

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
REVIEW PETITION [STAMP] NO.2535 OF 2017
IN
CIVIL REVISION APPLICATION NO.782 OF 2014
WITH
CIVIL APPLICATION NO.789 OF 2016

Sarojini Shetti	]	Petitioner
Vs.		
Sudha wd/o Mohan S. Vernekar	]	
and others.	]	Respondents

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Mr. R.A. Thorat, Senior Advocate i/b Jaydeep J. Thakkar i/b M/s. Mulla & Mulla & Craigie Blunt & Caroe,, Advocate for the Petitioner.
Mr. Pramod Patil i/b Rahul Mestry, Advocate for Respondents No.2(a) to 2(d).

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CORAM : R.G. KETKAR, J.

DATE : 20th AUGUST, 2019.

P.C.

Heard Mr. Thorat, learned Senior Counsel for the petitioner and for the opponent in C.A No.789 of 2016 and Mr. Patil, learned Counsel for the petitioner and for the applicant in C.A No.789 of 2016, at length.

2. By this Petition under section 114 r/w Order-LXVII, Rule-1 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the petitioner, hereinafter referred to as 'defendant No.1' has sought review of the

judgment and order dated 19th July, 2016 passed by this Court in Civil Revision Application No.782 of 2014. By that order, the Civil Revision Application preferred by the original defendants was dismissed.

3. C.A No.789 of 2016 is taken out by the applicants seeking permission to withdraw the rent deposited by the defendants in this Court as per the order dated 19th July, 2016.

4. The original defendants had instituted Review Petition No.8 of 2016 in this Court seeking review of the order dated 19th July, 2016. By order dated 29th August, 2016, Review Petition was dismissed. Aggrieved by the order dated 19th July, 2016 in C.R.A No.789 of 2016 and order dated 29th August, 2016 in Review Petition No.8 of 2016, the defendants preferred Special Leave petition before the Apex Court. By order dated 19th September, 2016, the Apex Court dismissed the S.L.P. The Apex Court granted time till end of January, 2017 for vacating and handing over possession of the suit premises to the respondents/plaintiffs subject to filing usual undertaking within 4 weeks. After dismissal of the S.L.P, defendant No.1 instituted the present Review Petition on or about 25th January, 2017. It appears that defendants took out Interim Application No.3-5 of 2017 before the Apex Court for extension of time to vacate the suit premises. The defendants prayed that time to vacate the suit premises may be extended till such time, the review petition is disposed of by this Court as also relieving them from the undertaking dated 6th October, 2016 being Annexure -A-2 annexed to I.A-3-5 of 2017. By order dated 31st January, 2017, I.A. No.3-5 of 2017 seeking extension of time were dismissed.

5. In support of this Petition, Mr. Thorat submitted that defendant No.1 has sought review of the order dated 19th July, 2016. Defendant No.1 has not sought review of the order dated 29th August, 2016 passed by this Court in Review Petition No.8 of 2016. He submitted that Order-XLVII, Rule-9 of the C.P.C lays down that no application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained. In the present case, defendant No.1 has not sought review of the order dated 29th August, 2016 passed in Review Petition. Defendant No.1 has sought review of the original order dated 19th July, 2016 passed in Civil Revision Application. He, therefore, submitted that bar under Order-XLVII, Rule-9 will not be attracted.

6. In support of this proposition, Mr. Thorat relied on the following decisions;

- [1] **Gobinda Ram Mondal Vs. Bholahath, Volume XV, the Indian Law Reports [Calcutta] 432**, where Calcutta High had considered section 378 of the Code of Civil Procedure 1859 and section 629 of the Code of Civil Procedure 1882. In this decision, the Calcutta High Court held that having regard to the words employed in section 378 and 629, “no application to review an passed on review or on an application for a review shall be entertained” are wide enough to bar a person in the position of the present defendant from making a second application for a review”. Second application to have the original judgment reviewed upon new materials is maintainable and the said application ought to be entertained on merits.

