

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
REVIEW PETITION NO. 66 OF 2014
IN
CIVIL REVISION APPLICATION NO.864 OF 2013**

Mr.Sakharam Dashrath Polekar
and Ors.

..Applicants

Vs

The Bombay Society of Sisters of
Charity of St.Birtho Loma and
Vincenza through:

.. Respondents

Mr. S.R.Page a/w Mr. Mayur S. Sonawane, Advocate for
Applicants.

Mr.Clive D'Souza, Advocate for Respondents no.1 and 2.

CORAM : R.G.KETKAR,J.

DATE : 10/10/2016

PC:

1. At the request of Mr Page, Review Petition is taken up for admission. Heard Mr. S.R. Page, learned counsel for the applicants and Mr. Clive D'Souza, learned counsel for respondents no.1 and 2 at length.

2. By this Petition under section 114 read with Order 47, Rule 1 of C.P.C., the applicants have sought review of the order dated 12.12.2013 passed by this Court in Civil Revision Application No.864 of 2013. By that order, the Civil Revision Application preferred by the applicants, hereinafter referred to as 'defendants', challenging the Judgment and decree dated 21.7.2011 passed by the learned Judge, Court Room No.10 of

Small causes Court at Mumbai in R.A.E.suit No.1917 of 2005 as also the judgment and decree dated 18.1.2013 passed by the Appellate Bench of the Small Causes Court at Bombay Appeal No.85 of 2011, was dismissed.

3. The respondents, hereinafter, referred to as 'plaintiffs, had instituted R.A.E. Suit No. 1917 of 2005 against the petitioners, hereinafter referred to as 'defendants' for recovery of possession of hut admeasuring 16 feet in length, 13 feet in breadth and having height of 9'x6" with an open Opla having a length of 13 feet and breadth of 4'6", situate in plot of land admeasuring 4605 sq.yards bearing final plot no.1261, T.P.S. Bombay City No. IV, Mahim Area (C.S. Nos 29, part and 34 part of Mahim Division), situate at P. Balu Marg, Prabhadevi, Mumbai 400025 (for short, 'suit premises'). The plaintiffs, inter alia contended that they had purchased the suit property vide agreement dated 3.12.1966 for carrying out various activities of the plaintiffs-trust and construct the building on the same plot. The plaintiffs offered alternate accommodation of equal area in the same vicinity to the defendants. Since the plaintiffs could not secure the alternate accommodation of equal area in the same vicinity, they requested Dashrat Polekar, original tenant to shift to some other part of the plot. That proposal was accepted and accordingly agreement dated 4.3.1969 was executed between the plaintiffs

and Dashrat Polekar. The plaintiffs demolished the original structure and constructed other structures in the same compound having the same area as per the original structure for residence of Dashrat Polekar.

4. The plaintiffs' claim possession on the grounds that :

1. defendants have carried out additions and alterations of permanent nature without permission of the plaintiffs as contemplated by Section 16(1)(b);

2. defendants have encroached upon the open land not demised to them;

3. defendants are source of nuisance and annoyance to the plaintiffs and other inmates of the plaintiffs' society as contemplated under section 16(1)(c);

4. defendants have changed the user of the demised premises from residential to business as contemplated under section 16(1)(n);

5. the plaintiffs require the suit premises for reasonably and bona fide for their use and occupation and for the benefit of the trust as contemplated under section 16(1)(g); The plaintiffs also averred that greater hardship would be caused to the plaintiffs than the defendants in the event of refusal to pass eviction decree.

5. After considering the evidence on record, the Courts below

held that the plaintiffs have established ground under section 16(1)(b) and that the defendants have encroached upon open land not demised to them and that the defendants are source of nuisance and annoyance to the plaintiffs as also the defendants have changed the user of the demised premises from residential to business as contemplated under section 16(1)(n) of the Act. Aggrieved by this decision, the defendants instituted Civil Revision Application in this Court which was dismissed on 12.12.2013. It is against this order, the defendants have filed Review Petition.

