

IN THE HIGH COURT OF BOMBAY AT GOA
APPEAL FROM ORDER NO.30 OF 2017
WITH
CIVIL APPLICATION NO.135 OF 2017

Rashmi Constructions Pvt.
A Company incorporated under the
Indian Companies Act, 1956
Having their office at Nitin Chambers
Vasco da Gama, Goa.
Through their Director
Shri N. P. Nair
62 years of age,
Son of P. Nair,
Having office at Nitin Chambers
Vasco da Gama. ... Appellants

V e r s u s

City & Industrial Development Corporation
of Maharashtra Limited (CIDCO),
Through their Chief Engineer &
General Manager (Tech)
Having office at CIDCO Bhavan,
3rd floor, CBD, Belapur,
Navin Mumbai 400 614. ... Respondents

Shri A. F. Diniz and Ms. S. Bhobe, Advocates for the
Appellants-Judgment Debtors.

Shri Ajit Kantak, Advocate for the Respondents-Decree
Holders.

Coram:- NUTAN D. SARDESSAI, J.

Reserved for Order on : 23 July 2018
Order Pronounced on : 26 July 2018

ORDER

1. The appellants have taken exception to the order dated
07.07.2017 passed by the learned Adhoc Senior Civil Judge,

pursuant to which she allowed the review application in the execution proceedings. The appellants were the judgment debtors while the respondents were the decree holders before the Trial Court and would be referred to as such for brevity's sake hereinafter.

2. Heard Shri A. F. Diniz with Ms. S. Bhobe, learned Advocate for the appellants who contended that initially an application was moved by the decree holders in the execution proceedings dated 21.06.2007 under order XXI Rule 41 of the Civil Procedure Code calling for the attendance of the judgment-debtors-Director for the purpose of cross examination which came to be withdrawn on 17.01.2008 and disposed off accordingly. This was followed by another application dated 26.04.2013 for summons to Shri Bandekar to depose in the matter of the affairs of the judgment-debtors-Company and which again came to be rejected by the Order dated 17.04.2017 on the premise that the earlier application was rejected and that the affairs of the Company would be available with the Company. The decree-holders then filed an application for review which came to be allowed by virtue of the impugned order. There was no error apparent on the face of the record to allow the review and yet the learned Trial Judge granted the review in favour of the decree-holders.

3. Shri A. F. Diniz, learned Advocate for the appellants placed reliance in the case of Kamlesh Verma vs. Mayawati & Ors. [(2013) 8 SCC 320], submitted that an explanation was given for the first time by the decree-holders in their application seeking review disclosing their intention for hearing them again in the light of the clarification given in respect of the earlier application dated 21.06.2007 and the subsequent one dated 26.04.2013. He placed further reliance in Saraswatibai Mahadeorao Pawade [2017 DGLS (Bom.) 570] and Rallis India Ltd. [2010 BCI 120] and submitted that it was a fit case to interfere with the order under challenge and to dismiss the same.

4. Shri A. R. Kantak, learned Advocate for the decree holders submitted that the provisions of order XXI Rule 41 of the Civil Procedure Code did not at all apply. He next adverted to the application moved subsequent in point of time for summoning Bandekar dated 26.04.2013 and submitted that there was a valid ground to withdraw the earlier application and the change in circumstances precipitated the second application for examining Bandekar. There was no basis to interfere with the order under challenge and hence the appeal had to be dismissed.

5. i would consider the submissions of Shri A. F. Diniz, learned Advocate for the judgment-debtors and Shri Ajit Kantak, learned Advocate for the decree-holders and decide the appeal appropriately.

6. It is a matter of record that the decree-holders had moved the application under order XXI Rule 41 of the Civil Procedure Code seeking the assistance of the Court to examine the **Director** Shri Narayan Bandekar for the purpose of cross examination. This application came to be withdrawn at the instance of the decree-holders and accordingly the Trial Judge passed an order dismissing the application on 17.01.2008 as withdrawn with no order as to costs. The decree-holders moved another application though not styled under order XXI Rule 41 of the Civil Procedure Code for the issue of summons to the same Narayan Bandekar to depose in the matter of the affairs of the Company when he was the Director of the Company carving a ground that the judgment debtors had not filed the affidavit through their Directors but filed the same through one Vassu Nair, their constituted attorney on 04.01.2007. It was also their case in this application that the Directors Manda and Narayan Bandekar had tendered their resignations which were accepted and in

their place Vassu Nair and another were appointed as Directors. Nonetheless, the decree-holders sought the assistance of the Court to summon Narayan Bandekar to depose particularly regarding the affairs of the Company at the time when he was its Director.