[2] **Tamil Nadu Arasu Kooturuvuthurai Vs. Srinivasan, 2015 (5) CTC 225** and in particular paragraph 54 thereof, where Division Bench of Madras High Court has held that express language of Order-XLVII, Rule-9 bars an application for a review of an order passed on a Review but it does not bar a second application for review of the original order.

He also relied on commentary of learned Author Shri C.K. Thakker (Retired Judge of the Apex Court) where the learned Author has observed that where review is sought on a new or fresh ground, second application for review is not barred.

Mr. Thorat, therefore, submitted that the present Review Petition is not barred under Order-XLVII, Rule-9 of the C.P.C.

7. Mr. Thorat has invited my attention to the grounds in the present Review Petition and in particular paragraph 17 onwards. Defendant No.1 has contended that on 19th January, 2010, agreement was entered into by and between Jyotsna Vernekar (as owner of the property) and Mr. Ashok Vernekar, plaintiff No.2 as Confirming party on one hand and Keshav Construction Company (for short 'the said Company') for re-development of the suit property on the other. The said Company agreed to re-develop the property by demolishing the bungalow of the plaintiffs on the said property. As per the said agreement, total amount of Rs.17,60,00,000/- was advanced by the said Company to Vernekar family for the purpose of making payment to the sitting tenants for vacating their respective premises.

8. Mr. Thorat submitted that these developments took place during pendency of the appeal before the Appellate Court. The plaintiffs, however, did not bring these facts before the Appellate Court as also these facts were not disclosed at the time of hearing of C.R.A. Defendant No.1 was not aware of these developments. The said developments have direct bearing on the ground of eviction covered by section 13 (1) (g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act').

9. Mr. Thorat further submitted that though S.L.P preferred by the defendants was dismissed by the Apex Court on 19th September, 2016 challenging the order dated 19th July, 2016 passed by this Court in C.R.A No.782 of 2014 and the order dated 29th August, 2016 in Review Petition No.8 of 2016, the orders impugned in the S.L.P did not merge in the order of the Apex Court. In support of this proposition, he relied on the following decisions;

[1] **Kunhayammed Vs. State of Kerala, AIR 2000 Supreme Court 2587.**

[2] **Khoday Distilleries Ltd (now known as Khoday India Limited) Vs. Mahadeshwara Sahakara Sakkare Karkhane Ltd. Kollegal (under liquidation) represented by the Liquidator, (2019) 4 SCC 376.**

Mr. Thorat, therefore, submitted that the order dated 19th July, 2016 deserves to be recalled.

10. On the other hand, Mr. Patil submitted that the present review Petition is not maintainable. He submitted that the order dated 19th July, 2016 passed in C.R.A has merged in the order dated 19th

September, 2016 passed by the Apex Court. He submitted that before the Apex Court the parties were duly represented and after considering the facts and circumstances of the case, the Apex Court dismissed the S.L.P. Thus, the order passed by the Apex Court is a speaking or reasoned order and, therefore, the order passed by this Court on 19th July, 2016 in C.R.A has merged in the order of the Apex Court and, therefore, the present Review Petition is not maintainable.

11. Mr. Patil further submitted that defendant No.1 has come with the case about acquiring knowledge of certain developments which were not within her knowledge. Defendant No.1 ought to have filed application for review either before the trial Court or the Appellate Court. In other words, in any case, defendant No.1 cannot maintain review petition in this Court. He further submitted that eviction decree has been executed.

