IN THE HIGH COURT OF BOMBAY AT GOA.

CIVIL APPLICATION (REVIEW) NO. 32 OF 2014
IN
SECOND APPEAL NO. 2 OF 1998.

SHRI SHAIKH KASSAM
AND 2 ORS. ... Applicants.

Versus

SHRI SHAIKH ABDUL
RAZAK REP. BY
ATTORNEY SHRI SHAIKH
RASHID AND 2 ORS., ... Respondents.

Mr. D. Pangam and Mr. L. Fernandes, Advocates for the applicants.

Mr. S. D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar Advocate for the respondent no.1.

Ms. M. Kamat, Advocate for the respondent no.2a & 2b.

Coram:- C. V. BHADANG, J.
Date:- 12th August, 2015.

ORAL ORDER

By this application, the applicants (original respondents) in Second Appeal No.2/1998 are seeking review of the judgment and order dated 26.6.2012 of this Court. By the said Judgment the Second Appeal is allowed, and while setting aside the judgment and decree passed by the First Appellate Court in Regular Civil Appeal No. 40 of 1993 the judgment and decree passed by the trial Court in Regular Civil Suit No. 65 of 1990 is restored.

2. The only ground for seeking review of the judgment is that the following judgments cited, on behalf of the appellants have not been referred and considered by this Court.

i. V. Swarajyalaxmi and others Vs. Authorised Officer, Land Reforms, Medak and others, 2003(9) SCC 525

ii. Raghunath Pradhani Vs. Damodra Mahapatra and others, 1979(1) SCC 508.

iii. Premier Tyres Limited Vs. Kerala State Road Transport Corporation, (1993) Suppl.(2) SCC 146.

iv. Badri Narayan Singh Vs. Kamdeo Prasad Singh and another, AIR 1962 SC 338.

3. It is submitted that non-consideration of the judgments cited is in the nature of an error apparent on the face of the record which needs to be corrected.

4. The brief facts are that the respondent no.1 Shaikh Abdul Razak who was the original plaintiff in Regular Civil Suit no. 65 of 1990 had filed a suit inter alia for (i) a declaration to the effect that the gift deed dated 20.5.1968 executed by Shaikh Azis in favour of Shaikh Azamatulla in the absence of approval and signatures of the other co-owners was ab-initio, illegal and void and not binding on the plaintiff, (ii) a declaration to the effect that

the sale deed dated 22.7.1968 executed by the original defendant nos. 2, 3, 4 and 5 in favour of the original defendant no.1 in the absence of approval and signatures of other co-owners was ab-intio, illegal and void and was not binding on the plaintiff and (iii) for a declaration that the compromise decree dated 22.12.1986 passed by the learned Civil Judge, Senior Division in Civil Suit No. 97 of 1980 is ab-initio, illegal and void.

5. The learned Trial Court had decreed the suit which was reversed by the First Appellate Court. In the Second Appeal, this Court while allowing the Second Appeal had restored the decree passed by the trial Court.

6. I have heard Mr. Pangam, the learned counsel appearing for the applicants, Mr. Lotlikar, the learned Senior Counsel appearing for the respondent no.1 and Ms. M. Kamat, the learned Counsel appearing for the respondent nos. 2(a) and 2(b).

7. It is submitted by Mr. Pangam, the learned counsel appearing for the applicants that the judgments cited on behalf of the applicants have not been considered. It is submitted that in the judgments reported in ***V. Swarajyalaxmi***(supra)***, Raghunath Pradhani,*** (supra) and ***Premier Tyres Limited,*** (supra), it has been

held that when the judgment debtor has no saleable interest in the property nothing could be transferred in a sale in execution proceedings and eventually auction purchaser would not get any title out of such auction sale. It is submitted that in the present case, under the gift deed the title had already passed, as such, no saleable interest had remained which could have been sold in the auction. The judgment reported in the case of ***Badri Narayan***, (supra) was cited in support of the contention that the prayer clause(a) in the suit (namely declaration that the gift deed dated 20.5.1968 is null and void) having been refused by the trial Court, (against which no appeal was filed by the first respondent) had attained finality. Thus, the other prayers which are based on the main relief for declaration were not sustainable. It is submitted that on account of non-consideration of these judgments there is an error apparent on the face of the record which has cropped up in the impugned judgment.

8. On the contrary, it is submitted by Shri Lotlikar, the learned Senior Counsel appearing for the respondent no.1 that although there is no specific reference to the cases in the impugned judgment, their effect has been considered which would be apparent from the discussion in paragraphs 25 to 27 of the impugned judgment. He submitted that the review-petitioner

cannot seek re-consideration of the entire matter, as if in appeal under the garb of filing a review application. It is submitted that the powers available in review application are essentially limited and said scope cannot be enlarged. The learned Senior Counsel thus submits that the remedy of the applicants, if any, is to challenge the judgment before the appropriate forum.

