

(2017) 07 CAL CK 0066
In the Calcutta High Court
Case No : 12476 of 2016

Pronab Pal

APPELLANT

Vs

Tapan Pal & Anr.

RESPONDENT

Date of Decision : 28-07-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 47 Rule 1](#) -
[Specific Relief Act, 1963](#), [Section 21](#), [Section 21\(5\)](#) - Power to award compensation in ce

Citation : (2017) 07 CAL CK 0066

Hon'ble Judges : Ashis Kumar Chakraborty

Bench : SINGLE BENCH

Advocate : Anubhab Sinha, Satrajit Sinha Roy, Udayan Dutta, Sudarshan Ray, Nirvika Dutta

Judgement

1. This is an application for review of the order dated December 12, 2016 passed by this Court

in C.O. 3640 of 2016. By the said order, this Court allowed the revisional application filed by the

defendant no. 2 in the suit and set aside the order dated July 28, 2016 passed by the learned Civil

Judge (Senior Division), 1st Court at Barasat, North 24 Parganas in Title Suit No. 852 of 2011

thereby, allowing the application filed by the present applicant, the plaintiff in the suit to amend his

plaint.

2. In the year 2011, the present applicant filed the aforementioned suit, before the learned

Civil Judge (Senior Division), 1st Court at Barasat, District- North 24-Parganas, against one Maya

Dhara, since deceased (the defendant no. 1) and the revisional petitioner (the defendant no. 2)

claiming, inter alia, a decree for declaration that the agreement for sale between himself and the

defendant no. 1, since deceased in respect of the suit property described in schedule "A" to the

plaint is valid and binding and that the subsequent deed of sale executed by the defendant no. 1,

since deceased in favour of the defendant no. 2 in respect of the suit property is invalid, inoperative,

void and liable to be set aside. In the suit, the present applicant also claimed a decree for specific

performance of the agreement entered into by and between himself and the defendant no. 1, since

deceased in respect of the suit property in his favour and in prayer (i) of the plaint he claimed a

decree for costs. Subsequently, in the year 2013 the present applicant filed an application before the

learned Court below praying for, amendment of his plaint filed in the suit to incorporate paragraph

10A in the plaint, as also to incorporate the words "including loss of Rs. 30 lakhs only", after the

word "cost" in prayer (i) of the plaint. By the order dated July 28, 2016 the learned Court below

allowed the said amendment application filed by the present applicant. The defendant no. 2

challenged the said order dated July 28, 2016 passed by the learned Court below by filing the

revisional application, being C.O. 3640 of 2016 before this Court. By an order dated November 23,

2016 this Court admitted the revisional application and stayed the operation of the order dated July

28, 2016. On December 12, 2016 when the revisional application was taken up for hearing none

appeared to represent the revisional petitioner. However, the learned advocate appearing for the

present applicant, the plaintiff submitted that the applicant had prayed for amendment of his plaint

to incorporate the claim for damages that he has suffered for the breach of the agreement for sale by

the defendant no. 1, since deceased and, as such, the learned Court below was absolutely correct to pass the order allowing the amendment of the plaint. However, this Court held that the cause of

action for the relief for damage sought to be incorporated in the prayer portion of the plaint arose in

the year 2010 but the amendment application was filed in the year 2016, when the said claim for

damages was barred by limitation. By the order dated December 12, 2016 this Court set aside the

order dated July 28, 2016 passed by the learned Court below allowing amendment application filed

by the applicant and allowed the revisional application. As mentioned earlier, it is the said order

dated December 12, 2016 which is sought to be reviewed by the applicant in this application.

During the pendency of this review application, the defendant no. 1 Maya Dhara died and her heirs

and legal representatives have been brought on record of this application as the proforma opposite

party nos. 2 (a) to 2 (c).

3. Mr. Anubhav Sinha, learned advocate appearing in support of the review application drew

the attention of this Court to paragraph 5 of the amendment application, as well as in paragraph 10

sought to be incorporated in the plaint where it is stated by the applicant plaintiff that since the

defendant no. 1 committed breach of the agreement for sale he is still continuing to reside at a

rented accommodation and he is still suffering damage. Therefore, according to him, the plaintiff

applicant's claim for Rs. 30 lakhs on account of loss sought to be incorporated in prayer (i) of the

plaint filed in the suit was not barred by limitation. It was further submitted that as per the

provisions contained in Section 21 of the Specific Relief Act, 1963 (in short "the Act of 1963"),

particularly the proviso to sub-Section (5) thereof, the plaintiff in a suit for specific performance

can, at any stage of the suit amend his plaint to claim compensation for the breach of contract

committed by the defendant. Mr. Sinha strenuously contended that in view of the proviso to sub-

Section (5) of Section 21 of the Act of 1963, the plaintiff in a suit for specific performance suit is

entitled to amend his plaint to claim compensation on account of the breach of contract by the defendant, at any stage of the suit before the trial Judge or even before the appellate Court and the

provisions of the Limitation Act do not apply to such claim of the plaintiff. In support of his

contention, the learned counsel relied on the decision of the Division Bench of this Court in the

case of Balaji Apartment (P) Ltd. vs. Flora Properties (P) Ltd. reported in 1998(2) Cal LJ 265 and

the Division Bench decision of the Bombay High Court in the case of Kahini Developers (P) Ltd.

vs. Mukesh Morarji Panchamatia & Ors . reported in 2013(3) Mh. L. J. On the strength of the said

decisions of the Division Bench of this Court and the Division Bench of the Bombay High Court it

was argued for the applicant that the said order dated December 12, 2016 passed by this Court

holding that the relief sought to be incorporated by the applicant plaintiff was barred by limitation

is vitiated by an error of law which is apparent on the face of the record and, as such, the said order

should be reviewed by this Court under Order 47 Rule 1 of the Code.

