

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
REVIEW PETITION NO.109 OF 2018
IN
WRIT PETITION NO.404 OF 2018

Dr. Naeem Hasan Karnalkar ... Petitioner
Vs.
Vinod Purushottam Jawajiwar (expired)
through legal heirs and others ... Respondents

Mr. K. H. Karnalkar i/b. Mr. Venkatesh A. Shastry for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : JUNE 26, 2019

P.C. :

Heard Mr. Karnalkar, learned Counsel for the petitioner at length.

2. By this Petition under Section 114 read with Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), petitioner has sought review of the order dated 19.04.2018 passed by this Court in Writ Petition No.404 of 2018. By that order, the Writ Petition instituted by the petitioner was dismissed. The Petition was instituted challenging the judgment and order dated 29.09.2016 passed by the learned 6th Additional Judge, Small Causes Court, Pune in Miscellaneous Application No.45 of 2015 as also the judgment and order dated 29.11.2017 passed by the learned Ad-hoc District Judge-1, Pune in Miscellaneous Civil Appeal No.426 of 2016. By these orders, the Courts below rejected the application made by the petitioner / defendant for condonation of delay in filing restoration application for setting aside ex-parte decree. Respondents had instituted Suit against the petitioners / defendants. The Suit was decreed on 20.03.2015. The defendant filed application under Order IX, Rule 13 of C.P.C. for setting aside ex-parte decree. There was a delay of 11 days in filing the application under

Order IX, Rule 13 of C.P.C. Defendant took out Miscellaneous Application No.42 of 2015 for condoning the delay of 11 days. By the orders dated 29.09.2016 and 29.11.2017, the Courts below rejected the application.

3. On behalf of the respondents, objection as regards maintainability of the application under Order IX, Rule 13 was raised. The respondents contended that against the ex-parte decree dated 20.03.2015, defendant instituted substantive appeal under Section 96 of C.P.C. Pending the Appeal, they took out application for condonation of delay, which was dismissed on 29.11.2017. In view of explanation to Order IX, Rule 13 of C.P.C., if the Appeal is dismissed on the ground other than withdrawal of appeal, application under Order IX, Rule 13 is not maintainable. Respondents also relied upon decision of ***Bhanu Kumar Jain Vs. Archana Kumar, (2005) 1 SCC 787***. In view thereof, Petition was dismissed on the ground of maintainability.

4. In support of this Review Petition, Mr. Karnalkar submitted that application under Order IX, Rule 13 was filed prior in point of time of filing the substantive appeal under Section 96 of C.P.C. He submitted that application under Order IX, Rule 13 was dismissed by the learned District Judge on 29.11.2017. On the same day, application for condonation of delay in filing substantive appeal under Section 96 was also dismissed. He, therefore, submitted that application under Order IX, Rule 13 of C.P.C. was maintainable. This Court, however, held that application under Order IX, Rule 13 is not maintainable. He, therefore, submitted that order dated 19.04.2018 deserves to be recalled thereby restoring Writ Petition to its original position.

5. It is not possible to accept this submission. As mentioned earlier, defendant took out application under Order IX, Rule 13 of C.P.C. for setting aside the ex-parte decree. There was a delay of 11 days in filing

the application under Order IX, Rule 13 of C.P.C. Defendant took out Miscellaneous Application No.42 of 2015 for condoning the delay of 11 days. By order dated 29.09.2016, the learned trial Judge dismissed the application. The said order was confirmed by the learned District Judge on 29.11.2017. It is also material to note that the application for condonation of delay in filing the substantive appeal was dismissed by the learned District Judge on 29.11.2017. In view of explanation to Order IX, Rule 13 of C.P.C., application under Order IX, Rule 13 cannot be maintained once the appeal against the ex-parte decree is disposed of on the ground other than the withdrawal of the appeal. In view thereof, no case is made out for reviewing the order dated 19.04.2018.

6. 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. ”

7. Applying the tests laid down by the Apex Court to the facts of the present case, no ground is made out for review of the order dated 19.04.2018. Review Petition fails and the same is dismissed.

(R. G. KETKAR, J.)