

ODC-1

RVWO 27 of 2022

With

CS/219/2016

IA No. GA/1/2022

IN THE HIGH COURT AT CALCUTTA

ORDINARY ORIGINAL CIVIL JURISDICTION

[Commercial Division]

NEW CENRAL BOOK AGENCY PRIVATE LIMITED AND ANR.

Vs.

MADHUSRI KONAR AND ANR.

BEFORE :

The Hon'ble JUSTICE KRISHNA RAO

Heard On : 07.11.2022

Order On : 11.11.2022

Appearance:

Mr. Soumya Roy Chowdhury, Adv.

Mr. Sarosi Dasgupta, Adv.

Mr. Dwip Raj Basu, Adv.

.....For the Plaintiff

Mr. Reetobroto Mitra, Adv.

Mr. Shankarsan Sarkar, Adv.

Mr. L.R. Mondal, Adv.

Mr. M.M. Rahaman, Adv.

...For the defendants

ORDER

1. The present review application is filed against an order dt. 19th July, 2022 passed in IA No. GA/8/2020 (Old G.A.No.35/2020) in CS No. 219 of 2016 (Madhusri Konar & Anr. – versus- New Central Book Agency Pvt. Limited & Anr). The prayer is to review the said order and to stay the proceeding of CS No. 219 of 2016 till the disposal of appeal being F.A. No. 122 of 2020 pending before the appellate Court.

2. It is not necessary to narrate the facts in details in the present review application since they have been stated in the main order. It was submitted by the learned Counsel for the applicant that the order dt. 19th July, 2022 suffers from bona fide mistake and error apparent on the face of record being contrary to law.

3. It was further submitted that the order dt. 19th July, 2022 suffers from on the face of record as it fails to consider Section 10 of the Code of Civil Procedure.

4. It was further contended that this Court while passing the order dt. 19th July, 2022 dismissed the application filed by the applicant only on the ground that whole of the subject-matter in both proceedings are not identical but as per Section 10 of the Code of Civil Procedure, this Court is required to consider whether the present suit and the previous suit are directly and substantially in issue.

5. Learned counsel for the applicant has relied upon the judgment reported in (2005) 4 SCC 741 (Board of Control for Cricket in India & Anr. –versus- Netaji Cricket Club & Others) and relied paragraphs 89 and 90:

“80. Order 47, Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.

90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words “sufficient reason” in Order 47, Rule 1 of the Code is wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine “actus curiae neminem gravabit”.

6. By relying the said judgment it was submitted that this court has committed mistake by holding that the subject matter of both the proceedings are not identical instead of taking into consideration that both the suit are substantially and directly in issue.

7. Similarly the counsel for the applicant has relied upon the following judgments :

a. (1971) 2 SCC 200 (Raja Shatrunji -versus- Mohammed Azmat Azim Khan and Others) paragraph 13:

“13. On 27 November, 1962 when the matter was heard by the High Court, this amendment did not come into the statute-book. That is why the judgment-debtor made an application to bring it to the notice of the High Court that the law was that the words “charged under the decree” were always deemed to have been deleted and this law was effective from

the date of coming into force of the 1952 Act on May 25, 1953. The High Court by a majority opinion was of the view that the judgment-debtors should be given relief. Under Order 47 of the Code of Civil Procedure the principles of review are defined by the Code and the words "any other sufficient reason" in Order 47 of the Code would mean a reason sufficient on grounds analogous to those specified immediately previously in that order. The grounds for review are discovery of new matters or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or the review is asked for on account of some mistake or error apparent on the face of the record. In *Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao* Lord Davey at p. 205 of the Report said that "the section does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event". Counsel for the appellant submitted that when the High Court decided the matter, the High Court applied the law as it stood and a subsequent change of law could not be a ground for review. The appellant's contention is not acceptable in the present case for two principal reasons; first, it is not a subsequent law. It is the law which all along was there from 1952. The deeming provision is fully effective and operative as from May 25, 1953 when the 1952 Act came into force. The result is that the Court is to apply the legal provision as it always stood. It would, therefore, be error on the face of the record. The error would be that the law that was applied was not the law which is applicable. Secondly, [Section 4](#) of the 1952 Act confers power on the court to apply the law notwithstanding any provision contained in the Code of Civil Procedure. Therefore the application though intituled an application for review was not so. The substance and not the form of the application will be decisive."

