(2019) 11 GAU CK 0055

Gauhati High Court

Case No: Review Petition No. 37 Of 2019

Bimal Sarma		APPELLANT
	Vs	
Daibaki Kumari Devi And 5 Ors		RESPONDENT

Date of Decision: Nov. 21, 2019

Acts Referred:

- Code Of Civil Procedure, 1908 - Section 114, Order 7 Rule 7, Order 47 Rule 1

Hon'ble Judges: Prasanta Kumar Deka, J

Bench: Single Bench

Advocate: P D Nair

Final Decision: Dismissed

Judgement

Heard Mr. D Mozumdar, learned Senior Counsel assisted by Mr. G Alam, learned counsel for the petitioner and Mr. S Ali, learned counsel for the

respondents.

This application under Section 114 read with Order XLVII Rule 1 of the CPC is for review of the judgment and order dated 12.10.2018 passed in

RSA 150/2013. The ground for review is reproduced hereinbelow:-

Ã¢â‚¬Å“(iii) For that the finding of this HonÃ¢â‚¬â„¢ble Court while deciding substantial question of law No. 3 to the effect that the evidence of admission of

the plaintiff/respondent is of no help to the defendant appellant No. 1 since there is no counter claim for declaration of right of the defendant/ appellant

No. 1 to possess the Kha Schedule land is erroneous inasmuch as there is no need to file counter-claim by the appellant/defendant No. 1 because such

admission on the part of the mother did not entitle the petitioner/plaintiff a decree at least for the land measuring 8 lechas with house standing thereon.

The said admission is in effect an abandonment of a part of her claim. Even assuming that there was no formal expression of her desire to abandon a

part of her claim, considering the question that Ã¢â‚¬" (I) the petitioner has established clearly in the trial that the house standing on 8 lechas of land so

abandoned by the mother with knowledge of the mother and others was constructed by the petitioner, (II) the case is between a mother and her son,

(III) there are materials to show that the brother of the petitioner had a hand in the institution of the suit and (IV) it came out spontaneously from the

heart of the mother that she does not have the intention to evict the petitioner from at least 8 lechas of land, this HonÃ¢â‚¬â„¢ble Court ought to have

protected the land measuring 8 lechas in possession of the petitioner and the house standing thereon.Ã¢â‚¬â€‹

The petitioner was the defendant/appellant no. 1 in the second appeal. Mr. Mozumdar supporting the aforesaid ground for review submits the truth

should be the guiding star in the entire judicial process. The power of the court is to be exercised with an object to subserve the cause of justice and

for getting the evidence in aid of just decision to uphold the truth. In support of his submission Mr. Mozumdar relies on the case law of Maria

Margarida Sequeira Fernandes and others vs. Erasmo Jack De Sequeira (Dead) through LRs. reported in (2012) 5 SCC 37. 0Seeking invocation of

the power under Order XLVII Rule 1 of the CPC it is the contention that during the cross examination of the plaintiff mother she expressed in her

cross examination that she had no objection if the defendant/appellant no. 1 remains over 8 lechas of land. Referring the said statement of the plaintiff

mother Mr. Mozumdar wanted to link it to the natural bond of the mother towards her son. In the present case in hand, the plaintiff is the mother and

the defendant/appellant no. 1 is her younger son. For the said reason in order to bring out the truth the relief sought for by the plaintiff/ respondent no.

1 for her declaration of right, title and interest over Ã¢â‚¬Ëœ Ka Ã¢â‚¬â„¢ schedule land and confirmation of her possession in respect of land of Schedule

Ã¢â‚¬Ëœ Kha Ã¢â‚¬â„¢ with that of Schedule Ã¢â‚¬Ëœ Ka Ã¢â‚¬â„¢ after dismantling and removing all constructions made by the principal defendant may be modified

invoking the power under Order VII Rule 7 of the CPC.

Mr. Ali, on the other hand, objected to the said submission of Mr. Mozumdar on the ground that the jurisdiction under Order XLVII of the CPC cannot

be exercised inasmuch as the petitioner failed to point out any error apparent on the face of the judgment. Referring to the judgment Mr. Ali submits

that the same contention was made at the time of hearing of the second appeal and to that effect after considering the said submission the court

passed the reasoned judgment and once the court heard the submission and passed the judgment there is no further scope for review of the said

judgment. In support of his contention Mr. Ali relies on the case law of Kamlesh Verma vs. Mayawati and others reported in (2013) 8 SCC 320

another case law of Union of India vs. Sandur Manganese and Iron Ores Limited and others reported in (2013) 8 SCC 337.

I have considered the submissions made by the learned counsel appearing for the parties. In order to decide this review application it would be

appropriate to reproduce the contentions of the learned counsel for the defendant/appellant no. 1 and the findings of the court in the second appeal for

ready reference:-

Ã¢â‚¬Å“16. I have considered the submission of the learned counsel appearing for the parties to the appeal. The contention of Mr. Mazumdar is specific to

the point that the plaintiff respondent once permitted the defendant appellant No. 1 to reside within Ã¢â‚¬Ëœ Kha Ã¢â‚¬â„¢ schedule land and on the basis of the

said permission the defendant appellant No. 1 having altered his position, the plaintiff respondent is not entitled for the relief sought for as decided by

the courts below deciding the Issue No. 3 in favour of the plaintiff respondent. In other words, the plaintiff respondent is estopped seeking the said

relief of recovery of possession. In order to examine the said submission of Mr. Mazumdar it would be proper and appropriate to look into the

pleadings of both the plaintiff respondent and the defendant appellant No. 1.