7. The learned Senior Civil Judge vide her order dated 17.04.2017 dismissed this application on hearing the parties on two grounds namely, that an earlier application for summoning the same Narayan Bandekar as a witness was withdrawn by the decree-holders and secondly on the ground that the judgment-debtors being a Company, the matter relating to its affairs would be available with the Company and rejected the application. It is not as if the learned Judge had not assigned reasons. Nonetheless, the decree-holders moved an application for review of this order dated 17.04.2017 spelling out in no uncertain terms that the only intention for filing the review was the hearing sought for by the decree-holders for hearing them again in the light of the clarification given with respect to the earlier applications dated 21.06.2007 and the subsequent dated 26.04.2013, both for summoning Narayan Bandekar as a witness to depose about the affairs of the Company. The learned Judge however in her wisdom hastily concluded that the review application was filed by the

decree-holders on the ground of mistake apparent on the face of the record and proceeded to hold that the records clearly showed that the initial application for summoning Bandekar dated 21.06.2007 was withdrawn in view of the application dated 29.09.2007.

8. The learned Judge tried to distinguish the second application for summoning Narayan Bandekar as a witness not as in his capacity as a director of the judgment debtors-Company but because the relevant records were not handed over by him and his wife even after tendering resignation from the Directorship. What was materially lost on the learned Trial Judge was that in both the applications i.e. one dated 21.06.2007 under order XXI Rule 41 of the Civil Procedure Code and the other dated 26.04.2013, the whole purpose of examining Narayan Bandekar was regarding the affairs of the judgment debtors-Company irrespective of his status either described as a Director in the first application and simplicitor by his name in the second application. The learned Judge for that matter without any rhyme or reason, concluded that the withdrawal of the earlier application had no relation to the subsequent application which according to her constituted an error apparent on the face of the record and allowed the application. The learned Judge had to find the error in the

application under consideration and not what was the intent and purport of the first application vis a vis the contents of the second application.

9. Order XXI Rule 41 of the Civil Procedure Code deals with the examination of the judgment-debtor as to his property and empowers a decree-holder holding a decree for the payment of money, to apply to the Court for an order that the judgment-debtor or where it is a corporation, any officer thereof or any other person to be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment debtor has any and what other property or means of satisfying the decree, and the Court may make an order for the attendance and examination of such judgment-debtor or officer or other person, and for the production of any books or documents. A bare reading of this provision does not at all substantiate the contention of Shri Kantak, learned Advocate for the decree-holders that it does not apply to their case or that they had not sought the assistance of the Court thereunder which it had done in the first instance.

10. Kamlesh Verma (supra), held at paras 14, 15 and 16 as below :

"14. Review of the earlier order cannot be done unless the court is satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. This Court, in Col. Avtar Singh Sekhon v. Union of India & Ors. [1980 (Supp) SCC 562], held as under:

'12. A review is not a routine procedure. Here we resolved to hear Shri Kapil at length to remove any feeling that the party has been hurt without being heard. But we cannot review our earlier order unless satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. In Sow Chandra Kante v. Sheikh Habib this Court observed :

'A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.... The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality.'

15. 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. This Court, in *Parsion Devi & Ors. v. Sumitri Devi & Ors.*, [JT 1997 (8) SC 480 : (1997) 8 SCC 715], held as under:

'7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In *Thungabhadra Industries Ltd. v. Govt. of A.P.* this Court opined:

'What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an 'error apparent on the face of the record'). The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an 'error apparent on the face of the record', for there is a distinction which is real, though it might not always be

capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.' (emphasis ours)

8. Again, in *Meera Bhanja v. Nirmala Kumari Choudhury* while quoting with approval a passage from *Aribam Tuleswar Sharma v. Aribam Pishak Sharma* this Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or 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 under Order XLVII Rule 1 CPC. In exercise of the jurisdiction under Order XLVII Rule 1 CPC it is not permissible for an erroneous decision to be 'reheard and

corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'.

