

(2011) 07 CAL CK 0029

Calcutta High Court

Case No: RVW No. 5 of 2004, RVW No. 18 of 2007, RVW No. 21 of 2008 and RVW No. 009 of 2010

Madan Das

APPELLANT

Vs

Lt. Governor and Others

Simachalam Vs Union of India
(UOI) and Others
 G. Veera
Kumar Vs IOC Ltd. and Others

 Smt. Arati Das Vs The
Collector, L.A.

RESPONDENT

Date of Decision: July 29, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 47 Rule 1, Order 47 Rule 5, 100A, 114, 122
- Constitution of India, 1950 - Article 226, 227

Citation: AIR 2011 Cal 168 : (2011) 4 CHN 220 : (2011) 6 CTC 241 : (2012) 1 JCR 246

Hon'ble Judges: Jainarayan Patel, C.J; Sambuddha Chakrabarti, J; Pinaki Chandra Ghose, J; Kalyan Jyoti Sengupta, J; Indira Banerjee, J; Bhaskar Bhattacharya, J; Aniruddha Bose, J

Bench: Full Bench

Advocate: B.K. Das and M. Roy, in RVW 5/2004, Surojit Samanta and Balai Lal Sahoo, Biswajit Samanta, Debojit Samanta, Madhumaita Roy, in RVW 18 and 21/2007 and RVW 29/2008, Haradhan Banerjee and Subrata Roy Karmakar, Bhaskar Banerjee, in RVW 009/2010, for the Appellant; Amalesh Roy and Suman Sehanabis, Ratheswar De Sarkar, Md. Tabraiz, Maheswar Lall and G.S. Makker for Union of India, for the Respondent

Judgement

Bhaskar Bhattacharya, J.

All these matters have been referred to this Bench pursuant to a reference made by a Division Bench of this Court in the Circuit at the Port Blair vide order dated 22nd March, 2004 as the said Division Bench was of the view that the Five-Judge-Bench-decision in the case of [K.N. Mishra Vs. Union of India \(UOI\) and Others](#), was not in conformity with the decisions of the Supreme Court as well as an

earlier Five-Judge-Bench-decision of this Court in the case of [Ratanlal Nahata Vs. Nandita Bose](#),

2. Consequently, the Chief Justice has constituted this Full Bench of Seven Judges for resolving the dispute as to whether the view of the Five-Judge-Bench in the case of K.N. Mishra v. Union of India (supra), reflects the correct position of law, as to the right of a Circuit Bench at Port Blair to hear an application of review in respect of an order passed by another Bench consisting of different Judges, when the Judges of the Original Bench deciding the matter are still available as the Judges of this High Court.

3. In the case of Ratan Lal Nahata v. Nandita Bose (supra), the earlier Five-Judge-Bench had arrived at the following conclusion with regard to the application of the provision of review to the writ-jurisdiction:

1. Order 47, Rule 5 of the CPC although ipso facto has no application in relation to a writ-proceeding or a proceeding on the Original Side or the Appellate Side of this Court, the principles laid down therein may be applied. "2. In a case where merely one of the learned Judges attached to the bench is available he may issue the rule but the matter on merit must be heard by a Division Bench of two Judges or such number of Judges as the Hon"ble the Chief Justice may constitute.

"3. The Hon"ble the Chief Justice has an unfettered jurisdiction in the matter of constitution of Benches in all matters including a review application.

"4. As a matter of propriety, a Judge who is still attached to the Court should be made a party to hear the review application unless exceptional situation arises which may in the opinion of the Hon"ble Chief Justice would be subversive to imparting justice to a litigation keeping in view the principle that justice is not only to be done but manifestly seem to be done.

4. A Division Bench sitting in the Circuit, in the year 2003 ("Third Division Bench") was dealing with an application of review of an order passed by another Division Bench ("First Division Bench") on the ground of error apparent on the face of record where the immediate earlier Circuit Bench ("Second Division Bench") which held the Circuit prior the holding of the Circuit by the Third Division Bench entertained the application for review notwithstanding the fact that the judges of the First Division Bench were then still available as judges of the Calcutta High Court and after finding that there was an error apparent on the face of record, did not dispose of the matter by holding what should be the final order after rectification of the error apparent on the face of record as it had no sufficient time in that circuit for disposal and placed the matter for final disposal before the Third Division Bench after, however, recalling the order passed by the First Division Bench on the ground of error apparent on the face of record. The Third Division Bench disagreed with the order passed by the Second Division Bench which directed rehearing of the main writ-application by a succeeding Circuit Bench for passing the final order on review

and referred the matter to the Hon"ble Chief Justice to constitute larger Bench to answer the following points formulated by the Third Division Bench:

(1) If an application for review of an order disposing of a writ application is made on the ground of error apparent on the face of record, whether the Bench hearing such application, after recording its finding that there was such error, can dispose of such application by recalling the original order without arriving at the final verdict as to what should be just order on the writ application after removing the alleged error, entrusting such duty to a succeeding Bench after making some prima facie observation on merit of the writ application?

