
(2014) 01 GUJ CK 0104
In the Gujarat High Court

Case No : Civil Application (For Condonation of Delay) No. 4700 of 2012 in Miscellaneous Civil Application (Stamp Number) No. 890 of 2012 in Letters Patent Appeal No. 2339 of 2009 in Special Civil Application No. 11825 of 2009 with Miscellaneous Civil Application (

Ghaghal Ranchhodbhai Amarabhai	APPELLANT
Vs	
Bhanjibhai Devshibhai Luhar 4 and Others	RESPONDENT

Date of Decision : 21-01-2014

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 135D

Citation : (2014) 01 GUJ CK 0104

Hon'ble Judges : K.M. Thaker, J;G.B. Shah, J

Bench : Division Bench

Advocate : P.C. Kavina, with Mr. Divyesh Sejpal, for the Appellant; Mehul S. Shah, Advocate for the Respondent(s) No. 1, for the Respondent

Judgement

G.B. Shah, J.—So far as Civil Application No. 4700 of 2012 is concerned, Rule. Mr. Mehul S. Shah waives service of notice of rule on behalf of respondent No. 1.

We have heard Mr. P.C. Kavina, learned Senior Advocate with Mr. D.C. Sejpal, learned Advocate appearing for the applicant-third party and Mr. Mehul S. Shah, learned advocate for the respondent No. 1. Though duly served, none has appeared for respondent Nos. 2 to 5. On request made by learned senior advocate and learned advocates who were present before the Court, we have heard them by way of final hearing.

The applicant-third party seeks below mentioned relief in the present application:

9 (a) Condone delay of 295 days caused in filing the application for joining applicant as party and for application for review of the order and judgment in LPA No. 2339/09.

Civil application No. 4700 of 2012 has been filed by the applicant-third party to condone the delay of 295 days caused in filing the review application against the

order dated 10.5.2011 passed in Letters Patent Appeal No. 2339 of 2009 which was filed against the judgment dated 17.11.2009 delivered in Special Civil Application No. 11825 of 2009.

1.1 The applicant-third party has also preferred Misc. Civil Application (Stamp) No. 890 of 2012 for review under Order 47 of the Code of Civil Procedure, 1908. The prayer sought for in paragraph 12 reads as under.

12.

(a) to review/recall the order dated 10.5.2011 in LPA No. 2339/09.

(b) to hear the parties, and

(c) to set aside the order dated 10.5.2011 in LPA No. 2339/09 and restore the order and judgment in Sp.C.A. No. 11825/2009 dated 17.11.2009.

(d)

(e)

(f)

1.2 At the time of hearing of the application, learned advocate for respondent No. 1 - original appellant raised the objection that the applicant-third party has not preferred the application for leave to file the review as he was not party to the litigation. As per the learned senior advocate for the applicant-third party though no such provision exists in the CPC that before filing an application for review, leave application is to be preferred by a person who was not party to the original litigation, but to put all the technical objections of respondent No. 1 - original appellant at rest, the applicant-third party has preferred Civil Application No. 11534 of 2012. The prayer 7(A) of the same reads as under.

7.

(A) Your Lordships be pleased to grant leave and hold that the applicant is entitled to file and maintain the application for review in the order dated 10.5.2011 in Letters Patent Appeal No. 2339 of 2009, in the interest of justice and equity;

(B)

2. Learned senior advocate for the applicant-third party has submitted that the applicant-third party had purchased the land in question on 7.7.2010 from one Hajabhai Kalabhai Bharwad who had purchased the said land on 5.7.2010 from the sole heir Varsangbhai Jalabhai Koli of deceased respondent No. 5 - original respondent No. 4 i.e. Mongiben D/o. Motibhai Koli and W/o. Jalabhai Kalabhai and both the said transfers took place after the learned Single Judge dismissed Special Civil Application No. 11825 of 2009 on 17.11.2009 and when there was no stay order of any competent court/authority. The entries related to both transfers were mutated in Form No. 6 - Record of Right about ownership on

16.7.2010 and the same were certified on 25.8.2010 respectively vide entry Nos. 581 and 582.

2.1 Somewhere around in July 2011, the applicant-third party received the notice related to the subject land from the Mamlatdar, Sayla inviting objections against mutation entry in the name of respondent No. 1 - original appellant i.e. Bhanjibhai Devsinhbhai Luhar pursuant to the order in Letters Patent Appeal No. 2339 of 2009 dated 10.5.2011. According to the applicant-third party, he had purchased the land said to be free from the litigation, he immediately contacted the seller Hajabhai Kalabhai Bharwad who, (as claimed by him) was also totally unaware about the litigation and hence they contacted Varsangbhai Jalabhai Koli who had sold the land to Hajabhai Kalabhai Bharwad and he too claimed that he had no knowledge about Letters Patent Appeal No. 2339 of 2009. Moreover, as narrated in paragraphs 3 to 8 of the affidavit of the applicant-third party dated 30.7.2012, he has claimed that he made efforts to get the relevant documents, information and then approached the advocate and in the circumstances, delay of 295 days had occurred in preferring the application for review and so, it is prayed that the said delay occurred in preferring Misc. Civil Application (Stamp) No. 890 of 2012 be kindly condoned in the interest of substantial justice.

2.2 Learned senior advocate for the applicant-third party has then submitted that even on merits to satisfy this Court about the review/recall of the order dated 10.5.2011 passed in Letters Patent Appeal No. 2339 of 2009, the applicant-third party has a very good case. Learned senior advocate has then vehemently submitted that the said judgment in Letters Patent Appeal was delivered against the dead person, as respondent No. 5 - original respondent No. 4 - Mongiben Koli died on 21.12.1998 i.e. at the time of delivering the judgment and even at the time when the said appeal was filed and heard. Moreover, said Letters Patent Appeal No. 2339 of 2009 proceeded against the dead person without joining the heir of deceased Mongiben D/o. Motibhai Koli and W/o. Jalabhai Kalabhai i.e. without joining Varsangbhai Jalabhai Koli. He then submitted that no notice of appeal was served on the heir of Mongiben i.e. Varsangbhai Jalabhai. Moreover, referring to the notice issued in Letters Patent Appeal No. 2339 of 2009 on respondent No. 5 - original respondent No. 4 - Mongiben reveals that thumb mark of an unknown person is put and it is said to have been served and thus in service of notice i.e. process of this Court, fraud has been committed by respondent No. 1 - original appellant in getting favourable order and thus, this Court has delivered the judgment and order against the dead person. Drawing the attention of this Court to the process i.e. notice, learned senior advocate then submitted that on perusal of thumb impression, it appears that it is not mounted and does not state that who has put the thumb impression and as Mongiben had expired on 21.12.1998, it cannot be the thumb impression of Mongiben and thus there was no service of notice of Letters Patent Appeal on respondent No. 5 - original respondent No. 4 in Letters Patent Appeal nor was it served on her heir Varsangbhai and so, the order dated 10.5.2011 passed in Letters Patent Appeal No. 2339 of 2009 is required to be reviewed.

