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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

REVIEW APPLICATION STAMP NO. 6180 OF 2015
IN
SECOND APPEAL NO.795 OF 2010

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| 1. | Parmeshwar Rambhau Jamdade
Age – 47 years, Occ – Service & Agriculture
R/o Kamkheda, Taluka and Dist- Beed | APPLICANTS |
| 2. | Syed Taher Ali s/o Jainulla Abedin Quadri,
Age – 55 years, Occ – Trade,
R/o Beed Prop, Mangal Decorators,
Netaji Maindan, (New Bhaji Mandi)
Beed, District – Beed | |

VERSUS

- | | | |
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| 1. | Bajrang Limbaji Jamdade
Age – 53 years, Occ – Agriculture
R/o Kamkheda, Taluka and District – Beed | RESPONDENTS |
| 2. | Shahurao s/o Babaji Jamdade,
Died Through LRs | |
| | 2A. Chatrabhuj s/o Shahurao Jamdade,
Age – 65 years, Occ – Agriculture | |
| | 2B. Ashok s/o Shahurao Jamdade
Age – 55 years, Occ – Agriculture | |
| | 2C. Sunil s/o Shahurao Jamdade,
Age – 42 years, Occ – Agriculture | |
| | 2A to 2C R/o Kamkheda,
Taluka and District – Beed | |
| | 2D. Kantabai w/o Dagdu Bahir,
Age – 60 years, Occ – Housewife,
R/o Navgan Rajuri
Taluka and District – Beed | |
| | 2E. Radhabai w/o Uttamrao Rahade, | |

Age – 50 years, Occ – Housewife
R/o Ketrua, Taluka and District – Beed

2F. Kusum w/o Vitthalrao Hatode,
Age – 48 years, Occ – Housewife
R/o Pachegaon, Taluka and District – Beed

2G. Shamal w/o Suresh Kavthekar,
Age – 45 years, Occ – Housewife
R/o Pitthi Naigaon,
Taluka and District – Beed

3. Bansi s/o Keshavrao Maske,
Age – 35 years, Occ – Agriculture
R/o Kamkheda, Taluka and District – Beed

4. Madlasa w/o Ankush Giri
Age – 60 years, Occ – Agriculture
R/o Mudapuri, Taluka – Georai
District – Beed

5. Rajubai w/o Shrimant Lonkar,
Age – 52 years, Occ – Agriculture
R/o Kamkheda, Taluka and District - Beed

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Mr. Girsh K. Thigale (Naik) Advocate for the applicants
Mr. Amol Joshi h/f Mr. R. S. Deshmukh, Adv. for respondent No.1

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 2nd DECEMBER, 2016

ORAL JUDGMENT :

1. Heard learned advocates for the appearing parties.
2. Learned advocate Mr. Naik-Thigale for the review applicant purports to raise a case, which in his estimate would reflect error

apparent on the face, as would emerge in order to lay a review of the order dated 27th November, 2014 in second appeal No.795 of 2010.

3. After hearing learned advocates, there appears to be general consensus with regard to certain occurrences *viz.*, agreement of sale had been executed by applicants in favour of respondents No.1 and 3, a suit based on agreement of sale for specific performance had been instituted by plaintiffs No.1 and 2 and subsequently plaintiff No.2 had withdrawn himself from the fray, who in turn had been arrayed as defendant No.4 in said suit. Accordingly, amendments to the plaint were carried out and defendant No.4 too had filed his written statement.

4. In the interregnum it appears that certain other documents had come to the fore, which apparently are inconsistent according to learned advocate for the review applicants.

5. On these broad facts learned advocate for the review applicants submits that it is discernible that the contract which had been entered into in favour of plaintiffs No.1 and 2 jointly was not a severable one and in the circumstances the suit ought to have failed. He further submits that failure of suit had been all the more necessitated as plaintiff No.2 had withdrawn himself

from claim in the suit unconditionally, which is an absolute right of a litigant, as such the purported agreement of sale loses its efficacy. He further goes on to contend that the readiness and willingness as had been shown in the claim with the withdrawal of plaintiff No.2, joint readiness and willingness even if pleaded, would not be a case which can be said to satisfy conditions under section 16 (c) of the Specific Relief Act.

6. His thrust appears to be on that while an agreement of sale has been contended to be executed in favour of two persons by alleged vendor, after institution of suit for specific performance one of the plaintiffs withdrawing from the suit, whether a decree of specific performance would be possible, since splitting up of the agreement would not be accommodated by law.

7. Secondly, his case is while plaintiff No.2 had unconditionally withdrawn from the suit for specific performance, subsequently, who had been transposed in the array of defendants, would be able to switch his stands, initially against execution of agreement and subsequently in favour of its execution, could be considered by the court for grant of specific performance.

8. He purports to state that requirement of section 16 (c) of the Specific Relief Act, would not be able to said to have been satisfied in the scenario and this aspect has escaped attention while decision had been rendered on 27th November, 2014.

9. He submits that decision under review may ostensibly dwell upon these aspects, however, it cannot be said to be dealing with the same as would be required.

10. Learned advocate submits that these are the errors which emerge on record and are apparent and as such, review application be granted.