"(2) If the answer to point No. 1 above is given in affirmative, whether the review application should be deemed to be pending so long the succeeding Bench is not arriving at a conclusion altering the original order disposing of the writ application or affirming the original order?

"(3) If the answer to the point No. 1 is affirmative but the answer to point No. 2 is in negative or if the answer to the point No. 1 above is given in negative, whether the succeeding Bench should be bound by the observations of the Bench made on merit while entrusting the same to the succeeding Bench for final decision?

(4) If answer to points Nos. 1 and 2 are both given in affirmative, in such a case, whether in a Circuit Bench at Port Blair an application for review of an order passed by a Bench sitting in Writ jurisdiction can be entertained by a succeeding Circuit Bench consisting of different Judges from those of the previous one in the absence of any special assignment of the Hon"ble Chief Justice when the Judges of the previous Bench are still functioning as the Judges of the Calcutta High Court?

5. Consequently, the Chief Justice constituted a Five-Judge-Bench in the case of K. N. Mishra (supra), and by order dated July 25, 2003 the said Five-Judge-Bench answered those points thus:

Consequently, the first question formulated by the referring Bench has to be answered in the affirmative.

In view of Rule 3 of Chapter XVIII of the Appellate Side Rules, which, in our view, will have an overriding effect over the provisions of Order 47 Rule 5 of the Code of Civil Procedure, the second question has to be answered in the negative.

As far as the third question is concerned it follows that the succeeding Bench will not be bound by the observations on the merits of the case made by the Bench which allows the review application while entrusting the same to the succeeding Bench for final decision. In the special circumstances prevailing in the Andaman and Nicobar Islands, an application for review of an order passed by a Bench sitting in writ jurisdiction can be heard and decided by a succeeding Circuit Bench consisting of a different set of Judges even without any special assignment of the Hon"ble Chief Justice, notwithstanding the fact that the Judges of the previous Bench are still

functioning as Judges of the Calcutta High Court.

The questions referred to this Bench are answered accordingly.

6. As indicated earlier, a subsequent Division Bench in the Circuit disagreed with the views of the said Five-Judge-Bench as according to the said Division Bench, those answers were in conflict with the earlier Five-Judge-Bench-decision in the case of Ratan Lal Nahata (supra) and other Supreme Court decisions and referred the matter to the Chief Justice for constituting a larger bench.

7. At the very outset, all the learned Counsel appearing for the parties raised a preliminary objection as to the power of the Division Bench to refer the matter to a larger bench when there exists already a judgment of a Five-Judge-Bench. In our view, having regard to the power conferred upon the Chief Justice by the Appellate Side Rules to constitute a larger bench and the Chief Justice having exercised such power by constituting a larger bench of seven judges, the aforesaid preliminary objection is bereft of any substance for the following reasons:

8. The third proviso to Rule 1 of Chapter II of the Appellate Side Rules is relevant and quoted below:

Provided also that on the requisition of any Division Bench, or whenever he thinks fit, the Chief Justice may appoint a special Division Bench, consisting of three or more judges, for hearing any particular appeal, or of any matter:

(Emphasis supplied by us).

9. The aforesaid power of the Chief Justice to constitute a larger bench as provided in Rule 1 of Chapter II of the Appellate Side Rules has been approved by the Supreme Court in the case of [Pramatha Nath Taluqdar Vs. Saroj Ranjan Sarkar](#), where the Apex Court has upheld the inherent power of the Chief Justice to constitute a larger bench. The said decision was again followed by a Full Bench of this Court in the case of Tara Dutta v. State and Anr. reported in AIR 1975 Cal 450 (FB). Thus, the question of legality of the reference at the instance of the Division Bench has lost its significance once the Chief Justice, having regard to the importance of the question involved, has decided to constitute this larger bench. We, thus, overrule the said preliminary objection.