16. 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. The mere possibility of two views on the subject is not a ground for review. This Court, in *Lily Thomas & Ors. v. Union of India & Ors.*, [(2000) 6 SCC 224], held as under:

'54. Article 137 empowers this Court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Supreme Court Rules made in exercise of the powers under Article 145 of the Constitution prescribe that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Code of Civil Procedure which provides:

'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.'

Under Order XL Rule 1 of the Supreme Court Rules no review lies except on the ground of error apparent on the face of the record in criminal cases. Order XL Rule 5 of the Supreme Court Rules provides that after an application for review has been disposed of no further application shall be entertained in the same matter.

56. It follows, therefore, that the

power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised. However, this Court in exercise of its powers under Article 136 or Article 32 of the Constitution and upon satisfaction that the earlier judgments have resulted in deprivation of fundamental rights of a citizen or rights created under any other statute, can take a different view notwithstanding the earlier judgment.

58. Otherwise also no ground as envisaged under Order XL of the Supreme Court Rules read with Order 47 of the Code of Civil Procedure has been pleaded in the review petition or canvassed before us using the

arguments for the purposes of reviewing the judgment in Sarla Mudgal case, [JT 1995 (4) SC 331] It is not the case of the petitioners that they have discovered any new and important matter which after the exercise of due diligence was not within their knowledge or could not be brought to the notice of the Court at the time of passing of the judgment. All pleas raised before us were in fact addressed for and on behalf of the petitioners before the Bench which, after considering those pleas, passed the judgment in Sarla Mudgal case. We have also not found any mistake or error apparent on the face of the record requiring a review. 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. No such error has been pointed out by the learned counsel appearing for the parties seeking review of the judgment. The only arguments advanced were that the judgment interpreting Section 494 amounted to violation of some of the fundamental rights. No other sufficient cause has

been shown for reviewing the judgment. The words 'any other sufficient reason appearing in Order 47 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. Neki*, [AIR 1922 PC 112] and approved by this Court in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius*, [AIR 1954 SC 526] 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 *T.C. Basappa v. T. Nagappa*, [AIR 1954 SC 440] this Court held that such error is an error which is a patent error and not a mere wrong decision. In *Hari Vishnu Kamath v. Ahmad Ishaque* [AIR 1955 SC 233], it was held:

'It is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error

apparent on the face of the record? Learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated. Mr. Pathak for the first respondent contended on the strength of certain observations of Chagla, C.J. in – ‘Batak K. Vyas v. Surat Borough Municipality, [AIR 1953 Bom 133’] that no error could be said to be apparent on the face of the record if it was not self-evident and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case.’

Therefore, it can safely be held that the petitioners have not made out any case

within the meaning of Article 137 read with Order XL of the Supreme Court Rules and Order XLVII Rule 1 CPC for reviewing the judgment in Sarla Mudgal case. The petition is misconceived and bereft of any substance.'

11. In *Saraswati Mahadeorao Pawade (supra)*, a learned Single Judge of this Court (Chandurkar A.S., J), was of the view that the impugned order could not be sustained on hearing the learned Counsel for the appellants after noting that the Appellate Court while rejecting the application for amendment had clearly observed that the plaintiff had failed to exercise due diligence while seeking amendment and hence in view of the proviso to order VI, Rule 17 of the Code, rejected the application. While exercising the review jurisdiction, the learned Judge of the Appellate Court appeared to have been impressed by the fact that absence of all joint family properties would result in the dismissal of the appeal which could hardly be a reason to exercise review jurisdiction in the absence of any error apparent on the face of the record. It considered the judgment in *Kamlesh Verma(supra)*, where the Hon'ble Supreme Court amongst others had observed that the expression "any other sufficient reason" would mean

grounds that are analogous to the grounds stated in order XLVII Rule 1 of the Code. Review would not mean an appeal in disguise for correcting an erroneous decision.

12. The learned Senior Civil Judge was therefore clearly in error to reconsider the application instead of examining whether there was any error apparent on the face of the record while passing the impugned order as it did. The said order therefore cannot be allowed to stand which is completely in contradiction to the predicates of order XLVII Rule 1 of the Civil Procedure Code.

13. In view thereof, i pass the following :

ORDER

The appeal is allowed and the impugned order allowing the review application is quashed and set aside.

NUTAN D. SARDESSAI J.

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