

HIGH COURT OF SIKKIM : GANGTOK
(Civil Revisional Jurisdiction)

S.B.: HON'BLE THE CHIEF JUSTICE

DATED : 04.06.2018

Review Pet (C) No. 01 of 2016

1. Shri Kharga Bahadur Gurung
2. Shri Krishna Bahadur Gurung
3. Shri Iswar Gurung
4. Shri Devendra Gurung
5. Shri Mani Chandra Gurung

(All sons of late Ganja Bahadur Gurung
Residents of upper Sichey, P.O. & P.S.
Gangtok, East Sikkim).

6. Smt. Ram Maya Gurung
W/o late Jiwan Gurung
R/o Upper Sichey
P.O. & P.S. Gangtok, East Sikkim.
7. Shri Nawa Ratna Gurung
S/o late Ganja Bahadur Gurung
R/o Upper Sichey
P.O. & P.S. Gangtok, East Sikkim.
8. Shri Lok Ratna Gurung
S/o late Ganja Bahadur Gurung
R/o Upper Sichey
P.O. & P.S. Gangtok, East Sikkim.
9. Smt. Ran Maya Gurung
W/o late Ganja Bahadur Gurung
R/o Upper Sichey
P.O. & P.S. Gangtok, East Sikkim.

10. Miss Sevika Gurung (Minor)
D/o late Jiwan Gurung,
R/o Upper Sichey
P.O. & P.S. Gangtok, East Sikkim.
11. Miss Dinisha Gurung (Minor)
D/o late Jiwan Gurung
R/o Upper Sichey
P.O. & P.S. Gangtok, East Sikkim.

... Petitioner (s).

Versus

Shri Nirmal Gurung
Son of Late Bhaktay Gurung
R/o Upper Sichey,
P.O. & P.S. Gangtok, East Sikkim.

... Respondent (s).

Appearance:

Mr. B. Sharma, Sr. Advocate with Mr. Sajal Sharma,
Advocate for the Petitioners.

Mr. A. Moulik, Sr. Advocate with Ms. Kessang Diki
Bhutia, Mr. Ranjit Prasad and Ms. Kesang Choden
Tamang, Advocates for the Respondent.

ORDER

Satish K. Agnihotri, CJ

Seeking review of the Judgment dated 26th
November 2015 rendered by this Court in RFA No. 10 of 2013,
whereby the first appeal was dismissed confirming the

Judgment and Order dated 30th March 2013 rendered in Title Suit No. 13 of 2012 by the Court of District Judge, Special Division-II, East Sikkim at Gangtok, the instant review petition is filed.

2. The facts, in brief, relevant for consideration of the instant review petition are that the respondent/plaintiff filed a suit for recovery of possession, eviction and other consequential benefits claiming a decree for recovery of khas possession of the suit property described in the Schedule 'B' of the plaint, after removing the defendants/ review petitioners herein and also a decree for damages, wherein the following issues were framed: -

- "1. Whether the suit of the plaintiff is maintainable?
2. Whether the suit barred by Law of Limitation?
3. Whether the suit of the plaintiff is bad for non-joinder of necessary parties?
4. Whether the counter-claim made by the defendants is barred by the Principles of Resjudicata and Estoppel?
5. Whether the schedule 'A' land as described in the plaint is the ancestral property of the parties? If so, whether the same is liable to be partitioned?
6. Whether the defendants have perfected their rights over the schedule 'B' land through adverse possession?

7. To what relief or reliefs, if any, are the parties entitled?"

3. Learned District Judge holding the suit as maintainable, decided issue No. 2 in favour of the plaintiff/respondent herein, that the suit was not time barred under law of limitation. On the issue No. 3 as to whether the suit of the plaintiff was bad for non-joinder of necessary parties, it was held against the defendants. On issue No. 6, it was held that the defendants have not perfected their rights over the suit property. On issue No. 5, it was held that the same issue came up for consideration earlier in Civil Suit No. 65 of 1997 for partition of Schedule 'A' property, wherein the Civil Judge held that the suit property was self-acquired property of Bhaktay Gurung, which he purchased in auction sale. It was stated that the said finding was upheld in Civil Appeal No. 05 of 2001 on 26th March 2002 in the first appeal. Accordingly, the Schedule 'A' property was held as self-acquired property. The learned District Judge further observed that the issue has attained finality, as Judgment dated 26th March 2002 rendered by the First Appellate Court was taken in the second appeal, which was dismissed on 02nd July 2002. The Special Leave Petition filed thereagainst in the Supreme Court of India was also dismissed on 30th September 2002. Thus, the issue was also hit by the rule of *res judicata*, holding that the Schedule

'A' property was not an ancestral property. Issue No. 4 was related to the counter claim which was, accordingly, considered along with issue No.5. Resultantly, the suit was disposed of, decreeing the suit denying the counter claim made by the defendants.