10. Mr. B. K. Das, Mr. Tabraiz, Mr. Surojit Samanta and Mr. Haradhan Banerjee, the learned Advocates appearing on behalf of the respective parties have advanced separate submissions before us and have all supported the views taken by the Five-Judge-Bench in the case of K. N. Mishra v. Union of India (supra). The points taken by those learned Counsel may be summed up thus:

1) As the Circuit Bench at Port Blair is situated in a remote place and there is virtually no possibility of a Judge revisiting the Circuit within the period of one year, the view taken in the case of K.N. Mishra (supra) by the Five-Judge-Bench was a reasonable

one inasmuch, as it is very difficult for the poor litigants in the Port Blair to come to Kolkata and pray before the Hon^{ble} Chief Justice for hearing of the matter in Kolkata by the Judges, who are available in the mainland.

2) The provision contained in Order 47 Rule 5 of the CPC requiring that the review application should be heard by the same Judge is not a mandatory one and can be altered by the High Court in exercise of its power of rule making and the introduction of Chapter XVIII of the Writ Rules has virtually authorized the existing Circuit Bench to hear out application for review of an order passed by an earlier Bench consisting of different judges notwithstanding the fact that the Judges of the earlier Bench are still available as a Judge of Calcutta High Court in the mainland.

11. In order to appreciate the aforesaid questions, it will be profitable to refer to the provisions of Calcutta High Court (Extension of Jurisdiction) Act, 1953, an Act to extend the jurisdiction of the High Court of Calcutta to Chandernagore and the Andaman and Nicobar Islands and the same is quoted below:

1. Short title. - This Act may be called The Calcutta High Court (Extension of Jurisdiction) Act, 1953.

"2. Extension of Jurisdiction of Calcutta High Court to Chandernagore and Andaman and Nicobar Islands.- The jurisdiction of the High Court at Calcutta shall extend to Chandernagore and the Andaman and Nicobar Islands and shall, as from the 2nd day of May, 1950, be deemed to have extended to Chandernagore, and the said High Court shall, for all purposes, be deemed to be the High Court for Chandernagore and the Andaman and Nicobar Islands.

"3. Effect of certain Orders. Any order made-

(i) by the highest Court of Appeal in relation to Chandernagore before the 2nd day of May, 1950, or in any proceeding pending before that Court on that day, or

(ii) by the Chief Commissioner of the Andaman and Nicobar Islands before the commencement of this Act in the discharge of his functions as the High Court for those Islands, shall for all purposes have effect, not only as an order of that Court, or, as the case may be, of the Chief Commissioner, but also as if it were an order made by the High Court at Calcutta.

"4. Power to make rules.- Subject to the provisions of any law for the time being in force, the High Court at Calcutta may make rules to carry out the purposes of this Act and for the purpose of effectively exercising its jurisdiction in or in relation to Chandernagore and the Andaman and Nicobar Islands.

12. It appears from the aforesaid Act that Section 4 gives power to this High Court to make Rules to carry out the purposes of the Act and for effectively exercising its jurisdiction in or in relation to the Andaman and Nicobar Islands and pursuant to such power, Chapter XVIII of the Appellate Side Rules was incorporated.

The said Chapter XVIII of the Appellate Side Rules is quoted below:

CHAPTER XVIII

Rules for cases arising in the Andaman & Nicobar

Islands framed by the Court in Exercise of the power

Conferred on it u/s 4 of the Calcutta High Court

(Extension of jurisdiction) Act, 1953

(Act No. 41 of 1953)

1. In this Chapter, unless the context otherwise requires:

(a) "Case" includes suit, appeal, application, petition and reference;

(b) "Circuit Bench" means a Bench consisting of one or more Judges holding Court in the Islands; and (c) "Islands" means the Andaman & Nicobar Islands.

2. One or more Judges of the High Court shall visit the Islands, by way of Circuit, whenever the Chief Justice from time to time may appoint, in order to exercise in respect of cases arising therein the jurisdiction and powers vested in this Court by the Constitution and the Calcutta High Court (Extension of Jurisdiction) Act, 1953:

Provided that such visit shall be made at least once a month unless the Chief Justice otherwise directs.

3. All cases including applications under Articles 226 and 227 of the Constitution of India shall be initiated in the Islands and heard by the Circuit Bench.

