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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**REVIEW PETITION NO.1 OF 2024
IN
WRIT PETITION NO.15335 OF 2023**

Chandrakant Kantilal Shah & Ors. ... Petitioners

V/s.

Rajiv Navinchandra Shah & Ors. ... Respondents

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Mr. Sharan Jagtiani, Senior Advocate with *Mr. Kunal Vajani*, Mr. Kartikey Bhatt and Mr. Prasanna Tare for the review petitioner.

Mr. R.D. Soni with Mr. Gaurang Jhaveri, Ms. Vandana Bait, Mr. Harsh Nishar, Mr. Amey Deshpande and Ms. Niyati Sontakke for respondent No.1.

Mr. Rubin Vakil i/by Mr. Mufeez Ansari for respondent No.14.

Dr. Abhinav Chandrachud with Ms. Akshada Shetye for respondent No.21.

CORAM : AMIT BORKAR, J.

DATED : JANUARY 24, 2024

P.C.:

1. In this review petition, the short question that arises for consideration is whether the omission of the court due to its inadvertence or on account of the failure of the parties to draw its attention to consider material date affecting the merits of the case can be included within the expression "error apparent on the face of record" as required under Order 47 Rule 1 of the Code of Civil

Procedure, 1908 ("C.P.C." for short)

2. The facts necessary for adjudication of the review petition are as follows:

i) The petitioner is the original plaintiff who filed suit for declaration, injunction and partition.

ii) After the issues were framed, the plaintiff filed an affidavit on 26 June 2023 in lieu of examination-in-chief. Therefore, the trial commenced on *26 June 2023*.

iii) On 26 September 2023 Respondents/original defendant Nos.1 to 4 and 8 to 10 initially filed *additional written statement*. However, on the same date, the Trial Court discarded the *additional written statement* on the ground that such an *additional written statement* was filed without the court's permission.

iv) On *11 October 2023*, the respondents/defendants applied to Order 6, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') to incorporate the same plea of res judicata. According to them, on 13 January 2023, a substantive suit was dismissed between the *then*-plaintiff and the said defendants. The issues raised in the present suit are similar to those raised in the earlier suit, and, therefore, the present suit is barred by the principle of res judicata.

3. The Trial Court, by the order impugned in the petition, allowed the application for amendment. The petitioner, therefore, filed the writ petition. This court, by the order under review, allowed the writ petition.

4. The defendants have filed a present review petition contending the following grounds for review of the decision in the writ petition:

(i) The basis of the judgment was the incorrect date of commencement of trial, i.e. 26 July 2023, which is a false statement on oath made by the writ petitioner; The correct date of commencement of trial is 26 June 2023.

(ii) The superior Court stayed not only the execution of the order but also the effect of a judgment in the civil suit. The stay of the judgment of the civil suit, which gives rise to the plea of *res judicata*, was vacated on 27 June 2023, which event occurred after the commencement of trial and, therefore, proviso to Order 6 Rule 17 of C.P.C. was inapplicable.

5. To explain the scope of power under Order 47 Rule 1, the learned Senior Advocate for the review petitioner has relied on the judgments of the Apex Court in **Haridas Das v. Usha Rani Banik**, (2006) 4 S.C.C. 78; **Kamlesh Verma v. Mayawati**, (2013) 8 SCC 320; **Meera Bhanja v. Nirmala Kumari Choudhury**, (1995) 1 SCC 170; **S. Bagirathi Ammal v. Palani Roman Catholic Mission**, (2009) 10 SCC 464; **Board of Control for Cricket in India v. Netaji Cricket Club**, (2005) 4 SCC 741; **M.M. Thomas v. State of Kerala & Anr**, (2000) 1 SCC 666; and **Municipal Corporation of Greater Mumbai & Anr. v. Pratibha Industries Ltd. & Anr.**, (2019) 3 SCC 203.

