dismissed by order as noted above.

9. The review petition, which has been filed by the review petitioner to review the judgment is referable to Article 137 of the Constitution read with Order XLVII of Supreme Court Rules, 2013. Article 137 of the Constitution provides as follows:-

"137. Review of judgments or orders by the Supreme Court.-- Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."

10. The Rules have been framed under Article 145 of the Constitution namely "The Supreme Court Rules, 2013" in which Order XLVII deals with the review. Order XLVII Rule 1 provides:-

**"Order XLVII
Review**

1. The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.

The application for review shall be accompanied by a certificate of the Advocate on Record certifying that it is the first

application for review and is based on the grounds admissible under the Rules.

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11. The jurisdiction of this Court to review is, thus, specifically provided in the Constitution as well as Rules framed under Article 145. This Court while considering the review jurisdiction of Supreme Court has noted and considered the scope and ambit of the review jurisdiction in **Vikram Singh alias Vicky Walia and Anr.**

Vs. State of Punjab and Anr., (2017) 8 SCC 518 in

paragraph 23 of which judgment following was laid down:-

"23. In view of the above, it is clear that scope, ambit and parameters of review jurisdiction are well defined. Normally in a criminal proceeding, review applications cannot be entertained except on the ground of error apparent on the face of the record. Further, the power given to this Court under Article 137 is wider and in an appropriate case can be exercised to mitigate a manifest injustice. By review application an applicant cannot be allowed to reargue the appeal on the grounds which were urged at the time of the hearing of the criminal appeal. Even if the applicant succeeds in establishing that there may be another view possible on the conviction or sentence of the accused that is not a sufficient ground for review. This Court shall exercise its jurisdiction to review only when a glaring omission or patent mistake has crept in the earlier decision due to judicial fallibility. There has to be an error apparent on the face of the record leading to miscarriage of justice to exercise the review jurisdiction under Article 137 read with Order 40 Rule 1. There has to be a

material error manifest on the face of the record with results in the miscarriage of justice."

12. Learned counsel for the respondent Nos. 1 to 3 has also relied on a Three-Judge Bench judgment of this Court in **Mukesh Vs. State (NCT of Delhi), (2018) 8 SCC 149** where this Court has also elaborately considered the scope and ambit of the review jurisdiction of this Court. In paragraphs 5, 6 and 7, following was laid down by this Court:-

"5. The power of review of the Supreme Court as envisaged under Article 137 of the Constitution is no doubt wider than review jurisdiction conferred by other statutes on the Court. Article 137 empowers the Supreme Court to review any judgment pronounced or made, subject, of course, to the provisions of any law made by Parliament or any rule made under Article 145 of the Constitution.

6. An application to review a judgment is not to be lightly entertained and this Court could exercise its review jurisdiction only when grounds are made out as provided in Order XLVII Rule 1 of the Supreme Court Rules, 2013 framed under Article 145 of the Constitution of India. This Court in *Sow Chandra Kante v. Sk. Habib* [(1975) 1 SCC 674] speaking through V.R. Krishna Iyer, J. on review has stated the following in para 1: (SCC p. 675)

"1. ... A review of a judgment is a

serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."

7. As per rule, review in a criminal proceeding is permissible only on the ground of error apparent on the face of the record. This Court in *P.N. Eswara Iyer v. Supreme Court of India* [(1980) 4 SCC 680] while examining the review jurisdiction of this Court vis-à-vis criminal and civil proceedings had made the following observations in paras 34 and 35: (SCC p. 695)

"34. The rule [Order XL Rule 1] , on its face, affords a wider set of grounds for review for orders in *civil proceedings*, but limits the ground vis-à-vis *criminal proceedings* to "errors apparent on the face of the record". If at all, the concern of the law to avoid judicial error should be heightened when life or liberty is in peril since civil penalties are often less traumatic. So, it is reasonable to assume that the Framers of the Rules could not have intended a restrictive review over criminal orders or judgments. It is likely to be the other way about. Supposing an

accused is sentenced to death by the Supreme Court and the "deceased" shows up in court and the court discovers the tragic treachery of the recorded testimony. Is the court helpless to review and set aside the sentence of hanging? We think not. The power to review is in Article 137 and it is equally wide in all proceedings. The rule merely canalises the flow from the reservoir of power. The stream cannot stifle the source. Moreover, the dynamics of interpretation depend on the demand of the context and the lexical limits of the test. Here "record" means any material which is already on record or may, with the permission of the court, be brought on record. If justice summons the Judges to allow a vital material in, it becomes part of the record; and if apparent error is there, correction becomes necessitous.