12. Mr. Patil has invited my attention to Civil Application No.267 of 2016 filed by the defendants for amending the C.R.A. He invited my attention to Schedule appended to that application. In paragraph 7A, reference was made to Arbitration Petition (L) No.1654 of 2015 (filed on 19.8.2015) between Jyotsna Ashok Vernekar and others Vs. Avishkar Concreal Pvt. Ltd and the said Company. Reference was also made to paragraph 1, sub para (d) of the Award dated 21st May, 2015. He submitted that apart from Arbitration Petition (L) No.1654 of 2015, one more Arbitration Petition bearing Arbitration Petition (L) No.1653 of 2015 was filed by Ashok Mohan Vernekar, Jyotsna Vernekar, Tanmay Ashok Vernekar against Aavishkar Concreal Private Ltd. Arbitration Petition (L) No.1654 of 2015 and Arbitration Petition (L) No.1653 of 2015 were always together on board for hearing.

It is, therefore, inconceivable that defendant No.1 was aware of only proceeding of Arbitration Petition (L) No.1654 of 2015 and was not aware of proceeding of Arbitration Petition (L) No.1653 of 2015. In short, he submitted that at the time of hearing of C.R.A itself, the defendants were fully aware of arbitration proceedings and, therefore, there is no subsequent development or defendant No.1 cannot claim that she acquired knowledge about arbitration proceedings only after disposal of the C.R.A, Review Petition by this Court and S.L.P filed in the Apex Court.

13. Mr. Patil also invited my attention to I.A. No.3-5/2017 filed by the defendants in the Apex Court for extension of time. In paragraphs 4 and 5, the defendants have dealt with execution of development agreement between Vernekar Family on one hand and the said Company on the other. In paragraph 5, the terms agreed between the parties were extensively quoted. By order dated 31st January, 2017, the Apex Court dismissed I.A Applications. Defendant No.1 has raised self same grounds in the present review petition which were also raised in I.A's.

14. Mr. Patil further submitted that the suit was instituted invoking grounds under sections 13 (1) (g) and 13 (1) (l) of the Act. He invited my attention to the findings recorded by the Courts below while dealing with ground under section 13 (1) (l) of the Act. He submitted that the said ground is independent of section 13 (1) (g) of the Act and even if the contentions raised by defendant No.1 that subsequent developments have bearing on the ground under section 13 (1) (g) of the Act, decree passed under section 13 (1) (l) can still be maintained. He, therefore, submitted that no case is made out for reviewing the order dated 19th July, 2016.

15. In so far as Civil Application No.789 of 2016 is concerned, he submitted that the plaintiffs may be permitted to withdraw the amount deposited by the defendants in this Court. Mr. Thorat, on instructions, states that defendant No.1 has no objection for withdrawal of the said amount.

16. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. In order to find out whether present review petition is maintainable or not, it is necessary to deal with following contentions;

- [1] whether the present review petition is barred in view of Order-XLVII, Rule-9 of the C.P.C?
- [2] whether order dated 19th July, 2016 has merged in the order dated 19th September, 2016 passed by the Apex Court?

Order XLVII, Rule-9 of the C.P.C reads thus;

“9. Bar of certain applications._ No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained”.

A perusal of the above provision clearly shows that what bars under Order-XLVII, Rule-9 is the application seeking review of the order made in the review application. A perusal of the prayers made in the present Review Petition leaves no room for doubt that defendant No.1 has sought review of the order dated 19th July, 2016 and not the order dated 29th August, 2016 passed in Review Petition No.8 of 2016.

17. In the case of **Gobinda Ram Mondal** (supra), Division Bench of the Calcutta High Court held that second application to have the original judgment reviewed upon new materials is maintainable and can be entrained. The Division Bench considered section 378 of 1859 C.P.C and section 629 of 1882 C.P.C. In the case of **Tamil Nadu Arasu** (supra), Division Bench of Madras High Court has summed up conclusions in paragraph 54. In paragraph 54 (ii), the Division Bench held that express language of Order-XLVII, Rule-9 of the Code bars only an application for a review of an order passed on a review, but it does not bar a second application for review of the original order. Even the learned Author Shri C.K. Thakkar has observed that where review is sought on a new or fresh ground, second application for review is not barred. In view thereof, I find merit in the submission of Mr. Thorat that present Petition seeking review of the original order dated 19th July, 2016 in C.R.A No.782 of 2014 is not barred under Order-XLVII, Rule-9 of the C.P.C.

