

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

REVIEW APPLICATION NO.99 OF 2022
IN
CIVIL APPLICATION NO.5805 OF 2020
IN
SECOND APPEAL (STAMP) NO.40384 OF 2017

SYED SALIMUDDIN S/O SYED NASIRUDDIN
VERSUS
NAYYAR JAHAN BEGUM W/O SYED MOINUDDIN AND ANOTHER

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Mr. A.S. Kulkarni, Advocate for the applicant
Mr. A.P. Bhandari and Mr. S.R. Nehri, Advocates for the respondent No.1

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CORAM : SMT. VIBHA KANKANWADI, J.
RESERVED ON : 29th MARCH, 2022
PRONOUNCED ON : 05th MAY, 2022

ORDER :

1 Present review application has been filed for review of order dated 03.01.2022 in Civil Application No.5805 of 2020 in Second Appeal (Stamp) No.40384 of 2017 by this Court rejecting the Civil Application for condonation of delay in filing the Second Appeal.

2 The present applicant is the original plaintiff-appellant, who had

filed the Second Appeal in order to challenge the Judgment and Decree passed in Regular Civil Suit No.906/2011 by learned 4th Civil Judge Senior Division, Aurangabad on 11.03.2013, whereby the Judgment was given on preliminary issue and the plaint was rejected under Order VII Rule 11(d) of the Code of Civil Procedure 1908 stating that it is hit by the principles of *res judicata* under Section 11 of the Code of Civil Procedure. The said order passed by the Trial Court was then challenged by the present applicant-appellant in Regular Civil Appeal No.114/2013. It came to be dismissed by learned District Judge-7, Aurangabad on 18.07.2016. Thereafter the Civil Application No.5805 of 2020 was filed by the present applicant for getting the delay of 399 days condoned in filing Second Appeal. This Court rejected the said application on 03.01.2022.

3 Heard learned Advocate Mr. A.S. Kulkarni for the applicant and learned Advocate Mr. A.P. Bhandari for the respondent No.1.

4 It has been vehemently submitted on behalf of the review applicant that this Court rejected the application on the ground that documentary evidence has not been produced to support the reasons. It was averred that at the relevant time General Power of Attorney holder of the applicant was ill and in fact, he had handed over all the relevant documents

about his ill health and treatment to the concerned Advocate, who had drafted the application. After going through those documents, only the concerned Advocate had drafted the civil application and in fact, when the list of documents was prepared those documents were marked as Exh.'A-1'. However, the Clerk of the Advocate failed to append those documents due to mistake. No fault can be attributed to the applicant or even the GPA holder for such mistake on the part of the Clerk of the Advocate. In fact, the applicant and his GPA holder are cousins. The applicant was serving as Subhedar i.e. Government service in Central Prison, Aurangabad and, therefore, the applicant had wholly relied on his Power of Attorney. The applicant retired from service on 30.09.2018. The learned Advocate submits that in view of the fact that it was the mistake of the Clerk the applicant should not be allowed to suffer. He has a good case on merits. The learned Advocate for the review applicant has tried to make submissions on the basis of the merits of the case also.

5 Per contra, the learned Advocate for the respondent No.1 strongly objected the application and submitted that there is no error on the face of the record, when this Court rejected the application on 03.01.2022. There was absolutely no attempt by the applicant to produce those documents on record at a later point of time. In fact, affidavit-in-reply was

filed by the respondent No.1 to the said application and he had taken objection in the said affidavit-in-reply. In para No.5 it was clearly mentioned by the respondent No.1 that there are no documents attached to the application for the alleged treatment of Power of Attorney. In spite of that no efforts were made. Under such circumstance, the review is not maintainable.

6 At the outset, it is to be noted that the record of this Court in respect of Civil Application No.5805 of 2020 was called. Notice was issued to the respondents by order dated 20.07.2021 in the said Civil Application No.5805 of 2020 and it was made returnable on 26.08.2021. Ultimately the respondent No.1 appeared through Advocate on 15.09.2021. Respondent No.1 filed affidavit-in-reply on 25.09.2021 and then the matter was on board on 27.09.2021. On that day the learned Advocate for the applicant was absent. Thereafter the matter was heard on 13.10.2021 and reserved for Judgment. The Judgment/order was pronounced on 03.01.2022. In the affidavit-in-reply of respondent No.1 in para No.5 it was specifically stated that “though para No.1 of the application refers to approaching Patanjali Ayurvedic Clinic, absolutely no document is produced on record for establishing said fact.”

6.1 Para No.6 of affidavit-in-reply is - “I say that, considering the fact

that, the averments in the application are not supported by any document and further that, ill health of power of attorney holder cannot be a ground for condonation of delay, application under reply deserves to be rejected.”

6.2 When this specific objection was raised, still, till 13.10.2021 no efforts were made by the applicant to trace out the documents of treatment of Power of Attorney and file it on record. Therefore, there is absolutely no error apparent on the face of the record.

7 Another fact to be noted is that now, the applicant is coming with a case that it was a mistake of the Clerk of the Advocate who was then representing the applicant and the Clerk was attached to the earlier Advocate. Affidavit of that Clerk is not filed along with this application to say that it was his mistake.

8 One more factor i.e. required to be considered is that this Court was considering as to whether the inordinate delay has been satisfactorily explained or not by the applicant in the application in order to condone that delay. In order to consider that point this Court had also considered the merits, in a sense that whether the illness of the Power of Attorney can be said to be a good ground to condone the delay. Taking into consideration the averments the applicant was knowing that the Power of Attorney was ill.

This can also be considered from a different angle that the applicant is making it clear that the Power of Attorney is his cousin. There were no strained relationship between them. Both are resident of Aurangabad. Under such circumstance, it is hard to believe that the applicant had no knowledge about the illness of his Power of Attorney. He himself could have filed the appeal and, therefore, this Court had come to the conclusion that no case is made out to condone the delay. Since the facts and circumstances have been considered by this Court, there is no scope for review.

9 It has been observed in **Kishor R. Madan vs. Ramesh A. Phatnani, 2004(1) ALL MR 176**, that -

“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.”

10 When the appellant himself had not corrected his own mistake, though the opportunity was available, he cannot label this Court with a case that there is error apparent on the face of the order passed by this Court.

There is no merit in the present application. It deserves to be rejected.
Accordingly, it is rejected.

(Smt. Vibha Kankanwadi, J.)

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