35. The purpose is plain, the language is elastic and interpretation of a necessary power must naturally be expansive. The substantive power is derived from Article 137 and is as wide for criminal as for civil proceedings. Even the difference in phraseology in the Rule (Order XL Rule 2) must, therefore, be read to encompass the same area and not to engraft an artificial divergence productive of anomaly. If the expression "record"

is read to mean, in its semantic sweep, any material even later brought on record, with the leave of the court, it will embrace subsequent events, new light and other grounds which we find in Order 47 Rule 1 CPC. We see no insuperable difficulty in equating the area in civil and criminal proceedings when review power is invoked from the same source."

(emphasis in original)"

13. The ratio of the above judgments is that review in a criminal proceeding is permissible only on the ground of error apparent on face of record. The submission which is pressed by the learned counsel for the respondent Nos.1 to 3 is that in view of the fact that M.A. No.1589 of 2018 was rejected by this Court, the review petition is not maintainable. The M.A., which was rejected, was an application to recall the judgment. Grounds for recall of a judgment and grounds to review the judgment can be different. Review is a proceeding, which exists by virtue of the Statute. The M.A. which was rejected was not an application to review under Article 137 as well as Order XLVII Rule 1, thus, by rejection of M.A., it cannot be said that review petition filed by the review petitioner is not maintainable.

14. The M.A. which was filed by the review petitioner and was rejected by this Court on 05.06.2018 by order "No further order is called for" can in no manner take away the right of the review petitioner to file review under Order XLVII Rule 1 of the Supreme Court Rules, 2013. This Court with regard to filing of applications styled as application for clarification, modification or recall of the judgment has observed that in substance those applications are for review and they should not be entertained and the applicants be given leave to file a review applications which may be dealt with as per the Rules of the Court. This Court in **Delhi Administration vs. Gurdip Singh Uban and Ors.**, (2000) 7 SCC 296, in paragraph 18 made the following observation:

"18. We, therefore, agree with the learned Solicitor General that the Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the application is in substance one for review. In that event, the Court could either reject the application straight away with or without costs or permit withdrawal with leave to file a review application to be listed initially in chambers."

15. We, thus, are of the considered opinion that by mere rejection of M.A. filed by the review petitioner, the review petitioner cannot be precluded from filing the present review petition. Review petition is, thus, fully

maintainable and the argument of the respondent that review petition is not maintainable cannot be considered. Further submission of the counsel for the respondent that all grounds which have been taken in the review petition were earlier taken in M.A., and due to rejection of M.A. they cannot be re-agitated, cannot be acceded to. The order passed in M.A. does not indicate that any of the issues which were raised were considered and decided by this Court, and further the review being statutory proceedings cannot be considered on the specious plea raised by the respondents.

16. The rectification of an order emanates from the fundamental principles that justice is above all. In the Constitution, substantive power to rectify or review the order by the Supreme Court has been specifically provided under Article 137 as noted above. The basic philosophy inherent in granting the power to the Supreme Court to review its judgment under Article 137 is the universal acceptance of human fallibility.

17. A perusal of the order dated 18.05.2018 in the transfer petition indicates that the order was passed on the preliminary hearing of the transfer petition and before passing the order, no notice was issued under

Order XXXIX Rule 2 of the Supreme Court Rules, 2013,
which is to the following effect:-

"Order XXXIX

**Applications For Transfer Of Criminal
Proceeding Under Section 406 Of The Criminal
Procedure Code, 1973 And Section 11 Of The
Terrorist Affected Areas (Special Courts)
Act, 1984**

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2. The petition shall be posted before the Court for preliminary hearing and orders as to issue of notice. Upon the hearing the Court, if satisfied that no prima facie case for transfer has been made out or that the petition is otherwise not tenable, shall dismiss the petition; and if upon such hearing the Court is satisfied that a prima facie case for granting the petition is made out, it shall direct that notice be issued to the respondent to show cause why the order sought for should not be made; such notice shall be given to the accused person where he is not the applicant, to the respondent State and to such other parties interested as the Court may think fit to direct.

