

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

MISC. CIVIL APPLICATION (REVIEW) NO.1089/2015
IN
SECOND APPEAL NO.33/2013(D)

- 1) Hariom s/o Chaganlal Jaipuriye,
Aged about 65 years, Occ. Business,
R/o Marwari Chowk, Yavatmal.

..... APPLICANT
(ORIGINAL R.1/
DEF. NO.1)

...VERSUS...

- 1) Manoj Ganpatlal Chamedia
Aged 45 years, Occ. Agriculturist,
R/o Sardar Chowk, Yavatmal.
- 2) Municipal Council, Yavatmal,
Through its Chief Officer,
Yavatmal, Tahsil & District Yavatmal.

...RESPONDENTS
**(ORIGINAL APPELLANT/
PLAINTIFF)**

Shri P.D. Meghe, Advocate for applicant.
Shri C.S. Kaptan, Senior Advocate with Shri R.S. Kalangiware, Advocate for
respondent no.1.

CORAM :- S.M. MODAK, J.
DATED :- 17/09/2021

ORAL JUDGMENT

Heard learned Advocate Shri Meghe for the
applicant/defendant no.1 and learned Senior Advocate Shri
Kaptan for respondent no.1/original plaintiff. Though present

respondent no.2/defendant no.2 is served and put in appearance, no one is present on their behalf. The only issue involved in this review application is whether there is an error apparent on the face of the record when this Court decided Second Appeal No.33/2013 on 04/09/2015.

2. The plaintiff filed the suit for declaration as to the ownership on the basis of oral partition and for possession of the suit property and for other ancillary reliefs. Defendant no.1 contested that suit. The defendant claims to be the purchaser of the suit property in a public auction conducted by defendant no.2- Yavatmal Municipal Council. He purchased it in the year 1976. After full-fledged trial, the Trial Court decided the suit on 11/10/2000. Eight issues were framed and all were answered either in the affirmative or in the negative. While dictating/typing operative order, the Trial Court mentions as below:

“The plaintiff’s suit for declaration, for possessing and for inquiry into the mesne profits is hereby in its entirety.”

The word either dismissal or decreeing the suit was conspicuously absent in that operative order. Be that as it may, the original plaintiff considers it as a dismissal of the suit and preferred the

First Appeal. The Appellate Court disposed of the First Appeal by way of dismissal on 14/08/2012.

3. Being aggrieved, plaintiff filed Second Appeal No.33/2013. Notices were ordered to be issued to the respondents who are the defendants before the Trial Court. As per the judgment dated 04/09/2015, this Court remanded the matter back to the Trial Court for fresh consideration and liberty was granted to adduce additional evidence if required. While remanding the matter, this Court has noted down two main grounds. They are as follows:-

a) The Trial Court while passing the operative order has failed to mention whether the suit is decreed or dismissed

&

b) First Appellate Court while dismissing the First Appeal has referred many judgments but not discussed them.

4. While delivering that judgment, this Court noted the presence of learned Advocate for the appellant/plaintiff and learned Advocate for respondent no.2/defendant no.2. Passing of this judgment gave rise to filing of present review application by defendant no.1. The applicant/defendant no.1 raised following grounds:-

- a) This Court has neither noted the presence nor absence of respondent no.1 in the said judgment (respondent no.1 has admitted by way of additional affidavit that his learned Advocate was not present when the appeal was decided on 04/09/2015 and he was busy in some other Court).
- b) When the plaintiff filed second appeal, in the memo of appeal, no grievance raised by the plaintiff about the lacuna in the operative order passed by the Trial Court.
- c) This Court while deciding the second appeal has not framed substantial questions of law.
- d) There is a remedy provided under Section 152 of the Code of Civil Procedure for correcting the accidental error or omission in the judgment and the plaintiff has not exhausted that remedy and as such he is estopped from making grievance about that lacuna before this Court in the second appeal.

5. In support of his contention, learned Advocate Shri Meghe relied upon a judgment in case of Singaram Vs. Ramanathan reported in LL 2021 SC 445.

6. Learned Senior Advocate Shri Kaptan formulated his objection on following grounds:

- a) Not mentioning anything about presence or absence of learned Advocate for defendant no.1 in the judgment does not amount to the error apparent on the record. This Court is fully empowered to proceed with the appeal even if one of the parties has not appeared inspite of notice.
- b) There is no need to frame substantial question of law as the matter is not decided on merits. But only order of remand is passed.
- c) The order of remand can certainly be justified in view of the lacuna in the judgment passed by the First Appellate Court. It is in respect of not framing of proper points for determination by the First Appellate Court as contemplated under the provisions of Order 41 Rule 31 of the Code of Civil Procedure.
- d) Lastly the errors pointed out by the applicant are not at all the errors and they do not fall within the purview of order 47 Rule 1 of the Civil Procedure Code.
- e) There is difference between review jurisdiction and appellate jurisdiction.

