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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.08.2018

Pronounced on : 17.09.2018

Coram

The Honourable Ms.Justice P.T.ASHA

Review Application No.222 of 2018
in S.A.No.387 of 2004
& C.M.P.No.15001 of 2018

1. Balambal
W/o. Vijayaraghavan

2. Bakthavatsalam
S/o. Sundaram

3. Ramalingam
S/o. Sundaram

... Petitioners

Versus

D. Prakash

... Respondent

Review Application filed under Section 114 r/w order XLVII Rule 1 of Civil Procedure Code against the decree and judgment passed by Her Lordship Hon'ble Ms.Justice K.B.K.Vasuki in S.A.No.387 of 2004 dated 13.03.2015 allowing the appeal and set aside the decree and judgment passed in A.S.No.16/2003 dated 05.11.2003 on the file of the Additional District Judge, Fast Track Court No.1, Tindivanam reversing the Judgement and decree dt.5/10/2011 made in O.S.No.152/1994 on the file the Principal Subordinate Judge, Tindivanam.

For Petitioners : Mr.Ajmal Khar, Senior Counsel,
for Mr.K.Shaul Hameed

For Respondent : Mr.T.R.Rajagopalan, Senior Counsel,
for Mr.D.Ravichander

O R D E R

The Review Application is directed against the order in S.A.No.387 of 2004. The respondents in the above Second Appeal are the petitioners. The proceedings emanate from a suit for



specific performance filed by the respondents herein on the file of the Subordinate Court, Tindivanam in O.S.No.152 of 1994.

2. The suit was decreed as against which the review petitioners had filed A.S.No.16 of 2003 on the file of the Additional District [Fast Track Court No.1], Tindivanam. The Appellate Court reversed the judgment and decree of the learned Subordinate Judge, Tindivanam against which the respondent herein had filed the Second Appeal which is the subject matter of the review. I am restricting my consideration to the review and the grounds raised during the arguments.

3. Mr.Ajmal Khan, Senior Advocate appeared on behalf of the counsel for the Review Petitioner. The learned Senior Counsel has made the following submissions seeking a review of the judgment and decree dated 13.03.2004 in S.A.No.387 of 2004.

(i) This Court had raised additional substantial question of law, during the course of argument of the second appeal and while framing these issues the provision of Section 100 (5) has not been taken note of.

(ii) The property in question not only belongs to respondents 1 to 3 but also to the adult children of the 1st respondent and these children have not been made parties to the agreement of sale.

(iii) That the respondents herein had not made the deposit of the balance sale consideration to date.

4. As regard the first point the learned senior counsel would argue that the additional substantial questions of law was framed at the time of hearing and therefore the procedure contemplated under Section 100(5) has been ignored. It is his contention that the procedure which is contemplated therein has to be strictly followed and any deviation from this would render the judgment perverse.

5. The learned Senior Counsel would contend that the questions of law which have been framed contrary to the procedure contemplated has also been answered in favour of the respondent which has caused grave prejudice to the review petitioners. He relied on the judgment reported in 2018 (5) JT Page 257 Vijay Arjun Bhagat and Ors. Vs. Nana Laxman Tapkire and Ors. wherein the Hon'ble Supreme Court had dealt with the procedure prescribed under Section 100 of the Code and the Hon'ble Supreme Court had held that while exercising the powers contemplated under the proviso to sub section 5, the High Court is bound to assign reasons for framing additional question of law at the time of hearing the appeal. The Hon'ble Supreme Court stipulated three conditions which is a pre-requisite for framing additional issues as contemplated in the proviso to Section 100 (5).



- (i) Such question should arise in the appeal
- (ii) Assign reasons for framing the additional questions
- (iii) Frame question at the time of hearing the appeal.