2.3 Learned senior advocate for the applicant-third party has then submitted that respondent No. 1 - original appellant has suppressed the fact that the land in question was sold by Varsangbhai Jalabhai to Hajabhai Kalabhai Bharwad and then to the applicant-third party during the hearing of Letters Patent Appeal No. 2339 of 2009. If respondent No. 1 - original appellant had disclosed this fact and joined the applicant-third party as party in the Letters Patent Appeal, the order would not have been passed because after the judgment of the learned Single Judge in Special Civil Application No. 11825 of 2009, the sale deed in favour of respondent No. 1 - original appellant was void and purchaser of the land after the date of the said judgment i.e. after 17.11.2009, the land in question was restored to Varsangbhai Jalabhai and hence Varsangbhai Jalabhai had validly transferred the land. Thus, the applicant-third party is bona fide purchaser of the land with value without notice of litigation and thus, he was required to be heard before deciding the Letters Patent Appeal finally by this Court, but on account of ulterior intention of respondent No. 1 - original appellant, the applicant-third party was not aware about the proceedings and hence, the application of the applicant-third party may be allowed to review the order dated 10.5.2011 passed in Letters Patent Appeal No. 2339 of 2009.

2.4 In support of his submissions, learned senior advocate for the applicant-third party has relied on the following decisions.

- (i) Gangadhara Palo Vs. The Revenue Divisional Officer and Another,
- (ii) Bakshi Dev Raj and Another Vs. Sudhir Kumar,
- (iii) A. Nawab John and Others Vs. V.N. Subramaniam,
- (iv) Pohla Singh @ Pohla Ram (d) by Lrs. and Others Vs. State of Punjab and Others,
- (v) Shivdeo Singh and Others Vs. State of Punjab and Others,

3. Learned advocate Mr. Mehul S. Shah appearing for respondent No. 1 - original appellant opposed the Civil Application by submitting that the grounds mentioned in the Civil Application are denied by him. He submitted that any reason which can be considered as sufficient cause is not made out and therefore also the application does not deserve to be entertained. He has submitted that the applicant has falsely stated about the time when he came to know about the order passed in Letters Patent Appeal No. 2339 of 2009. He very strenuously argued that the condonation application is filed with suppression of material facts and by stating false facts.

3.1 He has specifically stated the grounds in para 4 of the affidavit-in-reply dated 5.9.2012 that respondent No. 1 - original appellant had inquired from his son Bhupatbhai Bhanji Luhar who had gone to serve Koli Mongiben along with one Ravirajsinh B. Vaghela and came to know that they had served the notice on son of deceased Koli Mongiben i.e. Varsang Jalabhai Koli.

3.2 It is also stated in the reply that the service of notice was accepted by said Varsangbhai but he had not informed that his mother had expired and copy of the service of notice bearing thumb impression of Varsang Jalabhai Koli is produced on record of Letters Patent Appeal No. 2339 of 2009.

3.3 It is stated that the heir of the deceased Mongiben i.e. Varsangbhai had never made any attempt to appear in the Letters Patent Appeal but he had approached before the Apex Court and challenged the said judgment in Letters Patent Appeal No. 2339 of 2009 dated 10.5.2011.

3.4 It is further stated that the impugned judgment is not void and even otherwise the third party cannot seek review of the judgment and as such the present proceedings are not at all maintainable at law since the SLP filed against the judgment dated 10.5.2011 has not been entertained and has been dismissed.

3.5 Hence, it cannot be said that the heir of deceased Mongiben was unaware of the proceedings of the Letters Patent Appeal.

3.6 It is also stated that against the said SLP, no review has been preferred by the heir of deceased Mongiben. It is further stated that as the present applicant was not party to the Letters Patent Appeal, he cannot file review in the said proceedings and the heir of deceased Mongiben had never tried to appear before the revenue proceedings of the present opponents against the Government in pursuance of mutation entry No. 215 dated 30.5.1980. Learned counsel for respondent No. 1 - original appellant has submitted that as per well established law, legal heirs of proforma defendant or of the opposite party are not required to be brought on record since they are formal parties more particularly when no relief is sought against them. He further stated that the applicant-third party is not a bona fide purchaser and has not come with clean hands and as such he had colluded himself with Varsangbhai Jalabhai Koli and Hajabhai Bharwad and has entered into the alleged transaction of land with calculated risk and no sufficient grounds are pleaded and established on record for seeking condonation of delay and/or for review of order passed in Letters Patent Appeal and hence the applications deserve to be dismissed.

3.7. In support of his submissions, learned advocate for respondent No. 1 - original appellant relied on the following decisions:

- (1) Meghmala and Others Vs. G. Narasimha Reddy and Others,
- (2) Gopabandhu Biswal Vs. Krishna Chandra Mohanty and Others,
- (3) Sanjay Verma Vs. Manik Roy and Others,
- (5) Sunil Gupta Vs. Kiran Girhotra and Others,

4. We have considered rival submissions made by learned senior advocate for the applicant-third party and learned advocate for respondent No. 1 - original appellant. We have also perused the submissions made by the applicant-third party in paragraph 4 referred hereinabove.

4.1 From the submissions referred above and from the averments made in the application itself, it is manifest that for a long time, the applicant-third party has deliberately, knowingly and intentionally remained silent over his alleged right.

4.2 As such, the averments made in the application also appear to be far from truth and vague.

5. The uncontroversial facts related to the land in question are as under.

(a) Respondent No. 1 - original appellant had entered into the sale deed in respect of the land in question on 29.6.1979 and purchased the said land from Mongiben D/o. Motibhai and W/o. Jalabhai Kalabhai Koli - owner of the said land and entry No. 215 was mutated on 30.5.1980 and certified on 5.9.1980 in favour of respondent No. 1 - original appellant.

(b) The Deputy Collector pursuant to the proposal and report made by the Mamlatdar, Limdi related to entry No. 215 in the year 1997, issued notice u/s 54 read with section 75 of the Ordinance on the ground that the said transaction dated 29.6.1979 is violative of the provisions of the Ordinance. The respondent No. 1 - original appellant filed explanation and considering the same, the Deputy Collector, Limdi passed the order dated 2.2.2000 and declared that respondent No. 1 - original appellant was not agriculturist; hence, he be removed from the said land and entry No. 215 be deleted.

(c) Respondent No. 1 - original appellant preferred the appeal being Appeal No. 68 of 1999 - 2000 before the Collector, Surendranagar which came to be rejected vide order dated 6.8.2001.

(d) Against that, respondent No. 1 - original appellant filed Revision Application No. 42 of 2005 before the Secretary (Appeals), Revenue Department who rejected the same vide his order dated 27.3.2009.

(e) Against the said order, respondent No. 1 - original appellant preferred the petition i.e. Special Civil Application No. 11825 of 2009 which came to be rejected by order dated 17.11.2009.

(f) Though Mongiben died in 1998, no one brought said fact on record before learned Single Judge.

