

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL APPLICATION (REVIEW) NO.10 OF 2018
IN
APPEAL FROM ORDER NO.6 OF 2017

1. M/s. Shirka Constructions,
a Proprietorship Firm, by its Proprietor,
Shri Shirish Q. Kamat, of major age,
Indian National.
2. Shri Shirish Q. Kamat,
son of Shri Q. Kamat, major of age,
Indian National,

Both having office at C-6,
Vishal Apartments,
behind Vishant Theater,
Aquem, Margao-Goa.

... Applicants

V/s

1. M/s. Appollo Engineers & Contractors Pvt. Ltd.,
having its office at Ground Floor,
Sanrit Apartments, near Masjid,
Malbhat, Margao-Goa.
2. Shri Kiran V. Naik,
major of age, Indian National,
resident of Ground Floor,
Sanrit Apartments, Near Masjid,
Malbhat, Margao-Goa.

... Respondents

Shri D.J. Pangam and Shri S.P. Munj, Advocates for the
Applicants.

Shri P.S. Rao, Advocate for the Respondents.

Coram : NUTAN D. SARDESSAI, J.

Reserved on : 3rd JULY, 2018

Pronounced on : 4th JULY, 2018

ORDER:

The applicants seek the review of the order passed by this Court dated 11/04/2018 on the grounds that the important documents which were not produced before the Trial Court and this Court ought to be produced which would tend to tilt the decision in the applicants' favour. The said documents would establish that the respondents would not be entitled to any temporary injunction of whatsoever nature in respect of the suit property and therefore the application had to be granted and as otherwise there was an error apparent on the face of the record.

2. The respondents opposed the application by their affidavit in reply and pressed for its dismissal in limine with exemplary costs. The documents which the applicants were seeking to produce to buttress their plea in review were certainly not new and important documents which were not available with the applicants or which could not be produced despite due diligence. A perusal of the documents would clearly indicate that the most of these documents were available with the applicants even before the order of

temporary injunction came to be passed before the Trial Court and were not produced alongwith the written statement. The jurisdiction under Order XLVII CPC had to be strictly exercised and therefore no case whatsoever was made out for a review of the order passed by this Court and the application had to be dismissed.

3. Heard Shri D.J. Pangam, learned Advocate for the applicants who adverted to the order passed by the Trial Court dated 9/01/2017 and submitted that the restraint order passed against the applicants was not only to prevent them from carrying out the construction but also from interfering with the suit property. He submitted that they were otherwise in possession of the property and which was completely onerous to the applicants. He adverted to the various clauses of the Memorandum of Understanding dated 24/03/2009, referred to the Share Certificates and the Allotment Letters which established that the applicants as the share holders were entitled to obtain loan from the financial institutions and which was also apparent from the letters of the bank. The learned Trial Court could not have granted injunction and

therefore it was a fit case to review the order passed by this Court.

4. Shri P.S. Rao, learned Advocate for the respondents submitted that the review jurisdiction was to be exercised in rare circumstances and within the predicates of Order XLVII Rule (1) CPC. The applicants had to exercise the diligence of a very high order and in the absence thereof they could not seek the review of the order passed by this Court. He referred to the order passed by the Trial Court at length and submitted that the learned Trial Court had dealt with all the aspects of the case and so too this Court while deciding the Appeal From Order. No review was permissible of the order under review and in that context placed reliance in **Haryana State Industrial Development Corporation Limited V/s. Mawasi & Ors. [(2012) 7 SCC 200]**, **State of West Bengal & Ors. V/s. Kamal Sengupta & Anr. [(2008) 8 SCC 612]**, **Inderchand Jain (dead) through LR's V/s. Motilal (dead) through LR's [(2009) 14 SCC 663]**, **Hriday Kanta Koyal V/s. Jogesh Chandra Mandal & Anr. [(1957) SCC Online Cal 105]**, **Union of India V/s.**

Sandur Manganese & Iron Ores Limited & Ors. [(2013) 8 SCC 337], Lily Thomas & Ors. V/s. Union of India & Ors. [(2000) 6 SCC 224] and M/s. Northern India Caterers (India) Ltd. V/s. Lt. Governor of Delhi [(1980) 2 SCC 167] and pressed for its dismissal.

