
(1984) 10 GAU CK 0005
In the Gauhati High Court
Case No : Second Appeal No. 113 of 1978

Union of India

APPELLANT

Vs

Mahalchand Motilal Kothari

RESPONDENT

Date of Decision : 30-10-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1

Citation : (1985) 2 GLR 86

Hon'ble Judges : T.C. Das, J

Bench : Single Bench

Advocate : A.R. Barooah and M.K. Sharma, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

T.C. Das, J.—This is an appeal against the judgment and decree passed by the learned Assistant District Judge No. 2 at Gauhati in Money Appeal No. 11 of 1976 in affirming the judgment and decree passed by the learned Munsiff, Gauhati in Money Suit No. 29/72. The litigation for claiming a sum of less than Rs. 2000/- entered the Court premises as far back in the year 1972. But the end of this litigation has not yet come till 1984. In this appeal, the Appellant has been represented by Mr. A.R. Barooah, learned Counsel whereas none appears to contest the appeal.

2. Put very shortly, the essential facts are these:

The Respondent as Plaintiff instituted a Money Suit No. 29/72 in the Court of Munsiff, Gauhati against the Appellant for realisation of compensation for short delivery of 1294 kg. of green Moong amounting to Rs. 1700/-. A consignment of green Moong was booked by M/s Shah Jayantilal Himatlal and Co. at Guntur to be delivered to the Plaintiff at New Gauhati Station. The Plaintiff who is a registered firm at Gauhati became the owner of the said consignment for valuable consideration. The consignment which was booked on 17.9.68 was

delivered to the Plaintiff on 12.11.68 at New Gauhati Station with a short delivery of 1294 kg. of green Moong contained in 18 bags for which a short certificate was issued by the Railway authority at the destination station. The Plaintiff alleged that the shortage occurred the consignment was due to negligence and misconduct on the part of the Railway servant in handling the same in transit as a result of which the Plaintiff had to suffer a total loss to the tune of Rs. 1700/- inclusive of proportionate railway freight, etc. The plaint contained a schedule of claim to the extent of the said amount. The relief claimed by the Plaintiff stood at Rs. 1700/- with future interest at the rate of 9% per annum till the realisation of the amount. The Defendant (Appellant herein), contested the suit by filing written statement and denied the allegations about the commission of any negligence or misconduct on the part of the employees of the Defendant in handling the consignment during the course of transit from the booking station to the destination. That apart, the Defendant took several pleas in the written statement including the defect of the suit due to non-disclosure of the material facts to connect the consignment with the relevant railway receipt and nondisclosure of material facts to substantiate the claim.

3. On the pleadings, only 3 issues were framed by the learned Trial Court. The parties led evidence, oral as well as documentary in course of trial. After the hearing was over the Plaintiff filed a petition for amendment of the plaint on the ground that railway receipt and the invoice number of the consignment involved in the suit were omitted to be inserted in paragraph 2 of the plaint. Therefore, the prayer for amendment was made to insert those material facts in paragraph 2 of the plaint. That petition was resisted by the Defendant by filing their written objection. The Trial Court considered the petition and the objection on merit and found no material basis to allow the petition. Consequently, the learned Trial Court rejected the prayer for amendment by its order dated 20.7.74. There after, the learned Trial Court considered the evidence on record and came to a definite conclusion that the Plaintiff could not prove the case and as such was not entitled to any relief and dismissed the suit by its judgment and decree dated 9.10.74. Thereafter on 7.2.75 the Plaintiff filed an application purported to under Order 47 Rule I of the CPC with a prayer for review of the judgment and decree passed by the learned Trial Court on 9.10.75 dismissing the suit of the Plaintiff. The main ground for which the Plaintiff sought for review of the judgment appears in paragraph 4 of the review petition which may be quoted herein below:

4. That inspite of due diligence the notices having been misplaced could not be traced out and omission of the particular Invoice and R/R No. being most technical, it is a fit case for review the judgment by Your honour.

The review petition was resisted by the Defendant. An objection was filed by the Defendant on the ground that no review petition lies against the final judgment and decree of the Trial Court in the facts and circumstances of the case. Secondly, the petition was barred by limitation. These are the two main grounds on which the review petition was challenged by the Defendant.

4. The learned Munsiff heard both the parties and allowed the review petition as a consequence of which the judgment and decree passed by the same Court was set aside and the Plaintiff was allowed to amend the plaint and to produce the documentary evidence. This is how a "de-novo" trial began in the same Court even inspite of the fact that the amendment application which was made earlier to amend the plaint with the same ground was rejected on 20.7.74 by the Trial Court. The learned Court heard both the parties and curiously enough, allowed the review application and reversed the judgment and decree passed earlier in the suit by the same Court. The Defendant preferred an appeal challenging the decree and judgment of the learned trial Court passed subsequently on 20.2.76 by setting aside the earlier judgment and decree dated 9.10.75. The appeal was heard by the learned Assistant District Judge No. 2 at Gauhati. The learned appellate Court below by its judgment and decree dated 1.2.78 dismissed the appeal of the Defendant. This is how this Second Appeal has been preferred in this Court by unsuccessful Defendant. Sad as it may appear that unfortunate situation emerges in this appeal.

