# Haridas Das vs Smt. Usha Rani Banik & Ors on 21 March, 2006

## Equivalent citations: AIR 2006 SUPREME COURT 1634, 2006 (4) SCC 78, 2006 AIR SCW 1771, (2007) 1 TAC 268, (2007) 3 ACJ 1973, (2006) 4 ALLMR 11 (SC), (2006) 3 JCR 31 (SC), (2006) 40 ALLINDCAS 51 (SC), ILR(KER) 2006 (2) SC 340, 2006 (4) SRJ 465, 2006 (3) SCALE 287, 2006 (2) ALL CJ 1111, (2006) 1 CLR 581 (SC), (2006) 2 CTC 321 (SC), (2006) 3 MPLJ 226, 2006 (2) CTC 321, (2006) 3 ACC 820, 2006 ALL CJ 2 1111, 2006 (4) ALL MR 11 NOC, (2006) 3 ICC 29, (2006) 3 JLJR 14, (2006) 2 GAU LT 1, (2006) 3 CIVILCOURTC 163, (2006) 3 LANDLR 27, (2006) 3 MAD LJ 17, (2006) 3 MAD LW 258, (2006) 4 MAH LJ 14, (2006) 3 RAJ LW 1877, (2006) 4 SCJ 182, (2006) 3 SUPREME 125, (2006) 2 RECCIVR 511, (2006) 3 SCALE 287, (2006) 63 ALL LR 346, (2006) 4 ANDH LT 12, (2006) 2 ALL WC 1706, (2006) 4 CAL HN 58, (2006) 2 CURCC 94, (2006) 2 ALL RENTCAS 87, (2006) 1 WLC(SC)CVL 711, (2006) 2 PAT LJR 270, (2006) 100 REVDEC 800, (2006) 4 BOM CR 92

## Author: Arijit Pasayat

## Bench: Arijit Pasayat, Tarun Chatterjee

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           CASE NO.:
Appeal (civil)  7948 of 2004

PETITIONER:
Haridas Das

RESPONDENT:
Smt. Usha Rani Banik & Ors.

DATE OF JUDGMENT: 21/03/2006

BENCH:
ARIJIT PASAYAT & TARUN CHATTERJEE

JUDGMENT:
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J U D G M E N T ARIJIT PASAYAT, J.

Challenge in this appeal is to the order passed by a learned Single Judge of the Gauhati High Court on an application for review under Order XLVII Rule 1 of the Code of Civil Procedure, 1908 (in short the 'CPC'). The application was filed by respondent No.1 for review of the judgment and order dated 21.8.2002 passed in Second Appeal No.12 of 1993. The Second Appeal was allowed by the High Court by the judgment and order, reversing the judgment and order passed in Title Appeal No.6/90

and affirming the judgment and decree dated 19.1.1989 passed in Title Suit No. 2 of 1987.

Reference to the factual background, as projected by the appellant in some detail would be necessary because the High Court has referred to the factual background to modify the judgment passed by the High Court in the Second Appeal and directing its dismissal. As a consequence the judgment and decree passed by the First Appellate Court was affirmed and that of the learned Munsif in the Title Suit was reversed.

One Kalipada Das, (respondent No.1 in the review petition) the original owner of the suit property, entered into an oral agreement with the appellant on 19.8.1982 and on the same day, the appellant paid a sum of Rs. 14,000/- towards the agreed consideration of Rs.46,000/- to sell his portion of the suit property, with a dwelling house standing thereon. The possession of the suit property was also handed over to the appellant, with a promise that a sale deed would be executed in favour of the appellant within three years. Again on 23.8.1982 the appellant paid a further sum of Rs. 31,000/. In essence Rs.45,000/- was paid leaving only a nominal sum of Rs.1,000/- to be paid at the time of execution of the sale deed.