5. Order XLVII Rule 1 CPC reads thus:

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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the

Appellate Court the case on which he applies for the review.

Explanation : The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment.

6. Therefore on a bare reading of Order XLVII it is apparent that the applicant has to make out a case that 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, that he seeks the review of the judgment or order as the case may be. Therefore it is incumbent on the party seeking a review to show the error apparent on the face of the record or that despite the exercise of due diligence there is a discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the decree or order was made or on account of some such mistake or error apparent on the face of the record or any other sufficient

reason. Admittedly, most of the documents which are sought to be produced now by the applicants were available with them at the time of the suit before the learned Trial Court and also while pursuing the Appeal From Order before this Court and yet for some inexplicable reason the same were not produced in Court.

7. A detailed reference to the memorandum of understanding dated 24/03/2009 and/or its various clauses or for that matter the Share Certificate and Allotment Letters or letters of the financial institutions would not in any manner buttress the case of the applicants to seek a review of the order passed by this Court. Shri D. Pangam, learned Advocate for the applicants while replying to the submission of Shri P. Rao that despite the revocation of the Power of Attorney of the applicants, it was still being used by the applicants prejudicial to the interest of the third party, contended that the notice for revocation was pursuant to the letter dated 4/05/2015 and the public notice of the same date was issued on that day itself but which was published at the instance of the respondents and not the Society. It was also

his contention that till date the applicants had not received any notice of revocation of Power of Attorney from the Society and as such there was no basis in the contention of Shri P.S. Rao that the applicants were using a revoked Power of Attorney and were misleading the prospective purchasers.

8. It was otherwise the contention of Shri D.J. Pangam that as a share holder and as a member of the Society no injunction could be granted against them and which was dealt with by the respondents. However, that aspect of the matter has no bearing on the review application which is not a ground urged therein or seriously canvassed before this Court assuming such a ground is available to them. Insofar as exercise of due diligence is concerned, it was the contention of Shri D.J. Pangam that they have shown their documents to the earlier advocate but on instructions had not produced the same before the Trial Court. However, this aspect of the matter has come to light only in the course of the review application and it was nowhere their case before the Trial Court or before this Court while arguing the Appeal From Order that they were advised against the production of the

documents in Court. Therefore the plea of due diligence too would fall flat.

9. In **Haryana State Industrial Development Corporation Ltd.** (supra), the Apex Court observed that the power of review is a creature of the statute and no Court or quasi-judicial body or administrative authority can review its judgment or order or decision unless it is legally empowered to do so. It quoted Order XLVII Rule 1 CPC and relied in **Moran Mar Basselios Catholics V/s. Most Rev. Mar Poulouse Athanasius [AIR 1954 SC 526]**, where a three Judge Bench referred to the provisions of the Travancore Code of Civil Procedure, which was similar to Order XLVII Rule 1 CPC and observed as below:

“It is needless to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein.”

10. **Haryana State Industrial Development Corporation**

Ltd. (supra), considered another three Judge Bench decision in **Thungabhadra Industries Ltd. V/s. Govt. of A.P. [AIR 1964 SC 1372]**, where it was held that the power of review is not analogous to the appellate power and observed at para 11 thus:

"11. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions, entertained about it, a clear case of error apparent on the face of the record would be made out."

It further referred to **Meera Bhanja V/s. Nirmala Kumari Choudhary [(1995) 1 SCC 170]**, where the Apex Court observed at para 9 thus:

"9. it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be

two opinions. We may usefully refer to the observations of this Court in the case of **Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale AIR 1960 SC 137** wherein, K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record:

"17. ... An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ."

11. In **Haryana State Industrial Development Corporation Ltd.** (supra), a reference was also made to the judgment in **State of W.B. V/s. Kamal Sengupta [(2008) 8 SCC 612]**, where it was observed by the Apex Court at para 21 as below :

"21. At this stage it is apposite to observe that

where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review *ex debito justitiae*. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier.”

