

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION (Review) NO.1968 OF 2015
IN
SECOND APPEAL NO.522 OF 2013
WITH
CIVIL APPLICATION (Review) NO.1969 OF 2015
IN
SECOND APPEAL NO.521 OF 2013

Parasram s/o Chandrakant Gaikwad,
(deceased, through Legal Representatives) ..APPLICANTS

VERSUS

Digambar s/o Tatyaba Gaikwad,
(deceased, through L.Rs.
Rajabhau s/o Digambar Gaikwad & ors.) ..RESPONDENTS

Mr P.R. Katneshwarkar, Advocate for applicants

CORAM : N.W. SAMBRE, J.

DATE : 23rd February, 2015

ORAL ORDER :

The present Civil Applications by appellants-original defendants are for review of the common order dated 20th August, 2013, passed by this Court, in Second Appeal Nos.521 of 2013 and 522 of 2013, whereby this Court has dismissed both the appeals.

2. Brief facts, relevant for consideration of the present Civil Applications, are as under :-

3. The respondents/plaintiffs filed Regular Civil Suit No.304 of 1989, praying therein that the registered agreement to sell in respect of survey no.3 (b), to the extent of 3 Acres, situated at village Bhatsangvi, Taluka Kallam be declared as cancelled and further for recovery of possession. The applicants herein are original defendants. It was the case of the plaintiffs that the registered agreement to sell was executed by them as a security for loan of Rs.5,000/- advanced by defendants to them. According to the plaintiffs, as per understanding between the parties, the agreement was not to be acted upon. The defendants got possession of the property under the said agreement on 23rd January, 1969 and the amount of Rs.5,000/- was paid in Diwali of 1970.

4. The suit was resisted by the defendants as, according to them the consideration agreed under the registered agreement was Rs.6,000/- and an amount of Rs.5,000/- was paid on the date of the agreement and balance amount of Rs.1,000/- on 23rd January, 1971.

5. By way of counter-claim, the defendants have claimed decree for specific performance as according to them, they are in possession of the property in question from 23rd January, 1969.

6. The learned Trial Judge, by his judgment dated 19th March, 2008, passed in Regular Civil Suit No.304 of 1989, held that in view of the recitals of agreement to sell, the defendants were in possession of the suit property from 23rd January, 1969 and as such recorded finding that the suit was barred by limitation and dismissed the suit, as well as the counter claim, resulting into filing of Regular Civil Appeals No.129 of 2008 as well as Regular Civil Appeal No.190 of 2008 by the defendants and plaintiffs, respectively. The learned Principal District Judge, Osmanabad dismissed by common judgment dated 9th December, 2011 the appeal filed by the defendants and allowed the appeal filed by the plaintiffs and decreed the suit for possession, however, refused the declaration as regards cancellation of registered agreement to sell. An attempt by the defendants to review the said judgment was also unsuccessful.

7. Being aggrieved by the common judgment and decree dated 9th December, 2011 of the first appellate Court, Second Appeal No.521 of 2013 and Second Appeal No.522 of 2013 had been preferred.

8. On 20th August, 2013, this Court passed an order in Second Appeals, framing an issue as under :-

“Whether the defendant is entitled to protection under section 53-A of the Transfer of Property Act in respect of suit property under

written agreement Exh.109 and whether the defendant has done some act, in furtherance of the contract showing readiness and willingness to claim the shield of section 53-A of the Transfer of Property Act. “

After framing of the said issue, this Court, by the same order, directed the Trial Court to decide it after giving opportunity of hearing to both the sides, and the appeals were posted to 20th December, 2013 for further hearing.

9. The Trial Court by order dated 2nd December, 2013 decided the said issue against the present applicants/appellants. As such, the applicants/appellants questioned the same in the Second Appeals filed.

10. The Second Appeals were finally heard and dismissed by this Court by the common judgment dated 17th December, 2014, of which the applicants/defendants have sought review by present Civil Applications on two grounds (a) this Court in order dated 20th August, 2013 has observed that the Lower Appellate Court was not justified in passing the decree for possession in favour of the plaintiffs, when it was found that the suit filed by the plaintiffs for possession was barred by limitation and the said judgment of the Lower Appellate Court was contrary to the law laid down by the Apex Court in **Santosh Hazari vs. Purushottam Tiwari (deceased) by L.Rs.**, reported in **(2001) 3 SCC 179**. Hence, the said

issue ought to have been decided by the second appellate Court, i.e. this Court on its merit by recording appropriate findings in the background of order dated 20th August, 2013 passed by the Court. (b) as regards the finding recorded about cancellation of the sale deed in question.

