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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7226 OF 2015

Jaykumar Govindrao Nikam and others ... Petitioners

Vs.

Aryan Hospitality Pvt. Ltd and another ... Respondents

Mr.Rahul P. Walvekar, Advocate for Petitioners.

Ms.Teresa Daulat a/w Ms.Archana Karmokar i/b Divya Shah & Associates, Advocate for Respondent No.1.

CORAM : R.G.KETKAR, J.

DATE : 04th JANUARY, 2016

P.C. :

. Heard Rahul P. Walvekar, learned Counsel for the petitioners and Ms.Teresa Daulat, learned Counsel for respondent No.1 at length. Leave to amend so as to substitute prayer clause (b) so as to challenge order dated 07/04/2015 passed by the learned 11th Joint Civil Judge, Junior Division, Kolhapur below Exhibit 17 in Regular Civil Suit No. 306 of 2014 is granted. Amendment shall be carried out forthwith.

2. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the judgment and order dated 07/04/2015 passed by the learned 11th Joint Civil Judge, Junior Division, Kolhapur below Exhibit 17 in Regular Civil Suit No. 306 of 2014. By that order, the learned trial Judge declined to

condone the delay in filing Review Petition seeking review of judgment and order dated 05/11/2013. By order dated 05/11/2013, the learned trial Judge rejected the application Exhibit 14 taken out by the plaintiffs under Order 26 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for appointment of the Court Commissioner. By the impugned order, the learned trial Judge rejected the application on the ground that neither the plaintiffs nor their advocate was present in the Court till 3.45 p.m. and no application for adjournment is filed. In view of the decision of the Apex Court in the case of *Smt. Poonam Vs. Sumit Tanwar*, **AIR 2010 S.C. 1384**, the learned trial Judge declined to entertain the Petition as the advocate for the plaintiffs is not rendering assistance to the Court.

3. Mr. Walvekar submitted that the plaintiffs have instituted Suit for mandatory injunction against the respondents, hereinafter referred to as defendants, for demolishing the unauthorised construction carried out by them, failing which, the same may be demolished through the Court and for perpetual injunction restraining the defendants from encroaching upon and carrying out construction over the suit property. Pending the Suit, the plaintiffs took out application Exhibit 14 for appointment of the Deputy Superintendent of Land Records, Karvir as the Court Commissioner for spot inspection and submitting report along with map etc. By order dated 05/11/2013, the learned trial Judge rejected the

application. The plaintiffs filed application for review on 15/12/2014. According to them, there was delay of 10 days in filing the application. The plaintiffs, therefore, filed application Exhibit 17 for condoning the delay. By the impugned order, the learned trial judge has rejected that application. He submitted that as the delay is hardly of 10 days, the learned trial Judge ought to have condoned the delay.

4. During the course of hearing, I enquired from Mr.Walvekar as to whether plaintiffs are ready and willing to argue Review Petition as by rejecting the application for condonation of delay in filing Review Petition, Review Petition stood dismissed. He, however, submitted that plaintiffs have instructed him to challenge only order dated 29/06/2015.

5. On the other hand, Ms.Daulat submitted that the learned trial Judge rejected the application Exhibit 14 on 05/11/2013. The application for review is made on 15/12/2014. In other words, she submitted that there is delay of more than one year in filing the application and no sufficient cause is made out for condoning the delay.

6. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. Perusal of the application Exhibit 17 shows that the only explanation given by the plaintiffs is that they made

application for certified copy on 21/11/2014 and because of their personal difficulty, they could not consult their advocate and consequently, could not file application within limitation. As noted earlier, the order below Exhibit 14 was passed on 05/11/2013. The period prescribed for filing Review Petition is 30 days under Article 124 of the Limitation Act. The application for certified copy is made by the plaintiffs only on 21/11/2014 i.e. to say after the prescribed period of limitation. Perusal of the reasons given in paragraphs 2 & 3 of the application Exhibit 17 shows that no case is made out for condonation of delay .

7. That apart, the learned trial Judge relied upon the decision in the case of **Smt.Poonam** (*supra*). In that case, the Apex Court observed that in case the Counsel for the parties are not able to render any assistance, the Court may decline to entertain the Petition. After considering the reasons given by the plaintiffs in application Exhibit 17, I do not find that any case is made out for invocation of powers under Article 227 of the Constitution of India. As the learned trial Judge has rejected the application for condonation of delay, it amounts to virtually dismissing the Petition seeking review of order dated 05/11/2013. In that context, I have examined merits of Review Petition. In the case of *Kamlesh Verma Vs. Mayawati*, **AIR 2013 SC 3301**, the Apex Court held that 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. In view thereof, on merits also, I do not find that any case is made out for review of order dated 05/11/2013. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)