IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO. 10650 OF 2011
IN
REVIEW APPLICATION STAMP NO. 22080 OF 2011
IN
SECOND APPEAL NO. 500 OF 2010
WITH
REVIEW APPLICATION STAMP NO. 22080 OF 2011
AND
CIVIL APPLICATION NO. 2120 OF 2014

Mahendra S/o Machindra Kamble .. Applicant

Versus

1. Sumanbai Bajirao Mahajan and others .. Respondents

Shri K. H. Dhuldhwaj, Advocate for the Applicant.
The application is dismissed against the Respondent No. 1.
Shri V. P. Raje, Advocate h/f Shri C. R. Deshpande, Advocate for Respondent Nos. 2 and 3.

CORAM : S. V. GANGAPURWALA, J.

Date on which reserved for Order : 21/08/2015
Date on which Order pronounced : 07/10/2015

PER COURT :-

. The civil application is filed for condonation of delay of 70 days caused in filing the review application. For the reasons stated in the application, the application is allowed. The delay is condoned.

2. This Court on 31st July 2015 had passed an order that, the review application itself would be heard on merits. Pursuant thereto the learned counsel for respective parties have argued the review application on merits.

3. Mr. Dhuldhwaj, the learned counsel for the review applicant has argued the review application at length and submits that, this Court while dismissing the second appeal did not formulate any substantial question of law. The same is against the mandate laid down by the Apex Court. The learned counsel relies on the judgment of the Apex Court in the case of **Dharam Singh Vs. Karnail Singh** reported in ***AIR 2009 SC 758*** and further submits that, dismissal of second appeal without formulating any substantial question of law is not permissible. The learned counsel also relies on the judgment of the Apex Court in the case of **Balla Ram (Dead) by L.Rs. and others Vs. Phoola (Dead) by L.Rs. and others** reported in ***AIR 2003 SC 2080***.

4. The learned counsel submits that, the Court while dismissing the second appeal has not considered the provisions of Sec. 110 and Sec. 114 of the Indian Evidence Act. There is evidence to show that prior to 1955 the predecessors of the present review applicant were in possession of the property. Thus the presumption is that they were the owners of the

property. The burden would be on the other side to prove otherwise in view of Sec. 110 read with Sec. 114 of the Indian Evidence Act. As the said provisions are not considered, the same would tantamount to an error apparent on face of record. It was mistake on the part of the Court, which can be considered in review. The learned counsel relies on the judgment of the Apex court in the case of **Board of Control for Cricket, India and another Vs. Netaji Cricket Club and others** reported in ***AIR 2005 SC 592(1)***. The learned counsel further submits that, mistake apparent on the face of record would mean a reason sufficient on the grounds analogous to those specified in the rules. The learned counsel relies on the judgment of the Apex Court in the case of **Lily Thomas, etc. Vs. Union of India and others** reported in ***AIR 2000 SC 1650***. The learned counsel also relies on the judgment of the Apex Court in the case of **R.V.E. Venkatachala Gounder Vs. Arulmigu Vishwesaraswami and V. P. Temple and another** reported in ***AIR 2003 SC 4548(1)*** to submit that once plaintiff is able to create high degree of probability to shift onus on defendant, it is for the defendant to discharge his onus in absence thereof the burden of proof on plaintiff would be discharged, which would amount to proof of plaintiff's title. The applicant is economically backward. He is socially and educationally backward. The learned counsel relies on the judgment of the Orissa High Court in the case of **Bishnu**

Charan Swain Vs. Secretary Works and Transport Department and others reported in ***AIR 1974 Orissa 115 (V. 61, C 37)***. The learned counsel submits that, non advertence to positive provision of law in the present matter as such, Sec. 110 and 114 of the Indian Evidence Act would be an error apparent on face of record. The learned counsel relies on the judgment of the Travncore-Cochin High Court in the case of **K. Sankaranarayana Pillai Vs. S. P. Sankara Iyer** reported in ***AIR 1954 Travancore-Cochin 226***. The learned counsel submits that, the non consideration of relevant record such as the entries in the old record would give rise to an error apparent on face of record and as such order is reviewable. The learned counsel relies on the judgment of the Apex Court in the case of **Rajendra Singh Vs. Lt. Governor, Andaman and Nicobar Islands and others** reported in ***AIR 2006 SC 75***.

5. The learned counsel further submits that, during the pendency of proceedings, the applicant could not get the old record. Now he could lay his hands on the old record of 1358 Fasli which shows the predecessor in title of the present review applicant to be the occupant and owner of the suit property. The said documents are relevant and material for effective adjudication of the dispute. Inspite of due diligence the said documents could not be traced out earlier. The said documents being of the year 1948 and 1949 would have high probative value.