18. In so far as other ground namely whether order dated 19th July, 2016 passed in C.R.A and order dated 29th August, 2016 passed in Review Petition No.8 of 2016 have merged in the order dated 19th September, 2016 passed by the Apex Court in S.L.P is concerned, in order to appreciate this submission, it is necessary to reproduce relevant portion of the order passed by the Apex Court which reads thus;

“Heard learned Counsel for the parties.

In the peculiar facts and circumstances of the case, we are not inclined to exercise our jurisdiction under Article 136 of the Constitution of India, the special leave petitions are therefore dismissed”.

A perusal of the above extracted portion clearly shows that while exercising jurisdiction under Article 136 of the Constitution of India, the Apex Court declined to interfere with the order passed by this Court and accordingly dismissed the S.L.P.

19. In the case of **Kunhayammed** (supra), the Apex Court held that under Article 136 of the Constitution of India, the Supreme Court may reverse, modify or affirm the judgment, decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can, therefore, be applied to the former and not to the latter.

20. In the case of **Khoday Distilleries Ltd** (supra), the Apex Court considered decision in **Kunhayammed** (supra)'s case. In paragraph 20, the Apex Court dealt with exercise of jurisdiction under Article 136 and laid down legal position which emerges from the petition seeking a grant of Special Leave to Appeal and the appeal itself though both dealt with under Article 136 and observed thus:

“Exercise of jurisdiction under Article 136 and the manner in which it is dealt with is clarified as under:

“14.The exercise of jurisdiction conferred on this Court by Article 136 of the Constitution consists of two steps: (i) granting special leave to appeal; and (ii) hearing the appeal. This distinction is clearly demonstrated by the provisions of Order 16 of the Supreme Court Rules framed in exercise of the power conferred by Article 145 of the Constitution. Under rule 4, the petition seeking special leave to appeal filed before the Supreme Court

under Article 136 of the Constitution shall be in Form No.28. No separate application for interim relief need be filed, which can be incorporated in the petition itself. If notice is ordered on the special leave petition, the petitioner should take steps to serve the notice on the respondent. The petition shall be accompanied by a certified copy of the judgment or order appealed from and an affidavit in support of the statement of facts contained in the petition. Under Rule 10 the petition for grant of special leave shall be put up for hearing ex parte unless there be a caveat. The court if it thinks fit, may direct issue of notice to the respondent and adjourn the hearing of the petition. Under Rule 13, the respondent to whom a notice in special leave petition is issued or who had filed a caveat, shall be entitled to oppose the grant of leave or interim orders without filing any written objections. He shall also be at liberty to file his objections only by setting out the grounds in opposition to the questions of law or grounds set out in the SLP. On hearing, the Court may refuse the leave and dismiss the petition for seeking special leave to appeal either ex parte or after issuing notice to the opposite party. Under Rule 11, on the grant of special leave, the petition for special leave shall, subject to the payment of additional court fee, if any, be treated as the petition of appeal and it shall be registered and numbered as such. The appeal shall then be set down for hearing in accordance with the procedure laid down thereafter. Thus, a petition seeking grant of special leave to appeal and the appeal itself, though both dealt with by

Article 136 of the Constitution, are two clearly distinct stages. In our opinion, the legal position which emerges is as under:

(1) While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction; it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave;

(2) If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out;

(3) If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in the appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him, though in an appropriate case, in spite of having granted leave to appeal, the Court may dismiss the appeal without noticing the respondent.

(4) In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge”.

