

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**927 REVIEW APPLICATION (CIVIL) NO.170 OF 2015
IN SA/645/2014**

**VIMALBAI DATTOPANT KALE AND OTHERS
VERSUS
SUSHILABAI WAMANRAO TEKALE**

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Mr. N.P. Patil Jamalpurkar, Advocate for the applicants

Mr. A.S. Kale, Advocate i/b Talekar and Associates for the sole respondent

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CORAM : SMT. VIBHA KANKANWADI,J.

DATE : 14th FEBRUARY, 2019

ORAL ORDER :

1 Present review application has been filed by the appellants in Second Appeal No.645 of 2014.

2 The present applicants-original appellants were the defendants before the Trial Court. Present respondent was the original plaintiff, who had filed Regular Civil Suit No.364/2000 for partition and separate possession before learned 3rd Joint Civil Judge Junior Division, Omerga, which came to be decreed on 21.04.2007. The present review petitioners approached learned Additional District Judge at Omerga in Regular Civil Appeal No.21/2009 and the said appeal came to be dismissed on

02.05.2014. Challenging both Judgments and Decrees, the present review petitioners approached this Court in Second Appeal No.645/2014. It appears that on the day of admission, the learned Advocate for the appellants was heard and on 27.11.2014 this Court dismissed the Second Appeal, holding that the appeal is not raising any substantial question of law. Now, by present review application the review petitioners contend that the said order be set aside and the Second Appeal be heard on its merits and allowed.

3 The present review petitioners have given grounds, on which they have filed the review application and in order to support the same, the learned Advocate for the review petitioners submitted that the original plaintiff had contended that her father Gopalrao expired after 1956. She had brother by name Dattopant, who expired 7 to 8 years prior to institution of the suit in 2000. The present petitioners are the legal representatives of said Dattopant. Learned Advocate for the petitioners submitted that no evidence was led to show that Gopalrao died in 1960 i.e. precisely after the implementation of Hindu Succession Act, 1956. In fact, the present petitioners had raised a defence that he had expired prior to 1956. Original plaintiff as well as defendant No.1 had led oral evidence and even both the Courts have come to the

conclusion that no concrete evidence is adduced regarding date of death of Gopalrao. When there was no such evidence to show that Gopalrao expired after 1956 it will have to be taken that he had expired after 1956 and in that case the question before the Courts was – Whether plaintiff could have got any share in the suit property ? He also submitted that even if, for the sake of argument, it is taken that Gopalrao expired after 1956, then whether plaintiff being the married daughter could have filed suit for partition against either the brother or his legal representatives. Therefore, that was the substantial question of law, because she was married prior to the commencement of Hindu Succession (Amendment) Act, 1994 as regards Maharashtra is concerned. He also submitted that the apportionment of share was not done by both the Courts below, taking into consideration the decisions in Smt. Raj Rani vs. The Chief Settlement Commissioner, Delhi and others, AIR 1984 SC 1234 and Radhabai Balasaheb Shirke, since deceased, through her L.Rs. vs. Keshav Ramchandra Jadhav, 2007 (5) Bom. C.R., 324. He also submitted that the appellants have not questioned that the order passed by this Court as erroneous, but then all these aspects were not considered by this Court and therefore, the review is maintainable.

respondent submitted that the contents of the application would show that it is in the nature of appeal memo, even the additional grounds, that is the substantial questions of law were supplied, that means, the petitioners intend to argue the Second Appeal afresh. They have not shown any error apparent on the face of the record to exercise the power of this Court under Order 47 Rule 1 of the Code of Civil Procedure, 1908. He relied on the decision in **Parsion Devi and others vs. Sumitri Devi and others, (1997) 8 Supreme Court Cases, 715**, wherein it has been held -

“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 47, Rule 1 CPC. In exercise of the jurisdiction under Order 47, Rule 1 CPC it is not permissible for an erroneous decision to be “reheard and corrected”. There is a clear distinction between an *erroneous decision* and an *error apparent on the face of the record*. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be “an appeal in disguise”.