(g) Against the said order, respondent No. 1 - original appellant preferred Letters Patent Appeal No. 2339 of 2009 and vide order dated 10.5.2011, the said appeal was allowed and orders dated 27.3.2009, 6.8.2001 and 2.2.2000 were set aside and it was held that since the orders passed by the authorities were set aside, the judgment delivered by the learned Single Judge in Special Civil Application No. 11825 of 2009 dated 17.11.2009 would not survive. It is important to note that the fact of death of Mongiben in the year 1998 was not brought on record of above referred Letters Patent Appeal by anyone. It is also equally important to note that on 13.10.2010 i.e. during pendency of Letters Patent Appeal No. 2339 of 2009, respondent No. 1 - original appellant has filed Civil Application No.

12634 of 2010 for joining heir of deceased Mongiben, but it is the fact that till disposal of said Letters Patent Appeal No. 2339 of 2009 i.e. till 10.5.2011, the said Civil Application No. 12634 of 2010 has not been listed on board. Thus, till the disposal of said Letters Patent Appeal No. 2339 of 2009, the fact of death of Mongiben was not placed before the Division Bench of this Court who has passed the above referred order dated 10.5.2011.

5.1 It is the case of the applicant-third party that after pronouncement of the judgment in Special Civil Application No. 11825 of 2009 dated 17.11.2009, entry No. 552 was mutated in the name of Varsangbhai Jalabhai Koli in the record of right.

5.2 It is important to note at this juncture that on or around 18.3.2010 (i.e. almost four months before the date on which the applicant or even his immediate predecessor Hajabhai Bharwad purchased the land), respondent No. 1 - original appellant had filed Civil Suit No. 20 of 2010 in the court of Principal Civil Judge (Junior Division), Sayla against Varsangbhai Jalabhai Koli and praying that the heir and legal representative of deceased Mongiben be restrained from dealing with the land in question and not to interfere with the possession of the present respondent No. 1 - original appellant and the said suit is still pending.

5.3 Thereafter, though the heir and legal representative of deceased Mongiben i.e. Varsangbhai Jalabhai Koli was party - opponent in suit No. 20 of 2010 filed by the present respondent No. 1 i.e. original appellant sold the land in question to one Hajabhai Kalabhai Bharwad on 5.7.2010 and thereafter leaving one day i.e. 6.7.2010, on 7.7.2010 the applicant-third party purchased the land in question from Hajabhai Kalabhai Bharwad and entry Nos. 581 and 582 were respectively mutated on 25.8.2010.

5.4 It is the case of the applicant-third party that he had purchased the said land after examining all these documents and after being convinced that the said land is free from any litigation.

5.5 It is also pertinent that though in the said suit No. 20 of 2010 above mentioned Mr. Varsangbhai Koli i.e. vendor of the land in question was party and though on the date of sale of land in question, the said suit was pending, the applicant has claimed that he had verified that land was free from litigation. Varsangbhai Jalabhai Koli i.e. the heir of deceased Mongiben and the vendor of the land in question was party - opponent in the said Suit No. 20 of 2010 and though he was served with the summons in the said Suit No. 20 of 2010, he remained absent and after adjourning the proceedings for almost 6 months, the Civil Court passed the order dated 1.9.2010 below Exh. 6 and granted injunction in favour of respondent No. 1 - original appellant.

5.6 Thereafter, entry No. 598 was purported to be inserted in the revenue record related to interim order dated 1.9.2010 below Exh. 6 in Civil Suit No. 20 of 2012 dated 4.10.2010 and upon the notice being issued u/s 135-D of the Bombay Land Revenue Code, 1879 on the present applicant-third party, he filed his

objections on 15.12.2010 and the Mamlatdar had rejected the same vide his order dated 30.12.2010 in Takrari Case No. 13 of 2010.

5.7 The present applicant-third party has preferred R.R.T. Appeal No. 22 of 2011 on 23.2.2011 before the Deputy Collector against respondent No. 1 - original appellant which was rejected on 29.2.2012.

5.8 Meanwhile, the applicant-third party has filed Civil Suit No. 1 of 2011 on 1.9.2011 for declaration and injunction.

5.9 It is also important to note that in Letters Patent Appeal No. 2339 of 2009 vide order dated 2.12.2009, the Division Bench of this Court had passed the order that the said appeal shall be listed for admission hearing on 7.12.2009 and till then all the parties to the said litigation were directed to maintain status quo regarding the land in question. On 7.12.2009, the said appeal was directed to be listed on 21.12.2009 and till then, respondents were directed that they shall not act upon the order dated 17.3.2009 passed in Special Civil Application No. 11825 of 2009. On 21.12.2009, vacated the stay in the said appeal with the observation that any action taken by either of the parties in the meantime with regard to the subject matter of the writ petition shall be subject to the result of this appeal i.e. Letters Patent Appeal No. 2339 of 2009.

6. According to the applicant-third party, in July 2011, he had received the notice inviting objections for mutating entry in the name of respondent No. 1 - original appellant pursuant to the order dated 10.5.2011 in Letters Patent Appeal No. 2339 of 2009 and according to him, he has purchased the land being free from litigation, he immediately contacted Hajabhai Bharwad and in turn Varsangbhai Jalabhai Koli and both allegedly showed their ignorance and claimed that they have no knowledge about Letters Patent Appeal No. 2339 of 2009 or any proceedings.

7. Another glaring fact which is forthcoming on the record is that, the heir and legal representative of deceased Mongiben i.e. Varsangbhai Jalabhai Koli had filed Special Leave to Appeal (C) No. CC 17746 of 2011 before the Apex Court which was drawn on 28.9.2011 and filed on 10.10.2011 and upon hearing the counsel on 8.11.2011, permission to file said SLP challenging the order dated 10.5.2011 passed in Letters Patent Appeal No. 2339 of 2009 was declined. In this background, the applicant-third party has come forward with this review application after an inordinate delay of 295 days, in our view, the applicant-third party has failed to make out sufficient cause to substantiate and justify the request to condone the delay of 295 days caused in filing the application for review of the order.

8. Thus, in absence of cogent or satisfactory explanation from the applicant-third party for delay of 295 days and in absence of no sufficient cause having been shown and the applicant-third party, as such, has failed to show sufficient cause and has failed to give satisfactory explanation for inordinate delay and to satisfy the Court to accept the request to condone the delay. So as to ascertain whether

there is any merits in the substantive application seeking review of earlier order, learned advocate for applicant was asked to submit and justify the request for review of the order dated 10.5.2011, so to find out whether there is any apparent error on the face of the order which would require or justify review/recall of the order so that if the applicant can make out even prima facie case justifying request for review/recall of the order dated 10.5.2011 passed in Letters Patent Appeal No. 2339 of 2009, then the request for condoning delay caused in preferring application can be accordingly considered.

8.1 Thus, before taking any final decision, we considered it appropriate to hear the application on merits also so as to ascertain as to whether there is any merit in Misc. Civil Application seeking review and if so whether delay may be condoned so as to consider the matter on merits. Therefore, we have also heard learned advocates for the parties at length on Civil Application No. 11534 of 2012 which is the application for leave to file the review and Misc. Civil Application (Stamp) No. 890 of 2012 i.e. review application.

