

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

MISC. CIVIL APPLICATION NO. 1185 OF 2014

Smt. Prabhjot Kaur @ Parjyoti Kaur
w/o Surendrapal Singh Chhatwal
and others.. ::

APPLICANTS

..Versus..

Smt. Kala wd/o Narendra Singh Chhatwal
and others. ::

NON-APPLICANTS

.....
Dr. Anjan De, Advocate for the applicants.
Shri N. P. Padhye, Advocate for the non-applicants.
.....

CORAM : S. B. SHUKRE, J.

DATED : 04th FEBRUARY, 2015.

P. C. :

1. Heard.
2. Learned Counsel for the applicants states that in this case first appellant Court has not followed the proper procedure which required the first appellate Court to call upon the parties to file an affidavit in support of their respective contentions in view of the provision of Order XIX rule 1 of the Civil Procedure Code as held by learned Single Judge of this Court in the case of Amar Singh Harisingh Thakur Vs. Tulshiram Kisan Ingle & ors. Reported in **2010(6) Bom.C.R. 352** and, therefore, the mistake on the part of the first

appellant Court has taken place in this case, and if such a mistake has taken place, as held by the Hon'ble Apex Court in the case of Board of Control For Cricket, India Vs. Netaji Cricket Club reported in **2005 AIR (SC) 592** that a mistake on the part of the Court can be a ground for reviewing of the judgment. He also submitted that the High Court being a Court of record has not only the power but also a duty to correct the mistake and it is under a duty to keep all its record correctly as held in the case of M. M. Thomas Vs. State of Kerala reported in **2000 AIR (SC) 540**.

3. According to learned Counsel for the non-applicants, no ground regarding not following the proper procedure by the first appellate Court was ever taken in the second appeal preferred by the applicants before this Court. He also submits that even before the first appellate Court, no such ground was taken. Therefore, he submits that no error apparent on the face of the record can be seen in the judgment sought to be reviewed by the applicants. He also submits that unless some statement on fact is made before the first appellant Court and unless it has been disputed, there would be no occasion for the first appellate Court to call upon any party to file an affidavit in support of its contention or in order to prove the statement of fact. Therefore, he submits that there is no merit in this review application.

4. Upon considering the judgment passed by this Court and

also the record of the second appeal, I am of the view that there is no substance in the argument advanced by learned Counsel for the applicants and there is merit in the argument canvassed by learned Counsel for the non-applicants.

5. There can be no quarrel about the proposition of law that this Court being a Court of record is under a duty to maintain its record correctly and, therefore, if there is an occasion which calls for correcting of the record, the Court would not only have the power but also the duty to correct the record by passing appropriate order which would include an order of review of the judgment. There is also no dispute about the principle of law that the mistake of the Court is a mistake which can be taken into account for review of the own judgment of the Court. There is also no doubt about the principle that if the fact and circumstances of the case warrant while adjudicating upon the application for condonation of delay, the concerned Court must call upon the parties, by passing necessary order, to file on record an affidavit in order to prove the facts disputed between them. But, the question would be whether, in this case, was there any disputed fact between the parties so as to necessitate passing of an order by the first appellate Court directing the parties to file an affidavit to prove their disputed fact. The question would have to be answered by referring to the order of this Court as well as the order of the first

appellate Court rejecting delay condonation application filed by the applicants.

6. Upon perusal of both these orders and also the record of the first appellate Court, one can very well see that the applicants had never stated before the first appellate Court as to why the other person Surendrapal did not take any steps in filing of the first appeal within a reasonable period of time after the applicants learnt about passing of the ex-parte decree. This Court, while rejecting the second appeal, had found that so far as the fact of absence of reason in delay condonation application for the other partners in not filing of the first appeal in reasonable time was concerned, no explanation nor any clarification had been given by the applicants in that regard and that was the reason which primarily weighed with this Court in rejecting the second appeal. That was also the reason, as seen from the record, which was considered by the first appellate Court in rejecting the delay condonation application. It is also seen that the other brothers had not given any explanation about their inaction in the matter. If no explanation has been given or no attempt in that direction has been made, it has to be said that there was no material brought on record by the applicants so as to enable the first appellate Court to call upon the applicants to fortify their stand or explanation by filing an affidavit on record. There has to be something by way of an assertion made or

some fact stated before the Court which is disputed by the parties which, as rightly submitted by learned Counsel for the non-applicants would make the concerned Court to resort to the provision of Order XIX rule 1 C.P.C. A party cannot be called upon to file an affidavit as a proof of fact when the fact itself is not pleaded. The fact having been not asserted in this case, there was no occasion for the lower Court to take recourse to Order XIX rule 1. Therefore, I see no mistake on the part of the first appellate Court in not passing an order as per the provision of Order XIX, rule 1 and, the approach, therefore, adopted by the first appellate Court cannot be seen to be against the factual position as well as the provisions of law. Such being the factual position of this case, I must say, there was no mistake on the part of the first appellate Court and, therefore, the applicants would not get any assistance from the afore-stated cases.

7. Apart from whatever has been discussed above, there is another ground why do I not consider the review application as tenable. The ground that the first appellate Court has not followed the appropriate procedure in the matter involving a mixed question of fact and law was not at all taken before this Court. It was also not urged before the first appellate Court that some particular procedure was required to be followed in the matter. Therefore, it can be said that what was not urged before this Court, cannot be a ground for

reviewing of it's own judgment.

8. I have already noted above that no mistake on the part of the first appellate Court can be seen in this case and, therefore, I am of the view that no case has been made out by the applicants in invoking review power of this Court.

9. Learned Counsel for the respondents has taken an objection that the legal representatives of deceased applicant No.2, without permission of this Court, cannot be brought on record and no application seeking necessary on their behalf has been filed. However, I do not propose to deal with this objection as I have already found that the review application as filed in this case is without any substance.

10. There is no apparent mistake on the face of the record. The application, therefore, deserves to be rejected.

The application stands rejected.

JUDGE

WNL