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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision:* 01.02.2017

+ CM(M) 130/2017

SHRI PARSHOTAM KUMAR Petitioner

Through Mr.S.D.Ansari, Adv.

versus

HAFIZ MOHD.SAMI(SINCE DECEASED)

THROUGH HIS LRS & ORS. Respondent

Through Mr.Deepak Gupta, Mr.Jai Mohan and
Mr.Gaurav Shankar, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

CM No.4081/2017

Allowed subject to all just exceptions.

CM No.4082/2017

For the reasons stated in the application the delay of 10 days in re-filing the petition is condoned. Application is allowed.

CM(M) 130/2017 & CM No.4080/2017 (stay)

1. The present petition is filed under Article 227 of the Constitution of India seeking to impugn the order dated 15.10.2016 passed by the appellate court disposing of a preliminary issue regarding maintainability of the appeal.
2. The petitioner seeks to raise a legal plea, namely, that in case the appellant files a review petition against a judgment in terms of order 47 CPC he cannot file an appeal against the same order.

3. The appellate court where this objection was raised in the appeal filed by the respondent after going through the legal position and the judgments of the Supreme Court concluded that if a review petition is filed before filing of the appeal, the review petition is maintainable. If the appeal is filed thereafter i.e. after the review had been filed and is disposed of before the review petition is decided, the jurisdiction of the court hearing the review petition comes to an end.

4. I have heard learned counsel for the parties.

5. Order 47 Rule 1 CPC reads as follows:-

“1. Application for review of judgment.- (1) Any person considering himself aggrieved,—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(C) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.”

6. Hence, in view of the above provision a review would lie from a decree or order from which an appeal is allowed but from which no appeal has been preferred. The contention which is sought to be raised by the petitioner is that a litigant who has sought to file a review against a decree or order cannot thereafter maintain an appeal against the same order in view of the above order.

7. Learned counsel appearing for the petitioner has strongly relied upon judgment of the Supreme Court in ***Rekha Mukherjee vs. Ashish Kumar Das & Ors., (2005) 3 SCC 427*** wherein it was held as follows:-

“17. The suit filed by the Respondents for grant of specific performance of contract was dismissed. The said decree although was appealable but in view of the order dated 15.7.2002, the said decree in its entirety ceased to operate. Order XLVII Rule 1 CPC postulates filing of an application by a person considering himself aggrieved, by a decree or order from which an appeal is allowed but from which no appeal has been preferred, to file an application if he desires to obtain a review from a decree passed against him. An appeal during the pendency of the review petition was, therefore, not maintainable. In terms of Order XLVII Rule 4, the Court may either reject or grant an application for review. In case a review is rejected, the order would not be appealable whereas an order granting an application may be objected at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit. Rule 8 of Order XLVII of CPC postulates that when an application for review is granted, a note thereof shall be made in the register and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.”

8. The court further clarified as follows:

“31. The doctrine of eclipse has no application in a case of this nature. An appeal preferred in terms of Section 96 CPC must conform to the requirements contained in Order 41 thereof. An appeal at the time of its filing would either be maintainable or would not be. The High Court, with respect, was not correct in holding that such an appeal could be filed in anticipation. If such a procedure is contemplated in the law; the Respondents herein might not have filed the substantive appeal or would have prayed for withdrawal of the review application before the trial court itself. Having filed a review application on legal advice and having succeeded therein in part, it was not open to

it to prefer an appeal against the entire decree dated 20.12.2001 whereby the suit in its entirety was dismissed. The Respondents could have only preferred appeal only from that part of the decree in respect whereof review was not granted. In a suit for specific performance of contract, a prayer in the alternative is ordinarily made to the effect that in the event the court declines to grant a decree for specific performance of contract, it may direct refund of the earnest money with interest.

32. The right of review is a statutory right. Such right can be invoked if the conditions therefore are fulfilled. So is a right of appeal. A right of review and right to appeal stand on different footings although some grounds may be overlapping. If a review is granted, the decree stands modified but such modification of a decree is not an ancillary or a supplemental proceeding so as to be revived upon setting aside the decree granting review.”

9. A three Judge Bench of the Supreme Court in ***Thungabhadra Industries Ltd. vs. Govt. of Andhra Pradesh, AIR 1964 SC 1372*** held as follows:-

“8. Order 47 Rule 1(1) of the Civil Procedure Code permits an application for review being filed “from a decree or order from which an appeal is allowed but from which no appeal has been preferred.” In the present case, it would be seen, on the date when the application for review was filed the appellant had not filed an appeal to this Court and therefore the terms of Order 47 Rule 1(1) did not stand in the way of the petition for review being entertained. Learned counsel for the respondent did not contest this position. Nor could we read the judgment of the High Court as rejecting the petition for review on that ground. The crucial date for determining whether or not the terms of Order 47 Rule 1(1) are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits

notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition would come to an end."

10. Similarly, a three Judge Bench of the Supreme Court in ***Kunhayammed & Ors. vs. State of Kerala & Anr. (2000) 6 SCC 359*** held as follows:-

"36. For our purpose it is Clause (a) Sub-rule(1) which is relevant. It contemplates a situation where "an appeal is allowed" but "no appeal has been preferred". The Rule came up for consideration of this Court in *Thungabhadra Industries Ltd. v. The Govt. of A.P.* [1964]5SCR174 in the context of Article 136 of the Constitution of India. The applicant had filed an application for review of the order of the High Court refusing to grant a certificate under Article 133 of the Constitution. The applicant also filed an application for special leave to appeal in respect of the same matter under Article 136 along with an application for condonation of delay. The Supreme Court refused to condone the delay and rejected the application under Article 136. When the application for review came up for consideration before the High Court, it was dismissed on the ground that the special leave petition had been dismissed by the Supreme Court. This Court held that the crucial date for determining whether or not the terms of Order 47 Rule 1 (1) CPC are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end. On the date when the application for review was filed the applicant had not filed an appeal to this Court and therefore there was no bar to the petition for review being entertained.

37. Let us assume that the review is filed first and the delay in the SLP is condoned and the special leave petition is ultimately granted and the appeal is pending in this Court. The position then, under Order 47 Rule 1 CPC is that still the review can be disposed of by the High Court. If the review of a decree is granted before the disposal of the appeal against the decree, the decree appealed against will cease to exist and the appeal would be rendered incompetent. An appeal cannot be preferred against a decree after a review against the decree has been granted. This, is because the decree reviewed gets merged in the decree passed on review and the appeal to the superior court preferred against the earlier decree - the one before review - becomes infructuous."

11. The legal position that follows from above two judgments of three Judge Bench of the Supreme Court is that on the date when the review petition is filed no appeal should have been filed. Thereafter subsequently in case an appeal is filed, the court hearing the review petition is still competent to dispose of the review petition subject only to this that before the application for review is finally decided the appeal itself should not have been disposed of. In case the appeal is disposed of prior to disposal of the review, the jurisdiction of the court hearing the review petition would come to an end.

12. In the present case the impugned order was passed on 20.2.2013. The respondent filed the review on 2.4.2013. On that date no appeal had been filed by the respondent. The appeal has been filed subsequently. In the meantime, the review petition has been dismissed. Hence, it is manifest in view of this legal position above that the appellate court is free to hear the appeal. Mere filing of a review does not bar filing of an appeal. No such bar is spelt out in CPC.

13. In view of the above, there is no infirmity in the impugned order to warrant interference by this court. The present petition is without merits and is dismissed. All pending applications, if any, also stand dismissed.

(JAYANT NATH)
JUDGE

FEBRUARY 01, 2017

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