11. Mr. Thigale, learned advocate for the review applicants, refers to a decision of division bench of this court in the case of “*Dinkar s/o Kisanrao Warade vs. Gajanan Prasad Sahakari Gruh Taran Sanstha and Others*” reported in 2014 (4) *Mh.L.J.* 299 and draws attention to observations in the decision as are appearing in paragraph No.22 reading, thus -

“22. The learned Counsel for respondent No. 4 has urged that this Court cannot sit in appeal over its own judgment and the review jurisdiction cannot be exercised as a substitute for appellate judgment. In Sant Lal Gupta and others Versus Modern Cooperative Group Housing Society Limited and others, reported in (2010) 13 SCC 336, the Hon. Apex Court has pointed out that an error apparent on the face of record means an

error which strikes one on mere looking and does not need a long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. Such error may include the giving of reasons that are bad in law or inconsistent, unintelligible or inadequate. It may also include the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence. The perusal of judgment of Cooperative Appellate Court, points for determination & findings recorded therein and then judgment delivered by learned Single Judge along with the impugned judgment dated 12th September, 2008 delivered by this Court in Letters Patent Appeal, clearly shows failure of this Court to take into account the considerations, both factual & legal, relevant for exercise of the appellate jurisdiction as also omission to consider the impact or validity of material findings recorded by the Cooperative Appellate Court, resulting into an error apparent on face of record. Merely by referring to three documents, all the conclusions and findings recorded by the Cooperative Appellate Court substantiated by it on the basis of material on record, could not have been set aside & have not, in fact, been set aside. Failure to look into entire material on record & not coming in close quarter of the findings on facts recorded by the Cooperative Appellate Court or then application of mind in writ jurisdiction by the learned Single Judge, is nothing but an error apparent. We, therefore, hold that judgment dated 12th September, 2008 suffers from an error apparent on face of record.”

12. Learned advocate for the review applicant in support of his submissions, refers to and relies on a judgment in case of “*Anil Dinmani Shanakr Joshi and Another V/s. Chief Officer, Panvel Municipal*

Council, Panvel and Another” reported in *AIR 2003 Bombay 238* to emphasise that withdrawal from a suit is not dependent on the order of court, since in the present case, not only there had been an application for withdrawal but the same had been granted by the court and as such, according to him, the suit, as far as plaintiff No.2 is concerned, stood withdrawn and could not be revived subsequently.

13. The other citation relied upon by learned advocate for the review applicants is in the case of *“Shiv Prasad V/s. Durga Prasad and Another”* reported in *(1975) 1 SCC 405* for the similar purpose drawing attention to paragraph No.12 in the same.

14. Judgment in the case of *“Padmakumari and Others V/s. Dasayyan and Others”* reported in *(2015) 8 SCC 695* has been relied on to stress that with withdrawal of plaintiff No.2 from the fray, pleadings as appearing would not stand to test of requirements under Order VI, Rule 3 of the Civil Procedure Code and thus would not satisfy requirements of section 16 (c) of the Specific Relief Act. As such, it ought to have been considered that there is no readiness and willingness pleaded as required.

15. While submissions have been advanced on behalf of the review applicants as aforesaid, the same are sought to be

countered by Mr. Amol Joshi, learned advocate appearing for the respondent No.1 referring to that looking at the grounds as have been taken in the Regular Civil Appeal No.213 of 2003 as also grounds of Second Appeal No.795 of 2010 and the submissions on behalf of the appellants would evince that the submissions now advanced by learned advocate Mr. Naik-Thigale are altogether foreign and new. None of these grounds had been taken either in the memoranda of appeals or for that matter during submissions hitherto. He submits that even if it is to be considered that such case had been advanced, yet observations as would appear in the judgment under review, particularly the ones as appearing in paragraphs No.9, 12, 16 and 17 have taken into account all the aspects as would be required to have decision on the points canvassed. He submits that perusal of the judgment under review would reveal not only facts but also events those have occurred during litigation have been properly taken note of and have been dwelt on.

16. Though, during the course of submissions, Mr. Thigale, learned advocate purported to draw attention to that no original record had been before the Hon'ble Single Judge while judgment under review had been delivered, yet the same is repelled by Mr. Joshi, learned advocate for the respondents stating that almost

all the documents were placed on record during the course of hearing.

17. Perusal of the judgment under review would show that Hon'ble Single Judge in the judgment has referred to submissions on behalf of the appellants in paragraphs No.3, 4, 5, 6 and 10 and as also to the citations which had been pressed into service and had quoted relevant observations therein. The Hon'ble Single Judge has also noted that the plaintiff has changed his stand during pendency of Miscellaneous Civil Appeal and further went on to observe that the plaintiff had shown his willingness and readiness to perform his part of contract in respect of entire land by paying balance consideration and had appreciated that there is no question of division of the suit land in the present case. He had considered in paragraph No.11 quoting excerpts of paragraphs No.6 and 8, from the citation, would support case of plaintiffs. It had been considered that theory of novation of contract does not carry any weight. Hon'ble Single judge has further referred to submissions on behalf of learned advocate for the review applicants that plaintiff and defendant No.4 did not express joint readiness and willingness and, therefore, decree of specific performance could not have been granted. The Hon'ble Single Judge has observed and noted

that defendant No.4 has supported case of the plaintiff and the same has been appreciated in detail by the trial court in paragraph No.30 and thus has found no substance in the same.

18. As far as submissions in respect of withdrawal being complete and the matter could not have been proceeded for decree of specific performance is concerned, under the circumstances appears to be a ground which does not find place while case was being proceeded with. Neither in the grounds which had been taken at first or for that matter nor at second appellate stage. This is a new ground, which is sought to be pleaded. In the circumstances, although Mr. Thigale, learned advocate for the review applicants has vehemently advanced his submissions, I find it difficult to indulge into his request to review the judgment and order, which apparently does not show that the aspects as had been canvassed then have not been dealt with and the judgment and order is deficient in respect of the same.

19. While a review is being considered, it may have to be borne in mind, proceedings may not be considered for other view could have been possible and those would not be allowed to be an appeal in disguise. Review application, as such, is

not being considered and the same stands dismissed.

20. In view of dismissal of review application, civil application No.3679 of 2015 does not survive and stands disposed of.

[SUNIL P. DESHMUKH, J.]

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