4. Feeling aggrieved, the defendants have preferred a Regular First Appeal being RFA No. 10 of 2013. The High Court by Judgment dated 26th November 2015 upheld the findings and decree passed by the learned District Judge and dismissed the appeal.

5. Feeling dissatisfied, the instant review petition is filed by the appellants/defendants solely on the ground that issue No. 5 as framed in the trial Court was not considered and decided in the same terms and the learned Single Judge of the High Court also committed an apparent error by not appreciating the issue No. 5 properly in its term framed by the trial Court. It is also pleaded that the issue as to whether the suit was barred by law of limitation was also not justly considered by the trial Court as well as the High Court in the first appeal. Mr. B. Sharma, learned Senior Counsel appearing for the review petitioners would contend that the learned trial Court has completely overlooked the wording of the issue which seeks finding on the issue as to whether the Schedule 'A'

land as described in the plaint was the ancestral property of the parties, if so, whether the same was liable to be partitioned. The learned trial Judge has wrongly relied on the decision of the Civil Judge in Civil Suit No. 65 of 1997, wherein it was held as self-acquired property of Bhaktay Gurung, but there was no finding as to whether the said Schedule 'A' land as described in the plaint was ancestral property of the parties or not. Thus, there is apparent error on the face of it, as the issue was fully ignored by the learned trial Court as well as the High Court in the first appeal.

6. On the issue of limitation, Mr. B. Sharma, learned Senior Counsel would contend that the trial Court has not appreciated the scope of Section 3 and Section 9 of the Limitation Act while holding that the suit preferred by the plaintiff/respondent herein was not barred by limitation. The review petitioners seek appreciation of factual evidence in the case.

7. Mr. Sharma, referring to the observation of the Supreme Court in paragraph 24 of the Judgment rendered in *Des Raj & Ors. v. Bhagat Ram (deceased by LRs) & Ors.*¹, submits that mere assertion of title by itself may not be sufficient unless the plaintiff proves animus possidendi. The

¹ AIR 2007 SC (Supp) 512

plaintiff has to establish that his possession on the property in a suit was exclusive, which was not done in the case on hand.

8. Countering the submissions, Mr. A. Moulik, learned Senior Counsel appearing for the respondent/plaintiff would submit that the review petition seeks to challenge the Judgment and Decree rendered by the trial Court. There is no challenge to the observations made by this Court in Regular First Appeal. It is further contended that the issue as to whether the Schedule 'A' land as stated in the plaint was an ancestral property has been settled way back in the earlier suit. Once it is held that the property was self-acquired property, it was not necessary to reiterate that it was not an ancestral property. Holding that the land in question was self-acquired property clearly negates the contention of the petitioner that it was an ancestral property and the issue attained finality. Thus, the trial Judge has rightly dismissed the claim of the defendants applying the principle of *res judicata* also. Mr. Moulik would further contend that the limitation issue has clearly been considered and found that the suit was not barred by limitation, which does not need further appreciation in review jurisdiction.

9. This Court in *Mr. Nar Bahadur Khatiwada vs. State of Sikkim & Anr.*² decided on 01st December 2017, on examination of various cases wherein the Supreme Court had deliberated and examined the ambit and scope of review jurisdiction, held as under: -

"22. On studied examination of the aforesaid decisions laid down by the Supreme Court, the following principles for maintainability of review are discernible:

(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

(ii) Review may be entertained when there is some mistake or palpable error which is self-evident and is not detectable by the long drawn process of reasoning.

(iii) The error must strike at mere looking of the record.

(iv) Jurisdiction of review is not exercisable merely on the ground that the decision is erroneous.

(v) There should be apparent grave miscarriage of justice.

(vi) On mere ground that other view on the subject is possible, the review cannot be maintained. In other words, power of review can be invoked for correction of mistake but not to substitute a view.

(vii) In a review petition, it is impermissible to reappreciate the evidence to reach a different conclusion. Review is not a rehearing of a original matter.

(viii) Review will be maintainable on discovery of new and important fact or evidence which after the exercise of due diligence was not within the knowledge of the petitioner or could not be brought by him.

(ix) Review may be exercised for application of wrong authority or law that falls within the ambit of error apparent on the face of the record.

(x) Sufficient reasons, as specified in Order 47 Rule 1 CPC has to be read analogous to those specified in the statutory provision."