State of West Bengal (supra), held that discovery of new and important matter or evidence must be relevant and must be of such a character that if it had been produced earlier, it would have altered the judgment earlier while reiterating that a review cannot partake of a character of an appeal.

12. In **Inderchand Jain** (supra), the Apex Court summarised the law on the subject on the review jurisdiction namely that:

“(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of

Order 47 Rule 1 C.P.C.

(ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on the points where there 21 may be conceivable be two opinions.

(iii) Power of review may not be exercised on the ground that the decision was erroneous on merits.

(iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an Advocate.

(v) An application for review may be necessitated by way of invoking the doctrine 'actus curiae neminem gravabit'."

13. In **Sandur Manganese** (supra), the two Judge Bench of the Apex Court considered Order XLVII Rule 1 CPC and in view thereof recorded that the following grounds of review are maintainable namely:

12.1) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could

not be produced by him;

12.2) Mistake or error apparent on the face of the record;

12.3) Any other sufficient reason

The words "any other sufficient reason" has been interpreted in *Chhajju Ram vs. Neki* [AIR 1922 PC 112] and approved by this Court in *Moran Mar Basselios Catholicos* (supra), to mean "a reason sufficient on grounds at least analogous to those specified in the rule".

while reiterating that review proceedings are not by way of an appeal and have to be strictly confined to the ambit of Order XLVII Rule 1 CPC.

14. In **Lily Thomas** (supra), a two Judge Bench of the Apex Court held that the words "any other sufficient reason" appearing in Order XLVII CPC Rule 1 CPC must mean "a reason sufficient on grounds at least analogous to those specified in the rule" as was held in **Chhajju Ram V/s. Neki** [AIR 1922 PC 112] and approved by this Court in **Moran Mar Basselios Catholicos** (supra). Error apparent on the face of the proceedings is an error which is based on clear ignorance or disregard of the provisions of law. In **M/s.**

Northern India Caterers (India) Ltd. (supra), a three Judge Bench of the Apex Court held that it is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of rehearing and a fresh decision in the case. Krishna Iyer J. concurring with the view taken by Pathak, J. held that :

“A plea for review, unless the first judicial view is manifestly distorted, is like asking for the moon. A forensic defeat cannot be averaged by an invitation to have a second look, hopeful of discovery of flaws and reversal of result.”

15. Considering the various judgments and materially that the applicants have not at all been able to show from the order passed by this Court that there was any error apparent on the face of the record and when the so called documents which are sought to be produced were substantially available with the applicants while they were before the Trial Court and before this Court in Appeal From order, the application is found lacking in merits and is therefore dismissed.

NUTAN D. SARDESSAI, J.

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16. Heard Shri D.J. Pangam, learned Advocate for the applicants and Shri P.S. Rao, learned Advocate for the respondents.

17. Shri D.J. Pangam, learned Advocate for the applicants submitted that he had been secured with the order of stay by the Trial Court and again by the order of this Court till the appeal came to be disposed off and even thereafter till date. No prejudice would be caused to the respondents in case the applicants are secured with the order of stay to pursue the remedies before the appellate forum and therefore he should be secured with such relief.

18. Shri P.S. Rao, learned Advocate for the respondents vehemently resisted the application for enlargement of stay on the premise that the Memorandum of Understanding stood terminated as per the concurrent findings of the Trial Court and this Court and besides there was no basis for the applicants to continue in possession and construction of the buildings in the suit property. There was no basis to grant stay and such a request had to be rejected.

19. The applicants were secured by an order of stay pursuant to the order of the Trial Court and subsequently by the order of this Court till date. The applicants were originally entrusted the construction of the suit project pursuant to the Memorandum of Understanding which admittedly stood terminated as per the findings rendered by the Courts below and this Court. Nonetheless, considering that the applicants have been secured by the interim order till date and in the interest of justice, the stay is further extended by four weeks.

NUTAN D. SARDESSAI, J.

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