

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL APPLICATION (REVIEW) NO.31 OF 2018

1. Mrs. Linda D'Souza e Fernandes,
Major of age, Indian National,
Widow of late Nolasco Souza,
residing at H. No.47,
Near Bambolim Church,
Bambolim, Ilhas, Goa.

2. Mr. Tony Fernandes,
Major of age, Indian National,
Son in law of Petitioner No.1,
residing at H. No.47,
Near Bambolim Church,
Bambolim, Ilhas, Goa.

3. Mrs. Mary Viegas Souza,
Major of age, Indian National,
Housewife, Daughter of
Petitioner No.1,
residing at H. No.47,
Near Bambolim Church,
Bambolim, Ilhas, Goa.

... Applicants/
Original Respondents

V e r s u s

1. Mr. Luis Antonio Romualdo
Jesus de Maria Jose De Abreu,
(since deceased through legal
heirs) Ms. Maria Do Ceu Abreu,
retired, spionster, major of age,
Resident of Thomas Ribeiro Road,
Fontainhas, Panaji, Goa. Presently
at Mumbai.

... Respondents/
Original Petitioner

Shri Sagar Dhargalkar, Advocate for the Appellants.

Shri Myron Menezes D'Souza, Advocate for the Respondents.

Coram:- NUTAN D. SARDESSAI, J.

Reserved for Judgment on : 14 December 2018
Judgment Pronounced on : 18 December 2018

JUDGMENT

1. The applicants who are the original petitioners are seeking a review of the judgment dated 24.08.2018 passed by this Court pursuant to which the petition was allowed and the impugned order therein which failed to assign sufficient reasons was quashed and set aside with a direction to the First Appellate Court to expedite the hearing in the matter.

2. Heard Shri Sagar Dhargalkar, learned Advocate appearing for the applicant who submitted that there was an error apparent on the face of the record in the order passed by this Court inasmuch as by the passing of the order under review, the applicant is left to face a fait accompli situation unlike the position had the Court to remand the matter to the District Court for a fresh hearing in which event the applicants would have got an opportunity to argue the case afresh and the learned District Judge could have passed a reasoned order. The judgment under review is therefore required to be reviewed and the matter is required to be remanded to the learned District Court for a fresh hearing on the stay

application. It was further his contention that there was an error apparent on the face of the record inasmuch as this Court had placed reliance in the judgment in **Bhagwan s/o. Ganpatrao Ghodsay vs. Kachrual s/o. Bastimal Samdariya [1987(2) Bom. C.R. 153]** to a limited extent without looking at the other part of the judgment which required that the legislative intent of the right of appeal created by Section 96 should be advanced and the purpose was not to frustrate the right of appeal itself but to regulate it in such a manner that the courts consider condonation of delay before admission of appeals.

3. The judgment passed by this Court in **Shaikh Ibrahim Janmohammad vs. Tekchand alias Ravindra Fakirchand Rathod [1988 (2) Bom.C.R. 436]** referred to in **Bhagwan Ghodsay** (supra) held that the Civil Procedure Code had to be interpreted so as to advance the cause of justice. In case a decree was allowed to be executed before deciding the application for the condonation of delay and also before hearing under Rule 11 of the Civil Procedure Code, the judgment debtor would be put to a great loss and inconvenience in case later on the courts condoned the delay and also admits the appeal on hearing under Rule 11. The judgment passed by this Court dated 24.08.2018 had

therefore to be reviewed and the matter remanded to the First Appellate Court to afford a fresh round of hearing to the applicants.

4. Shri M. D'Souza, learned Counsel appearing for the respondent submitted that a re-hearing of the matter was not permissible under the garb of review. It was his contention that the applicants had failed to make out the grounds of review good and in that context adverted to Order XLI Rule 3(A)(3) of the Civil Procedure Code which clearly laid a total embargo on the jurisdiction of the Court to grant stay. He made a passing reference to the fact that the applicants had filed an appeal after a delay of nine years which was presented in **July 2017** while the stay application was pursued only in **February 2018**. He referred to Rule 11 of Order XLI of the Civil Procedure Code which provided for a hearing only to the appellant or a pleader and the power of the Court to dismiss the appeal at the stage of admission itself. He next adverted to Rule 11-A which dealt with the legislative scheme of appeal and therefore submitted that the contention on behalf of the applicants was untenable that it was not possible to dispose off the appeal within sixty days. He adverted to the judgment in **Bhagwan Ghodsay** (supra) and submitted that the ground (ii) of the review application

was based on a clear misreading of the judgment in **Bhagwan Ghodsay** (supra) and in turn placed reliance in **M/s. Northern India Caterers (India) Ltd. vs. Lt. Governor of Delhi [AIR 1980 SC 674]**.

