



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

MISCELLANEOUS CIVIL APPLICATION (REVIEW) NO. 1058/2023

IN

SECOND APPEAL NOS. 375/2011 AND 466/2011 (D)

(ARPANA PRITHIVIRAJ PUNWATKAR & OTHERS **VERSUS** SHRIRANG SHRIPAT PUNEKAR & OTHERS)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders.*

Court's or Judge's order

Shri A. Shelat, counsel for the applicants.

Ms Kirti Satpute, counsel for the non-applicant nos.1, 2(a) and (b).

CORAM : A. S. CHANDURKAR, J.

DATE : NOVEMBER 04, 2023.

Ms Kirti Satpute, learned counsel for the non-applicant nos.1, 2(a), 2(b) and 3 submits that the non-applicant no.3 has expired.

2. The learned counsel for the applicant seeks leave to delete the name of the deceased non-applicant.

3. On 15.01.2018, notice was issued on the application for condonation of delay as well as on the review application. On 27.10.2023, the delay in seeking review was condoned. Hence, **ADMIT**. The non-applicants are duly served.

4. The applicants seek review of the judgment dated 26.09.2017 in Second Appeal Nos.375 of 2011 and 466 of 2011 by contending that having allowed the aforesaid second appeals by holding that Regular Civil Suit No. 187 of 2002 seeking declaration that the Will-deed dated 16.07.1997 was null and void had been filed within limitation, there was no reason to thereafter remand the proceedings to the Appellate Court. It is submitted by the learned counsel for the applicants that while deciding Regular Civil Suit No. 187 of 2002, the trial Court recorded a finding that the plaintiffs had proved that the Will-deed dated 16.07.1997 was null and void. However having found that the suit was barred by limitation it came to be dismissed.

5. The plaintiffs being aggrieved by the dismissal of the suit on the ground of limitation preferred Regular Civil Appeal No. 110 of 2007. The defendants did not challenge the findings recorded by the trial Court on merits. The Appellate Court on 28.04.2011 dismissed the said appeal. The plaintiffs had filed the aforesaid second appeals which came to be decided on 26.09.2017. It was held that the suit as filed was governed by Article 58 of the Limitation Act, 1963 and that it had been filed within limitation. It was further held that the non-compliance of the provisions of Order XXXII Rule 12 of the Code of Civil Procedure, 1908 did not affect the entitlement of the non-applicant no.3. After answering the substantial questions and setting aside the judgment of the Appellate Court, the proceedings were remanded to the Appellate Court to decide the appeal on merits.

6. The common judgment in Second Appeal Nos.375 of 2011 and 466 of 2011 dated 26.09.2017 was the subject matter of challenge before the Hon'ble Supreme Court in Petition(s) for Special Leave to Appeal (C) No(s).10492-10493/2018. The said Special Leave Petitions came to be dismissed on 16.08.2022. In this backdrop, the learned counsel for the applicants submits that since the findings of the trial Court on merits had attained finality as the same were not challenged by the defendants by preferring cross objection before the Appellate Court, the same would continue to operate and govern the parties. No purpose would be served by remanding the proceedings on that count. By remanding the said proceedings inspite of the findings on merits having been confirmed, an error apparent on the face of record has crept in.

7. The learned counsel for the non-applicants opposes the review application by submitting that under the provisions of Order XLVII Rule 1(2) of the Code of Civil Procedure, 1908, it was open for the present applicants who were the respondents in the Special Leave Petitions to have raised a challenge to the order of remand. It was thus submitted that the review application may not be entertained at the behest of the applicants.

8. On hearing the learned counsel for the parties and after perusal of the record, it is seen that the trial Court while answering Issue No.1 has held in clear terms that the Will-deed dated 16.07.1997 was null and void. Though the suit was dismissed as barred by limitation, the finding with regard to the Will-deed was not challenged by the defendants. It was only the plaintiffs who filed an appeal and challenged the dismissal of the suit on the ground of limitation. Since the findings recorded by the trial Court have attained finality the same would operate between the parties and no purpose would be served by remanding the proceedings to the Appellate Court. This aspect was lost sight of while deciding the second appeal and directing remand of the proceedings on that count.

9. As regards the objection raised by the learned counsel for the non-applicants based on the provisions of Order XLVII Rule 1(2) of the Code of Civil Procedure, 1908, it is found that the said provisions would not bar the maintainability of the present proceedings. This is for the reason that the review application was preferred by the applicants on 05.01.2018 at which point of time the applicants were not noticed in the Special Leave Petitions preferred by the non-applicants. Hence, on this count it cannot be said that the review application was not tenable.

10. For aforesaid reasons, the following order is passed :-

- (I) The judgment dated 26.09.2017 passed in Second Appeal Nos.375 of 2011 and 466 of 2011 is reviewed to the extent that the direction for remanding the proceedings to the Appellate Court for deciding the appeal on merits is recalled.
- (II) A decree be drawn in accordance with the prayers made in the plaint.
- (III) The parties shall bear their own costs.

11. The Miscellaneous Civil Application is allowed in aforesaid terms and disposed of.

(A. S. CHANDURKAR, J.)

APTE