

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

Appellate Side

Present :

The Hon'ble Justice Tapabrata Chakraborty

&

The Hon'ble Justice Partha Sarathi Chatterjee

RVW 35 of 2023

+

IA No. CAN 1 of 2023

Jyotsna Mazumdar

Vs.

Gouri Chakraborty @ Malakar

In

FA 02 of 2022

For the petitioner/respondent no. 1 :Mr. Haradhan Bannerjee, Ld. Sr. Adv.,
Mr. A. Pan.

For the opposite party no. 1/ appellant : Mr. Pinaki Ranjan Mitra,
Mr. Ashim Kumar Roy.

For the opposite party no.2/respondent no.2 : Mr. Tanmoy Bhattacharyya,
Mr. Somnath Das,
Mr. M. Mallick,
Ms. Joyeeta Kundu,
Mr. D. Banerjee.

Hearing is concluded on : 26.02.2025

Judgment on : 10.03.2025

Partha Sarathi Chatterjee, J.

1. The present Memorandum of Review along with its connected application has been filed seeking a review of the judgment dated 12th December, 2022, passed in FA 2 of 2022. By this judgment, the appeal was allowed, setting aside the judgment and decree dated 30th March, 2019, passed by the learned Civil Judge, Senior Division, 3rd Court, Howrah, in Title Suit No. 159 of 2009.
2. The succinct summary of the facts that need to be outlined to address the issues raised in the proceeding is that One Jyotsna Mazumdar, the plaintiff/respondent/petitioner (hereinafter referred to as "Jyotsna"), instituted a suit for the specific performance of a contract. In the plaint, Jyotsna contended that the suit property belonged to defendant no. 1/Appellant/Opposite Party no. 1 (hereinafter referred to as "Gouri"). Gouri had entered into an agreement for the sale of the suit property to Jyotsna for a consideration of Rs. 12 lakhs within a month from the date of execution of the agreement. An advance payment of Rs. 3 lakhs were also made to Gouri.
3. The agreement stipulated that Gouri would provide the documents related to the suit property to Jyotsna within the specified period. However, Gouri only supplied those documents at the end of 2008. After verifying the documents, Jyotsna approached Gouri for the execution and registration of the deed of sale. In response, Gouri refused to execute and register the deed, contending

that the agreement had become void. One morning, Jyotsna noticed that Ajit Das, defendant no. 2/respondent/Opposite Party no. 2 (hereinafter referred to as "Ajit"), was attempting to construct a boundary wall by bringing labourers and building materials. However, this attempt was thwarted by Jyotsna's timely intervention. These events led Jyotsna to file the suit.

4. After considering the pleadings and evidence presented by both parties, the learned Trial Court found merit in Jyotsna's contention and, accordingly, decreed the suit. Aggrieved by the judgment and decree, Gouri filed the appeal, FA 2 of 2022. As previously noted, by the judgment and decree dated 12.12.2022, the appeal was allowed, setting aside the Trial Court's judgment and decree. Seeking a review of this judgment, Jyotsna has initiated the present proceeding.
5. Mr. Banerjee, the learned advocate representing Jyotsna, argues that there is an error apparent on the face of the record. According to him, an error of law has occurred in the judgment dated 12.12.2022, as the Court failed to properly apply the provisions of Section 16(c) and 20 of the Specific Relief Act, 1963. As per these sections, he contends, a Court, while dealing with a suit or appeal for the specific performance of a contract, is required to consider the conduct of the parties. He claims that this Court omitted to consider the conduct of Gouri and fell into error by reversing the judgment and decree of the learned Trial Court. In support of his contention, he cites a decision, reported at (2015) 1 SCC 705 (*Zarina Siddique vs. A. Ramalingam Alias R. Amarnathan*).
6. He claims that although, due to the passage of time, it may not be possible to provide a reminder to the Court, arguments regarding the conduct of the

parties were advanced, but the Court overlooked this aspect. Since this issue cannot be raised in appeal, Jyotsna has approached this Court seeking a review of the judgment. To support his argument, he cites the decision reported in *Shankar K. Mandal & Ors. vs. State of Bihar & Ors.* (2003) 9 SCC 519.

7. Mr. Banerjee asserts that, in passing the judgment dated 12.12.2022, this Court overlooked the established legal principle that a party seeking a decree for specific performance is not required to deposit the money in Court or keep the money ready throughout the entire duration of the proceedings. Referring to two decisions, reported at (2006) 4 CHN 476 (*Abhijit Dey vs. Learned West Bengal Administrative Tribunal & Ors.*) & AIR 2021 SC 3055 (*Mani Squire Ltd. & Anr. vs. Nemai Chandra Kumar (D) & Ors.*), he contends that omission to consider the settled legal principle is error apparent on the face of the record.
8. He further argues that the Court failed to consider that Jyotsna, being a businesswoman, would not keep her money idle. Although her bank passbook and Income Tax Return did not reflect that she had the balance amount of the consideration money readily available, this does not imply that she was not ready to perform her part of the contract. To invigorate his argument, he cites the decisions, reported at 2022 SCC OnLine SC 1391 (*P. Daivasigamani vs. S. Sambandan*), AIR 1967 SC 868 (*Gomathinayagam Pillai & Ors. vs. Palaniswami Nadar*).
9. In response, Mr. Mitra, the learned advocate representing Gouri, argues that under the guise of a review, an issue cannot be re-agitated, nor can a Court be invited to rehear the entire matter or entertain any new issues. He submits

that a review is not an appeal in disguise. Referring to paragraph 14 of the judgment, Mr. Mitra points out that the entire argument advanced by Mr. Banerjee was already addressed. He further asserts that the contention raised by Mr. Banerjee today was never raised during the hearing of the appeal. He claims that the conduct of both parties was duly considered by this Court. To support his argument, Mr. Mitra cites the decision reported in *2023 (1) ICC 95 (SC) (S. Madhusudan Reddy vs. V. Narayan Reddy & Ors)*.

