IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Review Petition (ST) NO. 21835 OF 2015
IN
Second Appeal No.73 of 2009

SHAKUNTALA BHIKUCHAND DONDE
AND ORS. ...Petitioners
Versus
SMT. SUMANBAI YASHWANT PATIL
AND ORS. ...Respondents

....

Mr. A.V. Anturkar, Senior Counsel i/b. Amey Deshpande, Advocate for the Petitioners.
Mr. M.M. Sathey, Advocate for Respondent No.1.

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CORAM : R. G. KETKAR, J.

DATE : 25th FEBRUARY, 2016

P.C.

1. Heard Mr. A.V. Anturkar, learned Senior Counsel for the petitioenrs and Mr.M.M. Sathey, learned Counsel for respondent No.1, at length. Mr.Sathey waives service on behalf of respondent No.1 and states that within one week from today, he will file Vakalatnama on behalf of respondent No.1 both in Civil application and Review Petition.

2. On the oral application made by Mr. Anturkar, leave to delete respondent Nos.2 to 4 is granted as respondent No.1

being original plaintiff is the only contesting respondent. Leave as prayed for is granted. Amendment shall be carried out forthwith.

3. By this Petition under Section 114 read with order 47(1) of CPC, the petitioners have sought review of the judgment and order dated 23rd & 24th April, 2015 passed by this Court in Second Appeal No.73/2009. By that order, the Second Appeal preferred by the petitioners challenging the judgment and decree dated 20.8.2008 passed by learned District Judge-3, Nashik in Civil Appeal No.402 of 2008 was dismissed.

4. Respondent No.1, hereinafter referred to as the 'plaintiff', had instituted a suit being Special Civil Suit No.303/1989 for specific performance of the contract. By order dated 27.7.2001, learned trial Judge dismissed the Suit. Aggrieved by that decision, the plaintiff preferred Civil Appeal No.402/2001. By order dated 20.8.2008, learned District Judge allowed the appeal and quashed and set aside the judgment and decree dated 27.7.2001 passed by learned trial Judge and decreed the suit instituted by the plaintiff. Learned District Judge directed defendant Nos.1A, 1B, 1C and defendant Nos.2

to 6 to execute the sale deed in favour of the plaintiff on her depositing the balance amount of Rs.7,937/-. Aggrieved by this decision, the petitioners, hereinafter referred to as 'defendant Nos.2 to 6" preferred Second Appeal in this Court. The same was dismissed on 23rd & 24th April, 2015.

5. Mr. Anturkar submitted that on 27.10.1982 an agreement for sale at Exh.48 was executed by Bhikchand, since deceased, in favour of the plaintiff. The period of six months from 27.10.1982 was fixed for specific performance of the agreement. The period of six months from 27.10.1982 was to expire on 30.4.1983. Before that date, on 12.4.1983 time was extended upto 15.8.1983. As extension was given before expiry of six months period, Section 18 of the Limitation Act, 1963 (for short, 'the Act') is applicable. He submitted that thereafter no acknowledgment was given before 15.8.1983 thereby extending time. The plaintiff therefore ought to have instituted the suit within three years from 15.8.1983. In short, the plaintiff ought to have instituted the suit on or before 14.8.1986 and since the suit is admittedly instituted on 18.8.1989, it was clearly barred by limitation. He submitted that while dismissing the appeal,

this Court has considered Section 18 of the Act and held that by executing power of attorney dated 29.3.1989 by defendant Nos.2 to 6 in favour of Yashwantrao, husband of the plaintiff, they have acknowledged in writing their liability and right of the plaintiff to get the sale deed of the suit property. Section 18 lays down the effect of acknowledgment in writing. Sub-section (1) thereof provides that where **before the expiration of the prescribed period of a suit** or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation is required to be computed from the time when the acknowledgment was so signed. He submitted that the acknowledgment in writing has to be made **before the expiration of the prescribed period of a suit.** In the instant case there was no acknowledgment after 15.8.1983. The Court however relied upon Section 18 to hold that as defendant Nos.2 to 6 executed power of attorney in favour of Yeshwantrao Patil, husband of the plaintiff on 29.3.1989, defendant Nos.2 to 6 acknowledged in writing their liability and right of the plaintiff to get the sale deed of the suit property. He submitted that this finding is in the teeth of Section 18 of the Act and amounts to error apparent on the face of the record. He also relied upon Section 9 of the Act and submitted that the order deserves to be reviewed.

6. On the other hand Mr. Sathey supported the order and submitted that no case is made out for review of the order. He submitted that defendant Nos.2 to 6 filed S.L.P. before the Apex Court and the same was dismissed on 13.7.2015.

7. I have considered the rival submission advanced by learned Counsel for the parties. I have also perused the material on record.