6. The Learned Senior Counsel would also rely upon the judgment reported in 2018 (3) Scale Page 246 Surat Singh (Dead) vs. Siri Bhagwan & Others wherein the Hon'ble Supreme Court has elucidated the scheme of Section 100 in paragraph 29 of their judgment which reads as follows:

"29. The scheme of Section 100 is that once the High Court is satisfied that the appeal involves a substantial question of law, such question shall have to be framed under sub-section(4) of Section

100. It is the framing of the question which empowers the High Court to finally decide the appeal in accordance with the procedure prescribed under sub-section (5). Both the requirements prescribed in sub-sections (4) and (5) are, therefore, mandatory and have to be followed in the manner prescribed therein. Indeed, as mentioned supra, the jurisdiction to decide the second appeal finally arises only after the substantial question of law is framed under sub-section (4). There may be a case and indeed there are cases where even after framing a substantial question of law, the same can be answered against the appellant. It is, however, done only after hearing the respondents under sub-section (5)."

7. This was a case where the Hon'ble High Court had not framed any substantial question of law and the question of law was framed when the Second Appeal was being allowed and this approach of the High Court was deprecated by the Hon'ble Supreme Court. In another judgment of Hon'ble Supreme Court reported in 2008 (8) SCC Page 92 State Bank of India and Others vs. S.N.Goyal the Hon'ble Supreme Court has explained the word substantial question of law and the procedure to be adopted while dealing with Second Appeals. The Hon'ble Supreme Court has observed that the High Court was at liberty to reformulate the substantial question of law or frame other substantial question of law but however after recording reasons for the same and hearing the parties on such reformulated or additional substantial question of law. The basis on which the Hon'ble Supreme Court has made such an observation is to avoid technical errors or lapses which may ultimately lead to injustice and give rise to further appeals.

8. The learned Senior Counsel appearing on behalf of the respondents would argue that such a reasoning is contemplated



only in instances where parties were unaware of the questions of law upon which they had to address arguments. In the instant case, the learned Senior counsel would submit that the review petitioner was well aware of the question of law.

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9. The respondents have cited the decision reported in 2007 (15) SCC Page 157 Kannan (Dead) by Lrs. and others Vs. V.S.Pandurangam (dead) by Lrs. and others. wherein the Hon'ble Supreme Court has held that once the parties are aware on which they are basing the arguments it does not matter if no substantial question of law has been formulated by the High Court. The Hon'ble Supreme Court has held that merely because the substantial questions of law was not formulated, the judgment of the High Court does not automatically a nullity until and unless the person aggrieved is able to show prejudice to him.

10. The Hon'ble Judges had gone on to opine that the Judgment of High Court should only be set aside on the ground of non-compliance with the provisions of Section 100 (4) of C.P.C. If some prejudice has been cause to the appellant by reason of the non-framing of the issues.

11. Perusal of the notice sheet attached to the Second Appeal would indicate that the additional substantial question of law was raised with the knowledge and consent of the revision petitioners. The following dates and events would clarify the position:

09.02.2015	At request, post on 02.03.2015
02.03.2015	As per the order made in C.M.P.No.929 of 2012 the copy of the partition deed dated 11.11.1974 is received as Ex.B.1. Additional Substantial questions of law raised vide separate order sheet. 'Party heard, for continuation adjourned to 06.03.2015
06.03.2015	Heard both sides. Post "For Judgment" on 13.02.2015
13.03.2015	Judgment pronounced

12. There is a separate order sheet raising Additional Substantial questions of law in which the learned Judge has noted that both the learned counsel on record are present.



13. This dates and events would clearly demonstrate that the reason for framing of additional written statement was only on account of the fact that the review petitioner herein had filed C.M.P.No.929 of 2012 to receive xerox copy of the partition deed and to mark the same as additional evidence. Since, this document was marked as additional evidence in the Second Appal, the learned Judge had proceeded to frame additional questions of law in the presence of both the parties and there is no demur on the side of the review petitioner. Further the arguments have also been advanced on these questions. Therefore, the first argument advanced by the learned Senior Counsel seeking review fails.