8.2 Learned advocate for respondent No. 1 - original appellant has fairly submitted that if Civil Application No. 11534 of 2012, the application for leave to file review be allowed, he has no objection, more particularly, when this court is hearing the pending applications referred above by way of final hearing.

8.3 Before proceeding further, it is relevant to take into consideration the scope and purview of the application seeking review of the judgment and order and the extent to which the Court can exercise the jurisdiction, more particularly, when the same had been tested by the Apex Court by way of SLP as referred above and thereafter request being made for review of the said judgment and order.

8.4 This aspect has been considered by the Apex Court in various decisions.

8.5 On this issue, learned senior advocate for the applicant-third party has placed reliance on the decision reported in Gangadhara Palo Vs. The Revenue Divisional Officer and Another, The Apex Court in paragraphs 6 and 7 of the said decision observed thus:

6. When this Court dismisses a SLP by giving some reasons, however meagre (it can be even of just one sentence), there will be a merger of the judgment of the High Court into the order of the Supreme Court dismissing the special leave petition. According to the doctrine of merger, the judgment of the lower court merges into the judgment of the higher court. Hence, if some reasons, however meagre, are given by this Court while dismissing the special leave petition, then by the doctrine of merger, the judgment of the High Court merges into the judgment of this Court and after merger there is no judgment of the High Court. Hence, obviously, there can be no review of a judgment which does not even exist.

7. The situation is totally different where a SLP is dismissed without giving any reasons whatsoever. It is well settled that special leave under Article 136 of the

Constitution of India is a discretionary remedy, and hence a SLP can be dismissed for a variety of reasons and not necessarily on merits. We cannot say what was in the mind of the Court while dismissing the SLP without giving any reasons. Hence, when a SLP is dismissed without giving any reasons, there is no merger of the judgment of the High Court with the order of this Court. Hence, the judgment of the High Court can be reviewed since it continues to exist, though the scope of the review petition is limited to errors apparent on the face of the record. If, on the other hand, a SLP is dismissed with reasons, however meagre (it can be even of just one sentence), there is a merger of the judgment of the High Court in the order of the Supreme Court. (See the decisions of this Court in Kunhayammed v. State of Kerala, S. Shanmugavel Nadar v. State of T.N., State of Manipur v. Thingujam Brojen Meetei, and U.P. SRTC v. Omaditya Verma.)

8.6(a) Learned advocate for the applicant-third party has also placed reliance on the decision reported in Bakshi Dev Raj and Another Vs. Sudhir Kumar, The Apex Court in paragraphs 33 to 38 of the said decision observed thus:

Maintainability of Review Petition

33. Now, let us consider the maintainability of the review petition filed before the High Court after dismissal of SLP (C) No. 10939 of 2008 before this Court. It is not in dispute that the High Court, by order dated 18.03.2008, based on the statement of both the counsel disposed of Second Appeal No. 19 of 2005 by modifying the decree as stated therein. Against the said order of the High Court, the appellants preferred the abovesaid SLP before this Court. By order dated 14.05.2008, this Court after hearing the counsel for the appellants passed the following order:

1. The learned counsel for the petitioner prays to withdraw the petition. Prayer made is accepted.
2. The SLP is dismissed as withdrawn.

34. A reading of the above order makes it clear that based on the request of the counsel, the SLP came to be dismissed as withdrawn. It is also clear that there is no permission or reservation or liberty for taking further action. However, dismissal of SLP is not a bar for filing review before the same Court. This aspect was considered by a three-Judge Bench of this Court in Kunhayammed and others v. State of Kerala. The above aspect was dealt with elaborately in paras 38, 40 and 44:

38. The review can be filed even after SLP is dismissed is clear from the language of Order 47 Rule 1(1)(a). Thus the words "no appeal" has been preferred in Order 47 Rule 1(1)(a) would also mean a situation where special leave is not granted. Till then there is no appeal in the eye of law before the superior court. Therefore, the review can be preferred in the High Court before special leave is granted, but not after it is granted. The reason is obvious. Once

special leave is granted the jurisdiction to consider the validity of the High Court's order vests in the Supreme Court and the High Court cannot entertain a review thereafter, unless such a review application was preferred in the High Court before special leave was granted.

40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the court, (v) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the country and so on. The expression often employed by this Court while disposing of such petitions are -"heard and dismissed", "dismissed", "dismissed as barred by time" and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the merit worthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the SLP only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 CPC or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 CPC act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of a SLP does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because

permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger.

44. To sum up, our conclusions are:

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the SLP is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment, decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking 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.

(v) 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 SLP or that the order of the Supreme Court is the only order binding as *res judicata* in

subsequent proceedings between the parties.

(vi) 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.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of the High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC.

(emphasis in original)

35. In view of the principle laid down above by this Court, even after dismissal of SLP, the aggrieved parties are entitled to move the court concerned by way of review. In the case on hand, though the appellants moved an SLP in this Court against the order of the High Court in Second Appeal, admittedly, the SLP was dismissed as withdrawn without the leave of the Court.

36. Similar question was considered by this Court in *Sarguja Transport Service v. STAT*. In this decision it was held that where a petitioner withdraws a petition filed by him in the High Court under Article 226/227 without permission to institute a fresh petition, remedy under Article 226/227 should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition and it would not be open to him to file a fresh petition in the High Court under the same article though other remedies like suit or writ petition before this Court under Article 32 would remain open to him.

37. It was further held in *Sarguja Transport Service* case that the principle underlying Rule 1 of Order 23 CPC should be extended in the interests of administration of justice to cases of withdrawal of writ petition also. The main contention urged by the learned counsel for the petitioner in that case was that the High Court was in error in rejecting the writ petition on the ground that the petitioner had withdrawn the earlier writ petition in which he had questioned the order passed by the Tribunal on 4-10-1985 without the permission of the High Court to file a fresh petition. It was urged by the learned counsel that since the High Court had not decided the earlier petition on merits but had only permitted the petitioner to withdraw the petition, the withdrawal of the said earlier petition could not have been treated as a bar to the subsequent writ petition. While considering the said question, this Court considered sub-rule (3) of Rule 1 of Order 23 CPC and its applicability to writ petitions filed under Article 226/227 and held as under. (*Sarguja Transport Service* case, SCC p.12, para 9)

9. The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that article. On this point the decision in *Daryao* case is of no assistance. But we are of the view that the principle underlying Rule

1 of Order 23 of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Article 21 of the Constitution since such a case stands on a different footing altogether. We, however leave this question open.

38. In the light of the discussion in the earlier paragraphs even after dismissal of an SLP with or without reasons, the aggrieved party is entitled to file a review. In view of the language used in Order 47 Rule 1(1)(a) CPC which relates to "review", the present Review Petition (C) No. D-5 of 2008 cannot be dismissed on the ground of maintainability. Based on the above discussion and reasons, we hold that the review petition filed by the appellants was maintainable but in view of Order 3 Rules 1 and 4, Chapter relating to the role of Pleaders, and in view of the conduct of the appellants in not raising any objection as to the act of their counsel except filing review petition, we are not inclined to accept the claim of the appellants.

