

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

**REVIEW APPLICATION (CIVIL) NO.74 OF 2019
IN FA/2577/2013
WITH
REVIEW APPLICATION (CIVIL) NO.75 OF 2019
IN CA/12817/2018 IN FA/2577/2013**

Seth Kasturmal Dalsukh Dharamshala,
Through its Trustees

... Versus ...

Smt. Shantidevi w/o Laxminarayan Agrawal and others

...

Mr. S.P. Brahme, Advocate h/f Mr. Mr. S.P. Shah, Advocate for the applicant

Mr. V.J. Dixit, Senior Advocate h/f Mr. M.V. Bhamre, Advocate for the
respondent Nos.1 to 5

Mr. A.M. Phule, AGP for the respondent Nos.6 to 8

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 27th AUGUST, 2019

ORDER :

1 Both these review applications have been filed by original respondents in First Appeal No.2577 of 2013. In Review Application No.74 of 2019 they want to review all the first appeal, which was decided by this Court on 03.12.2018 by Hon'ble Shri. Justice Sunil K. Kotwal, to be reviewed and in Review Application No.75 of 2019 they want to review all the Civil

Application No.12817 of 2018 in First Appeal No.2577 of 2013 decided by the same Bench on the same day, be reviewed. The said Bench is no longer available and therefore, it has to be decided by this Bench.

2 The First Appeal was arising out of the Judgment and Decree passed in R.C.S. No.2/2004 instituted by Trust for recovery of possession on the basis of title. The Trust was created by one late Kasturmal Agrawal under his Will dated 13.07.1936. On the basis of said registered Will, the suit property, which was the Trust property, of which the possession was sought, it is stated that the Trust has lost the possession of the suit property from the defendants i.e. present applicants. Learned Trial Court had decreed the suit and therefore, original defendants had challenged the said decree in the First Appeal. By Judgment and Decree dated 03.12.2018, this Court allowed the First Appeal and it is stated that it was primarily on the ground that the plaintiff-Trust has failed to prove the Will.

3 It has been contended in the Review Application No.74 of 2019 that the Will was registered in the year 1956 and on the basis of the said Will the public Trust was created. The son of the testator acted as Trustee and the scheme for administration of the Trust was framed by application No.4/1998 under Section 50-A of the Bombay Public Trust Act. It is stated, that there

was no suspicious circumstance in respect of the Will and therefore while arriving at the said conclusion, this Court lost the sight of factual matrix. It has been held by this Court, that the attesting witness was not examined and there is no proper proof of due attestation. Alternatively the contents of the Will were also taken into consideration, but then it is stated that the intention of the testator is held to be not to create Trust, which was against tenor and wordings in the Will it has been wrongly held, that the intention of the testator was to create a Trust only for the purpose of the carrying out construction of Dharmshala and not even for administration of the Dharmshala. Another factor was wrongly taken by this Court while considering the First Appeal, that additional circumstance was plaintiffs Will was executed prior to the date of Kabulayat, under which the land was allotted to the testator. It was wrongly held that decision in Inquiry No.151/1997 holding that the suit property is the property of the Trust is inconsequential. It has been submitted that the learned Court while deciding the First Appeal failed to consider that the Will was executed by Kasturmali on 13.07.1936, wherein comprehensively the Will made a provision for several properties and disbursed all in phase wise. When the document had no interpolation and it was not viewed with suspicious circumstance, it ought not to have been held that the Will is not proved. The said Will was

registered on 19.10.1936 by late Kasturmal himself. In 1956 an application was made by the son of the testator for registration of the Trust. It was on the basis of Will itself. Registration of Trust was allotted by the learned Assistant Charity Commissioner on 30.05.1956. The learned First Appellate Court i.e. this Court failed to consider that the document of Will was executed in the year 1936, therefore, the attesting witnesses could not have been examined, for the simple reason, that they would have been no more. That fact was brought on record and in that circumstance, the attesting witnesses were not examined. No advantage could have been given to the original defendants. The provisions of Registration Act were also not considered, wherein, as per Section 60(1) and (2) of the Indian Evidence Act would provide for certificate of registration to be made admissible. Certificate of registration was, in fact, issued. The effect of the endorsement made into Indian Registration Act had its own effects. Late Kasturmal himself had presented the said Will before the registering authority. He showed his identity and then the registering officer had also identified Kasturmal and then after admitting the execution of the Will by Kasturmal, the same has been registered. Witness Tejmal Marwadi can be said to be one of the attesting witnesses, who had appeared before the Registrar and then identified Kasturmal. When Sub Registrar himself becomes an attesting

witness, as the testator had acknowledged the execution of the Will, further doubts ought not to have been raised by this Court. The question, as to whether the Will is proved or not, would have required re-appreciation of the evidence. In fact, an entirely new case has been made out in the Judgment pronounced by this Court. In fact, in Inquiry No.151/1997 the suit property has been registered as Trust property by the competent authority, therefore, the said fact ought not to have been gone into by this Court.

