

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO.448 OF 2015
IN
REVIEW PETITION LODGING NO.31 OF 2015
IN
WRIT PETITION NO.1481 OF 2010**

**M/s. Anupam Electricals
Through its Proprietor
Smt. Seema Ashok Kamath : Applicant/Org. Petitioner.**

In the matter between

**M/s. Anupam Electricals
Through its Proprietor
Smt. Seema Ashok Kamath : Review Petitioner.**

Versus

**The Maharashtra Housing Area
and Development Authority & ors. : Respondents.**

**ALONG WITH
REVIEW PETITION LODGING NO.31 OF 2015
IN
WRIT PETITION NO.1481 OF 2010**

**M/s. Anupam Electricals
Through its Proprietor
Smt. Seema Ashok Kamath : Review Petitioner.**

Versus

**The Maharashtra Housing Area
and Development Authority & ors. : Respondents.**

**Mr. Vaibhav Joglekar a/w Mr. Y R Shah for the Applicant/Review
Petitioner.**

**Mr. Vatsal Merchant a/w Mr. S Wakchure I/by Kishore Thakordas & Co.
for the Respondent Nos.7 to 12.**

Mr. Arvind Aswani I/by Mr. J G Reddy for the Respondent No.13.

**Mr. Prateek Sakseria a/w Mr. Saurabh Devrukhkar I/by M/s. Sanjay
Udeshi & Co. for the Respondent No.14.**

**CORAM : R. M. SAVANT &
REVATI MOHITE DERE, JJ.**
DATE : 27th JULY 2018

P.C.

1 The above Notice of Motion has been filed for condonation of delay of 1376 days (wrongly mentioned as 1930 days in prayer clause (a) of the Notice of Motion. The said figure of 1376 days has been arrived at in terms of the calculation which is made and appearing in the chronology and events submitted by the learned counsel appearing for the Applicant/Review Petitioner. The said figure is not disputed by the learned counsel for the Respondent Nos. 7 to 12 and 14 who are the main contesting Respondents.

2 In the affidavit in support of the Notice of Motion, the reasons for the delay are mentioned. Out of the said delay of 1376 days the delay of 735 days is sought to be explained by stating that the said delay has occasioned in view of the fact that the SLP filed against the order passed by the Division Bench of this Court of which the review is sought was pending in the Apex Court from 08/11/2011 to 12/11/2013. In respect of the remaining period, the explanation is that the daughter Anupama of the Applicant was involved in a criminal litigation arising out of a fire which took place in a building where she had carried out an electrical contract and hence both the Applicant/Review Petitioner and her daughter Anupama were engaged in prosecuting the criminal case which arose out of the FIR lodged against the Applicant/Review

Petitioner, her daughter and some other employees in the concerned Metropolitan Magistrate Court at Girgaum, Mumbai. The delay is also sought to be explained on the ground that some time was lost in making enquiries and collecting the documents under the Right to Information Act from the MHADA and MBRRB, ultimately resulting in the delay of 1376 days in filing the above Review Petition.

3 The Respondent Nos.7 to 12 who are the original owners of the property and the Respondent No.14 who is the developer have filed their affidavits opposing the condonation of delay which is sought by the above Notice of Motion. They have stated in their replies that the above Review Petition is the fifth round of litigation raising the same issue, which has gone into by this Court and various quasi judicial authorities. It is stated that parking Bay No.10 on the 3rd floor was being used by the Applicant/Review Petitioner for the residence of its employees. It is after the society of the flat occupants objected to the misuse that the above Review Petition is filed. It is further stated that the grievance in respect of the allotment of the said parking Bay No.10 was also made before the Apex Court. The Applicant/Review Petitioner however failed to get any relief from the Apex Court. It is stated that the filing of the SLP in the Apex Court did not preclude the Applicant/Review Petitioner to file a Review Petition in this Court. It is further stated that assuming the delay of 735 days is not to be taken into consideration i.e. the period spent in

the Apex Court, still there is no explanation for the period of 617 days. It is also stated that no particulars of the time spent in obtaining the information/documents is given in the affidavit in support. The manner in which the Applicant/Review Petitioner is prosecuting the above Review Petition is also sought to be highlighted by pointing out that though the above matter had come up before the Prothonotary and Senior Master on 11/08/2015 for removal of office objections, when the Applicant/Review Petitioner was directed to get the office objections removed after getting the delay condoned. The Applicant/Review Petitioner has waited till the year 2018 for getting the above Notice of Motion placed for hearing. Hence it is the contention of the said Respondents that the Applicant/Review Petitioner has not shown sufficient cause for condonation of the said huge delay of 1376 days in filing the above Review Petition.

In so far as condonation of delay is concerned, the learned counsel for the parties urged contentions based on the pleadings for and against the condonation of delay.

