

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

REVIEW APPLICATION NO.147 OF 2020

IN

SECOND APPEAL NO.171 OF 2019

SHIVANAND KALYANAPPA SOLSHE

VERSUS

PRASHANT SHIVAJI SURVASE AND OTHERS

...

Mr. S.G. Chincholkar, Advocate for the applicant

Mr. P.K. Deshmukh, Advocate for respondent No.1 to 5

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 16th FEBRUARY, 2021

PRONOUNCED ON : 08th JUNE, 2021.

ORDER :

1 Present review has been filed by the original appellant under Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 for the review of Judgment and order passed by this Court in Second Appeal No.171 of 2019 on 13.03.2019, whereby the Second Appeal was dismissed in *limine*, at the stage of admission itself, holding that no substantial question of law has been raised. It will not be out of place to mention here that the

present applicant had approached Hon'ble Apex Court by filing Special Leave to Appeal (C) No.12966 of 2019 and the liberty was granted to the applicant/appellant by order dated 02.08.2019 by Hon'ble Apex Court to file review.

2 Heard learned Advocate Mr. S.G. Chincholkar for the applicant and learned Advocate Mr. P.K. Deshmukh for respondent Nos.1 to 5.

3 It has been vehemently submitted on behalf of the review applicant that the applicant/appellant is the original defendant No.2, who had filed the Second Appeal challenging the Judgment and order passed by learned Principal District Judge, Osmanabad in Miscellaneous Civil Application No.15/2017, which was preferred for condonation of delay in filing First Appeal; as there was delay of 03 years 07 months and 21 days in filing Regular Civil Suit. By the said Miscellaneous Civil Application and thereby filing First Appeal the present applicant intended to challenge the ex-parte Judgment and Decree passed in Special Civil Suit No.136/2011 by learned 5th Joint Civil Judge Senior Division, Osmanabad on 05.06.2013, whereby the suit for partition, separate possession and cancellation of the sale deed holding that the said sale deed is not binding on the share of the plaintiffs came to be decreed and the sale deed in favour of present

applicant/appellant dated 13.10.2011 executed by original defendant No.1 was held to be not binding on the original plaintiffs-present respondent Nos.1 to 4. The said application for condonation of delay before the First Appellate Court came to be rejected on 21.06.2018. The appellant had purchased agricultural land to the extent of 06 H 40 R situated from village Murta, Tq. Tuljapur, Dist. Osmanabad for a consideration of Rs.9,30,000/-. He had issued public notice in the newspaper. He had taken all the precautions while purchasing the suit property from original defendant No.1. In the suit, when the present applicant was made as defendant No.2 he appeared in the matter after the notice was served on him, however, he had not engaged any Advocate, since he was under the impression and a representation was made by the original defendant No.1 that he will solve the family matter and there will not be a problem for the present applicant. He did not participate in the litigation, but defendant No.1 did not keep his promise. The matter was decided ex parte against the present applicant. Applicant had absolutely no knowledge about the decision in the matter. He came to know it for the first time on 17.01.2017 and thereafter he had applied for the certified copies and approached the First Appellate Court within 15 days from the date of the knowledge. However, there was delay of 03 years 07 months and 21 days. The learned Principal District Judge, Osmanabad rejected the application and, therefore, by way of Second Appeal the applicant had approached this

Court, however, by order dated 13.03.2019 this Court had also disposed of the Second Appeal holding that no substantial question of law, as contemplated under Section 100 of the Code of Civil Procedure, have been raised. In fact, there is error apparent on the face of the record by this Court. This Court ought to have taken liberal approach while deciding the said Second Appeal. Now, the Hon'ble Apex Court has given liberty to file review application and accordingly the applicant is before this Court. The applicant has every hope of success in his Second Appeal and, therefore, the earlier order passed by this Court deserves to be reviewed.

4 The learned Advocate for the applicant has relied on the decision in **M.K. Prasad vs. P. Arumugam, (2001) 6 SCC 176**, wherein it has been held that -

“In construing Section 5 of the Limitation Act, the court has to keep in mind that discretion in the section has to be exercised to advance substantial justice. The Court has a discretion to condone or refuse to condone the delay as is evident from the words “may be admitted” used in the section.....

Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigating him as an irresponsible litigant. He should have been more vigilant but his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with

respect to the property, concededly to be valuable. While deciding the application for setting aside the ex parte decree, the court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. The inconvenience caused to the respondent for the delay on account of the appellant being absent from the court in this case can be compensated by awarding appropriate and exemplary costs.”

4.1 Further reliance has been placed on the decision of co-equal Bench of this Court in **Pushkaraj Ratnakar Wagh vs. V.V. Industries and another, 2018 SCC OnLine Bom 6482**, wherein the substantial question of law, that was raised was, “Whether the first appellate Court erred in not following settled principles of law while rejecting the application for condonation of delay ? This Court answered the same question in affirmative and by holding that no one should be condemned unheard. Reliance was placed on the decision in **M.K. Prasad’s** case (supra) and other cases.

