
(2009) 02 BOM CK 0090

In the Bombay High Court

Case No : Civil Application (Review) No. 1 of 2009

Mr. Pascoal SebastiaoCardoso

APPELLANT

Vs

Mr. Manuel Joao Pereira

RESPONDENT

Date of Decision : 21-02-2009

Acts Referred:

Constitution of India, 1950 — Article 141

Citation : (2009) 02 BOM CK 0090

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : M.S. Usgaonkar, with Mr. Sudesh Usgaonkar, for the Appellant; M.B. D'Costa with Mr. J.A. Lobo, for the Respondent

Final Decision : Dismissed

Judgement

C.L. Pangarkar, J.—This application for review under Order 47, Rule 1 of Code of Civil Procedure, is filed by the original respondent in Appeal from Order No.43/2002. The appeal was preferred by the present respondent against the order passed by the Trial Court i.e. Civil Judge, S.D., Quepem. The said order was passed by the Trial Court in inventory proceedings initiated by the heirs of the deceased Roselina. The present respondent i.e. the appellant in the appeal, had purchased undivided share of all the properties, who the appellant believed to have a share in the property. The respondent and his sister, were, left out as their relation was not noticed. In the year 1996, the present respondent had instituted a suit against the present applicant for possession of house setting out the details of purchases made by him. The present applicant filed a written statement in the said suit in the month of August,1997. As stated earlier, the original appellant i.e. present respondent applied on 29.04.1998 for being added as a party to the inventory proceedings and sought to be appointed as a cabeça de casal. He had purchased the share of previous cabeça de casal. In that proceedings, on 18.11.1998, the present applicant i.e. original respondent prayed for direction to the appellant to produce all the sale deeds. Accordingly,

the original appellant produced all the sale deeds before the Court. Thereafter, the present applicant filed an application for exercising his right of pre-emption. The same was objected. After hearing all the parties, the learned Judge passed the impugned order and rejected the original appellant's contention that the respondent's application was barred by limitation. The application was, therefore, allowed and being aggrieved by that, the original appellant purchaser had preferred an appeal from order No.43/2002.

2. This appeal from order No.43/2002, was heard on 20.08.2008 and after hearing the parties, this Court by order dated 29.08.2008, allowed the appeal and set aside the order passed by the Trial Court on 10.06.2002. Being aggrieved by that order of allowing of appeal and setting aside the order of the Trial Court, this review has been filed.

3. I have heard the learned Counsel for the applicant and the respondent. Shri Usgaonkar, the learned Counsel for the applicant, mainly raised two grounds before me. The foremost ground that was raised by him, was that the learned Judge did not take into consideration the decision in Smt. Cynthia Shahid Dhar V/ s Shri Carlos Wilfredo Roque de Sequeira Nazareth, reported in 1991(2) Goa L. T. 30. and had he taken into consideration said judgment, he would not have come to this conclusion. He submits that non-consideration of this judgment itself, is a mistake apparent on the face of record and, therefore, the review application must be admitted. The second ground that was raised by him, was that the learned Judge has not considered the provisions of Portuguese CPC in proper prospective in as much as he has ignored the provisions contained in Article 1375 and 1376. He also contended that the provisions of Article 1512 and 1513 were also not properly considered and, therefore, it was a mistake apparent on the face of record.

4. The learned Counsel for the respondent/ original appellant, contends before me that it cannot be disputed that the decision in Cynthia Shahid Dhar's case, was placed before the learned Judge. He submits that even if that is not referred to in the judgment, that could be no ground for review of the judgment rendered by this Court.

5. After having gone through the judgment of this Court delivered on 29.08.2008, it is apparent that there is no reference whatsoever in the judgment in Cynthia Shahid Dhar's case.

6. The question is, however, whether this itself could be a ground for review of the decision. The learned Counsel for the respondent, submits that this cannot be a ground for review of the decision because the decision that is cited, is of Co-ordinate Bench and is not binding as such on the Court in the sense that it is not a law as laid down. He submits that it is the judgment of the Supreme Court which is alone binding on all the Courts because of the provision in Article 141 of Constitution of India.

7. A similar question arose before the Himachal Pradesh High Court. The

Himachal Pradesh High Court in The Nalagarh Dehati Co-operative Transport Society Ltd., Nalagarh Vs. Beli Ram etc., , made following observations:

1. The following question has been referred to the Full Bench:

Whether it is a mistake or error apparent on the face of the record within the meaning of Order 47, Rule 1, C.P.C. in any of the following contingencies :

(i) Where after a judgment is pronounced by a court, the Supreme Court or a larger bench of the same court renders a decision taking a different or contrary view on a point covered by the said judgment; or

(ii) Where the court so pronouncing a judgment has, for whatever reason, missed to take into consideration a decision of the Supreme Court or a High Court taking a different or contrary view on a point covered by the said judgment.

