

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

**REVIEW APPLICATION (CIVIL) NO.166 OF 2019
IN SA/25/2014**

MUKTA YESU PAGARE

VERSUS

GHAMAJI BHAVAJI PAGARE, DECEASED, THROUGH LRS AND OTHERS

...

Mr. S.V. Suryawanshi and Mr. S.J. Kadam, Advocates for the applicant

Mr. S.B. Kadu, Advocate for respondent Nos.1-A to 1-D, 2, 3-C, 3-F, 3-G and 7

Mr. S.V. Deshmukh, Advocate for respondent Nos.5-A, 5-C, 5-D, 5-F to 5-I

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 03rd AUGUST, 2021

PRONOUNCED ON : 12th OCTOBER, 2021

ORDER :

1 Present applicant is the original appellant in the Second Appeal. He had filed the said Second Appeal to challenge the Judgment and Decree passed in Regular Civil Appeal No.59/2003 by learned District Judge-1, Kopergaon on 21.08.2013, which was arising out the Judgment and Decree passed in Regular Civil Suit No.699/1996 by learned 4th Joint Civil Judge Junior Division, Kopergaon, Dist. Ahmednagar.

2 It will not be out of place to mention here that the said Regular

Civil Suit No.699/1996 was filed by the present applicant for possession and injunction. The suit was partly decreed and the original defendant Nos.1 to 4 were directed to hand over the possession of the property described in plaint para No.2A to the plaintiff. The original defendants challenged the said Judgment and Decree in Regular Civil Appeal No.59/2003 and the said appeal came to be allowed on 21.08.2013, thereby reversing the Judgment and Decree passed by the learned Trial Judge. The suit came to be dismissed in entirety.

3 The Second Appeal No.25 of 2014 was on board on 28.01.2014 for urgent admission. However, this Court dismissed the said appeal and it was held that it is a case of appreciation of evidence. It was also observed by this Court that the learned Appellate Court has made no error in appreciating the evidence and rightly dismissed the suit. It was also observed that no substantial question of law is arising in the Second Appeal and, therefore, the said Second Appeal came to be dismissed on 28.01.2014 (CORAM : A.V. NIRGUDE, J.). The present application has been filed under Section 114 read with Order 47 of the Code of Civil Procedure, 1908 for review.

4 Heard learned Advocate Mr. S.V. Suryawanshi for the applicant and learned Advocate Mr. S.B. Kadu for respondent Nos.1-A to 1-D, 2, 3-C, 3-E, 3-G and 7. Learned Advocate Mr. S.V. Deshmukh for respondent Nos.5-A,

5-C, 5-D, 5-F to 5-I was absent.

5 It has been submitted on behalf of the review applicant that the plaintiff had come with a case that he is the adopted son of one Yesu Mukta Pagare. There was a registered adoption deed executed on 21.07.1951. Yesu Mukta Pagare thereafter had preferred an application on 29.10.1952 to the Revenue Authorities to enter the name of the applicant as his legal heir and the said mutation entry was certified on 20.11.1952. Applicant's name was recorded as owner to the property bearing Sy.No.187/1 and 181/2C situated at village Dhamori, Tq. Kopargaon, Dist. Ahmednagar. The said registered adoption deed was prepared as well as registered prior to 21.12.1956 i.e. prior to coming into force of the Hindu Adoption and Maintenance Act, 1956. That adoption deed was having presumptive value under Section 16 of the said Act and also it was more than 30 years old document and therefore, in view of Section 90 of the Indian Evidence Act, its contents ought to have been considered. Effect of Section 15 of the Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as, "The Act of 1956", for the sake of convenience) was not considered. It is then stated that it was not expected either under old Law or the Act of 1956 that the mother should give or should be the party for giving child in adoption. Section 92 of the Act of 1956 expects only the consent of the mother. There was nothing on record to

show that mother had objected for the adoption of the applicant. Further, in view of Section 91 of the Indian Evidence Act, when the terms of adoption deed were recorded in writing, it was not expected that any evidence should be given about the ceremonies those were conducted at the time of the adoption. The admission given in cross-examination about the status or behaviour of the applicant was not material. The said adoption was saved under Section 30 of the Act of 1956, after the coming into force of the said Act. It was also not considered that the First Appellate Court had not framed proper points for determination; yet reversed the Judgment and Decree passed by the learned Trial Judge. All these aspects were not properly considered by this Court when the Second Appeal was dismissed at the threshold. Therefore, there is error apparent on the face of the record, which needs to be corrected, by restoration of the matter and considering all the points involved in the Second Appeal afresh.