6. The original petitioner has filed a reply to the review petition stating that due to inadvertence, the date of commencement of trial was stated to be 26 July 2023 in the memo of the writ petition. There is no question of treating judgment dated 11 December 2023 as suffering from error apparent on the face of the record.

7. The review has been sought on the ground that the judgment in the writ petition is based on an error of inadvertence, which amounts to an error apparent on the face of the record. The parameters for exercising power under Order 47, Rule 1 of the Code of Civil Procedure are well settled. An error may be a ground for review, but it must be apparent on the face of the record, which means an evident error and does not require any extraneous matter to show its incorrectness. It must be an error so manifest and evident that no court would permit such an error to remain on the record. The error may be one of fact or one of law, but the error of law must be definite and does not admit any ambiguity or discussion. A conclusion arrived at by the process of conscious reasoning cannot constitute an error of law apparent on the face of the judgment to be reviewed. However, a review cannot be granted on the mere ground that the decision arrived at is erroneous on merits, nor can a judgment in a second appeal be reviewed on the grounds of discovering new and important evidence on a question of fact. If a judgment proceeds on an erroneous assumption as to a material fact, or where the court omits to try a material issue and arrives at a conclusion, or where the court decides against a party on matters not in issue or where a Judge erroneously concludes

that he was bound by the findings of fact of the lower court, the judgment can be reviewed. In other words, where a judgment proceeds under a misapprehension of the actual state of circumstances or the court has failed to consider essential facts on record or fails to refer to some important documents affecting the very jurisdiction of the court, then the judgment can be reviewed. However, whether it is an error of law or fact, it must be an error of inadvertence.

8. Omission on the part of a court, either due to its inadvertence or on account of the failure of the counsel to draw its attention, to consider material pieces of evidence on the record affecting the merits of the case has always been held either an error apparent on the face of the record or as sufficient cause for justifying interference by way of review.

9. The Federal Court in the case of **Mst. Jamna Kunwar v. Lal Bahadur**, A.I.R. 1950 F.C. 131., held as follows

“Whether the error occurred by reason of the counsel's mistake or it crept in by-reason of an oversight on the part of the court was not a circumstance which could affect the exercise of jurisdiction of the court to review its decision. We have no doubts that the error was apparent on the face of the record and in our opinion the question as to how the error occurred is not relevant to this enquiry.”

10. In the case of **M.M.B. Catholicos v. M.P. Athanasius**, A.I.R. 1954 S.C. 526, the Supreme Court inter alia observed as follows:—

“The cases to which the reference has been made indicate that the misconception of the Court must be regarded as sufficient reason analogous to an error apparent on the face of the record.”

11. In the case of **Raghubir Gir v. Badam Gir**, 1950 A.L.J. 204., a Division Bench of Allahabad High Court held that where there was an error in the original order of a Civil Judge which appeared to have been passed with pointed attention towards the question of saleability of certain houses as such without any particular attention to the saleability of the site, the error could be said to be analogous to an error apparent on the face of the record within the meaning of Or. XLVII, Rule 1, C.P.C. The Division Bench quoted with approval the following observations of another Division Bench made in the case of *Narain Das v. Chirauji Lal* [XXIII A.L.J. 56 at p. 58.] :—

“In our opinion, the words “for any other sufficient reason” in Or. 47, R. 1, are not only very wide in themselves, but were intentionally so made by the legislature, because of the possibility of exceptional cases arising in which obvious injustice would be worked by strict adherence to the terms of the decree as originally passed. We are not prepared to hold that the court below was outside its jurisdiction in passing the order now under appeal.”

12. In the case of **Naurata v. Anokha**, A.I.R. 1954 Pepsu 85, it was held by a Division Bench that when important documentary evidence already on record was not brought to the notice of the court and referred to by either party when the appeal was heard, all the same, the documents being already there, the error is apparent on the face of the record, which an error whether it

occurs by reason of the counsel's mistake or it creeps in by reason of an oversight on the part of the court can always be a good ground for exercise of the jurisdiction of the court to reverse its decision.