6. In support of this petition, Mr. Page submitted that basically the suit instituted by the plaintiffs itself was not maintainable. He invited my attention to the order dated 17.10.1995 passed by the learned Judge in Interim Notice no.3500 of 1995 in R.A.E.Suit No.1341 of 1984. The plaintiffs had earlier instituted suit in the year 1984 on the ground of reasonable and bonafide requirement as contemplated under sections 13(1)(g) of the Act. During the pendency of that suit, the plaintiffs took out Interim Notice seeking liberty to withdraw the suit with permission to file fresh suit on the same cause of action. By order dated 17.10.1995, the learned trial Judge allowed the plaintiffs to withdraw the suit. The learned trial Judge however refused permission to file fresh suit on the same cause

of action. He, therefore, submitted that the present suit itself is not maintainable.

7. Mr. Page strenuously contended that the Appellate Court committed serious error in paragraph 15. He has invited my attention to paragraph 15 of the Appellate Court Judgment as also paragraph 17. In paragraph 17, the Appellate Court held that the defendants have re-erected the hut which was earlier demolished by the Corporation in the year 2005. The suit was instituted in the year 2005. He submitted that the plaintiffs have purchased the suit property by agreement of 1966. The parties thereafter entered into agreement on 4.3.1969. However, the Appellate Court has not considered agreements of 1966 and 1969. He, therefore, submitted that as the order under review suffers from errors apparent on the face of the record, Review Petition requires consideration.

8. On the other hand, Mr. D'Souza invited my attention paragraph 4 of the order dated 17.10.1995. In paragraph 4 the learned trial Judge noted the submissions advanced on behalf of the plaintiffs that the suit is instituted under section 13(1)(g) of the Act and if permission to file fresh suit on the same cause of action is given, no harm will be caused to the defendants as their requirement continued. Mr. D'Souza supported the order under review. He submitted that no arguments are advanced before the

appellate court which was sought to be advanced for the first time in review petition. He submitted that apart from the ground under section 16(1)(g), the courts below decreed the suit on other grounds as well. He, therefore, submits that no case is made out for review of the order dated 12.12.2013.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As far as the contention of Mr Page that the suit is not maintainable is concerned, I do not find any merit in this submission. Relevant portion of paragraph 4 of the order dated 17.10.1995 reads thus:

“To my mind in view of the submission made by the advocate for the plaintiffs, there is no controversy at all between the parties and the plaintiffs can very well withdraw the suit. Hence, I propose to pass the following order.”

Perusal of the above extracted portion clearly shows that the learned trial Judge after considering the submissions observed that there was no controversy at all between the parties and the plaintiffs can very well withdraw the suit. In other words, the learned trial Judge accepted the submission made by the plaintiffs that if permission to file fresh suit is given no harm will be caused to the defendants as their requirement continued. In

any case, the defendants have not shown that the requirement pleaded by the plaintiffs in the suit instituted in the year 1984 as also in the present suit instituted in the year 2005 is one and the same. It is material to note that after passage of nearly 21 years the plaintiffs have instituted the present suit in the year 2005. In view thereof I do not find any merit in this submission.

10. Mr. Page did not dispute that the submissions advanced by him before this Court in review petition were not advanced by the defendants, were not made before the appellate court. That apart, the Courts below decreed the suit on various grounds apart from ground under section 16(1)(b) of the Act. In view thereof, it cannot be said that the petitioners have made out a case for review of the order dated 12.12.2013.

11. In the case of **Kamlesh Verma Vs. Mayawati**, AIR 2013 Supreme Court 3301, it is observed by the Apex Court as under :

“The jurisdiction and scope of review is not that of an appeal and it can be entertained only if there is an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected, but lies only for patent error. Error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The power of review can be exercised for correction of a mistake but not to substitute a view. “

Applying the tests laid down by the Apex Court to the present case, I do not find that there is any error apparent on the face of the record or that any mistake is committed warranting its correction. Hence, Review petition fails and the same is dismissed.

(R.G.KETKAR,J.)