8.6 (b) Drawing our attention to both the above citations, learned senior advocate for the applicant-third party has submitted that as observed in the said citations, the review application after dismissal of the SLP is maintainable if the SLP is 'simply dismissed' i.e. without any observation on merit because it does not amount to merger of the order of the High Court in the order of the Apex Court.

9. Per contra, learned advocate for respondent No. 1 - original appellant has placed reliance on the decision reported in *Gopabandhu Biswal Vs. Krishna Chandra Mohanty and Others*, The Apex Court in Head Note-A and relevant observation reads as under.

(A) Administrative Tribunals Act (13 of 1985), S. 22(3)(f) - Civil P.C. (5) of 1908), O. 47, R. 1 - Review - SLP filed against judgment of tribunal, dismissed -

Judgment of tribunal becomes final and binding as between the parties - Review is not permissible - Person aggrieved by judgment of tribunal and who is not party to main petition and SLP cannot also challenge judgment of tribunal by filing review petition.

The power of review which is granted to an Administrative Tribunal is similar to power given to a civil Court under O. 47, R. 1 of the Code of Civil Procedure. Therefore, any person (inter alia) who considers himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred can apply for review under O. 47, R. 1(1)(a). An appeal lies to this Court from a decision of the Administrative Tribunal. If an appeal is preferred, the power to review cannot be exercised, where a SLP for leave to file an appeal preferred from the judgment of the Tribunal to Supreme Court was rejected; the rejection of, in effect, amounts to declining to entertain an appeal, thus making the judgment and order appealed against final and binding. Once a SLP is filed and rejected, the party cannot go back to the Tribunal to apply for review.

In the instant case, however, the four applicants who filed the two review petitions before the Tribunal were not parties to the main petition. They were also not parties to the SLP filed before this Court which was dismissed. Even if they are parties aggrieved they are not entitled to apply for a review of the main judgment of the Tribunal, since it will lead to reopening of a matter which has attained finality by virtue of an order of Supreme Court. The applicants, even if they are persons aggrieved, do not have, a right of review under any part of O. 47, R. 1. Even under O. 47, R. 1(2), the party not appealing from a decree or order can apply for review only on grounds other than the grounds of appeal which were before the appellate Court, and during the pendency of the appeal. All the grounds which were urged in review were, in fact, urged before the Tribunal at the time when the Tribunal decided the main application and they were also urged by the petitioner in the SLP which was filed before Supreme Court. The SLP has been dismissed. The same grounds cannot be again urged by way of a review petition by another party who was not a party in the main petition. Moreso when the review petitions were filed one and a half years after the main judgment was delivered and one year after the SLP was dismissed and there was no explanation for this delay. The only remedy for a person who wants to challenge that judgment is to file a separate application before the Tribunal in his own case and persuade the Tribunal either to refer the question to a larger Bench or, if the Tribunal prefers to follow its earlier decision, to file an appeal from the Tribunal's judgment and have the Tribunal's judgment set aside in appeal.

Review is not an available remedy.

9.1 Learned advocate for respondent No. 1 - original appellant has then put reliance on the decision by Apex Court in Meghmala and Others Vs. G. Narasimha Reddy and Others, The relevant observations read as under.

2. Judicial pronouncements unlike sand dunes are known for their stability/finality. However, in this case, in spite of the completion of several rounds of litigation upto the High Court, and one round of litigation before this Court, the respondents claim a right to abuse the process of the Court with the perception that whatever may be the orders of the High Court or this Court, inter-se parties the dispute shall be protracted and will never come to an end.

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27. So far as the other application filed by the respondents before the Special Court is concerned, it is based on the grounds that earlier judgment and order had been obtained by the appellant applicant suppressing material facts and the suit land had not been identified properly, and therefore, the judgment of the Special Court duly affirmed by the High Court stood vitiated.

Fraud/Misrepresentation:--

28. It is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eye of the law. "Fraud avoids all judicial acts ecclesiastical or temporal." (Vide S.P. Chengalvaraya Naidu v. Jagannath). In Lazarus Estate Ltd. v. Besalay the Court observed without equivocation that : (QB p.712) "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

29. In A.P. State Financial Corpn. v. GAR Re-Rolling Mills and State of Maharashtra v. Prabhu this Court observed that a writ Court, while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the courts are obliged to do justice by promotion of good faith. "Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law."

30. In Shrisht Dhawan v. Shaw Bro. it has been held as under:

20. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct.

31. In United India Insurance Co. Ltd. v. Rajendra Singh this Court observed that "Fraud and justice never dwell together" (fraus et jus nunquam cohabitant) and it is a pristine maxim which has never lost its temper over all these centuries.

32. The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (See Vizianagaram Social Welfare Residential School Society v. M. Tripura Sundari Devi, Union of India v. M. Bhaskaran, Kendriya Vidyalaya Sangathan v. Girdharilal Yadav, State of Maharashtra v. Ravi Prakash Babulalsing Parmar, Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. and Mohd. Ibrahim v. State of Bihar.)

33. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. [Vide *Vimla (Dr) v. Delhi Admin.*, *Indian Bank v. Satyam Fibres (India) (P) Ltd.*, *State of A.P. v. T. Suryachandra Rao*, *K.D. Sharma v. SAIL Central Bank of India v. Madhulika Guruprasad Dahir*]

34. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including *res judicata*. Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide *S.P. Changalvaraya Naidu, Gowrishankar v. Joshi Amba Shankar Family Trust*, *Ram Chandra Singh v. Savitri Devi*, *Roshan Deen v. Preeti Lal*, *Ram Preeti Yadav v. U.P. Board of High School & Intermediate Education and Ashok Leyland Ltd. v. State of T.N.*).

35. In *Kinch v. Walcott* it has been held that

...mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury.

Thus, detection/discovery of constructive fraud at a much belated stage may not be sufficient to set aside the judgment procured by perjury.

36. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of *res judicata* are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est.

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50. As per the provisions of Section 10 of the 1982 Act, the burden of proof is on the accused to prove that he is not guilty. Thus, it is not like any other criminal case where the accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right, however, subject to the statutory exceptions, the said principle forms the basis of Criminal Jurisprudence. For this purpose, the nature of offence, its seriousness and gravity thereof has to

be taken into consideration. Statutes like the Negotiable Instruments Act, 1881; the Prevention of Corruption Act, 1988; and the Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those Statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. Thus, the Legislature has adopted a deviating course from ordinary criminal law shifting the burden on the accused to prove that he was not guilty. The High Court while deciding these cases has not considered the issue of the locus standi of the respondents to maintain the application for eviction of the appellant applicant. Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the court. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution.

51. In view of the above factual position, we reach the following conclusions:

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(iii) In respect of the said agreement to sell the litigation remained pending before the Civil Court but there is nothing on record to show as to what had been its outcome.

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(xiv) The review application was certainly not maintainable as the respondents had approached the higher forum and it merely amounted to abuse of process of the court.