4. On the other hand, Mr. Udayan Dutta, learned advocate representing the defendant no. 2

revisional petitioner submitted that by filing the present review application, the applicant plaintiff is

seeking to reargue the revisional application on merit and submitted that it is settled law that the

provision of review under Order 47 Rule 1 of the Code, the Court cannot be invoked by any party

for rehearing of the dispute. In this regard, reliance was placed on behalf of the defendant no. 2

revisional petitioner on the decision of the Supreme Court in the case of Haridas Das vs. Usha Rani

Banik reported in (2006) 4 SCC 78.

5. I have considered the materials on record, as well as the arguments advanced by the learned

counsel appearing for the respective parties. A perusal of Order 47 Rule 1 of the Code shows that

review of a judgment or an order could be sought: (a) from the discovery of new and important

matters or evidence which after the exercise of due diligence was not within the knowledge of the

applicant; (b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent

on the face of the record or any other sufficient reason.

6. It is well settled law that under Order 47 Rule 1 a judgment may be open to review, inter

alia, if there is a mistake or an error apparent on the face of the record. In the present case it is

argued by the applicant plaintiff that by the proposed amendment of the plaint, which was allowed

by the learned Court below, he sought to incorporate a claim for compensation/damages for breach

of contract committed by the defendant no. 1 under sub-Section (5) of Section 21 of the Act of

1963. However, on December 12, 2016 when the learned advocate for the applicant plaintiff argued

the revisional application he did not bring any of the aforementioned decisions to the notice of this

Court. The Division Bench decision of this Court in the case of Balaji Apartment (P) Ltd. (supra)

where it was held that the right of a plaintiff in a suit for specific performance to amend his plaint at

any stage of the proceeding to incorporate a claim for compensation flows from the proviso to sub-

Section (5) of Section 21 of the Act of 1963 and the Limitation Act does not have any applicability

in respect of such claim is binding upon this Court. Even the Division Bench decision of the

Bombay High Court in the case of Kahini Developers (P) Ltd. (supra) holding that the Limitation

Act does not apply to the right of a plaintiff in a suit for specific performance to incorporate a claim

for compensation under the proviso to sub-section (5) of the Act of 1963 also has a persuasive

value. However, none of the said decisions were brought to the notice of this Court by the learned

advocate who represented the applicant plaintiff in the revision petition, while the revisional

application was decided on December 12, 2016.

7. The revisional petitioner, however, did not dispute the contention that in view of the

decision of the Division Bench of this Court in the case of Balaji Apartment (P) Ltd. the application

of the applicant plaintiff for amendment of his plaint could not be rejected nor could the order passed by the learned Court below allowing the amendment application could be interfered with by

this Court.

8. It is settled law that when a clear legal position established by a binding authority is

overlooked by the Court it becomes "an error apparent on the face of the record." This view gets

support from the Single Bench decision of this Court in the case of Tinkari Sen & ors. - vs - Dulal

Chandra Das reported in AIR 1967 Cal 518. In any event, at the time of passing the order dated

December 12, 2016 this Court also overlooked the statements in paragraph 10A sought to be

incorporated in the plaint by way amendment that the applicant plaintiff is still suffering the

damage/loss caused due to the alleged breach of the agreement for sale by the defendant no.1.

9. For the reasons aforesaid, this review application is allowed.

10. Since, the learned Counsel for the respective parties have already argued on the merit of the

amendment application of the applicant plaintiff, there is no point for fixing another hearing for

considering the review application on merit.

11. In view of the facts of the case, already discussed above the order dated December 12, 2016

passed in C.O. 3640 of 2016 passed by this Court is recalled and the revisional application, being

C.O. 3640 of 2016 stands rejected.

12. It is, however, made clear that although the applicant plaintiff's application for amendment

of his plaint by incorporating paragraphs 10A and to incorporate the words "including loss of Rs.

30 lakhs" only after the word "cost" in prayer (i) has been allowed but, whether the applicant

plaintiff is in fact entitled to such relief shall be decided by the learned Court below at the trial of

the suit, without being influence by any finding in this decision.

13. With the above directions the review application, being R.V.W. 391 of 2016 stands

disposed of.

14. In view of the above order allowing the review application, the application CAN 12476 of

2016 has become infructuous and the same stands disposed of without any order.

15. There shall be no order as to costs.

16. Urgent certified copy of this judgement, if applied for, be supplied to the parties subject to compliance with all requisite formalities.