

**(2007) 01 DEL CK 0076**

**In the Delhi High Court**

**Case No :** R.P. No. 237 of 2005 and C.M. No. 12554 of 2005 in C.M. (M) No. 1574 of 2004

Smt. Kama Vati

APPELLANT

Vs

Chander Bhan and Others

RESPONDENT

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**Date of Decision :** 08-01-2007

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 43 Rule 2, Order 6 Rule 17, Order 9 Rule 13, 151  
Constitution of India, 1950 — Article 227  
Limitation Act, 1963 — Section 3, 5

**Citation :** (2007) 137 DLT 396 : (2007) 146 PLR 21

**Hon'ble Judges :** J.P. Singh, J

**Bench :** Single Bench

**Advocate :** S.K. Sharma and Hiten Vats, for the Appellant; S.P. Chug, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

J.P. Singh, J.—This application under Order XLVII Rule 1 & 2 CPC read with Section 151 has been moved on behalf of the respondents

for review of the order dated 1.8.2005.

2. I have heard Mr. S.P. Chug, Advocate learned Counsel for the applicants/respondents/plaintiffs and Mr. S.K. Sharma, Advocate learned

Counsel for the non-applicant/petitioner/defendant.

3. It will be helpful to refer briefly to the facts of this case. The opposite party to this application had filed a petition under Article 227 of the

Constitution of India [C.M. (M)] against an order dated 19.8.2004 passed by the Civil Judge, Delhi allowing an application for review under

Order XLVII Rule 1 & 2 CPC read with Section 3 & 5 of the Limitation Act. The

learned civil judge had set aside a consent order vide order dated 19.8.2004, which was challenged under Article 227 of the Constitution of India. The said C.M. (M) was allowed by this Court and the impugned order dated 19.8.2004 was set aside. It was directed by this Court that the proceeding will commence from the stage where the same were before passing of the impugned order and the learned trial court judge was directed to make efforts to dispose of the matter expeditiously, preferably within six months and nothing said in the order of this Court was to be taken as expression of opinion on the merits of the case.

4. Learned Counsel for the applicants has submitted that Along with the C.M. (Main), C.M. No. 2094/2005 (an application u/s 151 CPC raising preliminary objections) was also heard but no order has been passed on the said application. On the other hand learned Counsel for the non-applicant-petitioner has submitted that in fact both the learned Counsel were heard extensively on merits after completion of the pleadings, for disposal of the petition and not for admission and the CM No. 2094/2005 actually did not survive and may be due to inadvertence it was not mentioned so while disposing of the petition.

5. I have again perused the order sheets from the time, when the writ petition first came up before this Court on 22.11.2004. Only notice (not notice to show cause why petition be not admitted) was issued by my learned predecessor and office was directed to complete the pleadings and the trial court proceedings were stayed. I have no doubt in my mind that the petition was heard at length for disposal and not for admission.

However the application u/s 151 CPC was not specifically dealt with, which in the facts and circumstances of this case can be specifically dealt with even now.

6. Learned Counsel for the applicants has submitted that he had raised a preliminary objection in the CM No. 2094/2005 that the petitioner had the remedy of filing an appeal under Order XLIII sub Rule (w) before the District Judge against the impugned order dated 19.8.2004, Therefore C.M. (M) under Article 227 of the Constitution of India was not maintainable. Secondly, the petitioner had accepted the cost imposed upon the respondents by the trial court and having once accepted the cost of Rs. 1000/- she could not challenge the order. Learned Counsel has submitted

that there is an error apparent on the face of the record and Therefore the order dated 1.8.2005 passed by this Court be reviewed and the C.M.

(M) under Article 227 of the Constitution of India be dismissed.

7. On the other hand learned Counsel for the non-applicant-petitioner-defendant has submitted that the application is an abuse of process of law.

The applicants are in the habit of playing fraud and tampering with court records, the ex parte decree was obtained by them by playing fraud and

that the order passed by the learned civil judge, which was impugned in the C.M. (M), was on an application for review of the consent order and

along with the said application for review in the trial court, there was also an application for condensation of delay u/s 5 of the Limitation Act in

filing the application for review and the order passed on the application for condensation of delay was not appealable, meaning thereby that a part

of the order could be appealed against, while the other part of the order passed on the application u/s 3 & 5 of the Limitation Act was not

appealable, Therefore the C.M.(M) under Article 227 of the Constitution of India was the appropriate remedy. Furthermore it being a case of

fraud on the court, the aggrieved party could challenge it at any stage and also under Article 227 of the Constitution of India.

8. Learned Counsel for the applicants has cited the judgments titled K. Sankaranarayana Pillai v. S.P. Sankara Iyer reported in AIR 1954 TRA.

226 , C.N. 81, Smt. Shakuntalabai Krishna Bhojar and Others Vs. State of Maharashtra, Kamta Chaudhary Vs. Lal Chandra Mool Pratap

Bahadur Pal, and Karumilli Bharathi Vs. Prichikala Venkatachalam, in support of the contention that if the error is apparent on the face of the

record, it can be rectified. There is no quarrel about the legal position regarding the jurisdiction and powers for review.

