

Ct.
No.
652

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akb

**01.05
2024**

C.O. 554 of 2020
Srish Chandra Haldar
-Versus-
Susanta Kar @ Kalu & Ors.

Mr. Sharanya Chatterjee
Mr. Dipayan Dan
Mr. Ayaskanta Ghosh **...For the Petitioner**

Mr. Sarbananda Sanyal
Ms. Poulami Chakraborty **...For the Opposite Parties**

The petitioner being the plaintiff filed a suit being Title Suit No. 85 of 2009 against the opposite parties herein seeking inter alia decree for recovery of Rs. 4,63,500/- along with interest @ 12% per annum from the date of disbursement of the amount, injunction restraining the defendants creating any disturbance and/or interfering with peaceful possession and also decree for declaration that the plaintiff and his family members are entitled to have free ingress and egress from the building constructed at the said property.

The opposite parties herein / defendants alleged to have not appeared before the Court below, in spite of service of summon and accordingly the suit was posted for ex parte hearing.

In the said suit petitioner filed affidavit-in-chief under Order XXVIII, Rule 4 of the Code of Civil Procedure and it was specifically averred in the evidence that the construction of the building on the suit property commenced

in the year 1999 and such construction was completed at a total cost of Rs. 15 lakhs and it was also averred that the construction cost of the said building was borne by the plaintiff / petitioner by selling his property at premises No. 33, Rajani Mukherjee Road and partly out of his accumulated fund.

After hearing, the Court below was pleased to pass ex parte judgment and decree on 11th April, 2013 by which the Court below decreed about the possessory right but did not give any other relief including the decree for Rs. 4,63,500/- and interest accrued thereon, in terms of the prayer made in the plaint on the ground *“plaintiff does not pray for other reliefs, hence they are not entitled to get the same And those are rejected”*.

Being aggrieved by the said ex parte decree plaintiff filed an application for review which was registered as Misc. Case No. 27434 of 2013 before the Court below contending that the plaintiff in his affidavit-in-chief has specifically pleaded about the said claim and he also stated therein that the defendant No. 1 refused to pay the share of construction cost to the petitioner as promised and on demand by the plaintiff/petitioner, created disturbance in the peaceful enjoyment of the property of the plaintiff/petitioner and such disturbance, obstruction and interference in the

possession as well as non-payment of the share of construction cost, compelled the plaintiff to file the suit for declaration, injunction and for recovery of aforesaid money. However, Court below after hearing the said Miscellaneous Case was pleased to dismiss the same by the order impugned, holding that the review petition is not maintainable.

Being aggrieved by the said rejection order Mr. Sharanya Chatterjee, learned Counsel appearing on behalf of the petitioner submits that the learned Court below was erred in holding that the application for review should not have been allowed, because the mistake of the learned Trial Court in dismissing the prayer for money decree on the ground “not pressed” is an error which is apparent on the face of the record and manifestly it is an error of inadvertence. In fact the plaintiff/petitioner has sufficient documentary proof which he has filed and marked as “Exhibit” during course of hearing to substantiate his claim of recovery of money in the original suit and therefore the observation of the Court below that the review application cannot be allowed merely on the ground that the decree cannot be changed or altered in a review petition, is erroneous and incorrect conclusion made by the Court below. Learned Court also erred in concluding that the term “any other sufficient reason” does not include

in itself “anything” as it is the Subjective Satisfaction of the reason advanced seeking review of the judgment which has to be decided on a case to case basis on the specific circumstances of each case and the Court below erred relying upon the decision which has no relevance in the factual aspect of the present case and accordingly the petitioner has prayed for setting aside the order impugned.

I have considered the submissions made on behalf of the petitioner. On perusal of the ex parte order passed in favour of the plaintiff on 11th April, 2013 it appears that the Court below granted plaintiffs right about possession but refused to grant any other relief observing “*as plaintiff does press for other relief, hence they are not entitled to get the same and those are rejected*”. Learned Counsel appearing on behalf of the petitioner herein submits upon instruction that his counter part in the Court below has never made any such submission before the Court that he is not pressing the other reliefs like the relief regarding money decree and the decree for injunction. However, the Court erroneously and/or inadvertently recorded that since the plaintiff is not pressing the said relief so such prayers are refused.

On perusal of the prayer of the plaint it is quite clear that plaintiff in paragraph 20(f) & (g) has distinctly prayed for decree of Rs. 4,63,500/- along with interest

accrued thereon and in paragraph 20(h) & (j) has prayed for injunction and other reliefs. As rightly pointed out by the petitioner that plaintiff has not made any prayer for amendment of the plaint by which he sought to have relinquished any such relief nor it appears that in the evidence adduced by him he has waived any such claim in the suit. On the contrary it is contended on behalf of the plaintiff that they have specifically adduced their evidence through affidavit-in-chief in which they have very much pressed about the monetary relief along with interest and also for other reliefs. It is also submitted that the plaintiff has paid advalorem Court fee for getting the said reliefs and accordingly the question of relinquishment of that part of the claim does not arise at all and it was erroneously recorded by the Court below that the plaintiff has not pressed the same.

In view of the aforesaid contention made on behalf of the petitioner it is quite clear that it is the Judge and the Advocates concerned, who are the best persons to say as to whether any such submission was made before the Court below or not regarding '*not pressing*' the other reliefs made in the plaint. Petitioner herein wants to establish that the statement recorded by the Court below that the plaintiff has not pressed other reliefs is not correct. Accordingly, making a prayer for review is the best way to challenge the statement

referred in the judgment before the same Court who recorded the said statement. Otherwise, preferring application/appeal before higher forum challenging the impugned recording may lead to concerned Advocate and the Judge to face the dock to furnish evidence to render a statement contained in the judgment of the Court incorrect or inaccurate.

In a decision in the case *Ayyagavi Narasimhu s. Andhra Bank Ltd. Masulipatam and Ors.*, reported in MANU/AP/0100/1957 self-same question was raised before the Court as to whether the claim based on mortgage has been given up in that suit as conceded by petitioner therein and the Court in paragraph 4 of the said decision clearly held that :

“If the party wants to make out that the concession was not so made or was not properly understood by the Court, the only procedure to be adopted is by applying for a review before the same judge and not to controvert it by means of evidence or affidavits. This position is clear from reported cases. The latest pronouncement of the Supreme Court on this topic is contained in Moran Mar Bassetios Catholicos Vs. Mar Poulose Athanasius, AIR 1954 SC 526.”

In such view of the matter I think the Court below was not justified in observing that no ground of review is attracted in the present context.

The application, being C.O. 554 of 2020 is hereby allowed. The impugned order dated 15th January, 2019 is

hereby set aside.

Learned Court below is directed to hear the plaintiff's application for review afresh and to pass a reasoned order preferably within a period of eight weeks from the date of communication of this order.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)