10. Applying the well-settled principles of law on scope of review jurisdiction to the facts of the instant case, it is noticed that the issue as to "whether the said Schedule 'A' land as described in the plaint is the ancestral property of the

² Review Pet. No. 06 of 2015

parties” came into consideration in the first appeal i.e. RFA No. 10 of 2013 in the High Court. The learned Single Judge in RFA No. 10 of 2013 has examined the issue at length and held as under: -

“33. In the earlier Civil Suit (CS No. 65/1997) the Appellants-Defendants herein (except Appellant-Defendant No. 6) had claimed a decree for declaration that they had equal ½ right title and interest in the properties of Schedule-A; a decree directing the partition of the properties mentioned in Schedule-A by metes and bounds; and issuance of perpetual injunction restraining Defendant No. 1, Respondent-Plaintiff herein, or any other person claiming or acting under him, from disturbing the possession of the Appellants and many other reliefs. The main reliefs claimed by the Appellants in the earlier Civil Suit were exactly the same which they claimed vide their counter-claim in the instant suit. The counter-claim made by them in the instant suit has been quoted in paragraph 3.8 (supra). In earlier Civil Suit, the claim of the Appellants was examined by a competent court between the same parties and a finding was recorded that Ganja Bahadur Gurung had separated from his father during his life time after realizing some amount in lieu of his share in his father’s property. This position remains undisturbed in First Appeal and Second Appeal and the SLP filed against the rejection of Second Appeal was dismissed by the Supreme Court. Thus, the question relating to the source of title allegedly derived by the Appellants in their successory rights attained finality between the parties in the previous Civil Suit filed for the same reliefs, which they claimed in their counter-claim. In such circumstances, the counter-claim made by the Appellants-Defendants in the instant suit on the same strength of their right and title, thus, was not maintainable on the principles of res judicata and the learned trial Court was fully justified in holding so.”

11. On examination, I do not find any mistake or palpable error, which is self evident, even on long drawn arguments advanced by the learned Senior Counsel appearing for the review petitioners. Extended elaborate arguments put

forth by the Senior Counsel for the review petitioners does not detect any error, as pleaded by the review petitioners, warranting review of the Judgment dated 26th November 2015. It is established that the Schedule 'A' land was an issue in Civil Suit No. 65 of 1997 which was held as self-acquired property of Bhaktay Gurung, on his purchase on auction sale. This finding stood confirmed in the first appeal, second appeal and ultimately in the Special Leave Petition preferred by the defendants, except defendant No. 9, thus, the issue as to whether the Schedule 'A' land as described in the plaint was the ancestral property of the parties is settled and no further argument is necessary on the purported ground that there is an error in appreciation of the facts, thus, the review is rejected on this ground.

12. On the issue of limitation, the High Court has examined at length in the first appeal and held as under: -

"16. In the instant case, the Appellants-Defendants throughout admitted that they were the co-sharers of the suit – property along with the Respondent-Plaintiff and they raised the plea of adverse possession for the first time when they filed their written statement on 18.08.2005. Thus, Article 65 will apply and the period for claiming adverse possession shall begin to run from 18.08.2005 when the Appellants-Defendants raised the above plea for the first time. The above position has also been highlighted by the Supreme Court in **Des Raj** (supra), relied by learned Counsel for the Appellants-Defendants, in which it was laid down that if a hostile title was asserted at any point of time, then the period of limitation shall begin to run from the said date and time and pendency of litigations between the parties would never stop the running of

limitation. In the instant case, as I have already said, upto the Supreme Court the Appellants-Defendants claimed themselves to be the co-sharers and they raised the plea of adverse possession for the first time in the instant suit on 18.08.2005. Thus, the instant suit filed by the Respondent-Plaintiff on 16.06.2005 was neither barred by limitation nor the Appellants-Defendants had perfected their title by way of adverse possession."

13. On appreciation of the facts as put forth by the learned Senior Counsel in the review petition, I do not find any error on application of legal provisions which falls within the ambit of error apparent on the face of the record. Reliance of the review petitioners in *Moran Mar Basselios Catholicos and another vs. Most Rev. Mar Poulouse Athanasius and others*³, does not alter the well-settled legal principles on exercise of review jurisdiction, wherein on examination of the facts involved therein, the Supreme Court held that there was certainly an error apparent on the face of the record. The facts involved in the instant case are distinct and different.

14. The petitioners have attempted to argue the case on merit, afresh seeking re-appreciation of evidence on facts, which is impermissible in review. The petitioners have not brought any facts into notice, which establishes that there was an error apparent or some mistakes or palpable error which is self evident in the Judgment sought to be reviewed in this petition.

³ AIR 1954 SC 526

15. On studied and anxious examination of the pleadings and the submissions put forth by the learned Senior Counsel appearing for the parties, I do not find any merit in the review petition, warranting interference.

16. Consequently, the review petition is dismissed. No order as to costs.

Chief Justice
04.06.2018

jk Approved for Reporting : Yes/No.
Internet : Yes/No.