14. The next argument that has been adduced by the review petitioner is that the agreement has not been executed by the adult sons of the first petitioner and they have not been impleaded. This argument was advanced even while arguing the Second Appeal and Additional substantial question No.1 which is framed by the learned Judge is as follows:

"(i) When the defendants having admitted that the suit property exclusively belonged to Sundara Dasari, first defendant's father-in-law and father of defendants 2 and 3 and by way of family arrangement, dated 11.11.1974, the property came to be allotted to the share of his 3 sons, still is the learned Principal District Judge right in holding that the suit property being a joint family property, the suit filed without impleading the heirs of the defendants is bad in law?"

15. The learned Judge has returned a finding at para No.20 & 21 of the judgment under review wherein the learned Judge has categorically found that the property in question is not joint family property and therefore the adult children of the 2nd and 3rd defendant who are the 2nd and 3rd petitioners herein have no share on birth in the property during the life time of the original owner.

16. The learned Judge has made the following observations:

"As far as the first defendant is concerned, she derived title to the property under her deceased husband and her husband died leaving his widow and two sons. Though it is not specifically stated in the agreement that it is entered into on behalf of the entire family, the evidence made available herein would reveal that one of his sons was present and participated in the course of negotiation. It is admitted so by DW.4 R.Murthy, who arranged for the negotiation between the parties. Further, DW.2 second defendant has in his cross examination impliedly



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admitted that the suit agreement was entered into in the capacity as Kartha of the family. DW.3 third defendant would in the course of his cross examination admit that the defendants in Ex.A3 reply notice expressed their willingness to execute the sale deed for suit items 1 to 3. In that event, the defendants cannot be permitted to deny the relief on the ground that the consent of the adult children was not obtained".

17. It is seen that the adult children of the first petitioner have not questioned the agreement of sale or the decree to date, by filing an appeal or entering appearance in the matter. Therefore, it can be presumed that the adult children of the first respondent have no axe to grind vis-a-vis the agreement of sale subject matter of the suit.

18. The learned counsel for the respondent would submit that in the guise of a review, the review petitioner is practically calling upon the review Court to once again sit in appeal and rehear the matter. The Hon'ble Supreme Court in the judgment reported in 2009 14 SCC Page 663 Inderchand Jain (dead) Through Lrs. vs. Motilal (Dead) Through Lrs. [which was cited by the respondent] has observed that the power of review can be exercised by a Court in the event of discovery of new and important matters or evidence takes place which despite the exercise of due diligence was not within the knowledge of the applicant and could not be produced at the time when the order was made. The review would also lie if the order has been passed on account of a mistake or any other sufficient cause. It is therefore clear that a review Court cannot sit in appeal over its own order and rehearing is impermissible in law.

19. The third ground on which the review petitioner had challenged the judgment is on the ground that the respondents had not made any deposit and therefore the learned Judge ought to have taken into account the readiness and willingness of the respondent. The learned counsel for the respondent would submit that the deposit of the balance sale consideration was made by the respondent on 17.10.2010 itself and he has also produced a copy of the lodgment schedule therefore this argument on the side of the review petitioner also fails. The respondent has also submitted the following judgment with regard to the scope of review and would contend that the respondents has not put across any new or important matter which despite their due diligences was not known to them.

- Haridas Das vs. Usha Rani Banik (SMT) and others reported in (2006) 4 SCC Page 78



20. The additional substantial questions of law had been formulated only on the account of the fact that the review petitioners had filed an additional document at the time of hearing of the Second appeal and therefore the learned Judge was constrained to formulate the additional substantial questions of law and which had been done in the presence and with the consent of both the parties. The 2nd argument has been dealt with in detail by the learned Judge after framing the Additional substantial questions of law. Therefore, I do not find any merits to review the order in S.A.No.387 of 2004.

21. In the result, this Review Application stands dismissed. No costs. Consequently, Connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1.The Additional District Judge,
Fast Track Court No.1,
Tindivanam.

2.The Principal Subordinate Judge,
Tindivanam

Copy to:
The Section Officer,
VR Section,
High Court, Madras-104

+1cc to Mr.K.Shahul Hameed , Advocate, S.R.No.64402

+1cc to Mr.D.Ravichander, Advocate, S.R.No.64052

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SV(CO)
GSP(09/10/2018)