13. Bearing in mind the aforesaid parameters, I shall now examine the merits of the application for review. The facts relevant to the adjudication of the issue involved in the review petition are as follows:

- i) On 13 January 2023, a Special Civil Suit bearing No.55 of 2010 between the then plaintiff and defendant Nos.1 to 4 and 8 to 10 and other defendants came to be dismissed;
- ii) In an appeal against the said decree, the Appellate Court granted the stay to the effect and operation of not only the decree but also the judgment passed in Special Civil Suit No.55 of 2010;
- iii) On 26 June 2023, the plaintiff filed an affidavit in lieu of examination-in-chief, which resulted in the commencement of trial as required under proviso to Order 6, Rule 17 of CPC.;
- iv) On 27 June 2023, the Appellate Court vacated the stay granted to the execution and operation of judgment in Special Civil Suit No.55 of 2010;
- v) On 26 September 2023, the defendants, without permission of the court, filed an *additional written statement* raising a plea of res judicata;
- vi) On 26 September 2023, the Trial Court discarded such an additional written statement on the grounds that permission of the

court was not obtained before filing an additional written statement;

vii) On *11 October 2023*, the petitioner filed an application for amendment under Order 6, Rule 17 of C.P.C. to incorporate a plea of *res judicata* based on judgment in Special Civil Suit No.55 of 2010.

14. This court allowed plaintiffs' writ petition mainly on two grounds:

(a) Merely because the effect of the judgment in a civil suit is stayed, may not dis-entitle the defendants from raising plea of *res judicata* earlier; and

(b) After the stay was vacated on 27 June 2023, the Trial Court fixed the suit for leading evidence on five occasions. The petitioner had the opportunity to apply for amendment on five occasions till 26 July 2023, which was considered the date of commencement of trial, for which the defendants did not plead due diligence.

15. In so far as a first ground for rejecting the amendment is concerned, a copy of the appellate court's order was not brought to the notice of this court, indicating that the appellate court stayed the effect of the entire judgment. A copy of the order passed by the appellate court indicates that the appellate court stayed the entire judgment of the Trial Court and, therefore, the findings rendered in Special Civil Suit No.55 of 2010 would not come into operation till the stay of the entire judgment is vacated. The fact stay of entire judgment in Special Civil Suit No.55 of 2010 was not

brought to the notice of this court during arguments by the parties to the petition.

16. The second reason assigned for allowing the writ petition was lack of due diligence as required under proviso to Order 6 Rule 17 of the C.P.C. The appellate court vacated the stay to the judgment in Special Civil Suit No.55 of 2010 on 27 June 2023. The trial commenced one day before the vacation of such stay—the cause of action for seeking amendment accrued to the petitioner after the commencement of trial. Hence, the proviso to order 6 rule 17 will not come into operation. Hence, it was not necessary for the defendants to plead and prove the exercise of due diligence as required under proviso to Order 6 Rule 17 of the C.P.C.

17. In my view, therefore, review petitioners are successful in substantiating the ground that omission on the part of this court to consider the correct date of commencement of trial due to its inadvertence on account of the failure of Counsel for the parties to draw its attention to said material fact affect merits of the case and such error in the facts of the case needs to be treated as an error apparent on the face of record justifying interference by way of review. Hence, the following order:

(a) Review Petition No.1 of 2024 is allowed in terms of prayer clause (a);

(b) Civil Writ Petition No.15335 of 2023 stands dismissed.

18. At this stage, learned advocate for the contesting respondents seeks continuation of stay. Since there was stay in

force during the pendency of the writ petition and review petition, the same shall continue for a period of four weeks from today.

(AMIT BORKAR, J.)

Note:- This order is modified as per order dated 31 January 2024. Correction in appearance is shown italicize.