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9.2 Drawing our attention to both the above referred decisions, learned advocate for respondent No. 1 - original appellant has submitted that considering the entire conduct of the applicant-third party, this Court will come to the conclusion that as such the applicant-third party has not come with clean hands and his conduct would definitely lead this Court to believe that the applicant-third party committed fraud by preferring this litigation. He has further submitted that it has also been further held in the above referred citations that the review application after dismissal of the SLP is not maintainable and as such, it amounts to abuse of process of law.

10. Considering page Nos. 111 to 130, it appears that it is a copy of the record of Special Leave to Appeal (Civil) No. CC 17746 of 2011 filed by Varsangbhai Jalabhai Koli (i.e. the heir of deceased Mongiben) along with the copy of the memo of Special Leave Petition, an application for permission to file SLP on behalf of heir of deceased petitioner Mongiben and the application for bringing on record the heir and legal representative of said deceased petitioner Mongiben.

11. It is not under dispute that the above proceedings before the Apex Court was prepared/drawn on 28.9.2011 and filed on 10.10.2011 challenging the impugned final judgment and order dated 10.5.2011 passed by this High Court in Letters

Patent Appeal No. 2339 of 2009.

12. It further appears from the above record that the heir of deceased Mongiben had raised the same contention as is raised by the present applicant-third party before this Court that the judgment and decree passed by this Court in Letters Patent Appeal No. 2339 of 2009 is against a dead person and hence nullity.

13. Page 67 is a copy of the order dated 8.11.2011 passed in the above referred Special Leave to Appeal (Civil) No. CC 17746 of 2011 and it further appears that the Honourable Apex Court upon hearing the counsel declined to grant leave to prefer Special Leave to Appeal to Varsangbhai Jalabhai Koli i.e. heir of deceased Mongiben.

14. It is important to note at this juncture that respondent No. 1-original appellant had filed Letters Patent Appeal No. 2339 of 2009 on 20.11.2009 without copy of the impugned judgment dated 17.11.2009 of Special Civil Application No. 11825 of 2009 and hence with the permission of this Court, the said appeal was filed without copy of the order and this Court had granted ex-parte status-quo on 2.12.2009. Subsequently, copy of the impugned order dated 17.11.2009 was also not available on 21.12.2009 and hence this Court had vacated the stay but at the same time, it was observed that "...any action taken by either of the parties in the meantime with regard to the subject matter of the writ petition shall be subject to the result of this appeal."

15. It is also the case of the applicant third party that above referred both the transactions of transfer of land in question i.e. dated 5.7.2010 of Hajabhai Kalabhai Bharwad and 7.7.2010 of the applicant third party had taken place after the learned Single Judge had dismissed the Special civil Application on 17.11.2009. Moreover, during the said transactions, there was no stay order of any competent Court/authority. Referring to page No. 131, it appears that on 4.6.2010, vide entry No. 565 in the revenue record-village form No. 7/12, name of the heir of deceased Mongiben had been entered. It is contended that vide revenue entry No. 566, Gomtiben, Rajuben and Samuben being heirs and legal representatives of deceased Mongiben had released their right in favour of Varsangbhai Jalabhai Koli and thereafter said Varsangbhai being the heir of deceased Mongiben sold the land in question to Hajabhai Kalabhai Bharwad on 5.7.2010 and thereafter the said land was sold by Hajabhai Kalabhai Bharwad on 7.7.2010 to the present applicant third party and relevant respective entries were mutated respectively vide entry Nos. 581 and 582.

16. All the above, three entries i.e. 565, 581 and 582 were certified on the same day i.e. on 25.8.2010.

17. Going through page Nos. 68 to 88, it appears that long before the date on which the said two sale transactions were made and then three entries were certified, respondent No. 1-original appellant had already filed Regular Civil Suit No. 20 of 2010 before the Court of Principal Civil Judge (J.D.), Sayla on 18.3.2010 against the heirs including Varsangbhai Jalabhai Koli with respect to

the land in question and though summons/process had been duly served to all the defendants including defendant No. 1 Varsangbhai, none has appeared and the Court has passed ex-parte order.

18. It is pertinent to note that said heir and legal representative of deceased Mongiben never appeared in the revenue proceedings preferred by present respondent No. 1-original appellant pursuant to entry No. 215 dated 30.5.1980.

19. During the entire period narrated in paragraph 5 hereinabove i.e. from 30.5.1980 upto order dated 10.5.2011 passed in Letters Patent Appeal No. 2339 of 2009, the said heir of deceased Mongiben i.e. Varsangbhai has chosen not to file appearance in any proceedings and not to contest any proceedings At this juncture, it is important to note that on the request of the present applicant third party, vide order dated 3.8.2012 in Civil Application (for condonation of delay) No. 4700 of 2012 direct service was granted to the applicant-third party.

20. The applicant-third party has filed affidavit of service dated 24.8.2012 in which he has declared on oath that notice issued on respondents No. 1, 3 to 5 had been personally served by him on 14.8.2012 and 21.12.2012. Referring the original process issued by this Court referred above, it appears that so far as respondent No. 5 original respondent No. 4 is concerned, the said notice has been served on Varsangbhai Jalabhai Koli and he has put his left hand thumb impression which has been mounted and identified by the applicant-third party. It is a fact that said Varsangbhai Jalabhai Koli has not filed his appearance in even this proceeding.

21. It is an admitted fact that as referred above, Varsangbhai Jalabhai Koli has put his thumb impression after the death of her mother Mongiben daughter of Motibhai Koli and wife of Jalabhai Kalabhai on 21.12.1998 but he never appeared in the subsequent revenue proceedings narrated in detail in paragraph 5 hereinabove nor in Letters Patent Appeal No. 2339 of 2009 as well as in Regular Civil Suit No. 20 of 2010 filed by respondent No. 1-original appellant.

22. It is also a fact that after the judgment dated 10.5.2011 delivered in Letters Patent Appeal No. 2339 of 2009, the said Varsangbhai on or about 28.9.2011 filed Special Leave to Appeal (Civil) No. CC 17746 of 2011 on 10.10.2011 in Honourable Apex Court on the ground that the appeal was decreed against the dead person i.e. Mongiben and he i.e. Varsangbhai Jalabhai Koli was never joined in spite of the fact that he being her heir as detailed in paragraph 7 referred above. It is also the fact that after the judgment and order dated 17.11.2009 in Special Civil Application No. 11825 of 2009 Varsangbhai Jalabhai Koli got his name, as the heir of deceased Mongiben inserted in the revenue record - Village Form No. 7/12 vide entry No. 565 on 4.6.2010. Moreover, he had also taken care and filed the affidavit of Gomtiben - aged 80 years, Rajuben - aged 70 years and Samuben - aged 45 years on the strength of which, their names had also been entered in the said entry No. 565 as the heirs and legal representatives of deceased Mongiben. Thereafter, said Varsangbhai had also taken care to the