- b.** AIR 1957 Cal 727 (*Shorab Merwanji Modi & Anr. -versus- Mansata Film Distributors and Anr.*) paragraphs 31 and 33:

"31. It remains to refer to one other matter. The learned Judge has also given it as a reason for refusing to stay the suit before him under section 10 that there is an additional party in that suit. That, by itself, does not make section 10 inapplicable. It is true that the section speaks of "same parties", but it has been held that the "same parties" mean "the parties as between whom the matter substantially in issue has arisen and has to be decided". Complete identity of either the subject-matter or the parties is not required. Authority for that proposition will be found in *Durga Prasad v. Kanti Chandra Mukherji*, (2) (I.L.R. 61 Cal. 670) (Six parties in one suit and five parties in another); and [Wahid-un-Nessa Bibi v. Zamin All Shah](#) (11) (I.L.R. 42 All. 290); *Jai Hind Iron Mart v. Tulsiram*

Bhagawandas (3) (I.L.R. 1953 Bom. 416); and Luxmi Bank Ltd v. Hari Kissan (12) (I.L.R. 1948 Nagpur, 403). The additional party impleaded in the Calcutta suit is the company Kapur-chand Limited, to which the payments due to Modi under the agreements were to be made. No allegation is made against the company except that some money was paid to it and that it was a party to and knew of the misrepresentations made by Modi. I do not think that the joinder of Kapurchand Ltd. on such allegations raises any separate and substantial issue as between it and the Mansata so as to make Section 10 inapplicable.

33. *In the result, Appeal No. 64 of 1955 is allowed in part. The order of the learned Judge, dated the 28th April 1953, in so far as, by it, he refused to stay the present suit under section 10 of the Code is set aside and it is directed that the suit be and do remain stayed so long as the Bombay suit, viz., Suit No. 1069/X of 1954, may remain pending. The rest of the order is upheld. Costs of this appeal, which will be half-costs, will be costs in the suit. Certified for two Counsel."*

c. AIR 1972 Cal 128 (Arun General Industries Ltd. -versus- Rishabh Manufacturers Private Ltd. & Others) paragraph 16:

"16. *The scope and extent of identity or similarity of the subject-matter in issue in two suits has received very careful judicial notice in two Bench decisions of the Bombay High Court and of this Court to which I will now refer. The Bombay decision is reported in AIR 1953 Bom 117. In that case the earlier suit was filed in this Court and the later suit was filed in the Bombay High Court. The plaintiff in the Bombay suit filed an application for injunction restraining the defendants in the Bombay suit from proceeding with the Calcutta suit. The defendants in the Bombay suit in their turn filed an application for stay of the Bombay suit. The Calcutta suit was filed on a contract for sale of 1898 tyres. It was held that the tyres were according to certain specifications and that the defendants in the Calcutta suit (plaintiffs in the Bombay suit) failed to take delivery of the tyres and therefore damages were claimed for non-acceptance. The defendants in the Calcutta suit thereafter filed the Bombay suit and contended that they had a contract to purchase only 1600 tyres and not 1898 tyres. The further contention of the Bombay plaintiffs was that the tyres were not according to specifications and that the tyres that were delivered were not according to contract quality. The Bombay plaintiff therefore claimed refund of the amount paid in respect of the price and also for damages for nondelivery. The question was whether the matter in issue in the Bombay suit was directly and substantially in issue in the Calcutta suit. It was held that Section 10 did not contemplate identity of issues in the two suits nor that the matter in issue in the two suits should be entirely the same or identical and that all that the section required was*