4 Review Application No.75 of 2019, as aforesaid, is in respect of rejection of an order by this Court, by which the review applicants intended to produce certain documents. By this application the applicants intended to produce proof regarding registration of the applicant-Trust. Further, a Judgment by 3rd Joint Ad-hoc District Judge, Dhule was tried to be brought on record.

5 Both the applications have been strongly opposed by the respondent Nos.1 to 5.

6 Heard learned Advocate Mr. S.P. Brahme holding for learned Advocate Mr. S.P. Shah for the review applicants, learned Advocate Mr. V.J. Dixit, Senior Counsel instructed by learned Advocate Mr. M.V. Bhamre for respondent Nos.1 to 5 and learned AGP for respondent Nos.6 to 8.

7 It has been vehemently submitted on behalf of applicants after giving the entire facts regarding the First Appeal, that in the First Appeal, two points were decided in favour of the appellants i.e. present applicants and they were in respect of – the suit was not barred under Order II Rule 2 of the Code of Civil Procedure, 1908, the suit was within limitation, however, it was held that the suit property is not the Trust property of the plaintiff and therefore, they are not entitled to get any declaration and possession, as prayed. The point regarding the title was considered and it was held that the Will is not proved, as the attesting witnesses were not examined. In fact, when the Will was registered instrument, it ought not to have been considered again by the First Appellate Court. Documents were produced on record to show that the suit property was the Trust property, as it was held by the competent authorities under the Maharashtra Public Trust Act. Inquiry regarding the declaration of the Trust was dismissed and appeal was also dismissed. However, when the matter was taken up before the District Court, the matter was pronounced and after remand, the learned Assistant Charity Commissioner held, that the suit property is a Trust property. Thereafter, the matter was further taken to learned Joint Charity Commissioner as well as before the District Court. However, the said decision is confirmed. Under such circumstance, when it had achieved the finality before the competent

authority, the said point ought not to have been gone into in the First Appeal. By way of Application No.12817 of 2017 under Order 41 Rule 27 of Code of Civil Procedure, appellant intended to produce additional evidence, in the form of certified copy of Judgment passed in Civil Miscellaneous Application No.26/2002 dated 25.04.2005 and the certified copy of the application and order dated 30.05.1956, whereby the Trust was registered. While disposing of that application it was observed, that the Court is satisfied with the production of the order regarding registration of the Trust is not necessary for pronouncing the Judgment in the appeal, because in the Civil Suit the registration of the Trust was not in dispute. When the registration of the Trust is stated to be not in dispute, but the suit property is stated to be not a trust property. The production ought to have been allowed, which could have assisted this Court in arriving at a proper conclusion. Therefore, the Judgment and Decree, that has been passed, is wrong and on the face of the record there is error, which needs to be corrected by allowing the review.

8 Reliance has been placed on the decision in **K.M. Varghese and others vs. K.M. Oommen and others, AIR 1994 Kerala 85**, wherein it has been held -

“In considering the evidence of the attesting witness for the purpose of proving the Will, the Court has to take into account all the

circumstances and must not be persuaded by the vague statements of the witnesses to hold that the Will has not been proved properly. Where the evidence of the attesting witnesses is vague, indefinite, doubtful or even conflicting upon material points, the Court is entitled to consider all the circumstances of the case and judge collectively therefrom, whether the requirements of the statute have been complied with, it is possible for the Court on an examination of the entire circumstances and evidence to come to a conclusion that the re-collection of the witnesses is at fault or that their evidence is suspicious or that they are wilfully misleading the court and therefore, the Court is obliged to pronounce in favour of the Will, disregarding the testimony of the witnesses.”