11. I have heard Mr Katneshwarkar, learned Counsel appearing on behalf of the applicants at length. According to him, the present one is a fit case for review as the observations recorded by this Court in order dated 20th August, 2013 are not taken into account by the Court at the time of final hearing of the Second Appeals and the said issue is not at all dealt with or answered by the second appellate Court. According to him, the same is an error apparent on the face of record. Learned Counsel has placed reliance on the judgment of the Apex Court in the matter of **Haridas Das vs. Usha Rani Banik & ors.**, reported in **2006 AIR (SC) 1634**, so as to canvass the scope of Order XLVII, Rule 1 of the Code of Civil Procedure. He has sought to place reliance on the observations made by the Apex Court in paragraphs no.12, 13, 15, 17 and 18 of the said judgment, so as to canvass that the plain reading of the order dated 20th August, 2013, passed in the Second Appeals, calls for the finding on the aspect of the passing of decree for possession by the Lower Appellate Court when the claim for possession was barred by limitation. He has also sought to place reliance on the judgment of this Court in the matter of **Saraswati Bai & ors. vs. Smt. Sona Bai & ors.**, reported in **1996 (2)**

CCC 61 (Bombay), so as to canvass the scope and amplitude of scope of review under section 114 read with Order XLI, Rule 1 of the Code of Civil Procedure. In support thereof, he has placed reliance on the observations made in paragraph 14 of the said judgment, which reads thus :-

“The statement of law relating to the scope and amplitude of power of review under Section 114 read with Order 47, Rule 1 of the C.P.C. Which emerges from the aforesaid decisions is that an error which may be corrected in review must be an error apparent on the face of record. The error should be so glaring and manifest that no court would permit such an error to remain on record. An erroneous view or erroneous judgment is not a ground for review, but the judgment or order which completely ignores a positive rule of law and the error is so patent that it admits of no doubt or dispute, such an error must be corrected in the review. In other words, as the Supreme Court has said, where without any elaborate argument one could point to the error and say here is a substantial point of law which stares 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 record would be made out.”

12. Learned Counsel for the applicants has also placed reliance on the judgment of Rajasthan High Court in the matter of **State of Rajasthan vs. M/s Mehta Chetan Das Kishndass**, reported in **AIR 1981 Rajasthan 36**, so as to canvass that the error in deciding applicability of provision about providing time limit, the non-canvassing of the said issue, as a consequence thereof non-consideration of the same, could be an error

apparent on the face of record. He has placed reliance on the observations made in paragraph 9 of the said judgment.

13. Based on the above referred judgments, the learned Counsel for the applicants submits that the judgment delivered by this Court on 17th December, 2014, deserves to be set aside and Second Appeals need to be restored and posted for re-hearing.

14. After considering the above referred contentions of the applicants, with the assistance of the learned Counsel for the applicants I have gone through the pleadings raised in the applications for review. It is required to be noted that at no point of time, the issue as regards the approach of the Lower Appellate Court, which according to the learned Counsel for the applicants is contrary to the law laid down by the Apex Court in the matter of Santosh Hazari (cited supra), was canvassed or addressed before this Court so as to invite a finding on the issue of possession - being barred by limitation. Once it is noticed that the said issue was neither canvassed nor agitated before the second appellate Court, I am afraid, the said issue can be gone into in the present applications, so as to form a basis for reviewing the judgment passed by this Court on 17th December, 2014. Perusal of the order passed by this Court on 20th August, 2013 though reflects that the said issue was considered by this Court, however, least that was expected from the applicants/appellants was to argue the said

issue before the Court at the time of final hearing and invite a finding thereon. Without arguing the said issue before the Court, putting the blame on the Court for non-consideration of the said issue, even without inviting the attention of the Court to the order dated 20th “August, 2013, in my opinion, cannot form a ground for review, more particularly under section 114 read with Order XLVII, Rule 1 of the Code of Civil Procedure.

15. The judgments cited by the learned Counsel for the applicants permit review upon noticing an error apparent on the face of record, however, in present case, what is sought to be advanced and brought to the notice of this Court by way of present applications is error, which according to the applicants has cropped up as said issue on which review is sought was neither argued nor canvassed and as such, the fresh findings are sought to be invited on the said issue in the review jurisdiction of this Court. This position that the ground on which review is sought was not canvassed is not in dispute as no such statement is made in the applications that the said issue was canvassed but no findings are delivered.

16. In my opinion, the law laid down by the Apex Court in the matter of **Kamlesh Verma vs. Mayawati & ors.**, reported in **(2013) 8 SCC 320**, does not permit this Court to review the judgment on the above referred issue, which is sought to be canvassed by the learned Counsel for the

applicants. At the most, the same can be a ground for the applicants in an appeal, if they so desire to prefer. In paragraph 20 of the said judgment, the Honourable Apex Court has summarized the principles on fit and unfit cases for review, as under :-

“20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1 When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in Chhajju Ram vs. Neki, AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulouse Athanasius & Ors., (1955) 1 SCR 520, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors., JT 2013 (8) SC 275.

20.2 When the review will not be maintainable:-

(i) *A repetition of old and overruled argument is not enough to reopen concluded adjudications.*

(ii) *Minor mistakes of inconsequential import.*

(iii) *Review proceedings cannot be equated with the original hearing of the case.*

(iv) *Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*

(v) *A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.*

(vi) *The mere possibility of two views on the subject cannot be a ground for review.*

(vii) *The error apparent on the face of the record should not be an error which has to be fished out and searched.*

(viii) *The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*

(ix) *Review is not maintainable when the same relief sought at the time of arguing the main matter had been negated."*

17. Similar is the case about the second issue that is sought to be canvassed in the review. Once the said issue was not raised before this Court, the question of not giving finding on the same will hardly be of any consequence.

18. In view of what has been stated above, there is no substance in the review applications. Thus, both Civil Applications for review stand rejected with no order as to costs.

(N.W. SAMBRE, J.)

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