4. Notwithstanding anything contained in paragraph 3, -

(a) An appeal under Clause 15 of the Letters Patent and applications relating thereto directed against the judgment or order of one of the Judges of the Circuit Bench, and

(b) Urgent applications under Articles 226 and 227 of the Constitution of India, as and when the Circuit Bench is not in session; may be filed with the leave of the Chief Justice and heard in Calcutta. Provided, however, that all such appeals and applications shall stand transferred to the Islands for being dealt with and disposed of by the next Circuit Bench, if not already disposed of, and

(c) Every case in respect of which all the parties in writing request the Registrar, Appellate Side, for being heard in Calcutta and the Chief Justice agrees to the same, may be filed and heard in Calcutta.

5. All cases arising out of the Islands but filed and/or pending in Calcutta but not heard in part shall stand transferred to the Islands for being placed before the Circuit Bench for disposal.

6. Urgent applications for bail in any criminal appeal and/or criminal revision and/or reference may be filed before the Registrar of the Islands, who shall have power to grant bail pending the orders of the next Circuit Bench.
7. The Registrar of the Islands shall be the Taxing Officer of the Court and the Chief Ministerial Officer of the Registry shall be the Stamp Reporter for all cases arising in the Islands.
8. The duties allotted to the Deputy Registrar in the Appellate Side Rules of the Calcutta High Court shall be performed by the Deputy Registrar of the Andaman and Nicobar Islands appointed by the Chief Justice.
9. During the absence of the Registrar from the head quarters in the Islands, save as hereinafter provided, the jurisdiction and duties of the Registrar shall be exercised and performed by the Sessions Judge who shall report daily to the High Court all orders of judicial or quasi-judicial character passed by him.
10. During the absence of the Registrar, any Memorandum of Appeal or Application, which is ordinarily required to be presented to the Registrar, may be presented to the Sessions Judge. All Memoranda of Appeals and Applications so received by the Sessions Judge shall be submitted for order to the Registrar if he is at the head quarters on the next day.
11. The Chief Justice will appoint the Registrar and the necessary staff including the Deputy Registrar.
12. Preparation of Paper-Books of the cases arising in the Islands shall be in accordance with the Rules in Chapter IX of the Appellate Side Rules, reading "Registrar or Deputy Registrar" for "Officer-in-Charge of Judicial Department" wherever it occurs in those rules.
13. It may not be out of place to mention here that by virtue of rule making power conferred upon this Court for regulating its own procedure, the Appellate Side Rules have been enacted and in the said Rules, a specific chapter, viz. Chapter X dealing with the provision of the Review has found place. The said Appellate Side Rules including the Chapter X are also applicable to the Circuit Bench at Andaman and Nicobar unless specifically excluded by Chapter XVIII or any other provisions of the Appellate Side Rules.
14. The aforesaid Chapter X dealing with the application for Review is quoted below:

Chapter X

Applications for Review of Judgment
1. The provisions of Chapter IV shall apply, so far as may be, to every application for review.

2. Every application for review of judgment shall set forth plainly and concisely the grounds on which a review is sought, and shall contain a certificate by an advocate of the court similar, mutatis mutandis, to that prescribed in appeals from appellate decrees (See Chapter V, Rule6).

3. Every application for review shall be accompanied by a certified copy of the judgment or order complained of, and of the decree, if necessary; and when the application proceeds on the ground of a discovery of fresh evidence, certified copies of the documents, if any, relied upon, shall be annexed to the application, together with an affidavit setting forth the circumstances under which such discovery has been made.

4. Every application for review of judgment shall be presented to the Stamp Reporter, who will certify thereon whether the petition is in due form, within time, and properly stamped, or that it is irregular, and shall return the petition with such certificate.

5. Within seven days of the return of the application by the Stamp Reporter, the applicant, either in person or by an advocate, shall present the application by way of motion in open court to the Division Bench of whose judgment a review is sought; or, if the Judges of such Division Bench be not sitting together, to the senior of such Judges who may be then attached to the court and present.

6. If an application for review of a judgment cannot be heard in the manner provided in Order XLVII, Rule 5, CPC Code, such application shall be presented by the applicant or his advocate with the certificate of the Stamp Reporter, as required by Rule 4, to the Chief Justice, who shall provide for the hearing of the application.

7. No copy of a decree or judgment presented or filed with an application for review which has been granted shall be returned. No affidavit accompanying an application for review shall be returned, whether such application has been granted or not.

8. If notice is issued to the other side, the applicant for review shall, before hearing, file a duplicate typed copy of the application, together with two typed copies of each of the following documents:

(i) The judgment or order complained of, and the decree, if necessary.

(ii) Any affidavit filed with the application.