As the time for execution of the sale deed was nearing, the appellant learnt that the said Kalipada Das with a view to defeat the appellant's right was trying to sell part of the property to one Chunnilal Deb and to mortgage part of the suit property with the Housing Board of Karimganj. He started openly threatening the appellant to dis-possess him of the suit property. The appellant paid the balance amount of Rs.1,000/- and asked Kalipada to execute the registered sale deed in his favour in respect of the property. In view of threatened dispossession, the appellant with a view to protect his possession of the suit property filed Title Suit No.201/85 along with connected Miscellaneous Case No. 65/85, inter alia, seeking confirmation of possession over the suit land and premises, and for permanent injunction restraining Kalipada Das from dispossessing the appellant and from selling the suit property to any third party. In the said plaint the appellant exclusively reserved his right to file another suit for getting the sale deed executed.

By an interim order Kalipada Das was directed to maintain status quo in respect of the suit property. The suit was dismissed for default, but later was restored by an order passed by learned Munsif.

The appellant filed another suit being Title Suit No.1 of 1986 (re-numbered as 13/90) for specific performance of the agreement for sale and for the execution of the proper deed of sale in respect of the suit property.

During the pendency of the said proceedings, Kalipada Das executed and registered a sale deed in favour of one Usha Rani Banik, defendant No.3 - Respondent No.1 herein, while the possession of the suit property still remained with the appellant. Immediately thereafter, the appellant filed Title Suit No. 2 of 1987 for cancellation of the said sale deed as the same was illegal, fraudulent and void. The respondent No.1 also filed a suit being Title Suit No.22/87 for declaration of her title to the suit property on the basis of the sale deed.

Title Suit No. 2 of 1987 filed by the appellant was decreed whereby the sale deed executed in favour of the Respondent No. 1 was cancelled. Against the said decree, the respondent No. 1 preferred an appeal before learned District Judge, Karimganj, which was allowed setting aside the decree passed in Title Suit No.2 of 1987. The appellant preferred Second Appeal No.12 of 1993 before the High Court. The Second Appeal was allowed restoring the judgment and decree passed in Title Suit No.2 of 1987.

By the impugned order as noted above the High Court held that no leave under Order II Rule 2 CPC was obtained by the respondent in Title Suit No.201 of 1985. Therefore, the Title Suit No.1 of 1986 filed for specific performance of the agreement for sale of land is hit by the provisions of Order II CPC. According to the High Court this is a case where review was permissible on account of some mistake or error apparent on the face of the record.

In support of the appeal learned counsel for the appellant submitted that the order of the High Court is clearly erroneous completely overlooking the scope and ambit of Order XLVII Rule 1 CPC. The parameters required for bringing in application of the said provision are absent in the present case.

On behalf of the respondent No.1 one Apu Banik claiming to be the Power of Attorney Holder stated that the High Court was justified in reviewing the order in the Second Appeal and the order does not suffer from any infirmity. He filed written argument signed by Usha Rani Banik stating that whatever was to be stated is contained in written argument.

Order XLVII Rule 1 reads as follows:

> "REVIEW :
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> 1. APPLICATION FOR REVIEW OF JUDGMENT.
>
> (1) Any person considering himself aggrieved -
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> (a) by a decree or order from which an appeal is allowed, but from which, no appeal has been preferred,
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> (b) by a decree or order from which no appeal is allowed, or
>
> (c) by a decision on a reference from a Court of Small Causes and who, from the discovery of new and important matter 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 on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him may apply for a review of judgment to the court which passed the decree or made the order.

> (2) A party who is not appealing from a decree or order may apply for a review or judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation : The fact that the decision on question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment.

2 [Repealed by Act 66 of 1956]."

