

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Misc. Civil Application [Review] No. 1064 of 2014
With
Civil Application No. 1141 of 2014
IN
Second Appeal No. 304 of 2001 [decided]
[Syed Faijullaha Sayyed Kadar Vs. Gajanan Pundlik Talmale & three others]

**Office Notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.**

Court's or Judge's orders

Mr. R.P. Joshi, Adv., for the Applicant.
Mr. S.P. Bhandarkar with Mr. Tejas Patil, Adv., for respondent nos. 1 to 4.

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CORAM : A.B. CHAUDHARI, J.

DATE : 06th February, 2015.

01. Misc. Civil Application No. 1064 of 2014 and Civil Application No. 1141 of 2014 are taken up together for decision.

02. Heard Mr. R.P. Joshi, learned counsel for the Review Applicant on both the above applications and Mr. S.P. Bhandarkar for the contesting respondents.

03. Mr. Bhandarkar, learned counsel for the respondents, submitted that the application for bringing additional evidence on record under Order-XLI, Rule 27, filed by the Review Applicant, i.e., Civil Application No.

1141 of 2014 is not maintainable, because such application is not contemplated in review proceedings.

04. Per contra, learned Adv. Mr. Joshi for the respondent, responding to the Preliminary Objection with the help of decisions in the cases of **[a] Inderchand Jain (Dead) through LRS. Vs. Motilal (Dead) through LRS.** [(2009) 14, SCC 663], and **[b] Shyam Gopal Bindal & others Vs. Land Acquisition Officer & another** [(2010) 2 SCC 316], submitted that the application under Order-XLI, Rule 27, Civil Procedure Code, is maintainable even in Review Application.

05. In the light of the said decisions, I hold that Application under Order-XLI, Rule 27, CPC, for production of additional evidence is maintainable.

06. In support of the application for production of additional evidence under Order-XLI, Rule 27, CPC, Mr. Joshi invited my attention to the judgment under review wherein this Court observed that the Review Applicant had failed to produce any Will, on the basis of which Mutation Entry [Exh.63] was taken and, therefore, there was a strong suspicion about the mutation entry itself. Mr. Joshi contended that now the Review Applicant has found the Will about which this Court had made the said observations and, therefore, that is the crucial evidence which the Review Applicant wants to file by the said application for production of additional evidence. For late production of the said additional evidence, Mr. Joshi

contended that Review Applicant came to know about it after the judgment was delivered by this Court in Second Appeal, when Smt. Kamlabai Talmale, widow of deceased Gajanan, had handed over the Will to one Sheikh Mohammad Alim Mohammad Saheb, a broker, since she had given the said document of Will for effecting sale of the suit field. The said broker then contacted the review applicant and that is how the review applicant came into possession of the Will. In support of all these facts, he has filed affidavit of the said broker - Sheikh Mohammad Alim Mohammad Saheb sworn before Tahsildar. He, therefore, submits that this is an evidence, which goes to the root of the matter and, therefore, the application for production of Will should be allowed and review should be allowed and the civil suit should be remanded for fresh trial. In support of the Review Application, therefore, he submitted that the Review Application is consequently required to be allowed. He relied on the decisions in the cases of :-

- [a] **State of West Bengal & others Vs. Kamal Sengupta & another** [(2008) 8 SCC 612],
- [b] **Damodar Bhatt Somnath Parvanikar Vs. Ganpati Chintamani** [1962 M.P.L.J. 48] (2008) 8 SCC 612],
- [c] **Shyam Gopal Bindal & others Vs. Land Acquisition Officer & another** [(2010) 2 SCC 316], and
- [d] **Inderchand Jain (Dead) through LRS Vs. Motilal (Dead) through LRS** [(2009) 14 SCC 663], and

[e] **Pitamber Kanhayalal Khattar & another**
Vs. Sadanand Harishchandra Honawar &
another [2007 (1) MhLJ 816]

07. Per contra, Mr. Bhandarkar, learned counsel for the contesting respondents, vehemently opposed the application and submitted that the Review Applicant has presented a cock and bull story in respect of the alleged Will dated 3rd October, 1978, which is said to have been found now and on the basis of which the applications have been filed. He submitted that the litigation cannot be reopened in the manner sought to be done by the review applicant. He, therefore, prayed for dismissal of the applications with cost.

08. I have perused the entire record, so also the judgment under review. I have perused the application under Order XLI, Rule 27, CPC. I have heard learned counsel for the rival parties and also have read the decisions cited by Mr. Joshi, learned Counsel for the Applicant.

09. This Court, while recording decision in the Second Appeal, found that the Mutation Entry [Exh.63] was said to have been made on the basis of Will dated 3rd October, 1978 and that the Mutation Entry was made ten years after the said date of Will. It was also observed in the Judgment that seventeen days before execution of sale-deed in favour of review applicant, the mutation

entry was made, which again indicated a serious doubt about the transaction. The story put up before me now by the review applicant that the said Will dated 3rd October, 1978 is traced out by him now because some broker took the possession thereof from Kamalabai during pendency of the litigation is nothing but a figment of imagination of the review applicant. It is obvious that the review applicant wants to reopen entire litigation which cannot be allowed, since the litigation must end. At any rate, what is seen is that the review applicant has not at all explained in the Trial Court or anywhere now as to why the mutation entry was taken ten years after the execution of will on 3rd October, 1978 and as to why the will was not traced out by him during trial in the suit or before the First Appellate Court, or during pendency of Second Appeal. In the absence of any explanation, the story now put up by the appellant in this application cannot at all be even considered, muchless believed.

10. That apart, the Lower Appellate Court held that the plaintiffs were entitled to 4/5th share in the suit land in the suit for partition and possession that was filed and not only that the present Review Applicant was given liberty to file a suit for a joint partition to the extent of the share of his vendor. In other words, the ancestral property could not have been disposed of by the Will and that is why the Lower Appellate Court made equitable decree even in favour of the present Review Applicant. But then, he did not take advantage of the said decree which was confirmed by this Court in the Second Appeal.

This Court finds that the Application under Order XLI, Rule 27, CPC is without any merit and does not at all satisfy the ingredients of Rule 27. This, Court, therefore, rejects the Civil Application No. 1141 of 2014 for production of additional evidence. In so far as the Review Application is concerned, the same consequently has no merit. In the result, following order is made:-

ORDER

[a] Civil Application No. 1141 of 2014 for production of additional evidence is rejected.

[b] Following rejection of Civil Application No. 1141 of 2014, Misc. Civil [Review] Application 1064 of 2014 has no merit, and is also rejected.

11. As a result of this order, Civil Application No. 1223 of 2014 for stay is disposed of.

Judge

[hedau]