(iii) Any affidavit in-reply.

(iv) When the application proceeds on the ground of a discovery of fresh evidence, the documents, if any, relied upon, together with an affidavit setting forth the circumstances under which such discovery has been made.

Note: Applications for copies of the documents mentioned above shall be governed generally by the rules contained in Chapter XIII.

(Emphasis supplied by us).

The provisions contained in Order 47 Rule 5 of the Code are very much relevant and quoted below:

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

(Emphasis supplied by us).

15. The contention of the learned Counsel for the parties before us was that in Rule 1(a) of Chapter XVIII, the word "case" has been defined to include a suit, appeal, application, petition and reference and according to them, it necessarily implied that the word "case" also included an application for review.

16. The learned Counsel then relied upon the definition of "Circuit Bench" meaning a Bench consisting of one or more Judges holding Court in the Islands and by relying upon Rule 3 quoted above, they contended that all the applications including the application for review should be heard by the Bench for the time being in Circuit, whoever may be the Judges comprising the same.

17. After hearing the learned Counsel for the parties and after going through the aforesaid provisions, we are unable to accept the contention of the learned Counsel for the parties that Chapter XVIII of the Appellate Side Rules has by necessary implication excluded the operation of Chapter X of the Appellate Side Rules or Order 47 Rule 5 of the Code of Civil Procedure. By virtue of Chapter X framed by this Court, the necessity of complying with the requirement of Rule 5 of Order 47 of the Code has not been dispensed with; on the other hand, Rule 6 of Chapter X specifically provides that if the requirement of Order 47 Rule 5 cannot be complied with in a given situation, the matter should be moved before the Chief Justice who shall provide for hearing of the same.

18. Thus, notwithstanding the fact that the judges of the Circuit Bench who passed the original order are still functioning as judges of this Court, if they are not available for sitting in the Circuit Bench within six months of filing of the application for review, any of the parties to such application is at liberty to mention the matter before the Chief Justice for appropriate order because those judges are precluded by absence or other cause for a period of six months next after the application, from considering the decree or order to which the application refers as provided in Rule 5 of Order 47 of the Code. In such a situation, the Chief Justice will provide for hearing

the matter either by assigning the matter to that bench in Kolkata when the circuit is not in session, provided, the case falls within the circumstances as provided in Rule 4 of Chapter XVIII of the Appellate Side Rules or by sending those judges to regular circuit or a special circuit for hearing that particular matter or similar other matters where they are involved or by assigning the matter to the existing or a future Circuit Bench; but there is no scope of interpreting any of the Rules of Chapter XVIII of the Rules as one authorizing only the existing Circuit Bench for the time being to take up the application for review as a matter of course by disregarding the provisions of Chapter X. Rule 3 of the Chapter XVIII merely says that subject to Rule 4 thereof, the matters arising out of the Islands should be initiated in the Islands and heard by the Circuit Bench but it does not exclude the operation of Chapter X of the Rules. At this juncture, it will be relevant to refer to Rule 2 of Chapter XVIII, according to which "one or more Judges of the High Court shall visit the Islands, by way of Circuit, whenever the Chief Justice from time to time may appoint, in order to exercise in respect of cases arising therein the jurisdiction and powers vested in this Court by the Constitution and the Calcutta High Court (Extension of Jurisdiction) Act, 1953, provided that such visit shall be made at least once a month unless the Chief Justice otherwise directs." (Emphasis supplied by us). Thus, a Circuit Bench may consist of one or more than one judge of the High Court as directed by the Chief Justice and as pointed out earlier, the Chief Justice in exercise of power conferred under Chapter X Rule 6 should constitute a Bench if the situation contemplated therein arises. Such Bench should hold the court in the island for hearing the application for review, unless the circumstances mentioned in Rule 4 of Chapter XVIII exist, when the bench can also dispose of the matter by holding the court in Kolkata and such bench will also be deemed to be a circuit bench within the meaning of Chapter XVIII.

19. The provision of review is a peculiar creature of the CPC which enables the original Court which actually dealt with a matter to reconsider its own order or decree on the specified grounds mentioned in Order 47 Rule 1 of the Code and according to Rule 5 thereof, if the Judges of the original Court who passed the order or the decree sought to be reviewed, are still available as Judges of that Court, the application for review should be dealt with by those judges unless for unavoidable reasons any of those judges is unable to attend court within six months from the date of filing of the application or has since retired or been transferred or has died and other Judges cannot hear such application. By the Appellate Side Rules framed by this Court the provisions contained in Order 47 Rule 5 has been fully adopted as would appear from Rule 6 of Chapter X.