5. His next plank of argument was that there was misrepresentation at the instance of the applicants inasmuch as the judgment in **Bhagwan Ghodsay** (supra) referred to the judgment in **Shaikh Janmohammad** (supra) which was delivered on **01.09.1986** unlike that in **Shaikh Janmohammad** (supra) relied upon on behalf of the applicants being decided on **23.10.1986** and could not be referred to in the judgment of **Bhagwan Ghodsay** (supra). Shri D'Souza, learned Counsel appearing for the respondent also placed reliance on a full Bench judgment of the Himachal Pradesh High Court in **The Nalagarh Dehati Co-operative Transport Society Ltd. Nalagarh vs. Beli Ram etc., [AIR 1981 Himachal Pradesh 1]** for a consideration of what would constitute the grounds for review as contained in Order XLVII of the Civil Procedure Code and submitted that no cause whatsoever was made out by the applicants for a review of the judgment passed by this Court. The application had therefore to be dismissed with costs.

6. I have considered the submission of Shri Dhargalkar, learned Counsel appearing for the applicants and Shri M. D'Souza, learned Counsel appearing for the respondent and besides considered the provisions of Order XLVII Rule 1 of the Civil Procedure Code which reads thus :

"Application for review of judgement - (1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from 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 judgement to the Court which passed the decree or made the order."

7. It is therefore to be seen in the circumstances whether the application as maintained for review of the judgment dated 24.08.2018 does in fact call for its review and on the grounds urged by the applicants or otherwise.

8. Order XLI of the Civil Procedure Code deals with the appeals from the original decrees and in terms of Rule 3-A visualises a scenario where an appeal is presented after the expiry of the period of limitation specified therefor. It contemplates that in such an eventuality an appeal shall be accompanied by an application for the condonation of delay supported by an affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period. Sub-section (2) reads that if the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under Rule 11 or Rule 13 as the case may be. Sub-rule (3) makes interesting reading inasmuch as where an application is made under sub-rule (1), the Court shall not make an order for the stay of the execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under Rule 11 decide to hear the appeal. In other words, as rightly contended by Shri D' Souza, learned Counsel appearing for the respondent there is a total embargo on the power of the Appellate Court to grant a stay in terms of Order XLI Rule 3-A(3) of the Civil Procedure Code.

9. Order XLI Rule 11 of the Civil Procedure Code deals with the power of the Court to dismiss an appeal without sending notice to the Lower Court and in terms of sub-rule (1), the Appellate Court after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day may dismiss the appeal. In other words, there are ample powers vested in the Appellate Court to dismiss the appeal on hearing the appellant or his pleader as the case may be. It would follow from a reading thereof that no notice to the respondent is contemplated at that stage where the Appellate Court upon hearing the appellant or his pleader takes a call to dismiss the appeal or issue a notice as the case may be. Rule 11-A deals with the time within which such hearing under Rule 11 should be concluded and reads that every appeal shall be heard under Rule 11 as expeditiously as possible and endeavour shall be made to conclude such hearing within sixty days from the date on which the memorandum of appeal is filed. In other words, Rule 11-A when juxtapositioned with Rule 11 would make it abundantly clear that the Appellate Court on hearing the appellant or his pleader after fixing the date for hearing may dismiss the appeal or proceed to issue a notice as the case may be. Therefore, it does not take within its sweep the contention on behalf of the applicants that it is not possible for

the Appellate Court to decide the appeal within sixty days for reasons such as the death of a party or the time spent in bringing the legal heirs on record and so on and so forth. The legislative scheme has to be properly understood and in that context too the contention of the applicants that it is not possible to conclude the hearing of the appeal within sixty days cannot be countenanced.