that the matter in issue in the two suits should be directly and substantially the same. It was also held that there should be identity of the subject-matter, and the field of controversy between the parties in the two suits must be the same, but the identity and the field of controversy contemplated need not be identical and same in every particular, but the identity and the field of controversy must be substantially the same. We respectfully agree with the views of the Division Bench of the Bombay High Court and we think Chagla C. J. has correctly and appropriately laid down the extent of the identity of the subject-matter in the two suits. In the facts of this case we have no doubt that the field of controversy between the parties in the Jabbalpur suit and the suit in this Court is substantially the same and, there is substantial identity in the subject-matter in the two suits.”

- d.** AIR 1990 Ori 23 (Shyama Sunder Mohapatra -versus- Janaki Ballav Patnaik & Ors.) paragraph 5:

“5. Coming to the core question in the case formulated earlier, the position is well settled that in a civil suit piecemeal trial of the issues should be avoided and attempt should be made to consider all the issues together as far as possible. This principle is embodied in Sub-rule (1) of Rule 2 of Order 14 of the Code. Sub-rule (2) of the said Rule contains an exception where issues both of law and of fact arise in the same suit and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to - (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. If the court is satisfied that a particular issue passes the tests laid down in Sub-rule (2) and if the court thinks it fit it may postpone the settlement of the other issues until after those issues have been determined, and may deal with the suit in accordance with the decision on that issue.”

- e.** (2010) 4 CHN 909 (Cal) (Amrita Bazar Patrika Private Ltd. & Ors -versus- Jayanta Sengupta & Ors):

“As held by the Supreme Court in [National Institute of Mental Health & Neuro Sciences v. C. Parameshwara](#) (supra) the fundamental test to attract [Section 10](#) is whether the final decision in the previous suit would operate as res judicata in the subsequent suit. [Section 10](#) would apply if the decision in the previous suit would non-suit the subsequent suit.

For attracting the bar of [Section 10](#), it is not necessary that the reliefs prayed for in both the suits should be identical. Nor is it necessary that the causes of action should be identical. Even if the reliefs are based on different causes of action, the later suit should be stayed if the subject matter in controversy is the same, as held in [Shorab Merwanji Modi \(supra\)](#) and in [Challapalli Sugar Ltd. vs. Swadeshi Sugar Supply Pvt. Ltd. \(supra\)](#). The subject matter of the subsequent suit must be covered by the previously instituted suit.

For the purpose of operation of [Section 10](#) it is also not necessary that all the parties on either side should be the same in both the suits. It is enough if there is substantial identity of the parties as held in [Shorab Merwanji Modi vs. Mansata Film Distributors \(supra\)](#), cited by Mr. Mitra. The view has been reaffirmed in [A.G. Industries Ltd. vs. Risabh Manufacturers \(supra\)](#).”

8. Per contra, Learned for the respondents submits that no ground is made out by the petitioner in the instant review application for review of the order. It is further contended that the petitioner has repeated old and overruled arguments for reopening of the conclusion arrived by this Court while passing the order dt. 19.07.2022.

9. Learned Counsel for the respondents further contended that this Court while passing the order dt. 19.07.2022 had considered all the grounds raised by the petitioner at the time of moving an application under Section 10 of the Code of Civil Procedure.

10. Learned Counsel for the respondents further submitted that the petitioner relying upon new judgments passed by the Hon’ble Supreme Court, this Hon’ble Court and other Hon’ble High Courts and intend to review the order passed by this Court dt. 19.07.2022 which is not permissible. He further submits that this Court while passing the order dt. 19.07.2022 had considered

the judgment passed by the Hon'ble Supreme Court in the case reported in (2005) 2 SCC 256 (National Institute of Mental Health and Neuro Sciences –vs- C. Parameshwara) and the order passed by the Coordinate Bench of this Court.

11. Learned Counsel for the respondents further submits that this Court cannot exercise an inherent power and nor can appellate power be exercised in the guise of exercising the power of review. It is further contended that Hon'ble Supreme Court in several judgments held that the Court's jurisdiction of review, is not the same that of an appeal.