21. The Court thereafter analysed number of cases where orders of different nature were passed and dealt with these judgments by classifying them in the following categories:

- (i) Dismissal at the stage of special leave petition – without reasons – no *res judicata*, no merger, *Workmen Vs. Board of Trustees of the Cochin Port Trust*, (1978) 3 SCC 119.
- (ii) Dismissal of the special leave petition by speaking or reasoned order – no merger, but rule of discipline and Article 141 attracted, *Penu Balakrishna Iyer Vs. Ariya M. Ramaswami Iyer*, AIR 1965 SC 195.
- (iii) Leave granted – dismissal without reasons – merger results, *Thungabhadra Industries Ltd Vs. Government of A.P.*, AIR 1964 SC 1371.

21. Applying the tests laid down in the aforesaid decisions to the facts of the present case, I do not find that order passed by this Court on 19th July, 2016 in C.R.A No. 782 of 2014 has merged in the order passed by the Apex Court on 19th September, 2016 while dismissing SLP.

22. In the light of the aforesaid discussion, it is to be held that the Review Petition filed by defendant No.1 is maintainable. The next question is whether defendant No.1 has made out a ground for review of the order. In order to deal with this controversy, it is necessary to deal with Civil Application No.267 of 2016 taken out by the defendants in C.R.A No.782 of 2014 and the schedule appended to that application. In paragraph 7A, the defendants specifically referred to the proceedings of Arbitration Petition (L) No.1654 of 2015 as also made reference to the Award made by the Arbitrator. Thus, at the time of hearing of C.R.A itself, defendants were aware of Arbitration Proceedings between Vernekar Family and the said Company. This aspect was also considered while hearing C.R.A as is evident from paragraphs 3 to 6 of the order. In paragraph 13, it was observed that learned Counsel for the defendants did not challenge the finding recorded by the Courts below on merits of the case. It was fairly stated that the findings were recorded after appreciating the evidence on record. The controversy in C.R.A revolved around construction of section 213 of the Indian Succession Act, 1925.

23. A perusal of I.A. No.3-5 of 2017 and in particular paragraphs 4 and 5 thereof also shows that defendant No.1 was aware of these developments and in the present review petition, self same grounds are raised. I, therefore, find merit in the submission of Mr. Patil

that defendant No.1 was aware of these developments at the time of arguing Civil Revision Application as also at the time of seeking extension of time for vacating the suit premises. Though Civil Application No.267 of 2014 was taken out for amending C.R.A and that application was allowed, none the less, the learned Counsel for the defendants did not attack the findings recorded by the Courts below while decreeing suit under section 13 (1) (g) and 13 (1) (l) of the Act. The contentions which are now raised could have been raised at the time of hearing of C.R.A. Be that as it may, as mentioned earlier, though these grounds were specifically agitated by the defendants, they were not pressed into service.

24. Even if, I accept contention of defendant No.1 that she was not aware of these developments and though the grounds raised in the present Petition have bearing on the ground of section 13 (1) (g) of the Act, as mentioned earlier, the Courts below have decreed the suit not only under section 13 (1) (g) of the Act but also under section 13 (1) (l) of the Act. The learned trial Judge has considered ground under section 13 (1) (l) in paragraphs 6 to 15 of his order and the Appellate Court has discussed this ground from paragraphs 21 to 42.

25. In view thereof, no case is made out for reviewing the order dated 19th July, 2016.

26. In the case of **Kamlesh Verma Vs. Mayawati, AIR 2013 SC 3301**, the Apex Court has considered the scope of review and has observed thus:

“The jurisdiction and scope of review is not that of an appeal and it can be entertained only if there is 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. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The power of review can be exercised for correction of a mistake but not to substitute a view. The mere possibility of two views on the subject is not a ground for review. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1 of C.P.C. ”

Applying the tests laid down by the Apex Court in **Kamlesh Verma** (supra) to the facts of the present case, no case is made out. Hence, Review Petition fails and the same is dismissed. Order accordingly.

27. In so far as C.A. No.789 of 2016 is concerned, the same is allowed in terms of prayer clause (a) with no order as to costs. Order accordingly.

[R.G. KETKAR, J.]