4 Before venturing to consider whether the Applicant/Rview Petitioner has made out a case for exercise of our discretion so as to condone the said huge delay of 1376 days in filing the above Review Petition is made out, we deemed it appropriate to consider whether there is any merit in the

above Review Petition.

The above Review Petition seeks review of the order dated 29/08/2011 passed by a Division Bench of this court. By the said order the Division Bench dismissed the Writ Petition. Whilst dismissing the Petition, the Division Bench has observed that the Applicant/Review Petitioner has been allotted a parking space on the third level in May 2006 and the Applicant/Review Petitioner has also taken possession of the same.

5 On behalf of the Respondent Nos. 7 to 12 and the Respondent No.14 the very maintainability of the above Review Petition was sought to be questioned on the ground that since the Apex Court has dismissed the SLP being No.34904 of 2011 filed by the Applicant/Review Petitioner, the instant Review Petition is not maintainable.

6 The learned counsel appearing on behalf of the Applicant/Review Petitioner made a contra submission that since the SLP has been dismissed in limine, by an order which reads thus “The Special Leave Petition is dismissed”, the above Review Petition is maintainable. In support of the said contention, reliance was placed on the judgment of the Apex Court in **Kunhayammed and others v/s. State of Kerala and another** reported in **(2000) 6 SCC 359**. The Apex Court in *Kunhayammed's* case was concerned with the doctrine of

merger where the order of the High Court stands merged in the order passed by the Apex Court. The Apex Court held that if the SLP is dismissed by a non-speaking order i.e. it does not assign any reason for dismissing the SLP, it would neither attract the doctrine of merger, so as to stand substituted in place of the order put in issue before it nor it would be a declaration of law by the Supreme Court under Article 141 of the Constitution of India for there is no law which has been declared. The Apex court ultimately held :-

“Mere rejection of a special leave petition does not take away the jurisdiction of the Court, tribunal or forum whose order forms the subject matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other Court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger.”

7 On behalf of the said Respondent No.14 reliance was placed on the judgment of the Division Bench of this Court in **Nivruti G Ahire v/s. State**

of Maharashtra and others reported in 2007 (5) Mh. L J 284 as also the judgment of the Apex Court in Abbai Maligai Partnership Firm and another v/s. K Santhakumaran and others reported in (1998) 7 SCC 386.

8 The aforesaid judgments cover the issue as regards entertaining a Review Petition and grant of reliefs therein, once the SLP has been dismissed by the Apex Court. In *Nivruti G Ahire's* case (supra) the Division Bench of this Court in paragraph 27 of the said report has observed to the following effect :-

“Once the Apex Court has opined that it finds no reason to interfere in the said order of this Court, to entertain an application for review of such an order would virtually amount to entertain an application for expressing an opinion different from the one expressed by the Apex Court in such order. Such an act would virtually amount to judicial indiscipline, though it may not be an affront to the order of the Apex Court.”

In *Abbai Maligai Partnership Firm's* case (supra) the Apex Court was dealing a case wherein the Review Petition was entertained by the High Court after the Apex Court had dismissed the SLPs on a contest. The Apex Court in the said fact situation in paragraph 4 of the said report has observed as under :-

“After the dismissal of the special leave petitions by this Court, on contest, no review petitions could be entertained by the High Court against the same order. The very entertainment of the review petitions, in the facts and circumstances of the case, was an affront to the order of this Court. We express our strong disapproval and hope there would be no occasion in the future when we may have to say so. The

jurisdiction exercised by the High Court, under the circumstances, was palpably erroneous. The respondents who approached the High Court after the dismissal of their SLPs by this Court, abused the process of the court and indulged in vexatious litigation.”

9 At this stage it is required to be noted that in the SLP filed by the Applicant/Review Petitioner notices were issued to the Respondents. The Respondents filed counter affidavits dated 20/03/2013, 03/07/2013, (MCGM , MHADA/MBRRB) and 11/09/2012 (Respondent No.14 – Developer). The Applicant/Review Petitioner filed a common rejoinder dated 02/09/2013. The Apex Court dismissed the SLP by order dated 12/11/2013. Having regard to the facts as above and pronouncements of the Division Bench of this Court in *Nivruti G Ahire's* case (supra) as well as the Apex Court in *Abbai Maligai Partnership Firm's* case (supra), we are of the view that the dismissal of the SLP filed by the Applicant/Review Petitioner being after a contest would undoubtedly be a relevant consideration for us to arrive at a conclusion whether there is any merit in the above Review Petition. In view of the pronouncement of the Division Bench of this Court in *Nivruti G Ahire's* case (supra) as well as the Apex Court in *Abbai Maligai Partnership Firm's* case (supra), in our view apart from the entitlement of the Applicant/Review Petitioner for any reliefs in the above Review Petition, the very maintainability of the above Review Petition is put in question.

