

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL APPLICATION (REVIEW) NO. 16 OF 2016

IN

SECOND APPEAL NO. 46 OF 2015

PRESENTATION CONVENT, THR. THEIR
ATT. SISTER THECLA PEREIRA.

... Applicant

Versus

MRS. MARIA SAVIA BARRETO AND 2
ORS.

... Respondents

Mr. Vishnuprasad A. Lawande, Advocate for the applicant.

Mr. C. Fonseca, Advocate for the respondents.

Coram:- F. M. REIS, J.

Date:- 20th January, 2017

P.C.

Heard Mr. V. A. Lawande, learned counsel appearing
for the applicant and Mr. C. Fonseca, learned counsel appearing
for the respondents.

2. The above application seeks for review of the order
dated 23.03.2016 passed by this Court dismissing Second Appeal

filed by the applicant at the stage of admission.

3. Mr. Lawande, learned counsel appearing for the applicant has pointed out that there were 20 substantial questions of law proposed by the applicant and in fact in support thereof the arguments were advanced which have neither been noted nor a decision rendered thereon. The learned counsel has taken me through the order passed by this Court to point out that there are no reasons in the said order disclosing as to why the proposed substantial questions of law were rejected. The learned counsel further pointed out that as such non consideration of the submissions advanced itself is an error apparent on the face of record which would call for interference of this Court in the order under review. In support of the said contention, the learned counsel has filed an affidavit of the concerned Advocate to the effect that all such contentions were raised before the learned Judge.

4. On the other hand, Mr. C. Fonseca, learned counsel

appearing for the respondents though has not disputed that all such contentions were raised before the learned Judge and however has disputed the correctness of the proposed substantial questions of law and the factual aspect raised by the applicant to point out that there are no substantial questions of law which arise in the present appeal for consideration. The learned counsel further pointed out that the foundation of the claim of the applicant is that the respondents have an alternate access but according to him the respondents have filed an affidavit to the effect that the respondents have no other alternate access other than the disputed access in the present suit. The learned counsel as such points out that the substantial questions of law as claimed by the applicant do not arise in the present appeal and as such according to him the learned Judge has rightly dismissed the appeal filed by the applicant.

5. I have given my thoughtful consideration to the rival contentions. Considering the said contentions and the affidavit of the learned Advocate for the applicant the fact that the arguments

in fact advanced were not considered by this Court while passing the order under review cannot be disputed. This itself is a ground to review such order. All contentions raised by the respondents to the effect that no substantial question of law arises in the present appeal are matters which would have to be considered by the Court while considering whether the appeal requires any consideration. Apart from that, the contention of the learned counsel appearing for the respondents disputing the existence of an alternate access is also a matter which would have to be considered while examining whether any substantial question of law arises in the present appeal in the facts and circumstances of the case. Keeping all the contentions of the applicant and the respondents open on a short point as the arguments in fact advanced were not considered neither noted nor any reason rendered in the order under review with that regard, I find that the review application deserves to be granted and the matter be posted for admission of the appeal afresh.

6. In this connection, the Apex Court in the judgment

reported in *(2008) 2 SCC 95* in the case of ***Mohd. Akram Ansari V/s Chief Election Officer and others*** has observed at para 14 thus :

“14. In this connection we would like to say that there is a presumption in law that a Judge deals with all the points which have been pressed before him. It often happens that in a petition or appeal several points are taken in the memorandum of the petition or appeal, but at the time of arguments only some of these points are pressed. Naturally a Judge will deal only with the points which are pressed before him in the arguments and it will be presumed that the appellant gave up the other points, otherwise he would have dealt with them also. If a point is not mentioned in the judgment of a Court, the presumption is that that point was never pressed before the learned Judge and it was given up. However, that is a rebuttable presumption. In case the petitioner contends that he had pressed that point also (which has not been dealt with in the impugned judgment), it is open to him to file an

application before *the same learned Judge* (or Bench) which delivered the impugned judgment, and if he satisfies the Judge (or Bench) that the other points were in fact pressed, but were not dealt with in the impugned judgment, it is open to the Court concerned to pass appropriate orders, including an order of review. However, it is not ordinarily open to the party to file an appeal and seek to argue a point which even if taken in the petition or memorandum filed before the Court below, has not been dealt with in the judgment of the Court below. The party who has this grievance must approach the same Court which passed the judgment, and urge that the other points were pressed but not dealt with.”

7. Taking note of the said observations as it is not disputed that the applicant has raised arguments in support of the substantial questions of law as proposed, I find that the applicant is entitled to file the above Review Petition.

8. In view of the above, the said order dated 23.03.2016 stands recalled. All contentions of both the parties on merits are left open. Place the matter on admission board on 23.02.2017.

F. M. REIS, J.

at*