4.2 Further reliance has been placed on the decision in **Robin Thapa vs. Rohit Dora, (2019) 7 SCC 359**, wherein it has been held that -

“Ordinarily litigation is based on adjudication on merits of contentions of parties. Litigation should not be terminated by default, either of plaintiff or defendant. Cause of justice requires that as far as possible, adjudication be done on merits.”

Based on these decisions the learned Advocate for the review

applicant submitted that the review be allowed and the Second Appeal be taken up for its decision.

5 Per contra, the learned Advocate for the respondent Nos.1 to 4 submitted that this Court has rightly dismissed the Second Appeal on the ground that no substantial question of law has been raised. The facts in the case were properly considered by this Court. In spite of giving an opportunity to the applicant before the First Appellate Court to show the reason for his absence or not taking any action for a period of about 03 years 07 months and 21 days except bare words there was nothing. Further, whatever representation would have made, even if we consider the thing, for the sake of argument, that it was made by the original defendant No.1 to the defendant No.2 and not by the plaintiffs, how the defendant No.2 could have kept mum from taking part in the litigation, is a question. There was overt act or any such act on the part of the appellant, which could have made defendant No.2 to abstain himself from participating in the litigation. Therefore, plaintiffs cannot be asked to suffer. They have already suffered at the hands of original defendant No.1, who had not given their share from the suit property. Learned Advocate for the respondent Nos.1 to 5 has raised question of maintainability of review petition itself. He submitted that in the review application, absolutely no ground has been shown as to why this

Court should review its earlier order. There is absolutely no error apparent on the face of the record. This Court cannot sit as an appellate Court on its own order. Reliance has been placed on the decision in **Haryana State Industrial Development Corporation Ltd. vs. Mawasi and others, AIR 2012 SUPREME COURT 3874**, wherein it has been observed that -

“The power of review is a creature of statute, Court, quasi-judicial body or administrative authority cannot review its judgment or order or decision unless it is legally empowered to do so.”

5.1 Further reliance has been placed on the decision in **Kishor R. Madan vs. Ramesh A. Phatnani, 2004(1) ALL MR 176**, wherein this Court had observed -

“Review proceedings cannot be equated with the original hearing of the case or an appeal. Finality to the order passed by the court cannot be revoked and the matter cannot be reconsidered except when glaring omission or patent mistake or grave error has crept up in the order delivered earlier. Merely because the order sought to be reviewed was overruled in another case subsequently is no ground to review the decision.”

5.2 Further reliance has been placed on the decision in **Lily Thomas vs. Union of India and others, AIR 2000 SUPREME COURT 1650**, wherein it has been observed that -

“The dictionary meaning of the word “review” is “the act of looking, offer something again with a view to correction or improvement. It cannot be denied that the review is the creation of a statute. The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practiced. However, the Supreme Court in exercise of its powers under Art. 136 or Art. 32 of the Constitution and upon satisfaction that the earlier judgments have resulted in deprivation of fundamental rights of a citizen or rights created under any other statute, can take a different view notwithstanding the earlier judgment.”

6 Relying upon these decisions it has been vehemently submitted on behalf of the respondent Nos.1 to 5 that there is absolutely no necessity to review the order passed by this Court on 13.03.2019.

7 At the outset, the background has to be noted further in detail which is already mentioned by this Court in order dated 13.03.2019 and aforesaid paras of this order itself. Plaintiffs had come with a case that

plaintiff No.4 is the wife of original defendant No.1 and plaintiff Nos.1 to 3 are their children. Plaintiffs have share to the extent of 06 H 40 R, which was on the western side of Gat No.207, which originally admeasures 12 H 34 R situated at village Murta, Tq. Tuljapur, Dist. Osmanabad. Plaintiffs specifically contended that the said property belongs to the Hindu Joint Family. Defendant No.1 sold the said property to defendant No.2 on 13.10.2011 without their consent. It was their clear case that defendant No.1 had no exclusive right to sell the said property and, therefore, they filed the suit for partition and separate possession as well as declaration that the sale deed is not binding on them. Defendant No.1 had appeared in the matter but he had not filed the written statement. Defendant No.2 though served even failed to appear. Thereafter, after taking into consideration the oral form of affidavit-in-chief of plaintiff No.4 and the revenue records, the suit came to be decreed. It was held that each of the plaintiff has 1/5th share in the suit property. The declaration was given that the sale deed executed by defendant No.1 in favour of defendant No.2 on 13.10.2011 was not binding on the plaintiffs share. It is to be noted that said Miscellaneous Civil Application No.15/2017 challenging the said Judgment and Decree passed by the learned trial Judge in Special Civil Suit No.136/2011 was filed by the present review applicant-original defendant No.2 with condonation of delay, as there was delay of 03 years 07 months and 21 days. The main contention

that was raised by the original defendant No.2 was that he had no knowledge about the pronouncement of Judgment and Decree by the Trial Court. He was suffering from Hypertension, Blood Pressure and Diabetes and due to old age and continuous treatment, he was advised by the Doctor to take total bed rest. He came to know about the Judgment and Decree only on 25.01.2017 and thereafter he filed application for certified copies.