6 Reliance has been placed on the decision in **Board of Control for Cricket, India and another vs. Netaji Cricket Club and others**, AIR 2005 SC 592(1), wherein it has been held -

“Section 114 of the Code empowers a Court to review its order if the conditions precedents laid down therein are satisfied. The substantive provision of law does not prescribe any limitation on the power of the Court except those which are expressly provided in S.

114 of the Code in terms whereof it is empowered to make such order as it thinks fit. Order 47, R.1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason. Thus, a mistake on the part of the Court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words 'sufficient reason' in O.47, R.1 of the Code is wide enough to include a misconception of fact or law by a Court or even an Advocate. An application for review may be necessitated by way of invoking the doctrine '*actus curiae neminem gravabit*'."

6.1 Further reliance has been placed on the decision in **Ranjit Sahu vs. Nilambar Sahu and another, AIR 1978 ORISSA 48**, wherein it has been held that -

"On a general reading of the Act and keeping the spirit of the statute in view a post-Act acknowledgment of a pre-Act adoption would not come within the ambit of S. 16 of the Act so as to attract the presumption thereunder."

6.2 Further reliance has been placed on **Shri Dinkar Kisanrao Warade vs. Gajanan Prasad Sahakari Gruh Taran Sanstha and others, 2014 (3) All.M.R. 690**, wherein it was held that, "*Failure to look into entire*

material on record and not coming in close quarter of findings on facts recorded by the Appellate Court or the then application of mind in the writ jurisdiction by Single Judge, is nothing but an error apparent and, therefore, the review is maintainable.”

7 Per contra, the learned Advocate for the respondents strongly objected to the exercise of power under Section 114 read with Order 47 of the Code of Civil Procedure by this Court for review in respect of given circumstances before the Court. It has been submitted that all the points involved in the case were in fact, properly considered by the First Appellate Court. The scope of the Second Appeal was restricted to the substantial question of law and the reasons given by this Court while arriving at the conclusion that no substantial questions of law are arising, in this case, are sufficient to dispose of the Second Appeal at the threshold. It was not expected that this Court write a long Judgment after re-assessing all the evidence. The power of review cannot be exercised under the guise of appellate powers.

8 Reliance has been placed on **Kamlesh Verma vs. Mayawati and others, 2013 ALL SCR 3411**, wherein it has been held that -

“The power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a

subordinate court. 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 CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.”

In this case Supreme Court went on to state the grounds, in which the review would be maintainable and under which grounds the review will not be maintainable, they are thus -

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.

(b) 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.

8.1 Further reliance has been placed on **Ghisalal vs. Dhapubai (dead) by LRs. and others, 2011 (3) Mh.L.J., 371**, wherein it has been held that - *when the adoption is by a male Hindu and if he has a wife living, then the consent of wife has been made a condition precedent.*

It has been submitted on behalf of the respondents herein that no such evidence was adduced by the applicant that wife of Yesu had given consent to the said adoption and this rule was not only made applicable in the Act of 1956; yet even prior to that such condition in old Hindu Law was in existence. The learned First Appellate Court has dealt with the point, as to the presumption attached to a registered adoption deed and by relying on the decision of the Full Bench of Jammu and Kashmir High Court in **Shamsher**

Singh vs. Deputy Custodian General, AIR 1973 J & K, 89, wherein it was held that - *a presumption under Section 16 of the Act can be raised only when an adoption is made under the Act and cannot be raised with regard to adoption made before the Act came into force.* Therefore, when there was no presumptive value attached to the alleged adoption deed; the plaintiff being the propounder of the deed of adoption was bound to prove the adoption by any other permissible mode. That could be proved by him only by oral evidence and the First Appellate Court considered as to how the oral evidence adduced by the Court is not believable. The dismissal of the Second Appeal at the threshold by this Court on 28.01.2014 was proper, correct and legal. It does not require any review.