20. Section 114 of the CPC which confers the substantive right of review also specifically provides that review application should be filed before that Court which disposed of the original proceeding. Thus, a combined reading of Section 114 and Order 47 Rule 5 of the Code makes it abundantly clear that unless the special circumstances mentioned in Order 47 Rule 5 of the Code subsist, no other Judges than the ones who delivered the original judgment or order sought to be reviewed

can take up the application for review.

21. It appears from records that this Court in exercise of power of rule making for regulating its own procedure has not made any specific provision excluding the operation of Order 47 Rule 5 from its operation in the Circuit Bench at Andaman. The entire Chapter XVIII of the Appellate Side Rules including the rules mentioned above, do not indicate anywhere that the provision of review provided in the CPC or those contained in Chapter X of the said Rules will not be applicable. Rule 3 of Chapter XVIII relied upon by the learned Counsel for the parties, merely enables the Circuit Bench to decide the cases by virtue of the provision of Calcutta High Court (Extension of Jurisdiction) Act, 1953 and the said Rule is subject to the provisions contained in Rule 4 of the said Chapter.

22. We are unable to accept the contention of the learned Counsel for the parties that the aforesaid provision should be treated to be the "implied assignment of the application for review to the existing Circuit Bench by the Chief Justice", even though the Judges who dealt with the original proceeding are available as Judges of Calcutta High Court. At this stage, it may not be out of place to mention here that by virtue of the provisions contained in the Code of Civil Procedure, in the matter of application for review read with Chapter X of the Appellate Side Rules applicable to the Circuit Bench, the Judges who have decided the original matter so long they are available as the Judges of this High Court alone have the jurisdiction to entertain the application for review and such power is not conferred upon any other Judge unless the Judges who passed the order sought to be reviewed decide not to entertain the application or any of the other circumstances mentioned in Order 47 Rule 5 of the Code is present. In those circumstances, Rule 6 of Chapter X would be applicable and the Chief Justice can assign the matter to any other judges.

23. In the decision of Five-Judge-Bench in the case of K. N. Mishra (supra) the Bench accepted the contention that Rule 3 of Chapter XVIII excludes the operation of Order 47 Rule 5 of the Code and in paragraph 23 the following reason has been given:

The aforesaid situation necessarily implies that it may not always be possible for the Bench hearing a review application to pass a final verdict on the review application by stating what the order on the main application should be. The limited time available to a Circuit Bench in deciding a review application may require to review application to be heard by one Bench and the main matter to be heard by another Bench, notwithstanding the fact that the Judges comprising the First Bench may be available in Calcutta. What is relevant is their unavailability in the Islands to give effect to the principles of Order 47 Rule 5 of the Code of Civil Procedure.

24. With great respect, we are unable to subscribe to the aforesaid view taken by the said Five-Judge-Bench for the simple reason that the said Rule 3 has not at all excluded the operation of Chapter X of the Rules or Order 47 Rule 5 of the Code. It appears that the Five-Judge-Bench in K. N. Mishra (supra) failed to appreciate the

role of Chapter X of the Appellate Side Rules which should be followed in all respect for filing, hearing and disposing of an application for review in this Court, whether in the mainland or in the Circuit, as in Chapter XVIII there is no separate provision for dealing with an application for review. In fact, the entire Appellate Side Rules except that portion which are excluded specifically or by necessary implication by Chapter XVIII or any other provisions of the Rules, should be applicable to the cases in the Circuit.

25. At this stage, we may also refer to the Rules applicable to an application under Article 226 of the Constitution of India which is part of the Appellate Side Rules as Appendix IV thereof. In those Rules, at several places separate provisions have been made explicitly applicable for the Andaman and Nicobar Islands (See Rules 8, 26, 27, 35(1), 35(5) and 38) but in Chapter X of the Appellate Side Rules, there is no deviation indicated specially for Andaman and Nicobar Islands. Even, in Appendix IV, there is no separate provision of review and thus, Chapter X of the Appellate Side Rules alone would be applicable in connection with the applications for review in relation to the Civil Appeals as well as Writ Matters in the Andaman and Nicobar Islands.