5. Mr. A.R. Barooah, learned Counsel for the Appellant has based his argument mainly on the following 3 legal points:

(1) That the learned Trial Court had no jurisdiction to set aside the judgment and decree passed earlier on 9.10.74 by allowing the time barred review application.

(2) That there was no material for review of the judgment and decree passed earlier by the learned Trial Court and the provisions of Order 47 Rule 1 of CPC has no application in the present nature of the case.

(3) That the learned Trial Court usurped the jurisdiction of the appellate Court to correct his earlier judgment and decree by allowing a review application thereby allowing amendment of the plaint which was once rejected earlier as far back as on 20.7.74 on the same facts and law.

6. To appreciate the contentions of the learned Counsel for the Appellant, let me now consider the principles behind the provision of law as laid down under the CPC for review:

The power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of Justice or to correct grave and palpable errors committed by it is no doubt a power bestowed with definitive limit to exercise the power of review. It may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an appellate Court to correct all manner of errors committed by the subordinate

Court.

7. In the present case, the grounds on which the review was allowed by the Trial Court were herdly the grounds for review. It is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. For any error or mistake if a review has to be allowed, the mistake must be apparent on the face of the record and not as a consequence of a wrong judgment or a wrong inference. The fact that there was no material on the record entitling the Court to draw an inference against the party for non-production of certain evidence may not be a valid ground for review, though it can be a ground for appeal.

8. In course of his submission Mr. Barooah has placed before me the case of Sushil Kumar Sen Vs. State of Bihar, and the case of Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, In M/s Northern India Caterers, their Lordships of the Supreme Court held:

...The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so....

A plea for review, unless the first Judicial view is manifestly distorted, is like asking for the moon. A forensic defeat cannot be avenged by an invitation to have a second look, hopeful of discovery of flaws and reversal of result....

9. While the first amendment application was rejected disallowing the amendment of the plaint, the review petition for the same material ought not to have been considered by the Trial Court. The review petition was filed nearly after 4 months which is apparently beyond the period of limitation prescribed by-law. The ground for belated presentation of the review application was that the Plaintiff could not get the copy of the decree within the period of limitation. But there is no proof on record that the Plaintiff ever applied for the decree or that the review application was accompanied by a copy of the decree. That apart, whether in the facts and circumstances of the present case, a review petition at all lies? The learned appellate Court below is silent. I have perused the judgment passed by the learned first appellate Court and I have found that the learned appellate Court abruptly came to the conclusion that "a review of the judgment can be made if there is a discovery of any new and important matter or evidence". But it is apparently clear that the Plaintiff failed to disclose the material facts in the plaint nor the Plaintiff produced the material documents at the time of adducing the evidence. The learned appellate Court below did not consider the effect of the rejection of the petition for amendment which was rejected earlier and denied the scope for amendment of plaint sought for by the Plaintiff to disclose the material facts in the plaint. The learned appellate Court ought to have considered that aspect of the matter. Besides, how the Trial Court exercised the jurisdiction to review the earlier amendment application and to review its own judgment and decree which was finally passed on 9.10.74? Will it

not amount to usurping the jurisdiction of the appellate Court? This vital aspect of the matter was not considered by the learned appellate Court below. This is not a case where the review application is at all maintainable even apart from the point of limitation. The application for review does not require to accompany the copy of the decree as it reveals from the relevant provisions of Order 47 Rule 1 Code of Civil Procedure. It is not also an usual practice that for presenting a review application a copy of the decree is required to be filed. The decree follows the judgment which is sought to be reviewed, if reviewed, a consequential decree shall follow in terms of the judgment. It is most logical as submitted by Mr. Barooah that a decree is not necessary to be accompanied with the review application. Therefore, the plea of the Plaintiff that the delay in presenting the review application was due to late receipt of the copy of the decree can never be a valid ground to get the period of limitation extended. This view I have adopted from a Full Bench decision of Allahabad High Court in *Wajid Ali Shah v. Nawal Kishore* as reported in (1895) 17 ILR 211. On this score also the review application can be held to be barred by limitation.

10. The learned lower appellate Court failed to consider this aspect of the matter and erroneously held that the review application was maintainable and in reviewing the judgment and decree passed earlier by the learned Trial Court was proper and correct in law. The learned Appellate Court while considering the point of limitation came to the finding that the review application was filed within the prescribed period and the Plaintiff had to wait till the copy of the decree was received. The learned Appellate Court below based the judgment on the point that the review application was maintainable and the learned Trial Court was justified in reviewing his earlier judgment and decree by setting aside those on the application for review. I cannot agree with the findings of the learned Appellate Court below supporting the judgment and decree of the learned Trial Court in setting aside its earlier judgment and decree on the purported application for review. It was not a fit case where review application could be entertained on the facts and circumstance of the case more so while the amendment of plaint was earlier refused by the same Court. It was also not proper to review any matter which was finally concluded by the earlier order of the said Court rejecting amendment petition of the plaintiff.

11. For the aforesaid persons I hold that the judgment and decree of the learned Courts below are liable to be set aside.

In the result the appeal is allowed. The judgment and decree of the learned Courts below are set aside and the Plaintiff's suit stands dismissed. As this appeal has not been resisted in this Court I do not like to assess any cost on the Respondent.