

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CIVIL APPLICATION NO.4323 OF 2022
IN
REVIEW APPLICATION NO.21 OF 2019**

- 1) Sow. Shantabai W/o Sitaram Phirke,
Age-63 years,
- 2) Suresh S/o Sitaram Phirke,
Age-47 years,
- 3) Chitralekha Sitaram Phirke,
Age-45 years,
- 4) Govinda S/o Sitaram Phirke,
Age-42 years,

All Residents of Nhavi,
Tq-Yawal, Dist-Jalgaon.

...APPLICANTS

VERSUS

- 1) Vasudeo S/o Ananda Patil,
Age-62 years, Occu:Agri.,
R/o-Nhavi, Tq-Yawal,
District-Jalgaon,
- 2) Pushpabai W/o Trimbak Patil,
Age-60 years, Occu:Household,
R/o-Nandura, District-Buldhana,
- 3) Smt. Nalinibai W/o Pralhad Mahajan,
Age-Major, Occu:Household,
R/o-Khardi,

- 4) Kamalbai Ananda Patil,
Age-71 years, Occu:Household,
R/o-Nhavi, Taluka-Yawal,
District-Jalgaon
(Through their Power of Attorney
Respondent No.1),
- 5) Sitaram Keshav Phirke,
Age-69 years, Occu:Agri.,
R/o-Nhavi, Taluka-Yawal

...RESPONDENTS

...
Mr. S.R. Barlinge Advocate for Applicants.
Mr. D.R. Markad Advocate for Respondent Nos.1 and 3.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE OF RESERVING ORDER : 22nd SEPTEMBER 2022

DATE OF PRONOUNCING ORDER : 20th JANUARY 2023

ORDER :

1. Present Application has been filed for recalling of the order passed by this Court on 4th December 2021 whereby Review Application No.21 of 2019 in Civil Application No.16724 of 2016 came to be dismissed.

2. The facts giving rise to the present Application are that the present applicants are the original defendant Nos.2 to 5, who

were the appellants in Second Appeal No.268 of 1994. That Second Appeal No.268 of 1994 came to be dismissed in default on 28th October 2015. Thereafter Civil Application No.16724 of 2016 was filed before this Court for calling back the order of dismissal of Second Appeal on 28th October 2015 and for condonation of delay of about 11 months in preferring the said civil application. Said Civil Application No.16724 of 2016 came to be rejected by this Court, by giving reasoned order, on 28th July 2017 (**CORAM: T.V. NALAWADE, J.**). Thereafter, Review Application No.21 of 2019 was filed, for review of the order dated 28th July 2017. This Court, by order dated 4th December 2021, dismissed the said Review Application after it was pointed out that the order passed by this Court in Civil Application No.16724 of 2016 on 28th July 2017 was sought to be challenged before the Hon'ble Supreme Court in Special Leave Petition (Civil) Diary No.28220 of 2017, which was arising out of the impugned final Judgment and order dated 28th October 2015 in Second Appeal No.268 of 1994 passed by this Court. The matter was called out before the Hon'ble Apex Court on 1st December, 2017; permission to file Special Leave Petition was granted, however, the Special Leave Petition was dismissed on the ground of delay. Therefore, in the order dated 4th December 2021 it was

observed by this Court that the review of the order passed by this Court on 28th July 2017 was not maintainable when the Civil Application No.16724 of 2016 was filed for recalling or the order dated 28th October 2015, which stood confirmed by the Hon'ble Apex Court.

3. Heard learned Advocate Mr. Barlinge appearing for the applicants and learned Advocate Mr. Markad appearing for respondent Nos.1 and 3.

4. Learned Advocate Mr. Barlinge appearing for the applicants – appellants has pointed out that the very point was before the Hon'ble Apex Court in ***Khoday Distilleries Limited and others vs. Mahadeshwara S.S.K. Limited, (2012) 12 SCC 291***, and in view of the fact that the decisions in three Judge Bench Judgment in ***Abbai Maligai Partnership Firm vs. K. Santhakumaran, (1998) 7 SCC 386*** and ***Kunhayammed vs. State of Kerala, (2000) 6 SCC 359***, leading to the conflicting views, matter was referred to the Larger Bench, by order dated 19th October 2012. The Larger Bench of the Apex Court decided the said legal position on 1st March, 2019 in ***Khoday Distilleries Limited (Now known as Khoday India Limited) and others vs. Sri Mahadeshwara Sahakara***

Sakkare Karkhane Limited, Kollegal (under Liquidation) represented by the Liquidator, (2019), 4 SCC 376. It is submitted that the legal position was made clear and for our purposes Clause Nos. (8) and (9) are important, which are reproduced below:-