9. At the first blush there appears to be force in the contentions of learned Counsel for the applicants but re-appraisal of the file shows that in this

case a prima facie fraud was played on the trial court and the defendant, by the applicants-plaintiffs, as is mentioned in para-3 of the order dated

1.8.2005; which order is sought to be reviewed. The facts show that the ex-parte decree was obtained by mentioning a wrong name i.e., (Smt.)

Sharda Tyagi as defendant No. 3 instead of Sh. Sardar Singh Tyagi apparently knowing well that service would not be effected on a non existing

person and efforts were made to dispossess the non applicant-widow in execution of an ex-parte decree. At this juncture the widow of the late

Sardar Singh Tyagi moved an application for setting aside the ex parte decree against her husband. Perusal of the file shows that not only wrong

name of her husband was mentioned in the suit but interpolations were also made in the vakalatnama to show appearance on behalf of her husband

wrongly named as Sharda Tyagi (non-existing person) as defendant No.3. An application under Order IX Rule 13 CPC was moved by the widow

highlighting the fraud and misrepresentation. Faced with this situation the learned Counsel for the applicants-plaintiffs on instructions from the

applicants gave a statement in the court as under which has been reproduced in the order dated 1.8.2005 passed by this Court and is being

reproduced hereunder again:

I have instruction to make the statement on behalf of the plaintiff/respondent. As per instruction I have no objection if the application of the

applicant under Order IX Rule 13 CPC dated March 1988 be allowed. RO & AC

10. It has already been observed in the order dated 1.8.2005 passed by this Court that the impleadment of the wife in the suit stood accepted

because an amended memo impleading her as defendant no.1 was filed by the applicants-planitiffs and the suit then proceed further for disposal on

merits. On 17.12.2002 even an application under Order VI Rule 17 CPC was moved by the applicants-plaintiffs to make her defendant No. 3

instead of defendant No.1 in the suit.

11. As usual, the previous learned Counsel who had made the above statement was changed and the application dated 10.2.2003 was moved for

review of the consent order dated 28.3.2001 which was passed for setting aside the ex parte decree. In my view more often than not a false blame

is put on the lawyers with a view to get the proceedings already completed re-opened, which practice has to be discouraged unless there is a gross

failure of justice or malafide or some ulterior motive on the part of the earlier counsel and action has also been taken by the party against such

counsel. In the present case rights of the parties are still to be decided on merits.

12. Normally the court while exercising jurisdiction under Article 227 of the Constitution of India will not turn itself into an appellate court because

the powers are not only judicial but also administrative. But as there is some

overlapping as to whether really an appeal could be filed because the impugned order has been passed under two provisions i.e., under the review jurisdiction and under the Limitation Act. I have already observed that there was no ground for condoning such a long delay in moving the application for review in the trial court, after the party itself had complied with the order and had taken steps for progress of the suit on merits. The suit was for taking possession of property from Smt. Kamawati the widow of Late Sardar Singh Tyagi.

13. The next contention of the learned Counsel for the applicants is that the non-applicant has accepted the cost of Rs. 1000/- and Therefore was estopped from challenging the impugned order and has cited the case titled Amar Singh Vs. Perhlad and Others, . Normally a party having accepted the cost will not be allowed to challenge the order but facts and circumstances of each case vary.

14. In the present case there is an element of fraud, manipulation and interpolation of the court records on the part of the applicants and a statement by the learned Counsel on instructions of the applicants-plaintiffs was accepted by the trial court and the ex parte decree was set aside.

The applicants-plaintiffs complied with the order of setting aside ex-parte decree and filed the amended memo and took steps for decision of the

suit on merits, then such party, in my view, is itself estopped from making an application for review of order on which it has already acted upon and

that too after the limitation for filing an application for review has long expired. Therefore, in the facts and circumstances of this case I will prefer

not to attach much weight to the acceptance of the cost by the non applicant-illiterate widow villager-defendant. Since the impugned order was set

aside it follows that the cost imposed in the said impugned order was also set aside and had to be refunded to the applicants-plaintiffs provided

they moved an application for refund of the cost.

15. Moreover no irreparable loss or injury is going to be caused to the applicants-plaintiffs because their suit is yet to be decided on merits. If they

prove their case on merits, they will get the land/property measuring 53 Sq. Yds. from the defendant-widow.

16. Above all in this case there is a fraud on the court and the opposite party for getting an ex parte decree and there is misrepresentation too,

because of which the previous learned Counsel for the applicants had conceded. It has been held by the Supreme Court of India in the case titled

S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, as under:

Fraud-avoids all judicial acts, ecclesiastical or temporal observed Chief Justice Edward Coke of England about three centuries ago. It is the settled

proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and nonest in the eyes of law. Such a

judgment/decreed - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be

challenged in any court even in collateral proceedings.

17. Considering all the facts and circumstances I find no merit in the application for review of the order dated 1.8.2005. The application is

dismissed and the trial court is directed to dispose of the matter on merits preferably within six months.

18. Nothing said herein will tantamount to expression of opinion on the merits of the case.