26. Incidentally, we may also refer to the Rules relating to contempt which is Appendix III to the Appellate Side Rules. By Rule 15 thereof, in case of civil contempt grounded on wilful disobedience to a judgment, decree, direction, order or other process of a court or wilful breach of an undertaking given to a court shall be heard by the judge or judges who passed the judgment, or the decree or gave the direction or the order or issued the writ or other process or before whom the undertaking was given. However, according to Rule 18 thereof, notwithstanding anything contained in the said Rule 15, the Chief Justice may assign a rule for hearing before another judge or bench if required in the special circumstances of the case or if the judge or the Bench reports or report to the Chief Justice for so doing. In chapter X, however, no such authority has been given to the Chief Justice to assign the application for review to any other bench except under the circumstances mentioned in Rule 6 indicated earlier.

27. Thus, neither the legislature nor this Court in exercise of its rule making power for regulating its own procedure has deviated from the mandate of Order 47 Rule 5 of the Code and on the other hand, has expressly adopted the provisions of Order 47 Rule 5 of the Code. It will not be out of place to mention here, that by exercise of Rule making power, this Court can annul, alter or add to any of the Rules of the First Schedule of the Code but there is no scope of altering or deviating from the body of the Code as provided in Section 122 of the Code.

28. In this connection, the following observations of a Special Bench of this Court in the case of *Mst. Nurnahar Bewa v. Rabindra nath Dev* reported in AIR 1988 Cal 358 (SB) dealing with the aforesaid aspect may be referred to:

After considering the respective contentions made on behalf of the parties, it appears to us that the Civil P.C. has got two "parts which may be termed as (a) "body of the Code" and (b) the "rules". Mr. Bhattacharya, in our view, is justified in contending that the body of the Code is somewhat inflexible inasmuch as the same cannot be altered except by amendment by the Legislature but the rules concerning with the details and machinery for implementing the various provisions of the Code, require greater flexibility and necessarily they should be easily altered. Precisely for the said purpose, the High Courts have been empowered u/s 122 to bring suitable amendments to various rules under the orders contained in the Civil P.C. Such orders and rules basically relate the procedural matters and they get sustenance from the Sections of the Civil P.C. In our view, Mr. Bhattacharya has reasonably contended that while the Section in the Civil P.C. creates jurisdiction, the rules indicate the mode in which such jurisdiction is to be exercised and the rules provide for the procedure for implementation of substantive rights created under various Sections of the Code.

29. As in the body of the Code, i.e. in Section 114 of the Code, it is explicitly mentioned that the review application is to be made to the Court "which passed the decree or made the order" and the same is maintained in the Schedule, there is even no scope of amending the Rules making it inconsistent with the body of the Code. We, thus, find that view taken in the case of K. N. Mishra (supra), regarding the power of the circuit bench consisting of the different judges than the ones who passed the original order to hear the application for review is not only contrary to the Rules framed by this Court but also is against the spirit of Section 114, the body of the Code as well as against the special concept of review.

30. In view of our opinion on the above question, the other points referred to the Five-Judge-Bench in the case of K.N. Mishra(supra), have become superfluous because those questions would have arisen for consideration only if the answer to the main question was decided by holding that the provisions of Chapter X Rule 6 of the Appellate Side Rules are inapplicable to an application for review in the Circuit.

31. We now propose to deal with the judgments cited by the learned Counsel for the parties.

32. All the counsel in support of their contention, relied upon the decision of the Supreme Court in the case of [Iridium India Telecom Ltd. Vs. Motorola Inc.](#), where it was held that in case of conflict between the Rules framed under the Letters Patent for the guidance of the Procedure of the Original Side of the Chartered High Courts and the Code of Civil Procedure, the former would prevail. In our view, for the interpretation of the Appellate Side Rules, the provisions contained in Section 129 cannot be resorted to, which strictly applies to the Original Side Rules of the Chartered High Court and according to the said decision, unless, the Code is amended with specific exclusion of the provisions based on the Letters Patent, the Rules framed by virtue of power of the Letters Patent would prevail over the Code.

For instance, by specific incorporation of Section 100A of the Code, the provision of the appeal before the Division Bench against the judgment of the single judge passed in a second appeal under the previous provisions of the Letters Patent has been done away with.

33. In the case before us, Section 129 of the Code is not at all attracted and as such, the principles laid down in the said decision of the Supreme Court is of no avail in deciding the points involved in these references. On the selfsame ground, the decision of the full bench of this Court in the case of Manikchand Durgaprasad, reported in AIR 1961 Cal 483 is of no assistance to them as there was conflict between the Original Side Rules and the provisions contained in the Schedule to the Code.