10. Mr. Bhattacharya, entering appearance on behalf of Ajit, adopted the submission of Mr. Mitra and places his reliance on a decision, reported at *2024 7 SCR 1077 (S. Tirupathi Rao vs. M. Lingamaiah & Ors.)*.
11. Undeniably, Section 114 and Order 47, Rule 1 of the Code of Civil Procedure, 1908, govern the right of an aggrieved party to seek a review of a decree, order, or judgment, and prescribe the procedure for such a remedy, respectively. According to the legislative mandate enshrined in these provisions, a Court can be invited to review its judgment only on three grounds: (i) the discovery of new and important matter or evidence, which, despite due diligence, was not within the applicant's knowledge or could not have been produced at the time the decree was passed or the order made; (ii) a mistake or error apparent on the face of the record; or (iii) any other sufficient reason.
12. It is a settled proposition of law that the power of review should not be confused with the appellate power, which allows an appellate court to correct all errors made by a subordinate court. The contentions raised and decided in the main proceedings cannot be reopened or re-agitated under the guise of a review petition.

13. In the present case, Jyotsna seeks a review of the judgment on the ground that there is an error apparent on the face of the record. Needless to state that there is a distinct difference between a mere erroneous decision and an error apparent on the face of the record. An error can be considered apparent on the face of the record only when it is patent, easily identifiable without the need for elaborate argument, and leaves no room for controversy. Such an error is immediately obvious, as if it stares at one upon a simple glance. The term 'error apparent on the face of the record' refers to an error that can be discerned by a mere perusal of the record, without reference to any external matter, and one that strikes the observer immediately, without requiring a lengthy process of reasoning to pinpoint the error. (See, the decisions of S. Tirupathi Rao (*supra*) and S. Madhusudan Reddy (*supra*)).
14. Although no specific ground was raised in the memorandum of review, Mr. Banerjee contends that certain arguments advanced by him were not addressed in the judgment dated 12.12.2022. Though Mr. Mitra has confirmed that Mr. Banerjee's arguments were fully addressed and he claims that Mr. Banerjee is attempting to introduce new arguments at this stage taking recourse to this plea. However, in the case of Shankar K. Mondal & Ors. (*supra*), it was ruled that if a party believes a judgment misrepresents court proceedings, they must immediately call the attention of the very Judges who have made the record while the matter is still fresh. If no such step is taken the matter must necessarily end there. In the present case, the hearing of the appeal was concluded on 15th November 2022 and the judgment was delivered on 12th December 2022. Review petition was filed on

17th February, 2023. Thus, at such distance of time, it is difficult to accept Mr. Banerjee's claim that his arguments were overlooked.

15. Mr. Banerjee's primary argument is that this Court omitted to consider the conduct of the parties. Section 20 of the Specific Relief Act, 1963 grants the Court equitable discretion to either grant or deny the relief of specific performance, and this discretion also depends upon the conduct of the parties. The plaintiff must establish the necessary ingredients to ensure that the discretion is exercised judiciously in his/her favour. At the same time, the provisions of this section allow the defendant, in an action for specific performance, to raise objections against the exercise of such discretion
16. However, it is undisputed that the conduct of the parties in a proceeding is reflected in their pleadings, evidence, and surrounding circumstances. It is not claimed that the judgment dated 12.12.2022 was delivered without considering the pleadings and evidence presented by the parties. Although the word 'conduct' is not explicitly used in the judgment, the paragraphs 23 and 24 of the judgment clearly determine that the parties did not intend for time to be the essence of the contract. This determination is positively based on the conduct of the parties as reflected in the evidence on record.
17. Section 16(c) of the Specific Relief Act, 1963 stipulates that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract, except for those terms whose performance has been prevented or waived by the defendant. Therefore, a mandatory precondition for obtaining a decree of specific performance is that

the plaintiff must aver and prove continuous readiness and willingness to perform their part of the contract.

18. Needless to say, that readiness and willingness must be proved through evidence. Based on such evidence and the conduct of the parties, the Court will infer the plaintiff's readiness and willingness. It is not necessary for the plaintiff to deposit the money in Court or with the defendant. However, the plaintiff must demonstrate that he/she has the financial resources to execute and register the deed. In other words, the plaintiff must prove his/her capability to execute and register the deed.
19. The record reveals that it was the plaintiff herself who, to prove her readiness and/or financial capability, submitted certain Income Tax Returns. However, the Court observed that the ITRs did not demonstrate her ability to pay the balance consideration. Paragraph 30 and 31 of the judgment dated 12.12.2022 reflects that all the evidence adduced by the parties was considered and only after this consideration, it was determined that the plaintiff failed to substantiate her claim that she was ready to perform her part of contract.
20. Therefore, it is clear that Mr. Banerjee, in his argument, has attempted to re-agitate issues that were previously raised and decided in the appeal, seeking a review of the judgment, which cannot be permitted as per settled legal principles. Mr. Banerjee seeks to introduce a new argument that being a businesswoman, Jyotsna would not keep money idle but she had capability to arrange the money. There is no scintilla of doubt regarding the binding nature of the precedents set in the judgments relied upon by Mr. Banerjee.

However, the propositions laid down therein would not be of assistance to the petitioner in this case.

21. Thus, based on the discussions in the preceding paragraphs, we are of the opinion that the petitioner has failed to demonstrate any error apparent on the face of the record. Consequently, the review petition and its connected application are dismissed, however, without any order as to costs.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)