

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Review Petition NO. 6 OF 2017
IN
Civil Revision Application NO. 251 OF 2016

Abdul Hamid Khan Matwan ...Petitioner

Versus

Abdul Qadir Amirmiya Surme ...Respondents
And Ors.

....

Mr.D.S. Chandnani i/b. Lexim Associates for the Petitioner.

Mr.S.S.Deshmukh, Advocate for Respondent No.1.

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CORAM : R. G. KETKAR, J.

DATE : 17th MARCH, 2017

P.C.

1. Heard Mr.D.S. Chandnani, learned Counsel for the petitioner and Mr.S.S. Deshmukh, learned Counsel for respondent No.1, at length.

2. By this Review Petition under Section 114 read with Rule XLVII Rule 1 of C.P.C., the petitioner, hereinafter referred to as 'defendant No.7', has sought review of the order dated

20.2.2017 passed by this Court in C.R.A. No.251/2016. By that order, C.R.A. preferred by defendant No.7 and others under Section 115 of C.P.C. challenging the judgment and order dated 1.3.2016 passed by the learned 4th Jt. Civil Judge, Senior Division, Thane in Special Civil Suit No.162/2015 was dismissed. By order dated 1.3.2016, the learned trial Judge held that the suit is not barred by limitation.

3. In support of this Petition, Mr. Chandnani submitted that the plaintiffs are the children of Hajirabi, daughter of Rahim Saheb. Hajirabi died on 6.9.1986. He submitted that the plaintiffs ought to have instituted suit for partition within three years from 6.9.1986 being the date of death of Hajirabi. Mutation entries were also made in the year 1986 and 1988. Even from 1988, within three years the plaintiffs did not institute the suit for partition. One of the prayers made in the suit is cancellation of the sale deed dated 6.3.2010. Even that prayer is clearly barred as the suit for cancellation could have been instituted within three years from 6.3.2010. He submitted that as the suit is instituted on 2.3.2015, the prayer for cancellation of the sale deed dated 6.3.2010 is also barred by law of limitation. He further submitted that against the

mutation entries, the plaintiffs preferred R.T.S. Appeals and same were also decided against the plaintiffs. He submitted that on the face of it the suit is clearly barred by limitation.

4. On the other hand Mr. Deshmukh supported the impugned order. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. In paragraph-5 of the order under review it was noted that the plaintiffs have instituted the suit for partition, declaration and for cancellation of the sale deed dated 6.3.2010. It is the case of the plaintiffs that they are in joint possession with defendant No.1. Perusal of the written statement *prima facie* does not indicate that defendant No.1 has denied right of Hajirabi as also pleaded ouster. Article 110 of Limitation Act, 1963 prescribes period of limitation as 12 years when exclusion becomes known to the plaintiffs. While rejecting the application made by the defendants on 1.3.2016, the learned trial Judge had observed that the prayer for partition is independent of prayer for cancellation of the sale deed dated 6.3.2010. The learned trial Judge also held that defendant No.1, being the son, under Mohammedan Law, is entitled to a share twice of the daughter.

Hajirabi, mother of the plaintiffs would get 1/3rd share and defendant No.1 will get 2/3rd share. Mutation entry No.1243 will not make defendant No.1 owner of the entire suit property.

5. In the case of *Sukhdeo Sable Vs. Assistant Charity Commissioner, 2004(3) S.C.C.137*, Apex Court observed that merely because some of the reliefs cannot be granted in the Civil Court, it can not entail an automatic rejection of the entire plaint.

6. Mr. Chandnani relied upon the decision of this Court in Notice of Motion No.738/2014 in Suit No.454/2014 [*Paresh Damodardas Mahant v. Arun Damodardas Mahant and others*] dated 13.10.2014 and in particular paragraph-34 thereof. In paragraph-34, the learned Single Judge of this Court observed that the case of the plaintiff that he has sued only when he learnt that defendant No.1 sought to appropriate the entire suit property to himself to the exclusion of the other co-owners in April, 2014 which act is admitted by defendant No.1. The learned Single Judge observed that this will not start the period of limitation from 2014. The plaintiff ought to have instituted the suit for administration of the estate of his

deceased father within three years of the death of his father when the cause of action to sue accrued to the plaintiff upon succession.

7. In the present case, the suit is instituted for partition, declaration and for cancellation of the sale deed. I have already indicated that defendant No.1 did not plead ouster. In view thereof as also in view of the decision of Apex Court in *Sukhdeo Sable* (supra), I do not find that any case is made out for review of the order dated 20.2.2017. 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.

8. Applying the tests laid down in the above cases to the facts of the present case, no case is made out for review of the order dated 20.2.2017. Hence, Review Petition fails and the same is dismissed. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)