

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

MISC. CIVIL APPLICATION (MCA) NO.368 OF 2018
IN
SECOND APPEAL NO.22 OF 2018

Shri Bajrang Sales Corporation, Thr. Partners Devendra C. Bhartia and ors.

-vs-

Nagpur Improvement Trust, Nagpur and ors.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri Rohit Joshi, Advocate for applicants.
Shri P. P. Kothari, Advocate for non-applicant No.4.

CORAM : A. S. CHANDURKAR, J.

DATE : December 17, 2021

The applicants who were the original appellants in Second Appeal No.22/2018 seek review of the order dated 06/02/2018 by which Second Appeal No.22/2018 was dismissed as it did not raise any substantial question of law.

The principal ground for seeking review of the aforesaid order is that the applicants as appellants before the first appellate Court had moved an application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (for short, the Code) seeking permission to lead additional evidence vide application below Exhibit-22. This application was rejected by the first appellate Court and that order passed below Exhibit-22 was challenged in Writ Petition No.6891/2016. This Court on

22/02/2017 set aside that order passed below Exhibit-22 and after restoring the said application directed the learned District Judge to decide that application while hearing the appeal on merits. It is the case of the applicants that the first appellate Court decided the appeal preferred by the applicant but without adjudicating the application below Exhibit-22. In other words, according to the applicants the directions issued in Writ Petition No.6891/2016 were not complied with. In the second appeal, ground (j) was raised by the applicants contending that the appellate Court erred in law in rejecting the application filed by the applicants under Order XLI Rule 27 of the Code. As that order was not available for considerable period, the records were inspected and it was found that the application below Exhibit-22 was undecided by the first appellate Court. This aspect not having been considered while deciding the second appeal, the same resulted in an error apparent on the face of record and hence a case for reviewing the order dated 06/02/2018 in Second Appeal No.22/2018 was made out.

2. Shri Rohit Joshi, learned counsel for the applicants submitted that the first appellate Court having failed to decide the application below Exhibit-22 it was clear that the directions

issued in Writ Petition No.6891/2016 were not complied with. This Court while deciding the second appeal ought to have considered that aspect. Though the ground raised in the memorandum of appeal was based on rejection of the said application, it was subsequently revealed on inspection of the record that the application under Order XLI Rule 27 of the Code was not decided by the first appellate Court at all. The ground as raised in the memorandum of appeal was based on the instructions received by the learned counsel and thus there was misconception of fact. It was contended that by seeking to lead additional evidence the applicants intended to substantiate their challenge based on alleged fraud by the non-applicant No.4 while mutating his name in the revenue records. Reliance was placed on the decisions in *State of Orissa and ors. vs. Harapriya Bisoi (2009) 12 SCC 378* and *State of Orissa and anr. vs. Fakir Charan Sethi (Dead Thr. LRs) and ors. (2015) 1 SCC 466*. It was thus submitted that the review application be allowed and the second appeal be re-heard on merits.

3. Shri P. P. Kothari, learned counsel for the non-applicant No.4 opposed the aforesaid submissions. At the outset he submitted that since the ground for review as raised was not

based on the substantial question of law on which the second appeal was heard, it was not permissible in review jurisdiction to consider a ground not based on such substantial question of law. In that regard the learned counsel referred to the decision in *Kamala Raphael vs. Earnest and ors. AIR 2001 Gauhati 1992*. Since the aspect now urged by the applicants was never raised by them in second appeal when it was argued, it would not be permissible for the applicants to urge that ground now. In any event it was submitted that the application filed under Order XLI Rule 27 of the Code was not liable to be allowed. There was no error apparent on the fact of record and in that regard the learned counsel placed reliance on the decisions in *Hari Ganu Bhadirge vs. Hari Ganu Shinde and anr. AIR 1929 Bom 225*, *Md. Ashraf Ali vs. Debraj Wadhera 1995 Supp (2) SCC 654* and *Ramdulari w/o Matabadalsingh (D) through LRs 2014 2 ALL MR 497*. It was thus submitted that the review application was liable to be rejected.

4. The scope of review has been examined by the Hon'ble Supreme Court in *Board of Control for Cricket in India and anr. vs. Netaji Cricket Club and ors. (2005) 4 SCC 741*. While considering the provisions of Order XLVII Rule 1 of the Code read with

Section 114 thereof, it was observed in paragraphs 88 to 90 as under:

“ 88. We are, furthermore, of the opinion that the jurisdiction of the High Court in entertaining a review application cannot be said to be ex facie bad in law. Section 114 of the Code empowers a court to review its order if the conditions precedent laid down therein are satisfied. The substantive provisions of law does not prescribe any limitation on the power of the court except those which are expressly provided in Section 114 of the Code in terms whereof it is empowered to make such order as it thinks fit.