17. ..... Thus from the pleadings it is clear that the defendant appellant No. 1 totally denied the pleadings of the plaintiff respondent so far the

ownership of the Ã¢â‚¬ËœKaÃ¢â‚¬â„¢ schedule land and the fact of permission to reside over the 8 lechas of land flowing from his mother and the acceptance

of the terms and condition as hereinabove stated. Keeping in view of the submission of Mr. Mazumdar it would be proper to enter into the principles

of estoppels and the burden to be discharged by whom in a suit of like nature.

19. ..... The denial of the permission and the acceptance of the terms and condition itself gives and inference that the defendant appellant No. 1 did

not act upon the representation and/or the declaration of the plaintiff respondent while carrying out the construction over the Ã¢â‚¬ËœKhaÃ¢â‚¬â„¢ schedule

land.

21. In the cross-examination of the plaintiff respondent while deposing against the counter claim of defendant appellant No. 2 she deposed that she

has no objection if the defendant appellant No. 1 stays over the 8 lechas of land. Mr. Mazumdar referring to the said deposition submits that the suit is

initiated by the elder son of the plaintiff respondent keeping himself behind the scenario. There is no dispute at Bar that the plaintiff respondent

allowed the defendant appellant No. 1 to possess and raise his residential house over the said 8 lechas of land. But once the ownership of the schedule

Ã¢â‚¬ËœKaÃ¢â‚¬â„¢ land is decided in favour of the plaintiff respondent on the face of denial by the defendant appellant Nos. 1 and 2, in my opinion mere

deposition by the plaintiff respondent the cause of action for the suit cannot be accepted to be vanished. The suit is decided on the facts and

circumstances pleaded giving rise to the cause of action for filing the same by the plaintiff respondent and the same crystallizes once the suit is filed.

The issues are framed keeping in view the pleadings which includes the cause of action and the court is to consider the said pleadings forming the

cause of action and to decide whether the plaintiff respondent is entitled to the relief or reliefs on the basis of the cause of action pleaded in his plaint.

The said piece of evidence could have been used against the plaintiff respondent had there been total denial of the permission granted to the defendant

appellant No. 1 but it is not the case of plaintiff respondent that she never granted the permission to the defendant appellant No. 1 to construct over

the said Ã¢â‚¬ËœKhaÃ¢â‚¬â„¢ schedule land and reside. It is the cause of action that accrued when the defendant appellant No. 1 tried to encroach further land

beyond the Ã¢â‚¬ËœKhaÃ¢â‚¬â„¢ schedule land. In my considered opinion the said piece of evidence of the plaintiff respondent is of no help to the defendant

appellant No. 1 wherein there is no counter claim for declaration of the right of the defendant appellant No. 1 to possess over the Ã¢â‚¬ËœKhaÃ¢â‚¬â„¢

schedule land.Ã¢â‚¬â€‹

In the case of Kamlesh Verma vs. Mayawati and others (supra) the HonÃ¢â‚¬â„¢ble Apex Court while making an observation of the summary of the

principles of review held as follows:-

Ã¢â‚¬Å“20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of

justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review

petition.

(ix) Review is not maintainable when the same relief sought atthe time or arguing the main matter had been nagatived.Ã¢â‚¬‹

In the case of Union of India vs. Sandur Manganese and Iron Ores Limited and others (supra), the HonÃ¢â‚¬â„¢ble Apex Court held as follows:-

Ã¢â‚¬Å“23. It has been time and again held that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a

view. In Parsion Devi v. Sumitri Devi, this Court held as under:

Ã¢â‚¬Å“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 Ã¢â‚¬Ëœreheard and correctedÃ¢â‚¬â„¢. A review petition, it must be remembered has a limited purpose and

cannot be allowed to be Ã¢â‚¬Ëœan appeal in disguiseÃ¢â‚¬â„¢.Ã¢â‚¬â€‹

24. This Court, on numerous occasions, had deliberated upon the very same issue, arriving at the conclusion 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.Ã¢â‚¬â€‹

From the aforesaid ratio it is the settled law that repetition of old argument is not enough to reopen a judgment nor the review proceedings can be

equated with the original hearing of the case. The mere possibility of two views also cannot be a ground for review. The review proceedings are not

appeals and must be strictly confined to the scope of Order XLVII Rule 1 of the CPC. The ground so urged by the learned Senior Counsel for the

petitioner bereft of any error apparent on the face of record if at all accepted it would require fresh appreciation of evidence and other materials like

the pleadings of the parties and to pass a fresh judgment by moulding the relief sought for by the plaintiff/respondent no. 1 which, in my considered

opinion, is not permitted under the scope of Order XLVII Rule 1 of the CPC. Moreover, as hereinabove observed, the submission of the learned

counsel for the petitioner was taken into consideration while passing the judgment. Mere possibility of two views as held by the HonÃ¢â‚¬â„¢ble Apex

Court upon appreciation of evidence on record also cannot be held to be within the scope of Order XLVII Rule 1 of the CPC. For the said reason I

am not inclined to entertain this review application which stands dismissed. No costs.