Further reliance has been placed on the decision in **Shivdas Loknathsing and others vs. Gayabai Shankar Surwase, 1993(2) Mh.L.J. 1623**, wherein it has been held that *there is a presumption of the entry made under Section 58(1)(c) of the Registration Act because of the provisions of Section 60(2) of the Indian Registration Act. It is for the party who wants to allege contrary to prove his contention.*

Further reliance has been placed on the decision in **Geetabai Ramchandra Pawar vs. Rambhau Maruti Pawar and others, 2015 (2) Mh.L.J. 516**, wherein it has been observed -

“The document of Will at Exh.129 shows that the testator put his thumb impression before the Sub Registrar when the document came

to be registered. There is endorsement of the Sub Registrar to the effect that the testator admitted that he was executing the Will. Under sections 59 and 60 of the Registration Act, 1908 such endorsement is admissible in evidence as admission of the person who executes the document. Thus the registration itself also raises presumption about the makers testamentary capacity. In view of this circumstance it can be said that the testator has fulfilled the legal requirements in relation to section 59 of the Succession Act. Thus, the burden was heavy on the plaintiff in this case to prove her ground.”

Further reliance has been placed on the decision in **Bandopant Sitaram Bapat and others vs. Sankar Sitaram Bapat and others, 1996(1) Mh.L.J. 815**, wherein *the Will was registered the Sub Registrar and the testator herself had gone to the Sub Registrar's office for the purpose of presenting the Will and the Will had the endorsement to that effect. Then the plaintiffs claiming under the Will entitled to presumption as regards the proper execution thereof as warranted by Section 58 read with Section 60 of the Indian Registration Act.*

Further reliance has been placed on the decision in **Ved Mitra Verma vs. Dharam Deo Verma, (2014) 15 SCC 578**, wherein it has been held that *the attesting witnesses having died, however, Sub Registrar who had registered the Will was examined, who had stated about the attesting witnesses*

signing as well as testator signing those documents then it ought to have been held that the Will is proved.

Further reliance has been placed on the decision in **Kamlesh Verma vs. Mayawati and others, 2013 (8) SCC 320**, wherein the principles governing the maintainability of the appeal have been stated, thus ;

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

(A) When the review will be maintainable :-

(i) Discovery of new and important matter or 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” has been interpreted in Chhajju Ram vs. Neki, AIR 1922 PC 112 and aproved by this Court in Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulouse Athanasius & Ors., (1995) 1 SCR 520, 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 vs. Sandur Manganese & Iron Ores Ltd. & Ors., JT 2013 (8) SC 275.

(B) When the review will not be maintainable :-

(i) A repetition of old an 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 negated.

Further reliance has been placed on the decision in **R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami and V.P. Temple, 2003 (8) SCC 752**, wherein it has been held, that the objections as to the admissibility of the documents in evidence which can be classified in two

classes - (i) an objection in the document which is sought to be proved is itself inadmissible in evidence and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient, then in such case the objection has to be raised immediately. In the first case, merely because a document has been marked as an exhibit, an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any subsequent stage. It was submitted that the present case falls in the second category and therefore all those facts challenging the registered Will ought not to have been gone into by this Court. On all the above said points the learned Advocate for the review applicants prayed for allowing the review.

9 Per contra, the learned senior counsel Mr. V.J. Dixit arguing for respondent Nos.1 to 5 submitted that the review application itself is not maintainable. In view of the fact that all the points, which have been raised by the review applicants, were already argued and they have been considered

by this Court in its Judgment. The scope of the review powers being limited one and can be said to be confined to error apparent on the face of the record, it cannot be extended to alleged decision based on erroneous legal position. He relied on the ratio laid down in Meera Bhanja (Smt) vs. Nirmala Kumari Choudhary (Smt), (1995) 1 Supreme Court Cases 170, wherein it has been held -

“The 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. The review petition has to be entertained only on the ground of error apparent on the face of the record and not on any other ground. An error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. The limitation of powers of court under Order 47 Rule 1, CPC is similar to the jurisdiction available to the High Court while seeking review of the orders under Article 226.”

Further reliance has been placed on the observations in Lily Thomas and others vs. Union of India and others, (2000) 6 Supreme Court Cases 224, wherein it has been held that *the power of review can be exercised for correction of mistake but not to substitute a view. Such powers can be exercised within a 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.

Further reliance has been placed on the decision of Division Bench of this Court in **Rajkumar Ramavtar Chourasia vs. Mathew Charian Christian, 1984 Mh.L.J. 898**, wherein it has been held that -

“It could not be said that there was a mistake apparent on the face of the record. At best it was a mistake of erroneous application of the law as laid down by the Division Bench on the basis of which the judgment in the second appeal was rendered. Merely because the view taken in second appeal came to be overruled subsequently it could not be said that there was any error that was apparent on the face of the record. To hold it otherwise would be to overlook the jurisdiction between an appellate jurisdiction and jurisdiction to review.”