In order to appreciate the scope of a review, Section 114 of the CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the Court since it merely states that it "may make such order thereon as it thinks fit." The parameters are prescribed in Order XLVII of the CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable verdict. This is amply evident from the explanation in Rule 1 of the Order XLVII which states that the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the Court should exercise the power to review its order with the greatest circumspection. This Court in M/s. Thungabhadra Industries Ltd. (in all the Appeals) v. The Government of Andhra Pradesh represented by the Deputy Commissioner of Commercial Taxes, Anantapur, [AIR 1964 1372] held as follows:

> "There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which states one in the face and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

In Meera Bhanja v. Smt. Nirmala Kumari Choudary [AIR 1995 SC 455] it was held that :

> "It is well settled law that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1, CPC. In

> connection with the limitation of the powers of the Court under Order XLVII, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of Aribam Tuleshwar Sharma v. Aribam Pishak Sharma speaking through Chinnappa Reddy, J. has made the following pertinent observations:
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> It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising 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.

But, there are definitive limits to be exercise of the power of review. The power of review may be exercised on the discovery of new and important matter of 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 merit. That would be in 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 error committed by the Subordinate Court."

A perusal of the Order XLVII, Rule 1 show 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 record or any other sufficient reason.

In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma (AIR 1979 SC 1047) this Court held that there are definite limits to the exercise of power of review. In that case, an application under Order XLVII, Rule 1 read with Section 151 of the Code was filed which was allowed and the order passed by the judicial Commissioner was set aside and the writ petition was dismissed. On an appeal to this Court it was held as under:

> "It is true as observed by this Court in Shivdeo Singh v. State of Punjab (AIR 1963 SC1908) there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inherest in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter of 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."

The judgment in Aribam's case (supra) has been followed in the case of Smt. Meera Bhanja (supra). In that case, it has been reiterated that an error apparent on the face of the record for acquiring jurisdiction to review must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning. The following observations in connection with an error apparent on the face of the record in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tiruymale [ AIR 1960 SC 137] were also noted:

> "An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ."

It is also pertinent to mention the observations of this Court in the case of Parsion Devi v. Sumiri Devi (1997(8) SCC

715). Relying upon the judgments in the cases of Aribam's (supra) and Smt. Meera Bhanja (supra) it was observed as under :

> "Under Order XLVII, Rule 1, CPC a judgment may be open to review inter alia, if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order XLVII, Rule 1, CPC. In exercise of the jurisdiction under Order XLVII, Rule 1, CPC it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise."

A Constitution Bench of this Court in the case of Pandurang Dhondi Chougule v. Maruti Hari Jadhav (AIR 1966 SC 153) has held that the issue concerning res judicata is an issue of law and, therefore, there is no impediment in treating and deciding such an issue as a preliminary issue. Relying on the aforementioned judgment of the Constitution Bench, this Court has taken the view in the case of Meharban v. Punjab Wakf Board (supra) and Harinder Kumar (supra) that such like issues can be treated and decided as issues of law under Order XIV, Rule 2(2) of the Code. Similarly, the other issues concerning limitation, maintainability and Court fee could always be treated as preliminary issues as no detail evidence is required to be led. Evidence of a formal nature even with regard to preliminary issue has to be led because these issues would either create a bar in accordance with law in force or they are jurisdictional issues.

When the aforesaid principles are applied to the background facts of the present case, the position is clear that the High Court had clearly fallen in error in accepting the prayer for review. First, the crucial question which according to the High Court was necessary to be adjudicated was the question whether the Title Suit No. 201 of 1985 was barred by the provisions of Order II Rule 2 CPC. This question arose in Title Suit No.1 of 1986 and was irrelevant so far as Title Suit No.2 of 1987 is concerned. Additionally, the High Court erred in holding that no prayer for leave under Order II Rule 2 CPC was made in the plaint in Title Suit No.201 of 1985. The claim of oral agreement dated 19.8.1982 is mentioned in para 7 of the plaint, and at the end of the plaint it has been noted that right to institute suit for specific performance was reserved. That being so the High Court has erroneously held about infraction of Order II Rule 2 CPC. This was not a case where Order II of Rule 2 CPC has any application.

The order of the High Court is clearly contrary to law as laid down by this Court. The judgment of the High Court in review application is set aside. Consequently, judgment and order passed in the Second Appeal stand restored. Appeal is allowed with no order as to costs.