effect that vide entry No. 566, all his sisters referred above i.e. Gomtiben, Rajuben and Samuben had released their right in favour of Varsangbhai and thereafter as referred above within a month, said Varsangbhai had sold the land in question to Hajabhai Bharwad on 5.7.2010 and said Hajabhai Bharwad was also prompt enough to sell the said land within two days i.e. on 7.7.2010 to the applicant-third party. Thus, now the applicant-third party is trying to make out a case that the land in question was sold and he purchased it when there was no stay order of any competent Court/authority and accordingly, he has purchased the clear and marketable title and he be considered as bona fide purchaser with value and without notice of litigation, however, the fact, as claimed by respondent No. 1, remains that Suit No. 20 of 2010 was pending and Varsangbhai was party, opponent in that suit and he was duly served with the summons. At the same time, besides the above chronicle facts including the fact that the record reflects that the notice qua respondent No. 1 in Letters Patent Appeal No. 2339 of 2009 was received by a person who is, not identified and the fact about Civil Application No. 12634 of 2010 were not brought to the knowledge of the Court. Despite the several facts and circumstances discussed at length hereafter, the vital fact/s which stare the face of respondent No. 1 i.e. original appellant and which is also required to be considered by the Court is the fact that before the learned Single Judge decided the petition and before the Letters Patent Appeal was finally heard and decided, said Mongiben had already died in 1998, however, the said fact was not placed on record by anyone before learned Single Judge and/or before the Division Bench and also the fact that the Division Bench was also not informed about Civil Application No. 12634 of 2010 and it was not listed on the cause list along with the Letters Patent Appeal.

23. The said facts, including the fact about Civil Application No. 12634 of 2010 is brought to the knowledge and notice of the Court for first time during hearing of this application. The details came on record when affidavits came to be filed during hearing of this application.

24. On this count, it is relevant to note, as mentioned earlier, it has emerged during hearing of this application that on the notice issued qua respondent No. 1 in Letters Patent Appeal No. 2339 of 2009 thumb mark of some unknown person is put to acknowledge the receipt of notice, however, it is claimed by the present applicant that the said thumb mark is not mounted and it does not state who has put the said thumb impression. The applicant has also claimed that the said thumb impression could not be of deceased Mongiben as she has expired on 21.12.1998.

25. In the affidavit dated 5.9.2012 of respondent No. 1 - original appellant (who is aged about 91 years) has claimed that his son Bhupatbhai Bhanjibhai Luhar had gone to serve the notice to Mongiben along with Ravirajsinh B Vaghela and as the son of deceased Mongiben i.e. Varsangbhai Jalabhai Koli had accepted the same without informing that his mother had expired and he has further stated on oath that the said thumb impression is of Varsangbhai. Moreover, this assertion

has not been denied by said Varsangbhai and/or by the applicant-third party or any other respondents. It is also the fact that the said Varsangbhai Jalabhai Koli has not filed his appearance in this proceeding. As referred hereinabove, the notice issued in this proceeding has been served on Varsangbhai and he has put his left thumb impression which has been mounted and identified by the applicant-third party. In light of such facts, learned senior advocate for applicant-third party has alleged that in service of notice i.e. process of this Court issued in Letters Patent Appeal No. 2339 of 2009, fraud has been committed by respondent No. 1-original appellant in serving the same, with a view to get favourable order.

26. In response to such allegation, respondent No. 1-original appellant in his affidavit dated 05.09.2012 has stated that subsequently when he learnt about death of Mongiben, he had filed an application for joining the legal heirs as the party.

27. In his further affidavit dated 01.10.2012, he has further disclosed that as soon as he came to know about the revenue entries Nos. 581 and 582, certified on 25.08.2010, he had filed application being Civil Application (Stamp) No. 13725 of 2010 before High Court, for joining them as parties but same remained in stage of removal of office objection when main Letters Patent Appeal was heard on 20.10.2010, which was finally pronounced, before the said Civil Application be listed for hearing.

28. Upon first time revelation and disclosure of above mentioned aspects during the hearing of these Civil Applications, direction was given to the office, to place the record and proceeding of said Civil Application No. 12634 of 2010 for joining party, before this Bench. In response to the said direction, office placed an office note dated 18.08.2012 before this Bench.

29. The said office note dated 18.08.2012, submitted by Deputy Section Officer reads as under:--

It is respectfully submitted that as per the direction of the Hon''ble Court (Coram: Hon''ble Mr. Justice K.M. Thaker) Civil Application No. 12634 of 2010 is required to be placed with the aforesaid matter. In this connection, it is further respectfully submitted that Civil Application No. 12634 of 2010 (for joining party) is a fresh matter and no order has been made by the Hon''ble Court as per the computer record and Register. Strenuous efforts are made by the department to trace out the aforesaid matter but it is not found till date. Inconvenience caused to the Hon''ble Court may kindly be regretted.

29.1 In view of such submission, on 20.09.2012 this Bench passed following order. The order dated 20.09.2012 and submission dated 24.09.2012 of Registrar (Judicial) reads as under:--

The Court has taken into consideration the office note dated 18.09.2012.

The Note neither satisfies the direction nor serves the purpose of hearing of

present application. Therefore, office is directed to take all necessary steps and action so as to comply the direction and find-out and place the papers of Civil Application No. 12634 of 2010 for perusal of the Court at the time of hearing of present application being Civil Application No. 4700 of 2012. Inquiry may also be made as regards the reasons for which the application is said to be "Not Traceable". Such report shall also be placed before the Court on the next date of hearing i.e. 26.09.2012.

S.O. to 26.09.2012.

In this regard it is humbly submitted that, pursuant to the above order a thorough search was made to trace out the Civil Application in question and it has been found that the said Civil Application was filed on 15th October 2010 and the Central Filing Center transferred it to the LPA Department on 16.10.2010 for circulating the same. Whereupon Ms. Yasmin Saiyed, Dy. S.O., who was working in the LPA Department at the relevant time, had received the same on 18.10.2010. This fact is ascertained from the Diary of the CFC and copy of the relevant page is placed at Flag "A", where Ms. Yashmin Saiyed, Dy. S.O., has marked her signature in lieu of receiving the same for kind perusal of the Honourable Court. It however appears that the matter was not placed before the Honourable Court at the relevant time.

It is further respectfully submitted that at the same time, a thorough physical search in the LPA Department was made and during the said search Civil Application No. 12634 of 2010 was traced out and it is tagged herewith as directed by the Honourable Court.

29.2 It is relevant to take into account the relief prayed for in Civil Application No. 12634 of 2010. Paragraph No. 10 of the above referred Civil Application No. 12634 of 2010 and prayer sought for vide paragraph No. 13 reads as under:--

10. Hence, this application has been required to be filed for joining following persons as the respondents in the present L.P.A. No. 2339 of 2009:

5. Varsangbhai Jalabhai Loki Having address at Ishwariya, Tal. Sayla, Dist. Surendranagar

6. Hajabhai Kalabhai Bharvad Having address at Sorinbhada, Tal. Sayla, Dist. Surendranagar

7. Ranchodbhai Amrabhai Dhandhal Having address at Ishwariya, Tal. Sayla, Dist. Surendranagar

8. Talati Tal. Sayla, Dist. Surendranagar

11.