10 The perusal of the impugned judgment and order would very much clear a picture that all the points, which were raised by the present review petitioners as appellants and applicants were considered by this Court, even though the initial finding that the Will is not proved as attesting witness is not examined was taken by this Court, yet, alternatively the contents of the Will have also been discussed with specific mention that if it is held that the Will is said to have been proved, then whether the suit property can be said to be Trust property. Thus, it is to be noted that all those authorities, on which the applicants are relying on the point of proof of Will,

in fact, could have been shown to this Court, at the time when the arguments were advanced and all those points as well as facts to state that the suit property is a Trust property, were available to the review applicants and they were placed before the Court. The decision has been rendered on merits. Under such circumstance, if at all the review applicants are dissatisfied, they have the remedy open to them. Under such circumstance, as laid down in **Lily Thomas** (supra), a review cannot be treated like an appeal in disguise. Further, the ratio laid down in **Rajkumar Chourasia** (supra) is very much apt in this case. The observations are, "A decision being erroneous in law is no ground for ordering a review. If a Court has decided the point, but decided it erroneously, the error cannot be said to be one apparent on the face of the record or even analogous to it." In such case, review cannot be said to be maintainable.

11 The scope of the review petition is required to be considered. In **Vinay Sharma & another Vs. State (NCT of Delhi) & others [(2018) 8 SCC 186]**, it has been observed that "*Power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. A repetition of old and overruled argument is not enough to reopen concluded adjudications.*" Here, in this case, the points which have been raised by the review petitioners can be termed as repetition

of old and overruled arguments.

Further, in Haryana State Industrial Development Corporation Limited Vs. Mawasi & others [(2012) 7 SCC 200], it has been held that "*Roving inquiry or de novo hearing in guise of review is impermissible.*"

Reliance was placed in this decision, in the case of Thungabhadra Industries Ltd. Vs. Govt. of A.P [AIR 1964 SC 1372] (Three Judges Bench), wherein it has been observed thus :-

"11. ... A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions, entertained about it, a clear case of error apparent on the face of the record would be made out."

Further note was taken in respect of the decision in Parsion Devi Vs. Sumitri Devi [(1997) 8 SCC 715], wherein it has been observed thus :-

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

The same ratio is reiterated in **Vikram Singh alias Vicky Walia & another Vs. State of Punjab & another [(2017) 8 SCC 518]**, wherein it has been held that "*Review cannot be made on those grounds which were already urged during appeal.*" In this case, the term "*an error apparent on the face of the record*" has been explained with the help of earlier pronouncement of the Hon'ble Apex Court in *Kamlesh Verma Vs. Mayawati [(2013) 8 SCC 320]*, wherein it was held that "*an error which is not self-evident and has to be detected by a process of reasoning is not an error apparent on the face of the record.*" The ratio laid down in *State of West Bengal & others Vs. Kamal Sengupta & another [(2008) 8 SCC 612]* can be taken wherein it has been observed thus :-

"21. At this stage, it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review *ex debito justitiae*. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier.

22. The term "mistake or error apparent" by its very connotation signifies an error which is evident *per se* from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning,

it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."

12 Thus, taking into consideration the above said legal position, it can be said that the points which have been raised by the review petitioners are not within the ambit of the powers of review which can be exercised under Section 114 read with Order XLVII of the Code of Civil Procedure, 1908.

13 As regards the review of the application under Order 41 Rule 27 of CPC is concerned, this Court has specifically stated that one of the documents which applicants intended to file on record i.e. judgment passed by Ad-hoc District Judge, Dhule was already on record and therefore, permission cannot be granted to produce the same document as additional evidence. The other document which was sought to be produced was the certified copy of the application and order dated 30.05.1956, when that document was available with the applicants, even before the institution of the suit and it was not produced during the entire trial for the reasons best known to the applicants. As it is observed by this Court, that the fact of the

registration of the Trust was not in dispute, but what was in dispute was, whether the suit property is a Trust property or not, then in that case, the document, which has no concerned with the dispute, cannot be allowed to be produced under an application under Order 41 Rule 27 of CPC.

14 There is absolutely no merit in the present review applications. Hence, the review applications are dismissed.

(Smt. Vibha Kankanwadi, J.)

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