

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

REVIEW APPLICATION NO.72 OF 2019
IN
SECOND APPEAL NO.284 OF 2017

ASHOK VITTHALRAO LAHANE, DECEASED, THROUGH LRS RANJANA
ASHOK LAHANE AND OTHERS
VERSUS
SHESHRAO DHONDIRAM DHAS

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Mr. R.F. Totla, Advocate for applicants

Mr. A.B. Kale, Advocate for the sole respondent

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CORAM : SMT. VIBHA KANKANWADI, J.
RESERVED ON : 22nd NOVEMBER, 2021
PRONOUNCED ON : 07th JANUARY, 2022.

ORDER :

1 Present review application has been filed by the appellants in the Second Appeal No.284 of 2017, who were the original plaintiffs in Special Civil Suit No.5/2013 decided by learned Civil Judge Senior Division, Jalna on 05.02.2015. Predecessor of review applicants/original plaintiff had filed suit for specific performance of the contract and for perpetual injunction and it came to be partly decreed. The alternative prayer for refund of the amount

by the defendant along with interest was allowed. The original plaintiff then challenged the said Judgment and Decree passed by the learned Trial Judge in Regular Civil Appeal No.58/2015, which came to be dismissed by learned Principal District Judge, Jalna on 31.01.2017. Thereafter, the said Judgment and Decree was challenged by the legal representatives of the original plaintiff in Second Appeal No.284 of 2017, which has been dismissed by this Court on 27.03.2019, on the ground that no substantial questions of law, as contemplated under Section 100 of the Code of Civil Procedure, 1908, were shown. Now, the present application has been filed for the review of the said Judgment and order passed by this Court.

2 Heard learned Advocate Mr. R.F. Totla for the review applicants and learned Advocate Mr. A.B. Kale for the sole respondent.

3 It has been vehemently submitted on behalf of the review applicants that there are errors apparent on the face of the record, when the Second Appeal was decided by this Court. In fact, it was not pleaded by the defendant-respondent that he is not in possession of the land and he had not put any excuse that he cannot execute the sale deed on that count. No issue was framed by the Trial Court in respect of possession. It was also not for consideration before the First Appellate Court and this aspect has not been seen by this Court, which required consideration. This Court while

considering the reasons for not allowing the relief of specific performance has observed that the land, which was contracted/agreed to be sold, was given to the defendant as project affected person and then, in view of the Writ Petition No.2154 of 2012 filed by the original defendant and his brother before this Court, the Government was asked to see, as to whether alternative land can be given. Thereupon, this Court has wrongly come to the conclusion that the defendant is not in possession of the suit land and, therefore, the discretion of refusing to grant specific performance was correctly exercised. The facts were not so pleaded and, therefore, there is error apparent, which needs to be corrected under review.

4 It has been further argued that there was no compliance of Order 41 Rule 31 of the Code of Civil Procedure by the First Appellate Court and while considering this point, this Court observed that no prejudice has been shown by the appellant, in fact, ground No.VII has been specifically raised in the appeal memo and it remained to be considered by this Court. Further, this Court has not given reasons or findings though effect of explanation (b) (i) to Section 10 of Specific Relief Act was considered. The documents in support were produced, however, they were not mentioned by this Court. Further, it was observed by this Court that the reasons for refusal of granting specific relief given by the Trial Court are very cryptic. Yet, those cryptic reasons have been found to be correct by the First Appellate Court, and this

was the point, on which the Second Appeal ought to have been admitted. Further, though the respondent appeared in the matter through Advocate, neither the respondent nor his Advocate were present on the date of hearing. Yet, the Court proceeded further. Further, there are observations in respect of page No.10 in the Judgment, which were, in fact, within the knowledge of the respondent and none was present from the side of the respondent. Therefore, the adverse remark against the appellants is, in fact, error on the part of this Court. The learned Advocate for the review applicants, therefore, prayed for allowing the review petition and setting aside the order of dismissal of the Second Appeal and taking it on record once again.