8. As noted earlier, Second Appeal was dismissed on 23rd & 24th April, 2015. In para-18 of that order, I have noted the facts which were not in dispute. They are to the following effect :

> "a. Deceased Bhikchand executed agreement of sale in favour of the plaintiff on 27.10.1982. Under that agreement, he agreed to sell 4,250 sq.mtrs. land for a total consideration of Rs.1,17,937/-. Deceased Bhikchand received Rs.51,000/-.

b. On 28.10.1982, deceased Bhikchand executed Power of Attorney in favour of the plaintiff's husband Yashwantrao;

c. Perusal of the agreement of sale shows that on 12.04.1983, deceased Bhikchand received Rs.10,000/- and extended time upto 15.08.1983 for executing the sale deed. On 03.01.1984, deceased Bhikchand received Rs.3,000/- and extended time upto 30.04.1984 for executing the sale deed. On 26.08.1984, deceased Bhikchand received Rs.3,000/-. The sale deed was to be executed within 2 months from obtaining permission from the Competent Authority under the ULC Act as also income tax clearance certificate. On 20.02.1985, deceased Bhikchand received Rs.10,000/- and reiterated that the sale deed was to be executed after receipt of sale permission as also income tax clearance certificate;

d. Perusal of the clauses of the Power of Attorney dated 28.10.1982 shows that the deceased Bhikchand had authorized Yashwantrao Patil to perform various acts on his behalf. It,however, did not include authorization to Mr. Yashwantrao Patil to obtain income tax clearance certificate;

e. The Courts below have held that time was not essence of contract;

f. On 02.08.1988, Bhikchand expired;

g. Defendants did not enter into witness box."

9. Perusal of clauses (c) , (e) and (g), as extracted hereinabove, show that even after 15.8.1983, the defendants accepted an amount of Rs.3000/- on 3.1.1984 and extended time upto 30.4.1984 for executing the sale deed. On 26.8.1984, the deceased Bhikchand received Rs.3000/-. **The sale deed was to be executed within two months from obtaining permission from the Competent Authority under the ULC Act as also income tax clearance certificate.** On 20.2.1985, deceased Bhikchand received Rs.10,000/- and reiterated that the sale deed was to be executed after receipt of the sale permission as also income tax clearance certificate. The Courts below have concurrently held that time was not essence of the contract and that defendants did not enter into witness box.

[*Emphasis supplied*]

10. Learned trial Judge declined to pass the decree for specific performance mainly on the ground that the plaintiff was not ready and willing to perform their part of the contract.

Learned trial Judge also considered whether the suit was barred by limitation and observed in para-52 that as per the last acknowledgment he extended time limit for two months after obtaining necessary permissions. That means, the period of two months was to start from on getting necessary permissions. In other words while dismissing the suit, learned trial Judge did not hold that suit was barred by limitation.

11. In para-21 of that order it was observed that even after execution of the agreement of sale, the plaintiff paid diverse amounts which were received by deceased Bhikchand. In fact on 26.8.1984, after accepting Rs.3000/- deceased Bhikchand took upon himself the responsibility of obtaining income tax clearance certificate. Said fact was also reiterated subsequently when he received Rs.10,000/- on 20.2.1985. It was further observed that no material was brought on record by the defendants to show that the income tax clearance certificate was obtained by them and said fact was intimated to the plaintiff calling upon her to perform her part of the contract. Perusal of the endorsement made by deceased Bhikchand on 26.8.1984 and 20.2.1985 clearly shows that the sale deed was to be

executed within two months from receipt of income tax clearance certificate. It is not the case of the defendants that after obtaining clearance certificate and intimating the said fact to the plaintiff, she did not take any steps for obtaining the sale deed within two months from obtaining such certificate. In para-21 it was noted that PW-1 Yeshwant deposed that deceased Bhikchand was to obtain Income Tax Clearance Certificate. The said statement remained unchallenged. After the death of Bhikchand in August / September, 1998, defendant Nos.2 to 6 executed General Power of Attorney on 29.3.1989 in favour of Yashwantrao Patil for performing acts as set out therein on their behalf. Power of attorney records that on 2.4.1987, layout was sanctioned and entry No.4360 to that effect in “D Patrak” was made in the revenue records.

12. In para-22, it was noted that defendant Nos.2 to 6 executed power of attorney in favour of Yeshwantrao on 29.3.1989 to perform the acts on their behalf and extended time for execution of the sale deed. The observations in paras-22 and 23 have to be understood in the context that the sale deed was to be executed within two months from obtaining

permission from the competent authority under the ULC Act as also income tax clearance certificate. In view thereof, it cannot be said that suit is barred by limitation.

13. That apart, as noted earlier, the trial Court specifically held that the suit is not barred by limitation. Perusal of the order passed by the learned District Judge shows that no such contention was agitated before the District Court. Apart from that said contention was also not raised in the second appeal. In view thereof, it cannot be said that the suit instituted by the plaintiff was barred by limitation. Reliance placed by Mr. Anturkar on Sections 9 and 18 of the Act is misconceived.

14. In the case of ***Kamlesh Verma Vs. Mayawati***, **AIR 2013 SC 3301**, the Apex Court while considering scope of review has observed thus :

> "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.".

15. In view thereof, no case is made out for review of the order. Review Petition fails and the same is dismissed with no order as to costs.

(R. G. KETKAR, J.)

Deshmane (PS)