“(8) An order refusing special leave to appeal may be a nonspeaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(9) If the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order

binding as *res judicata* in subsequent proceedings between the parties. ”

5. Learned Advocate for the applicants submits that when the Special Leave Petition was dismissed on the ground of delay and no speaking order was given, the review is maintainable. Learned Advocate further submits that it is also specifically stated in the Three Judge Bench decision in ***Khoday Distilleries Limited*** (supra) that:-

“ In the present case, special leave petition was dismissed in limine and without any speaking order but after the dismissal of the special leave petition, the respondent approached the High Court with review petition – Held, the High Court was empowered to entertain the same on merits. ”

6. Learned Advocate for the applicants, therefore, prayed that the order passed by this Court on 4th December 2021 in Review Application No.21 of 2019 be recalled and the review petition be heard on merits.

7. Per contra, learned Advocate Mr. Markad appearing for respondent Nos.1 and 3 opposed the Application and submitted that the order passed by this Court on 4th December 2021 is

correct. The Second Appeal was filed in the year 1994 and in the order passed by this Court on 28th July 2017 in Civil Application No.16724 of 2016, the details have been taken as to how lethargically the Second Appeal was handled. Even the cost imposed vide order dated 3rd March 2005, was not deposited till the order that was passed by this Court on 28th July 2017. There was inordinate delay of about 11 months in filing application for setting aside the dismissal order passed in Second Appeal.

8. At the outset, the chronology of the events is required to be considered. Second Appeal No.268 of 1994 was filed challenging the Judgment and decree passed by the learned IVth Additional District Judge, Jalgaon in Civil Appeal No.89 of 1988 with Civil Appeal No.76 of 1988, on 14th July 1994, thereby reversing the Judgment and decree dated 30th December 1987 by the learned Civil Judge, Junior Division, Yawal in Regular Civil Suit No.38 of 1978. The Second Appeal was admitted by this Court on 9th August 1994 and the interim relief was granted. This Court has taken note of the fact that after the interim relief was obtained, the appellants have not shown interest to serve notices of the Appeal on some of the respondents and therefore, the Appeal against those respondents was dismissed. Subsequently, application was filed for restoration of the Appeal as against

those respondents and the said application came to be allowed, subject to condition of deposit of cost amount. That cost amount was not even deposited and therefore this Court dismissed the Second Appeal on 28th October 2015 after taking into consideration various facts.

9. Perusal of the order passed in Special Leave Petition (Civil) Diary No.28220 of 2017 would show that, it was arising out of the final Judgment and order dated 28th October 2015 in the Second Appeal No.268 of 1994. The Special Leave Petition was called out on 1st December 2017, permission to file Special Leave Petition was granted. The Special Leave Petition was dismissed on the ground of delay. However, in the meantime, it appears that the present applicants had filed Civil Application No.16724 of 2016 before this Court with following prayers:-

“(B) By an appropriate order, the delay caused in filing this Civil Application may kindly be condoned and the Judgment and order dated 28.10.2015, passed by this Hon’ble Court in Second Appeal No.268 of 1994, may kindly be recalled and the appeal be restored to its original position.

(BB) Delay in filing this application may kindly be condoned. ”

10. It appears that when the matter was before the Hon'ble Apex Court on 1st December 2017, it was not pointed out by the present applicants that they had already approached this Court by filing Civil Application No.16724 of 2016 and that application was also dismissed on 28th July 2017. Under such circumstances, the legal position enumerated in ***Khoday Distilleries Limited*** (supra), at Clause No. (10), would be applicable because leave to appeal was granted by the Hon'ble Apex Court in the case in hand. Clause No. (10) in ***Khoday Distilleries Limited*** (supra), reads thus:

“(10) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.”

11. Thus, the doctrine of merger would be attracted and therefore, this Court, while passing order dated 4th December 2021 had stated that the review of the Civil Application No.16724 of 2016 which came to be disposed of on 28th July 2017, was not maintainable. The Hon'ble Apex Court after granting permission to file Special Leave Petition, had dismissed the same on the ground of delay, thereby it had confirmed the

order passed by this Court on 28th October 2015, dismissing the Second Appeal. In view of this position, there is no merit in the present Application. Once the order passed by this Court dismissing the Second Appeal was confirmed by the Hon'ble Apex Court, recall of the same by the High Court will not arise. Clause Nos. (8) and (9) in ***Khoday Distilleries Limited*** (supra), as canvassed by the learned Advocate for the applicants, will not be applicable in the present case.

12. For the aforesaid reasons, the Application stands rejected.

[SMT. VIBHA KANKANWADI , J.]