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18. The order having been passed on the first day of hearing without issuing notice under Order XXXIX Rule 2, review petitioner is right in his submission that there is an error apparent on the face of the record. It is also relevant to notice that the learned counsel for the respondent has also submitted that since by the last line

of the order liberty was granted to the respondent to approach the Court, and M.A. was rejected accordingly on 05.06.2018; the review petition has also to meet the same fate. The liberty was granted by this Court on 18.05.2018 that order being ex-parte, it will be open to respondents to approach this Court, if aggrieved. In the transfer petition, review petitioner was not one of the respondents, hence, it cannot be said that liberty was exhausted by filing M.A. by review petitioner. The review petitioner has right to exercise statutory jurisdiction of filing application for review of the judgment.

19. We may in this context refer to the judgment of this Court in **M.S. Ahlawat Vs. State of Haryana and Anr., (2000) 1 SCC 278**. In the above case, this Court convicted the petitioner under Section 193 Indian Penal Code. This Court recalled and set aside the said order after noticing that the procedure which was required to be followed for conviction was not followed. In paragraphs 3 and 4 of the judgment, the submissions were noticed, and this Court after coming to the conclusion that error was committed by not following the procedure, set aside the order convicting the petitioner. In

paragraphs 12 and 15 following was laid down:-

"12. This Court has always adopted this procedure whenever it is noticed that proceedings before it have been tampered with by production of forged or false documents or any statement has been found to be false. We have not been able to appreciate as to why this procedure was given a go-by in the present case. Maybe the provisions of Sections 195 and 340 CrPC were not brought to the notice of the learned Division Bench.

15. To perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience. We, therefore, unhesitatingly set aside the conviction of the petitioner for the offence under Section 193 IPC....."

20. We having found that there was error apparent in the order dated 18.05.2018, the said order has to be corrected. We, thus, allow the review petition, and recall the order dated 18.05.2018; consequently the Transfer Petition (Cr1.) No.262 of 2018 is revived. The review petitioner is impleaded as respondent No.4 in the transfer petition. One week's time is allowed to respondent No.4 and other respondents to file counter affidavit to the transfer petition and one week for filing rejoinder, if any.

21. List the transfer petition on 12.02.2021 for hearing.

22. The contempt petition stands closed.

.....J.
(ASHOK BHUSHAN)

.....J.
(INDU MALHOTRA)

NEW DELHI;
JANUARY 28, 2021.

Bar & Bench (www.barandbench.com)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

R.P.(Cr1.) No. 671/2018 in T.P.(Cr1.) No. 262/2018

RAJENDRA KHARE

Petitioner(s)

VERSUS

SWAATI NIRKHI & ORS.

Respondent(s)

(IA No. 124163/2020 - APPLICATION FOR ADJOURNMENT and IA No. 91741/2019 - DISCHARGE OF ADVOCATE ON RECORD and IA No. 97555/2020 - EARLY HEARING APPLICATION and IA No. 91739/2019 - PERMISSION TO APPEAR AND ARGUE IN PERSON)

WITH

CONMT.PET.(C) No. 1233/2019 in T.P.(Cr1.) No. 262/2018 (XVI-A)
(FOR PERMISSION TO APPEAR AND ARGUE IN PERSON ON IA 96653/2019 and
FOR EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT ON IA
96654/2019 and FOR EXEMPTION FROM FILING O.T. ON IA 96657/2019)

Date : 28-01-2021 These matters were called on for orders today.

For Petitioner(s) Petitioner-in-person

For Respondent(s) Ms. Madhvi Divan, ASG
Mr. B. V. Balaram Das, AOR
Mr. Ayush Puri, Adv.
Mr. Pranay Ranjan, Adv.

Mr. Rahul Shyam Bhandari, AOR
Mr. Konark Tyagi, Adv.

Mr. Kaustubh Shukla, AOR

Hon'ble Mr. Justice Ashok Bhushan pronounced the reportable judgment of the Bench comprising His Lordship and Hon'ble Ms. Justice Indu Malhotra.

The review petition is allowed in terms of the signed reportable judgment. Order dated 18.05.2018 is recalled and the transfer petition is revived.

One week's time is allowed to the respondents to file counter affidavit. One week time is granted for filing rejoinder

affidavit, if any.

List the transfer petition on 12.02.2021 for hearing.

The contempt petition is closed.

Pending application, if any, stands disposed of.

**(MEENAKSHI KOHLI)
ASTT. REGISTRAR-cum-PS**

**(RENU KAPOOR)
BRANCH OFFICER**

[Signed reportable judgment is placed on the file]

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