10 Since a submission was sought to be advanced on behalf of the Applicant/Review Petitioner that a fraud has been committed on this Court resulting in this Court passing the order dated 29/08/2011 of which review is sought, we deemed it appropriate to consider the said submission. The fraud alleged is on the basis that the plans in question do not disclose parking area described as Bay-10 on the third level and that the fact of the approved plan showing a total 24 parkings only i.e. 8 on each level i.e. from 1st to 3rd floor was suppressed from this Court. It is required to be noted that in so far as the said contention of fraud being practiced on this Court is concerned, the said contention was also sought to be raised by the Applicant/Review Petitioner before the Apex Court as can be seen from the averments made in the affidavit in rejoinder especially in paragraph 6, 7.18, 7.19, 7.20 filed in the Special Leave Petition which is now part of the compilation filed by the Applicant/Review Petitioner in the above Review Petition. That apart there is material on record to indicate that the Applicant/Review Petitioner was put in possession and was in occupation of the said parking area which fact is also accepted by the Applicant/Review Petitioner in the affidavit in support of the Notice of Motion. The said material indicates that when the Applicant/Review Petitioner sought to enclose the said parking area, that an objection was taken by the Society on the ground that the parking area was being misused, Hence the aforesaid material discloses that the Applicant/Review Petitioner was put in possession and was in use of the said parking area. There appears to be

substance in the contention urged on behalf of the Respondent Nos. 7 to 12 and the Respondent No.14 that only after the objection was raised by the Society, that the Applicant/Review Petitioner has chosen to file the above Review Petition. In the conspectus of facts as narrated above, the question that begs an answer is whether the Applicant/Review Petitioner has made out a case for review on any of the grounds mentioned in Order 47 of the Code of Civil Procedure, the answer has to be an emphatic “no”.

11 It is required to be noted that in the order dated 29/08/2011 of which review is sought, the Division Bench of this Court had specifically observed that if the Applicant/Review Petitioner is not satisfied with the allotment of the open parking space made to it, then it would be open for the Applicant/Review Petitioner to adopt appropriate proceedings. The Applicant/Review Petitioner did not choose to adopt any proceedings to challenge the said allotment. The Applicant/Review Petitioner challenged the order passed by the Division Bench dated 29/08/2011 before the Apex Court. The Apex Court has as indicated above dismissed the SLP and as stated herein above the said SLP was dismissed on a contest as the Respondents were issued notice, they appeared and also filed their counter affidavits to which rejoinder was filed by the Applicant/Review Petitioner.

12 In the present proceedings a further affidavit has been filed on

behalf of the Respondent No.14. In the said affidavit in paragraph 3(b) it is averred to the following effect :-

“The said Plan reflects Parking Bay No.10 on the Third Podium of the building which is the very parking allotted and used by the Petitioner since May, 2006. I therefore submit that the contention of the Petitioner being raised that parking 10 was never allotted to them is incorrect as the Parking Bay reflected as No.10 in the Plan dated 26th February, 2009 is the Parking Bay which has been occupied by the Petitioner since 2006”

A reading of the said paragraph therefore discloses that the Parking Bay reflected as No.10 in the Plan dated 26th February 2009 is the Parking Bay which has been occupied by the Petitioner since 2006.

13 The said averment is sought to be contested on behalf of the Petitioner by relying upon the letter dated 26/02/2009 of the Municipal Corporation for Greater Mumbai which is annexed to her rejoinder. In our view, the said document would also not further the case of the Applicant/Review Petitioner in so far as the allegation of fraud is concerned, as the Applicant/Review Petitioner was undisputedly in possession of the said open parking space which was allotted to her and it is only after the events which have transpired post her taking possession that she has chosen to make the said allegations. In our view, therefore, there is no merit in the contention that a fraud has been practiced on this Court which resulted in the order dated 29/08/2011 of which the review is sought.

14 In our view, the reasons mentioned in the affidavit in support of the Notice of Motion do not make out a case for exercise of discretion. In our view, assuming that the period spent in the Apex Court of 735 days is to be excluded, the reasons for the delay of the balance period of 617 days cannot be accepted, especially having regard to the fact that the Applicant/Review Petitioner is alleging fraud against the Respondent No.14, in our view, the above Review Petition is speculative in nature. Hence apart from the fact that case for exercise of discretion to condone the delay of 1376 days is not made out, we are also of the view that there is no merit in the above Review Petition. The above Notice of Motion is accordingly dismissed. The above Review Petition which suffers from the delay of 1376 to accordingly stand disposed of.

[REVATI MOHITE DERE, J]

[R.M.SAVANT, J]

Laxmikant
Gopal
Chandan

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