9 At the outset, it can be certainly said that there are limitations while exercising power of review. Unless it is shown that there is error apparent on the face of the record, said power cannot be utilized. The principles laid down in **B.C.C.I.** (supra) as well as in **Kamlesh Verma** (supra) are required to be borne in mind.

10 Here, the applicant has come with a case that certain points, which were raised by him, were not considered by this Court at the time of admission. A detailed scrutiny of the entire evidence amounting to re-appreciation of the evidence is expected. Reference to the facts and the

evidence that has come on record would be inevitable while passing any order in respect of admission of the Second Appeal. Unless substantial questions of law are shown by the appellant, this Court cannot admit the Second Appeal under Section 100 of the Code of Civil Procedure. It has been observed in **Kirpa Ram (deceased) through L.Rs. and others vs. Surendra Deo Gaur and others, 2021 (3) Maharashtra Law Journal, 250** that -

“Therefore if the substantial question of law framed by the appellants are found to be arising in the case, only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any substantial question of law. The formulation of substantial question of law or reformulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to frame substantial question of law, in case, it finds no error in the findings recorded by the First Appellate Court.”

11 From the perusal of the order passed by this Court on 28.01.2014, it can be seen that there is no reference to the adoption deed, however, it has been certainly said that the learned Judge of the First Appellate Court has made no error in appreciating the evidence. The oral evidence in respect of adoption was considered by this Court. In connection with this point the plaintiff had come with a case that there is registered adoption deed executed on 21.07.1951. That document appears to have

been produced before the Trial Court. Surprisingly the applicant himself has given the copy of decision in **Ranjit Sahu** (supra) of the Orissa High Court, in which the Full Bench decision in **AIR 1973 J & K 89** was considered and relied. Interpretation of Section 16 of the Hindu Adoption and Maintenance Act was considered and the Full Bench of the Jammu and Kashmir High Court held that the said presumption under Section 16 of the Act of 1956 will not be applicable to the adoption deed executed prior to the coming into force of the Act of 1956. It is to be noted that the First Appellate Court had considered the said document Exh.49 as well as the effect of Section 16 of the Act of 1956. After perusing Exh.49, it has been observed that the said document has been executed by Yesu Mukta Pagare in favour of the present applicant i.e. adopted son. It is to be noted that at the relevant time present applicant was only seven years old boy. He cannot be said to be a competent person to enter into any agreement or executing document. Section 16 of the Act of 1956 raises presumption in favour of a document registered under any law for the time being in force. Purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption. Thus, it does not contemplate signature of a child and, therefore, it was observed that, that document cannot be said to be a document regarding adoption. Therefore, taking into consideration both these aspects, the First Appellate Court had come to the conclusion that the adoption was not proved

by way of said document.

12 The applicant had the option of proving the adoption, which was prior to coming into force the Act of 1956; to prove it by oral evidence. Note of the oral evidence has been taken by this Court and the observations are made in that respect, which need not be repeated here. The conduct of the applicant after adoption has also been considered by this Court. After taking into consideration all these aspects, this Court had come to the conclusion that the assessment of the entire case, evidence and the law points involved by the First Appellate Court is correct and there is no error in appreciating the evidence and the act of dismissing the suit by allowing the appeal. Further conclusion has been drawn by this Court that no substantial question of law is arising in this case and, therefore, the appeal was dismissed. Therefore, taking into consideration all these points involved and the aforesaid ratio in respect of scope of Section 114 read with Order 47 Rule 1 of CPC, it can be concluded that there is no error on the face of the record, requiring re-assessment and review of the order passed by this Court on 28.01.2014. Application, therefore, stands dismissed.

(Smt. Vibha Kankanwadi, J.)