The said documents show Narayan Tuka Mahar as owner and possessor of land Sy. No. 8 admeasuring 23 Acres 11 Gunthas.

6. Mr. Raje, the learned counsel for respondents supports the judgment and submits that, present review applicant was the original plaintiff, who along with others had filed suit for possession on the ground that they are owners of the property. Both the Courts had concurrently arrived at the findings and dismissed the suit. The plaintiffs could not prove their title. There is no error apparent on the face of record and the review application be dismissed with heavy costs. The learned counsel relies on the judgment of the learned Single Judge of this Court in the case of **Shobha Bajirao Damodar Vs. Triratna Krida and Shikshan Prasarak Mandal Akola and others** reported in ***2009 (1) Mh. L. J. 979***.

7. I have considered the submissions canvassed by the learned counsel for respective parties.

8. The second appeal can be entertained only on a substantial question of law i. e. if the appellant in the second appeal can show existence of substantial question of law.

9. Present review applicant is the original plaintiff. He along with other plaintiffs had filed suit in the year 2001 claiming

possession of the land on the ground that their ancestors were the owners of the suit land. It is a fact that, the name of defendants and predecessor in title are recorded in the relevant record of the suit land for 50 years prior to the filing of the suit. The Trial Court as well as the Appellate Court had concurrently come to the conclusion that the plaintiffs evidence is not consistent with their pleadings. The plaintiffs had come with the case that Tukaram i. e. grandfather of plaintiff No. 1 had put Gyana Gaikwad in possession of the suit land towards money borrowed by him and the transaction was in the nature of security of loan. However, the plaintiff No. 1 admitted in cross examination that, Moinuddin was shown as owner in the relevant record of the year 1950 of land Sy. No. 8 to the extent of 50 paisa share and another person named Vithoba was recorded as owner to the extent of only 1/4th share and the name of Narayan was recorded to the extent of 1/4th share in the revenue record. These are the admissions given by the plaintiff No. 1 in the cross examination as has been observed by the Courts below. It has also been observed by the Courts below that the plaintiff No. 1 further admitted that, in the year 1983 pot hissa survey measurement was carried and names of these persons have been recorded as per their share. The said plaintiff No. 1 admitted in his evidence that his father sold one acre land out of Sy. No. 8/B to Ramchandra on 21.01.1972 by registered sale deed. The plaintiff No. 1 had also signed the document as consenting party.

The evidence led by the defendants was also considered, wherein various sale deeds were executed by the respective persons in the year 1981, 1972 of their respective share. The whole record was considered by both the Courts to show that the names of predecessor in title were recorded in the relevant record at least in the year 1955. The said documents were scrutinized. The Courts have also observed that, there is no evidence led by the plaintiffs to even remotely suggest that the suit land was given by the predecessor in title of plaintiff to Ghyana Gaikwad as security for the loan allegedly borrowed by him. The evidence led by the plaintiffs and defendant was scanned threadbare. During the pendency of suit itself, the suit was dismissed against the defendant No. 1 Sumanbai on 30.01.2002. The said order was not challenged. Possession of some land was also claimed from the defendant No. 1.

10. While considering the second appeal, this Court had observed that, since prior to 1955 the record shows that the land stood in the name of the defendants. Even prior to 1955 even 1/4th land was shown to have been possessed by Gyana and remaining by Mohiuddin. The admission of plaintiff No. 1 in his deposition was also considered. The pot hissa and names of respective persons recorded as against the Pot hissa was also considered. The plaintiffs could not prove the alleged theory of mortgage. Thereafter the sale transactions have taken place. In

one of the sale transaction plaintiff is also a consenting party.

11. This Court while dismissing second appeal observed that, view taken by the Courts below is possible view. There was no perversity in the appreciation of evidence. No substantial question of law arose for entertaining the second appeal. As no substantial question of law had arisen, the second appeal was dismissed.

12. There is no error apparent on the face of record. In the case of **Dharam Singh Vs. Karnail Singh** referred to supra, the High Court had allowed the second appeal without formulating the substantial question of law. In that case the Apex Court held that the same could not have been done without formulating the substantial question of law. In the present matter, this Court by confirming the concurrent findings of both the Courts below had dismissed the second appeal as no substantial question of law had arisen. Hence the present review application is dismissed.

13. The application is also filed for production of documents. The same are only xerox copies of documents. The production of such xerox copies cannot be allowed.

14. Considering the above, civil application for condonation of delay is allowed. The review application so also the civil application for additional evidence are dismissed. No costs.

[S. V. GANGAPURWALA, J.]

bsb/Sept. 15