9. I have considered the rival circumstances and submissions made.

10. This Court had framed following substantial questions of law in the appeal.

(I) Whether the appellant had no locus standi to challenge the Sale Deed and the Gift Deed in respect of the suit property in view of the fact that he had become absolute owner of one third share in the suit properly, only after the execution of the Gift Deed and the Sale Deed?

(II) Whether the purchase made by the appellant of the one third share of the suit property in a public auction held under the provisions of the Land Revenue Code, would vest the property, namely one third share of the suit property in the appellant free from all encumbrances?

(III) Whether, in view of contents of the Gift Deed which made it conditional, the same would prevail over the subsequent purchase, by the appellant, of the said property in public auction under the land revenue code, which was held for recovering the dues of the Donor as arrears of land revenue?

(IV) Whether the very fact that the respondent had obtained a consent decree acknowledging the rights of respondent no.1 to a portion of the suit property admeasuring 10,000 square meters, a suit to which the appellant was not a party, would constitute a denial of the right or title of the appellant in respect of the suit property making his suit for declaration maintainable under the law?

(V) Whether the cause of action accrued in favour of the appellant to challenge the Sale Deed dated 22/07/1968 and Gift Deed dated 20/05/1968 on 22/12/1986, when the Consent Decree was passed and whether consequently the suit was well within the period of limitation?

11. This Court had answered the substantial questions at serial Nos.II, III and IV in favour of the respondent no.1/plaintiff. This Court further held that the substantial questions at serial No.I and V do not arise.

12. The only ground in support of the review application is that judgments cited have not been considered by this Court. It is true that there is no reference to the cited cases in the impugned judgment.

13. In the cases reported in ***V. Swarajyalaxmi***(supra)***, Raghunath Pradhani,*** (supra) and ***Premier Tyres Limited,*** (supra), it is inter alia held that only where the judgment debtor had a salable interest, in the property that it can be transferred in the auction purchase in the execution proceedings.

14. A perusal of the judgment of this Court would show that in paragraph 24 of the judgment, this Court had considered provisions contained in chapter X of the Land Revenue Code("the Code" for short) about realisation of the land revenue. Section 128 of the Code provides for sale of defaulter's immovable property, under which the Collector may also pass the right, title and interest of the defaulter in any immovable property to be attached and sold. After considering the various provisions contained in chapter X of the Code, this Court went upon considering gift deed dated 20.5.2008 pertaining to the 1/3rd of the property "MOSSICHEM MOL" which was gifted to the donee-Shri Shaikh Azamatulla. This Court has considered that donee had agreed to accept the gifted property with encumbrance which had existed on the said property. This Court has then considered,that admittedly, the doner had secured a loan from the Government of Goa which had remained unpaid. It had come in the evidence of

PW1 that donee Shaikh Azamatulla was requested to pay the said loan by instalment of ₹ 50 per annum. PW1 further stated that the gift was conditional on the donee paying off the loan. It has thus been found that under the gift deed property could go to the donee, only if, the loan is paid off. This Court thereafter has considered in paragraph 26, the effect of the order dated 13.9.1997 in the LRC/13/76, passed by the Mamlatdar. It is further noticed that the objection of Shaikh Azamatulla to the auction sale had been rejected confirming the auction sale. This Court found that the learned Mamlatdar had further noticed that under the said gift deed the donee had accepted the gift with encumbrance existing thereon. Thus it was obligatory on the part of the donee-Shri Shaikh Azamatulla to clear the Government dues. The learned Mamlatdar had held that the said transfer was subject to clearance of the dues and the property was auctioned inclusive of encumbrance. That the order of the Mamlatdar had attained finality and had become conclusive. In that view of the matter, the objection was rejected and auction sale was confirmed.

15. It has further been noticed that the original defendant nos. 1 and 2 did not file any Civil Suit challenging the order of the Mamlatdar which has become conclusive. This Court has

thereafter noticed that the First Appellate Court had also come to the conclusion that the respondent no.1(original plaintiff) is the owner of 1/3rd. Thus, the net result is that there is a finding of fact that although there was a gift deed, the same was conditional on clearance of the government dues which was not done. Thus in the face of the law as down in the authorities cited, no relook is necessary on account of the said finding of fact.

16. In so far as the judgment in **Badri Narayan**(supra) is concerned, the contention is that once the declaration of gift deed being null and void, has been refused, the consequential reliefs could not have been granted. In the said case, the question was about the applicability of principle of res judicata. It is difficult to envisage as to how the said judgment would be relevant to decide the controversy in question.

17. In that view of the matter, in my humble opinion, mere non-mention of the three cases cited would not partake of the nature of an error apparent on the face of the record. It is trite that the scope of a review, is essentially limited and under the garb of review application, the review-petitioner cannot seek reconsideration of the matter, as if in appeal.

18. In the result, I do not find that any case for review is made out. Thus, the review application stands dismissed with no order as to costs.

C. V. BHADANG, J.

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