
(2008) 09 J&K CK 0008
In the Jammu And Kashmir High Court
Case No : Review Petition No. D-5 Of 2008

Bakshi Dev Raj & Anr

APPELLANT

Vs

Sudhir Kumar

RESPONDENT

Date of Decision : 08-09-2008

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Order 47 Rule 1(1), 100

Citation : AIR 2009 J&K 2765 : (2009) 1 JKJ 31 : (2009) 4 RCR(Civil) 814 : (2009) 2 SriLJ 676

Hon'ble Judges : Sunil Hali, J

Bench : Single Bench

Advocate : Y.E.Tak, Ajay Sharma, A.V.Gupta, Advocates appearing for the Parties

Judgement

1. This review has been filed against the judgment of this court in civil second appeal No. 19/2005 passed on 18.3.2008 whereby the appeal has been decided with the consent of the parties.
2. The grounds taken in the review are twofold; (a) that the concession given by the counsel for the petitioners was not lawful and is in violation of section 23 of the Contract Act which envisages that agreement has to be lawful and (b) that the civil second appeal has been disposed of without hearing on substantial questions of law framed by the court. In order to appreciate the legal premises raised by the learned counsel for the petitioners it is necessary to give brief facts of the case.
3. A civil suit was filed by respondent before the trial court at Kathua. The frame of the suit was that respondent plaintiff was owner of land bearing Khasra No. 65 and this title of the plaintiff was denied by the defendant petitioners and as a consequence of the denial the plaintiff respondent faced the threat of dispossession.

4. The stand of defendantspetitioners was that plaintiffrespondent was trying to usurp the property of defendants by filing the present suit. Said suit

came to be dismissed. An appeal was preferred before District Judge, Kathua who vide his order dated 9.6.2005 set aside the decree of the trial

court and consequently passed the decree in favour of the plaintiff. The direction in the decree was that defendants be restrained from interfering or

causing any interference or obstruction on the land of the plaintiff comprising survey No.110/65 adjacent to the land of defendantpetitioner. Against

this, civil second appeal was filed. In the second appeal two substantial questions of law were framed which are reproduced herein below:

1.Whether the report of the Commissioner is admissible in evidence without its formal proof?

2. Whether reliance can be placed on a site plan prepared by the Architect when the record is available with the Revenue Authorities which has

been withheld by the plaintiff?

5. However, this civil second appeal came to be disposed of with the consent of the parties. By this consent order the decree of the appellate court

was modified by giving following directions:

(a) The suit of respondent/plaintiff is decreed restraining other side from interfering or causing any interference or encroaching upon any portion of

his land measuring 11 kanals 12 marlas under survey No. 110/65 alongwith his other proprietary land w1 wtever existing on spot, (b) The

sheesham and shreen trees existing on spot would be the boundary line between two parcels of land belonging to rival sides as aforementioned

with the exact demarcating line running from centre of trees, which would be property of respondent/plaintiff to be cut by him at an appropriate

time without undue delay.

c) Whatever proprietary land of either parties falls on other side of the trees to form part of opposite party land stands conceded to each other by

respective parties over which their claims would be deemed to have been abandoned.

6. Against this, a special leave petition was filed before the Supreme Court bearing No. 10939/2008 and the same came to be decided on

14.5.2008.

7. It is in this backdrop that the review petition has been filed on 21.5.2008.

Caveator through Mr. A.V. Gupta, Sr. Advocate appeared on behalf

of the respondent and contested the review petition at the admission stage and has taken following objections to the maintainability of review

petition:

(a) that once the petitioner had preferred an appeal before the Supreme Court, the review was barred under O.47 Rule 1 sub rule (1) of CPC.

(b) that application is time bared, period of limitation prescribed for filing review in terms of Rule 66 Sub Rule (3) of J&K High Court Rules is 30

days.

(c) that review application can be maintained only if some evidence or matter has been discovered and it was not within the knowledge of

petitioner when the decree was passed or where there was a mistake or an error apparent on the face of record.

8. I have heard learned counsel for the parties and perused the record.

9. The review is an act of looking over something again with the view to correction or improvement. It is creation of statute. Power of review can

be exercised for correction of mistake not to substitute a view and it has to be exercised strictly in consonance with the statute. The contention of

the learned counsel for the petitioner is that concession recorded by the erstwhile counsel of the petitioner has caused substantial loss to the

petitioner and the said concession has been recorded in contravention to the provisions of O. 23 Rule 3 of CPC. It is alleged that no instructions

were given to the learned counsel for the petitioner to make such concession. It is further alleged that court should not have acted upon the

statement of erstwhile counsel for the petitioner as the same was neither executed nor signed by the parties.

10. The contention of the petitioner is that the compromise has been arrived at without the consent of the parties. He may be right in saying that no

instructions were given to the learned counsel for the petitioner to record such concession because the effect of such concession has rendered

substantial loss to the petitioner. The petitioner states that this is decision which can be characterized as vitiated by error apparent on the face of

record. The petitioner has placed reliance on two judgments of Supreme Court i.e. Gurpreet Singh vs. Chatur Bhuj Goel (1988)1 SCC 270 and

Pushpa Devi Bhagat vs. Rajinder Singh & Ors. 2006 (5) SCC 566. In the said

cases the Supreme Court was interpreting O. 23 Rule 3 CPC

only indicated as to when a compromise is required to be filed in writing. If we assume that compromise has been wrongly recorded, would that be

a ground for review. The 2nd question which has been raised by the learned counsels for the petitioner is that the appellate court was required to

have disposed of the appeal only after hearing the parties on substantial questions of law. On the other hand the contention raised by the learned

counsel for the respondents is that there is no inherent power of review with the court to review an order. His first contention is that no review is

permissible if an appeal has been preferred by the petitioner. It is not in dispute that an appeal was preferred before the Supreme Court which

subsequently disposed of on May 14, 2005. While analyzing import of O. 47 Rule 1 sub rule (1) for determining whether or not the terms of O. 47

Rule 1 sub rule (1) are satisfied when an application for review is filed. If on that date no appeal has been filed, it is competent for the court to hear

the petition for review. On that date if no appeal has been filed, it is competent for the court hearing the petition for review to dispose of the

petition on merits notwithstanding pendency of the appeal. If application for review is pending and appeal itself stand disposed of, jurisdiction of

court hearing the review comes to an end. An application for review of appealable decree is allowed only if no appeal has been preferred. In the

present case appeal was preferred before the review petition was filed. No review would be permitted under these circumstances.

11. The other contention of the learned counsel for the petitioner is that review is maintainable because there is a mistake or error apparent on the

face of record in the present case. A review by no mean is an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies

only for rectifying a patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law

which stares one in the face and there could reasonable be no two opinions entertained about it, a clear case of error apparent on the face of the

record would be made out. The grievance of the petitioner is that appellate court has recorded the concession of the learned counsel for the

petitioner without there being any written compromise signed by the parties or instructions to counsel to record concession. This according to the

petitioner is in violation of O. 23 Rule 3 CPC. This question is not a purely question of law and is not an error apparent on the face of record. It is

a matter which is required to be debated. This question cannot be decided without elaborate arguments and deliberations. This in my opinion

would not be a matter for review.

12. For what has been stated hereinabove I find no merit in this review which is dismissed.