8 From the record, that is, produced it could be seen that the present review applicant preferred not to lead any evidence to support the contention in his application for condonation of delay. Only on the basis of submissions of both the Advocates the application came to be decided. It was held by the First Appellate Court that there was nothing on record which would support the reasons given by the defendant No.2 for his absence before the Trial Court. This Court has observed in its earlier order which is now under review that there was inordinate delay and the reason was not supported by any documentary evidence, though it was contended that the Doctors had advised the review applicant for the total bed rest. He could not support it by any documentary evidence. Further, even the calculation of his age was also made by this Court and when the said application was filed for condonation of delay, he was about 48 years old, which cannot be said to be an old aged. Thus, it can be seen from the record that once the opportunity

was given to the defendant No.2 to contest the suit when the notice was served upon him. Another opportunity was given to him to put forth everything before the Court when an opportunity was given to him to support his reasons for condoning the delay. On both the occasions he has not taken benefit. Now, every endeavour is tried to be made that he has to be condemned unheard, which is absolutely not a true fact, if we consider the record. He had come with a case that he was represented by defendant No.1, that he would sort out the family dispute. In fact, no such promise appears to have been given by the defendant No.1 to the defendant No.2. They had taken the legal recourse for adjudication of their rights in the property. There was opportunity for the defendant No.2 to lead evidence before the First Appellate Court and he could have examined the defendant No.1 as his witness to support the fact that defendant No.1 had given the promise that he would sort out the family problem. Even if after giving proper opportunity evidence is not led, merely on the oral contention that the original defendant No.2 was asked to take bed rest for a period of 03 years 07 months and 21 days, the Court was not supposed to believe it. No doubt, liberal approach has to be taken while deciding application for condonation of delay, however, it comes with a rider that it can be used, that is, the liberal approach can be used only in favour of those litigants who behaved rationally. When the law on this point crystallized by Hon'ble Apex Court says that said application

could be considered liberally does not presume that every application for condonation of delay should be allowed. It depends upon the reason that has been given along with the supporting documents or evidence. The ratio in **M.K. Prasad's** case (supra) cannot be denied, but under which provisions or under which circumstances the observations were made in that case are required to be considered. It was a case where the counsel for the appellant had not appeared in the matter, and the other defendants had not contested the claim of the respondent therein. Under the circumstance, the person who was appearing on behalf of the company had left the service since 1994 and, therefore, the appellant therein was unaware about the passing of any decree. In that context Hon'ble Apex Court had observed that the appellant was not vigilant, as he ought to have been but his conduct could not have been castigated him as irresponsible litigant. Here, the facts are totally different. In spite of service of summons defendant No.2 preferred not to appear before the Court and contest the case, but then he believed in the alleged representation made to him by the defendant No.1. He has not come with the case that he had approached Advocate and when he gave entire facts to the Advocate, even the Advocate had advised him to wait and watch and not to appear in the matter before the Court. Therefore, the observations by this Court in **Pushkaraj's** case (supra) are not applicable. In that case also the facts were almost similar to **M.K. Prasad's** case (supra). The appellant

had engaged the Advocate. Appellant's father was a senior citizen and was retired AIS officer and, therefore, he was totally dependent upon him, because the appellant was met with an accident therein and, therefore, could not attend the Court. Under those circumstances, when their contentions were not accepted by First Appellate Court, this Court held that he could have been condemned unheard. Here, the facts are different.

9 If we peruse the review application, it is totally silent on the point, as to whether this Court had erred or what is the error apparent on the face of the record while deciding the Second Appeal on 13.03.2019. Those grounds, which could be only taken in the Second Appeal, have been mentioned or reported again. Hon'ble Apex Court had given the liberty to the present review applicant to approach before this Court. But for what purpose the Special Leave, that was filed before the Hon'ble Apex Court, was withdrawn is not made clear. Though the said liberty is given to the present review applicant, the review applicant is bound to show as to where is the error apparent on the face of the record, when this Court decided the application on 13.03.2019. The ratio laid down in **Haryana State Industrial Development Corporation Ltd.** (supra), **Kishor R. Madan** (supra) and **Lily Thomas** (supra) are applicable here. Further this Court in Review Application (Stamp) No.14527 of 2020 observed that -

7. 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 on the case 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."

10 The ratio laid down in **State of West Bengal & others vs. Kamal Sengupta & another, (2008) 8 SCC 612**, can be taken into account 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."

11 Therefore, taking into consideration the scope of the review, provision of review, facts of the present case and the law laid down in above said authorities, this is absolutely no fit case where the order passed by this Court on 13.03.2019 deserves to be reviewed. There is absolutely no merit in the application. It deserves to be rejected. Accordingly it is rejected with costs.

(Smt. Vibha Kankanwadi, J.)