10. Admittedly, there was a delay of nine years in filing the appeal at the instance of the applicants which was presented only in **July 2017** and the application for stay was pursued in **February 2018** i.e. well beyond the period of sixty days as contemplated in Rule 11-A and Rule 3-A of Order XLI of the Civil Procedure Code. Therefore, a purposeful interpretation of Rule 3-A(3), Rule 11 and Rule 11-A would not leave any scope for prevarication that the applicants were not entitled to an order of stay beyond the period of sixty days from the presentation of the appeal. In those set of circumstances on a due consideration of the judgment in **Bhagwan Ghodsay** (supra) at length that this Court came to a finding that the learned District Judge could not have granted the stay of the judgment and order assailed before it. The judgment in **Bhagwan Ghodsay** (supra) was duly and properly interpreted while coming to a finding that the First Appellate

Court had not assigned sufficient reasons and in that view of the matter the Writ Petition filed at the instance of the respondent came to be allowed by quashing and setting aside the order passed by the First Appellate Court. i would therefore not be persuaded to have a re-look at the judgment in **Bhagwan Ghodsay** (supra) which had been considered at length while passing the judgment under review much more so when the applicants have not substantiated from the tenor of the application what were the errors apparent on the face of the record so as to allow the application under consideration.

11. In **M/s. Northern India Caterers** (supra), a three Judge Bench of the Hon'ble Apex Court held that an error apparent on the face of the record exists if of the two or more views canvassed on the point it is possible to hold that a controversy can be said to admit of only one of them. If the view adopted by the Court in the original judgment is a possible view having regard to what the record states, it is difficult to hold that there is an error apparent on the face of the record.

12. In **Shaikh Ibrahim Janmohammad** (supra), referred in **Bhagwan Ghodsay** (supra), the respondents had filed the

suit for eviction of the petitioners for arrears of rent which was decreed exparte on **20.09.1984** as neither the defendant or his Counsel appeared. The defendant preferred an appeal on **07.10.1985** and alongwith the memo of appeal filed an application for condonation of delay and applied for interim stay of the execution of the exparte decree which came to be granted on **09.10.1985**. Notice of the application for the condonation of delay was issued to the plaintiffs who opposed the stay of the execution pending the decision on the application for the condonation of delay. The learned Trial Judge on hearing the parties vacated the ad-interim stay earlier granted on the premise that the mandatory provisions as laid down under Order XLI Rule 3-A(3) of the Civil Procedure Code did not allow this Court to make an order for a stay of the execution of the decree under challenge though there was a bonafide mistake as argued before this Court by the learned Advocate for the appellant.

13. The Judgment in **Shaikh Ibrahim Janmohammad** (supra) referred to by Shri Dhargalkar, learned Counsel appearing for the applicants was that passed at a latter date obviously not referred to in **Bhagwan Ghodsay** (supra) and which came to be passed in a civil revision application at the instance of the same parties. Therefore, reliance on this

subsequent judgment in **Shaikh Ibrahim Janmohammad** (supra) would not buttress the contention of Shri Dhargalkar, learned Counsel for the applicants that it was considered in **Bhagwan Ghodsay** (supra) to advance his case. Hence the departure.

14. In The Nalagarh Dehati Co-operative Transport Society Ltd. (supra), a full Bench of the Himachal Pradesh High Court considered Order XLVII Rule 1 of the Civil Procedure Code in the matter of error apparent on the face of the record and observed at paras 15, 16 and 18 as below :

“15. The second part of the question relates to a situation where a court has failed to notice an existing contrary decision of the High Court or the Supreme Court on a point covered by its judgment. Now the failure to notice a decision on a question of law of the Supreme Court, which is the law of the land under Article 141 of the Constitution, is not the same thing as failure to notice a binding decision of the High Court. So we would divide the question into two parts : (a) failure to notice a decision of the Supreme Court: (b) failure to notice a binding decision of the High Court.

16. Failure to notice an existing decision of the Supreme Court on a question of law results in not applying the law which should have been applied. Therefore, a contrary decision given on such a question would amount to a mistake or error apparent on the face of the record, The error would be obvious and no elaborate reasoning would be necessary to find it.

17. ...

18. However, failure to notice a binding decision of the High Court does not amount to a mistake or error apparent on the face of the record. It is true that the decision is binding but the High Court does not lay down the law as is done by the Supreme Court. The result, therefore, would be that the judgment would be wrong or erroneous. The decision on the question of law in that judgment would be wrong. Therefore, the court will have no jurisdiction to review its decision simply on the ground that it is contrary to the binding decision of the High Court."

15. What emerges from a consideration of the case urged on behalf of the applicants and the respondents is that the applicants are seeking a virtual re-hearing of the matter which

is not permissible under the garb of review and where the scope is clearly delineated and defined of the circumstances in which a review is permissible.

16. In the circumstances therefore the applicants having failed to point out the error apparent on the face of the record, the application would not survive and in view thereof, i pass the following :

ORDER

The application is dismissed with no order as to costs.

NUTAN D. SARDESSAI J.

arp/*