12. Learned Counsel for the respondents further submits that there is no error apparent on the face of record and the grounds put forth by the petitioner cannot be described as an error apparent on the face of record to exercise its power of review under Order XLVII, Rule 1 of CPC.

13. Learned Counsel for the respondents relied upon the recent judgments passed by the Hon'ble Supreme Court dt. 18.08.2022 in Civil Appeals No. 5503 – 04 of 2022 (S. Madhusudhan Reddy -versus- V. Narayana Reddy & Ors.) and submits that the petitioner has not made out any case for review of the order dt. 19.07.2022.

14. Learned Counsel for the respondents further relied upon the judgment reported in (2006) 5 SCC 501 (Jain Studios Ltd. –versus- Shin Satellite Public Company Limited) in which Hon'ble Supreme Court held that :

“11. So far as the grievance of the applicant on merits is concerned, the learned counsel for the opponent is right in submitting that virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had been negatived. Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be

confused with appellate power which enables a superior Court to correct all errors committed by a subordinate Court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.”

15. Learned Counsel for the respondents further relied upon the judgment reported in (2013) 8 SCC 337 (Union of India –versus- Sandur Manganese and Iron Ores Ltd. & Ors.) wherein the Hon’ble Supreme Court held that :

“25. In the present case, the error contemplated in the impugned judgment is not one which is apparent on the face of the record rather the dispute is wholly founded on the point of interpretation and applicability of [Section 11\(2\)](#) and [11\(4\)](#) of the MMDR Act. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction. Hence, in review jurisdiction, the Court shall interfere only when there is a glaring omission or patent mistake or when a grave error has crept in the impugned judgment, which we fail to notice in the present case.”

16. Heard, the Learned Counsel for the respective parties perused the grounds of the review application and the judgment relied by the respective parties.

17. Learned Counsel for the petitioner tried to canvas that this Court had dismissed the application filed by the petitioner under Section 10 of the Code of Civil Procedure on the ground that the entire subject-matter in both the proceedings are not identical and this Court has not considered that while deciding the application under Section 10 of the Code of Civil procedure this Court has to consider whether the matter is directly and substantially in issue.

18. While passing the order dt. 19.07.2022, this Court held that:

“The fundamental test of applicability of section 10 of the Code of Civil Procedure is whether on final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit, this court hold that section 10 is not attracted in the instant suit. Section 10 would apply only the case where the whole of the subject matter in both the suit is identical. The Hon’ble Supreme Court had given stress that the key word in Section 10 are the matter in issue is directly and substantially in issue” in previous instituted suit. The word “directly and substantially in issue” are used in contradistinction to words “incidentally or collaterally in issue.” In the instant suit the respondents have claimed royalty and damages against the petitioners and in the previous suit, the petitioners have claimed for declaration of agreement dt. 07.11.1981 is still subsisting and binding and declaration the letter dt. 09.10.2013 is illegal and bad in law thus the whole of the subject matter in both proceedings are not identical.”

19. After going through the entire order passed by this Court dt. 19.07.2022, this Court has rejected the prayer made by the petitioner and it is settled law that once such prayer is refused, no review petitioner would lie which would convert rehearing of the original mater. It is also settled law that the power of review cannot be confused with appellate power which enables a superior court to correct to all errors committed by the Sub-Ordinate Courts. It is not rehearing of an original matter. A re-petition of an old and overruled argument is not enough to reopen concluded adjudications.

20. It is also settled law that as long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction. In review jurisdiction, the Court shall interfere only when there is a glaring omission of patent mistake or when a grave error has kept in the impugned judgment, which this Court failed to notice in the present case.

21. In view of the above, this Court does not find any merit in the review application filed by the petitioner.

22. RVWO No. 27 of 2022 along with GA No. 1 of 2022 are thus dismissed.

(KRISHNA RAO, J.)

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