5 Per contra, the learned Advocate appearing for the respondent supported the reasons given by this Court.

6 At the outset, it can be seen from the Judgment/order that has been pronounced by this Court on 27.03.2019 that every opportunity was given to the appellants to make their submissions. The facts of the case were considered, the suit was in fact, partly decreed, the relief of specific performance was rejected, but the alternative prayer of refund of earnest amount together with interest was allowed. Therefore, the question was, as to whether the refusal on the part of the Courts below to grant the relief of specific performance was correct or not. As regards the point in respect of

alleged non compliance of Order 41 Rule 31 of the Code of Civil Procedure is concerned, this Court accepted that all the points have not been framed by the First Appellate Court, but there is substantial compliance of the same and, therefore, reliance was placed on the decision in **G. Amalorpavam & Ors. vs. R.C. Diocese Of Madurai & Ors. [(2006) 3 SCC 224]** and **Girijanandini Devi and Ors. vs. Bijendra Narain Choudhary [AIR 1967 SC 1124]**. After taking into consideration those pronouncements, it was then observed that the appellant has not shown prejudice on account of failure on the part of the First Appellate Court to frame all the points for determination. Mere raising all ground without showing the prejudice will not amount to error on the face of the record by this Court while passing the order.

7 Further, as regards the cryptic reasons given by the Trial Court for refusing to grant relief of specific performance, it has been specifically observed that though the Trial Court has not given those reasons; yet, those reasons have been elaborated by the First Appellate Court and they were based on the documents before the Trial Court itself. They have been reiterated by this Court in the order as to how it would not have been possible to grant specific performance. It requires no more elaboration on this point.

8 No doubt, this Court had taken into consideration the effect of

Explanation (b)(i) to Section 10 of Specific Relief Act; yet, the reasons those have been given, as to why relief cannot be granted for specific performance, were sufficient not to consider the other documents on record when those documents were in fact, considered for the performance of granting alternative relief.

9 As regards the observations on page No.10 in respect of the information about the compliance of the writ petition is concerned, it has been specifically observed that a question was asked to the learned Advocate to the appellants, as to whether there is compliance of that writ petition. But, then he preferred to give answer that the respondent might be knowing it. No doubt, there would be knowledge to the respondent, but when the respondent is not bringing that fact on record and the appellants were asking for specific performance, then, they ought to have brought evidence to show that there is compliance of the order passed by this Court in the writ petition. It cannot be said that there is any kind of error on the face of the record in respect of those observations by this Court.

10 Non framing of point of possession cannot be raised for the first time in review petition. It was never pleaded by the plaintiff that he was put in possession of the property by the original defendant at the time of executing agreement to sell. In fact, in his pleading the defendant had

specifically stated that the injunction was granted in his favour in Regular Civil Suit No.778/2012 filed against State by one Babasaheb. Further, when the matter was before this Court in Writ Petition No.2154 of 2012, all those facts were considered and the effect of the order passed by this Court in the said writ petition was considered by the First Appellate Court. Copies of the affidavits filed in the writ petition were also produced and it has been specifically mentioned by the First Appellate Court that though in the agreement to sell (Exh.32) it was mentioned that the suit land was given in possession to the plaintiff; yet, in the affidavit (Exh.41) dated 10.07.2012, the plaintiff himself has stated that the suit land is not in his possession. Definitely, when the land was acquired, the State Government would have taken its possession and we will have to presume that the proper procedure under the Land Acquisition Act, 1894 would have been followed. In the said writ petition, this Court directed the State Government to find out suitable unencumbered land for allotting it to the defendant. All these facts were considered by this Court, and then it was held that both the Courts below have exercised their discretion judiciously. There is absolutely no error on the face of the record. Therefore, the review application deserves to be dismissed.

11 When a detailed order has been passed and this Court had come to the conclusion that no substantial questions of law are arising in the

Second Appeal and the appeal lacks merits and it was then dismissed, the question is, whether a review of the same can be entertained. The scope of the review petition is required to be considered on the basis of catena of Judgments of Hon'ble Supreme Court as well as this Court. 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."

12 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 factor law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."

13 Therefore, taking into consideration the scope of the review when a detailed order is passed by this Court as to how the proposed substantial question of law by the appellant is in fact not a substantial

question of law, as contemplated under Section 100 of the Code of Civil Procedure, 1908, has been given in detail, there is no scope for this review. It deserves to be rejected. Accordingly it is rejected with costs.

(Smt. Vibha Kankanwadi, J.)

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