89. Order XLVII Rule 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.

90. 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 Order XLVII Rule 1 of the Code are 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”.” (emphasis supplied)

5. In the aforesaid decision it was observed that though in earlier decisions it was held that the words “sufficient reason” ought to relate to the grounds analogous to the grounds specified in Order XLVII Rule 1 of the Code, that position was not reversible. Reference was also made to the decision in *Lily Thomas vs. Union of India (2000) 6 SCC 224* wherein it was observed that if the Court finds that the error pointed out the review petition was under a mistake and the earlier judgment would not have been passed but for such erroneous assumption which in fact did not exist and its perpetration would result in miscarriage of justice, nothing would preclude the Court from rectifying the error.

6. If the facts of the present case are seen from the aforesaid perspective it becomes clear that this Court in Writ Petition No.6891/2017 had specifically directed the first appellate Court to decide the application below Exhibit-22 that was filed under the provisions of Order XLI Rule 27 of the Code along with the appeal. The same has however not been done. The Hon’ble Supreme Court in *Union of India vs. Ibrahim Uddin and anr. (2012) 8 SCC 148* has held in clear terms that failure to decide the application filed under Order XLI Rule 27 alongwith

an appeal filed under Section 96 of the Code would be fatal error rendering such judgment *non est*. In view of the undisputed fact that the application below Exhibit-22 was not decided by the first appellate Court while deciding the appeal, it becomes evidently clear that this aspect warrants consideration in exercise of review jurisdiction since there was misconception of fact on the part of the counsel that said application had been rejected by the first appellate Court.

7. In the memorandum of the second appeal it was stated that the application for leading additional evidence had been rejected by the first appellate Court. In the review application it has been stated that though the learned counsel for the applicants had been informed that the said application had been rejected, on inspection it was found that the said application was not decided at all. This in my view is a misconception of fact/erroneous assumption of fact which did not exist and its perpetration would result in miscarriage of justice as failure to decide the application under Order XLVII Rule 1 of the Code by itself renders the judgment of the first appellate Court to be one contrary to the law laid down in *Ibrahim Uddin* (supra). The other decisions relied upon by the learned counsel for the non-

applicant No.4 are found distinguishable.

8. Coming to the contention urged by the learned counsel for the non-applicant No.4 by relying upon the decision in *Niranjana Sarkar and anr.* (supra) that the Court can only consider an error apparent on the face of record in exercise of review jurisdiction if the same is based on a substantial question of law that is heard and decided, in my view, exercise of review jurisdiction in second appeal cannot be restricted on that count. A review application filed under Order XLVII Rule 1 read with Section 114 of the Code is liable to be entertained when the statutory parameters laid down therein are satisfied. If in a given case it is found that though such statutory parameters are satisfied necessitating exercise of review jurisdiction, exercise of such jurisdiction cannot be refused merely on the ground that the error found does not relate to the substantial question of law on which the appeal was heard and decided. In my view, the parameters for exercising the review jurisdiction having been specifically laid down in Rule 1 of Order XLVII, a further restriction in exercise of such jurisdiction despite statutory parameters laid down in Rule 1 being satisfied would not be permissible. The Court despite finding that there was an error

apparent on the face of the record warranting exercising of review jurisdiction in view of Order XLVII Rule 1 of the Code would be precluded from exercise of such jurisdiction for the reason that the ground of review is not based on the substantial question of law as heard and decided. Such construction which would impinge upon exercise of review jurisdiction despite the statutory requirements of Order XLVII Rule 1 of the Code being satisfied can not be preferred. In *Pandit Dhana Mali vs. Bhimabai through legal representative (2007) 15 SCC 434* it has been held that a judgment in second appeal is open to review subject to a ground therefor being available under Order XLVII Rule 1 of the Code. For this reason I am unable to follow the ratio of the decision in *Niranjan Sarkar and anr.* (supra).

Once it is found that the first appellate Court failed to decide the application below Exhibit-22 while deciding Regular Civil Appeal No.375/2016 and this aspect goes to the root of the matter, it necessitates exercise of review jurisdiction. The application for review is therefore liable to be allowed.

9. Accordingly, Misc. Civil Application (Review) No.368/2018 is allowed. The order passed in Second Appeal No.22/2018 dated 06/02/2018 is recalled. Second Appeal

No.22/2018 is restored to file for its adjudication on merits. The parties shall bear their own costs.

At this stage the learned counsel for the non-applicant No.4 seeks stay of the order passed today. The order passed today shall operate after a period of six weeks from today.

(A. S. Chandurkar, J.)

Asmita