12.

13. It is therefore prayed that:

(A)

(B) Be pleased to join the respondents Nos. 5 to 8 as stated in above para. 10 in the captioned L.P.A. No. 2339 of 2009.

(C)

29.3 Referring to the Record and Proceeding of above referred Civil Application No. 12634 of 2010, it appears that the said application was solemnized and signed by Respondent No. 1 herein-original appellant on 13.10.2010 and copy of the same was served to office of the Government Pleader on 15.10.2010 and it was admitted to the file on 21st January, 2011.

30. The Letters Patent Appeal No. 2339 of 2009 was allowed on 10.05.2011.

31. From the above fact, it is clear that when the hearing of the above referred Letters Patent Appeal No. 2339 of 2009 was commenced and when the said Letters Patent Appeal was allowed, Civil Application No. 12634 of 2010 referred hereinabove filed by Respondent No. 1 herein-original appellant for joining heir of deceased-Mongiben, the present applicant, as well as Hajabhai Bharwad etc. was pending for listing, however, it was, in fact, not listed as mentioned in the Office Note dated 24.09.2012. The foregoing discussion brings out the fact that the hard reality referred hereinabove i.e. Civil Application No. 12634 of 2010 for joining the party, in which present applicant is shown as proposed respondent No. 7 was pending when Letters Patent Appeal No. 2339 of 2009 was heard and the fact about pendency of said Civil Application No. 12634 of 2010 was not brought to the notice of the Division Bench and the said application was not listed also before the Division Bench and on record, it is still pending. Considering the above circumstances, we do not find any force and merit in the submission and objections made by learned advocate for respondent No. 1-original appellant cannot be overlooked. Moreover, the contentions and allegations raised by present respondent No. 1 i.e. original appellant including the claim and allegation that his son had personally gone to serve the notice issued in the said Letters Patent Appeal and that the said process was served to Varsangbhai (i.e. heir of said deceased Mongiben) who had received/accepted the process without disclosing that Mongiben died in 1998 and/or the allegation that it is the said Varsangbhai who put his thumb impression in acknowledgment of receipt of the process issued by the Court in the said Letters Patent Appeal, however, he did not enter his appearance in the said Letters Patent Appeal and did not appear before Division Bench and/or the allegation by the applicant third party that said Varsangbhai, with malafide intention again sold the land in question, so as to again earn consideration, to him i.e. applicant-third party but he i.e. said Varsangbhai allegedly did not inform him about any proceeding can be considered at the time when the Letters Patent Appeal is considered on merits.

32. However, in view of the fact that the above mentioned Civil Application No. 12634 of 2010 was pending at the time when Letters Patent Appeal was heard and since the said fact was not brought to the notice of the Division Bench and

since the said and other application were not listed before Division Bench, the said facts and the applications could not be considered by the Division Bench. Therefore, and also in view of the fact that said application is still pending and when the Letters Patent Appeal was heard and decided neither the aforesaid Varsangbhai nor Hajabhai Kalabhai Bharwad (whose names were mentioned in the application with request to implead them as party opponent in the Appeal) were impleaded and they were not heard, the request of the applicant third party in present application, in the interest of Justice, cannot be rejected and deserves to be granted. On this count alone, the applicant-third party in our view, satisfied us to review/recall of the order dated 10.05.2011, passed in Letters Patent Appeal No. 2339 of 2009. The rest of the submissions made by learned advocate for respondent No. 1-original appellant, referred here in above in para-4, in our considered view can be considered while rehearing Letters Patent Appeal No. 2339 of 2009 afresh after listing Civil Application No. 12634 of 2010, along with the said Letters Patent Appeal for hearing.

33. Thus though the applicant-third party has failed to show sufficient cause, to condone the delay as discussed hereinabove, but so far as Misc. Civil Application (Stamp) No. 890 of 2012, for review under Order 47 of the Code of Civil Procedure, 1908 is concerned, in our view, there exists sufficient ground to accept the said application to review/recall order dated 10.05.2011 passed in Letters Patent Appeal No. 2339 of 2009, and therefore so the delay of 295 days is required to and deserves to be condoned the delay. Hence, delay of 295 days in taking out the application seeking review of judgment and order dated 10.5.2011 in Letters Patent Appeal No. 2339 of 2009 is hereby condoned and Civil Application No. 4700 of 2012 seeking condonation of delay is hereby allowed and the relief prayed for in para 9 of the said Civil Application No. 4700 of 2012 is granted. Rule made absolute in terms of para 9 of Civil Application No. 4700 of 2012 so as to consider the above referred Review Application.

34. In this background and in light of the above discussion, it is relevant to recall and to take into consideration the observations in decision in the case of Gangadhara Palo (supra) and Bakshi Dev Raj (supra) so as to consider the issue whether the application seeking review of the judgment dated 10.5.2011 in Letters Patent Appeal No. 2339 of 2009 is maintainable. Learned senior advocate for the applicant-third party has submitted that the review application after dismissal of the SLP is maintainable if the SLP is simply dismissed i.e. without any observation on merit and it does not amount to merger of the order into the order of the High Court.

35. We have considered the said decision and having regard to the observations by Honourable Apex court, we are inclined to hold, and accordingly we hold that the Honourable Apex Court did not pass order on merit in the application seeking leave to appeal and/or in the SLP and that therefore in light of the observations in Gangadhara Palo (supra) and Bakshi Dev Raj (supra) read with the observations by the Honourable Apex Court in the decision in the case of A.

Nawab John (*supra*), the review application deserves to be considered on merits and that therefore we pass below mentioned order in Misc. Civil Application (ST) No. 890 of 2012 whereby the applicant seeks review of the judgment in Letters Patent Appeal No. 2339 of 2009.

36. For the foregoing reasons, Civil Application No. 4700 of 2012 for condonation of delay is hereby allowed. Rule is made absolute. For the reasons mentioned hereinabove, Civil Application No. 11534 of 2012 is hereby allowed.

37. So far as Misc. Civil Application (ST) No. 890 of 2012 seeking review application is concerned, it is admitted and process of Rule may be issued.

38. In the facts of the case, Rule in Misc. Civil Application (ST) No. 890 of 2012 is made returnable on 17.2.2014. In the meanwhile, office shall seek further and appropriate orders from Honourable the Chief Justice and place the review application i.e. Misc. Civil Application (ST) No. 890 of 2012 for final hearing before appropriate Court - bench after giving pucca/regular registration number to the same. The office is further directed to list Civil Application No. 12634 of 2009 for hearing along with the above referred review application. It is hereby clarified that observations made hereinabove by this bench are tentative in nature and it would not affect merits of the main review application to be heard later on.

Further order:

At this stage, learned advocate for the respondent has requested to stay the operation of this order.

However, considering the fact that the process in review application is made returnable on 17.2.2014, the respondent would have enough time, i.e. almost one month, to take out appropriate proceedings against the order, if the respondent so desires.

Therefore, request is not accepted.