He also relied on the decision in **Kamlesh Verma vs.**

Mayawati and others, (2013) 8 Supreme Court Cases, 320, wherein

principles relating to review jurisdiction were summarized -

20 Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute :

20.1 When the review will be maintainable :

(i) Discovery of new and important matter of evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words “any other sufficient reason” have been interpreted in *Chhajju Ram v. Neki* and approved by this Court in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius* to mean “a reason sufficient on grounds at least analogous to those specified in the rule”. The same principles have been reiterated in *Union of India v. Sandur Manganese & Iron Ores Ltd.*

20.2 When the review will not be maintainable :

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error,

manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

On the basis of these pronouncements he submitted that the review is not maintainable.

5 The first and the foremost fact, that is required to be considered that if the review is not maintainable then only we can go through the facts of the case. Perusal of the order passed by this Court on 27.11.2014 would show that only two grounds were canvassed or argued, though the appeal memo contained several grounds. The first point, that was canvassed was in respect of self acquired properties by Dattopant, taking into consideration the sale deeds and second point that

was canvassed on the point of limitation. Except these two points no other point was argued before this Court. Therefore, on these two points, which were argued, this Court had given decision. Another fact that is also required to be considered is that, at that time the appellants had engaged another Advocate. Now, change of Advocate will not give appellants a right to get order reviewed. They will have to show that there is error apparent on the face of the record i.e. the order. In view of Parsion Devi & ors. vs. Sumitri Devi & ors., (1997) 8 SCC, 715, the distinction has to be drawn between erroneous decision and an error apparent on the face of the record. Now, as regards the points, which were not at all canvassed before this Court when there is no decision, then it cannot amount to error on the face of the record. Even if for the sake of argument, if it is taken that those grounds were made in the appeal memo of the Second Appeal, so also those points, on which the appellants want review, were canvassed by them before the Courts below, ought to have been considered, but they have not been considered, then it would fall in the first category i.e. erroneous decision (for the sake of argument if this situation is accepted). Under such circumstance, as per the aforesaid decision, such decision can be corrected only by the Higher Court and not by the same Court sitting as Appellate Court of itself. As regards the citations, on which the learned Advocate for the petitioners

want to rely, ratio cannot be denied, but if the said ratio was not applied by this Court, then again on this point also it can be said, for the sake of argument it would fall under erroneous decision category. In view of decision in Kamlesh Verma vs. Mayawati & ors., (2013) 8 SSCC 320, a review is not maintainable, when the review proceedings cannot be equated with the herein original proceeding of the case. The review is also not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. It is not maintainable when the review is by no means an appeal in disguise, whereby an erroneous decision is reheard and corrected but lies only for patent error. Therefore, taking into consideration these facts and basically when the argument was not advanced on the other possible points, it cannot be stated that there is an error apparent on the face of the record of this Court. At the most, if at all any remedy is there for the petitioners it would be with the Higher Court. Hence, no case is made out to exercise the powers of this Court under Order 41 Rule 1 of the Code of Civil Procedure. Hence, the review application is hereby dismissed.

6 At this stage, the learned Advocate appearing for the review petitioners prays for directing the respondent not to alienate the property.

Both the learned Advocates make statement that the delay has been executed and respondent has got possession. Perusal of the record would show that on 02.05.2017 this Court had directed that the execution proceeding would proceed, however, possession should not be delivered. Thereafter, it appears that on 26.06.2018 it was informed by the parties that in the meantime, the respondent has taken possession of the property and thereafter a statement was made by the learned counsel appearing for the respondent, on instructions that respondent is not intending to create any third party interest over the suit property. Thereafter, the said order was not got extended on 11.07.2018 and 14.08.2018, however, on 11.10.2018 the interim relief, if any, was operating was directed to continue till next date. Thereafter, again it appears that it was not continued on one occasion, but then again it was continued on 04.01.2019. Now, it is only the question of not to create any third party interest. Under such circumstance, no prejudice will be caused to the respondent, if she is directed to not to create third party interest, for a period of four weeks. Hence, accordingly directions are given and the review petition is disposed of.

(Smt. Vibha Kankanwadi, J.)