7. On the point of “framing of points for determination” he relied upon the judgments :--

- a) In the case of Anita M. Barreto Vs. Abdul Wahid Sanaullah

reported in 1985 (1) Bom.C.R. 130 and

b) Khatunbi wd/o Mohammad Sayeed and others Vs. Aminabai w/o Mohammad Sabir reported in 2006 SCC OnLine Bom 637.

8. On the point of review jurisdiction, he relied upon the judgment in the case of Inderchand Jain (dead) through LRs Vs. Motilal (dead) through LRs reported in (2009) 14 Supreme Court Cases 663.

Conclusion

9. It is true that there is a difference in between the review jurisdiction and appellate jurisdiction. The appellate jurisdiction is certainly wide. Whereas the review jurisdiction is restricted only when there is an error apparent on the face of the record.

10. When it is an admitted fact that learned Advocate for respondent no.1/defendant no.1 was not present on 04/09/2015, it is not necessary for the Court even to mention that he was not present. While disposing of the Second Appeal presence of only those learned Advocates who were present is noted down. This cannot be said to be an error apparent on the face of the record.

11. So far as the justification given in the order of remand about not framing the points for determination, there cannot be any dispute about the necessity of framing of those points. This has been observed in both the two judgments relied upon by learned Senior Advocate Shri Kaptan. Entertaining that ground in review jurisdiction will amount to exercising appellate jurisdiction. It is not permissible.

Framing of Substantial Question of Law

12. It is required to be seen whether on the set of facts, there was any necessity for this Court to frame substantial question of law. When the record of the Second Appeal is perused, we may find that this Court has issued a notice on 03/02/2014. The record of the suit was called as per the order dated 08/12/2014. The farad sheet dated 20/08/2015 marks the appearance of learned Advocate for both the respondents wherein the matter was adjourned for admission along with interim application on 28/08/2015. On this background, this Court has decided the Second Appeal on 04/09/2015.

13. It is very well true that while passing order of remand, this Court has not made any observation about merits of the

matter that is to say about the case of the plaintiff or defendants. It was only said about the approach of the Trial Court and of the First Appellate Court. The Hon'ble Supreme Court in case of Singaram Vs. Ramanathan (*supra*) has observed about requirement to frame substantial question of law. In that matter before Hon'ble Supreme Court, the High Court has decided the Second Appeal without framing the substantial question of law and reversed the concurrent finding of facts. On this background, Hon'ble Supreme Court has reiterated about compliance of the mandatory requirement to frame substantial question of law.

14. It is very well true that in the judgment under review, this Court has not expressed any opinion on merits. That is to say neither confirmed the findings nor reversed it. So the question arises still where there was need to frame substantial question of law.

15. It is very well true that earlier this Court has issued a notice. It is very well true that on 04/09/2015 any substantial question of law was not framed. This Court after hearing the learned Advocates who were present on 04/09/2015 has decided to admit the appeal and then decided it on merits by consent of learned counsel present. It is very well true that if the second

appeal is disposed of at admission stage, this Court need not frame substantial question of law if Court is of the opinion that no substantial question of law is involved. However, when this Court feels that the appeal needs to be admitted, it was necessary to frame substantial question of law. This has not been done when the present appeal is disposed of on 04/09/2015.

16. So this Court feels that this is an error apparent on the face of the record. It has been interpreted that framing of substantial question of law is not only a procedural requirement but it involves application of judicial mind by the Court. In many of the cases, Hon'ble Supreme Court has reiterated this principle and even remanded the matters back to the High Court.

17. No doubt, any opinion on merits is not expressed, still when the matter is admitted, there was need to frame substantial question of law. After framing it, this Court could have decided what course of action needs to be adopted considering the facts and circumstances. After framing them, this Court either could have decided the matter on merits or could have remanded it for the reasons mentioned in the judgment dated 04/09/2015. So there is an error apparent on face of the record and this Court is required to exercise review jurisdiction. So, only on that ground

the application for review needs to be allowed. Hence the following order:

ORDER

- a) The review application is allowed.
- b) The judgment dated 04/09/2015 passed in Second Appeal No.33/2013 is reviewed.
- c) Second Appeal No.33/2013 is restored.

18. The Second Appeal be listed for admission on **18/10/2021**. On that date, Court will hear the parties. Learned Advocate Shri Meghe for applicant/respondent no.1 and learned Senior Advocate Shri Kaptan for present respondent no.1/appellant waives notice. The defendant no.1/review applicant is directed to intimate this order to the Municipal Council as well as their learned Advocate.

JUDGE

R.S. Sahare