34. Several other decisions of various other High Courts and this Court were placed to show that in case of a conflict between the Rules framed by the High Court and the provisions of the Code, the former should prevail. Those decisions are quoted below:

- 1) [Gowal Das Sidany Vs. Luchmi Chand Jhawar,](#)
- 2) [Mehta Suraya and I.P.M. Industries Limited and Others Vs. United Investment Corporation,](#)
- 3) Chandra Bhushan Misra v. Smt. Jayatri Devi (AIR 1969 All 142 (FB);
- 4) The Mahalaxmi Tent Factory, Jodhpur v. Kamla Devi and Ors. (AIR 1975 Raj 13);
- 5) [Shaw and Co. Vs. B. Shamaldas and Co.,](#)
- 6) [Umeshchandra Banerji Vs. Kunjilal Biswas and Others,](#)
- 7) Howrah Motor Co. Ltd. v. Excide Industries (2005 CLT (3) 573);

35. We have already pointed out that by the way of enactment of the Appellate Side Rules, this Court has specifically adopted the provisions of Order 47 Rule 5 of the Code vide Chapter X which are the only provisions of the Rules applicable in dealing with the applications for review in this High Court including the Circuit Bench and neither Chapter XVIII nor any other provision of the said Rules excludes the operation of the said Chapter. We have also indicated that there are several provisions in the Appellate Side Rules specifically excluding its operation to the Circuit Bench as would appear from the Appendix IV of the Rules but in Chapter X, no exception has been incorporated prohibiting its application to the Circuit Bench. Thus, there is no conflict between the existing Rules and the Code in the matter of application of Order 47 Rule 5 of the Code and those decisions are of no help to the learned Counsel for the applicants.

36. Moreover, we have already pointed out that by approving the right of the other judges to hear out a review application as a matter of course as held in K. N. Mishra

(supra), the very purpose of Review is frustrated.

37. The Supreme Court in the case of State of Orissa v. Commissioner of Land Record and Settlement, Cuttack, reported in AIR 1998 SC 3067 pointed out the special characteristics of the power of review by relying upon the decision of the Privy Council in the case of Maharajah Mahashur Singh v. Government of India, (1857-59) 7 Moo Ind App 283 (PC) 3, which is quoted below:

The decision of the Privy Council in Maharajah Mahashur Singh v. Government of India, (1857-59) 7 Moo Ind App 283 (PC) 3, Sutherland Weekly Reporter, p. 45 (P.C. decisions) to which reference was made by learned senior counsel Sri T.L. Vishwanatha Iyer is very apt in this connection. Adverting to the basic concept of review, it was observed by the Privy Council (p. 47):

"It must be borne in mind that a review is perfectly distinct from an appeal: that is quite clear, from all these Regulations that the primary purpose of granting a review was re-consideration of the same subject by the same Judge, as contra-distinguished to an appeal which is a hearing before another tribunal."

Their lordships added:

"We do not say that might not be cases in which a review might take place before another and a different Judge: because dealt or some other unexpected and unavoidable cause might prevent the Judge who made the decisions from reviewing it: but we do say that such exceptions are allowable only ex necessitate. We do say that in all practicable cases, the same Judge ought to review....."

It is, therefore, clear that the same Judge who disposes of a matter, if available, must "review" the earlier order passed by him inasmuch as he is best suited to remove any mistake or error apparent on the face of his own order. Again he alone will be able to remember what was earlier argued before him or what was not argued. In our opinion, the above principle is equally applicable in respect of orders of review passed by quasi-judicial authorities.

(Emphasis supplied by us).

38. On consideration of the entire materials on record, we hold that if in spite of the fact that the judges of the Circuit Bench who passed the original order are still functioning as judges of this Court, but they are not available for sitting in the circuit bench within six months of filing of the application for review, any of the parties to such application, may by taking aid of Rule 6 of Chapter X of the Appellate Side Rules mention the matter before the Chief Justice for an appropriate order and then the Chief Justice may provide for hearing the matter either by assigning the matter to those judges in Kolkata, when the circuit is not in session provided the case falls within the circumstances as provided in Rule 4 of Chapter XVIII of the Appellate Side Rules or by sending those judges to regular circuit or a special circuit for hearing that particular matter or similar other matters where they are involved or by

assigning the matter to the existing or a future circuit bench as the Chief Justice thinks fit because those judges, although available as judges of the Calcutta High Court, are precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers as provided in Rule 5 of Order 47 of the Code.

39. The references are answered accordingly.