18. However, failure to notice a binding decision of the High Court does not amount to a mistake or error apparent on the face of the record. It is true that the decision is binding but the High Court does not lay down the law as is done by the Supreme Court. The result, therefore, would be that the judgment would be wrong or erroneous. The decision on the question of law in that judgment would be wrong. Therefore, the court will have no jurisdiction to review its decision simply on the ground that it is contrary to the binding decision of the High Court.

24. The result is that we will answer the first part of the question in the negative, that is a subsequent decision of the Supreme Court or a larger Bench of the same court rendering a decision taking a different or contrary view on a point covered by the said judgment, does not amount to a mistake or error apparent on the face of the record. The answer to the second part of the question is that failure of the court to take into consideration an existing decision of the Supreme Court taking a different or contrary view on a point covered by its judgment would amount to a mistake or error apparent on the face of the record. But a failure to take into consideration a decision of the High Court would not amount to any mistake or error apparent on the face of the record.

8. From the observations of the Himachal Pradesh High Court, it is obvious that failure to take into consideration a decision of the High Court, would not amount to any mistake or error apparent on the face of record. It is also apparent that failure to take into consideration the judgment of the Supreme Court, would on the other hand, be a mistake or error on the face of record because Article 141 says that the decision rendered by the Supreme Court is a law.

9. The learned Counsel for the applicant had placed reliance on the decision in Sitaram V. Laxman reported in AIR 1980 BOMBAY 55 wherein this Court had made following observations :

6. Normally, as I am differing with the decision of a co-ordinate Bench of this Court, the matter should have been referred to a larger Bench. However, as the

matter was decided by Joshi J. without noticing the specific provisions of the Act and the Rules, it can safely be said that the said decision was delivered per incuriam and, therefore, is not binding upon me. As to when it could be said that a precedent is not binding, is by now well settled. A precedent is not binding if it was rendered in ignorance of the statute or a Rule having the force of a statute. In such circumstances it can be said that the matter was decided per incuriam.

10. After having gone through this judgment, it is clear that the Court had differed with the decision rendered by the Co-ordinate Bench on account of the fact that the Co ordinate Bench had rendered the decision in ignorance of the Statute and Rules having the force of the Statue. The Court was not considering the question as to whether the decision rendered by the Court in ignorance of the decision, would be a ground for review of the decision or not.

11. The learned Counsel for the applicant further submits before me that the Court must take into consideration the legal maxim "Actus Curiae neminem gravabit." The act of the Court, should not prejudice in any manner. There is no doubt that the act of the Court, should not and cannot prejudice anybody in any manner. The question is whether in the instant case, there is sufficient reason for reviewing the decision rendered by the Court. It is not disputed that the decision was rendered by the Court after giving full opportunity to both the parties. The decision discloses that all the provisions of the CPC as well as Portuguese Civil Procedure Code, were considered by the learned Judge and he has given his own interpretation to these provisions. If he has considered all the provisions of law which were required to be considered, in no case it could be said that there is sufficient reason for review of the decision rendered by this Court. In view of this, I do not find that any reliance can be placed on the decision of the Supreme Court in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, .

12. Another decision that was cited by the learned Counsel for the applicant is Rameswaraswami Varu V. Ramalinga reported in AIR 1960 ANDHRAPRADESH 17. The Andhra Pradesh High Court has made the following observations :

If failure to notice and give effect to binding authority because of failure of counsel to draw the attention of a Judge to such an authority can be said to constitute an error apparent on the face of the record, vide Mudlapur Murari Rao and Others Vs. Balavanth Dikshit and Another, and Natesa Naicker Vs. Sambanda Chettiar, , it seems to me to be difficult to sustain the proposition that a failure to give proper effect to decisions cited because the Court had over-looked (it may be for the reason that counsel did not draw its attention to it) certain material passages in the authorities cited is not such an error. In any case, it would be difficult to contend that it is not a ground at least analogous to such an error.

13. I will prefer to rely upon the decision of the Himachal Pradesh High Court, which says that although a decision may be binding, the High Court does not lay down the law as is done by the Supreme Court. It is further held by the Himachal

Pradesh High Court that in such cases, the judgment rendered by the Court, at the most, becomes wrong or erroneous. In the circumstances, I do not find that simply because the learned Judge did not note down the decision cited before him in his judgment, such not noting down by him of a decision in the judgment, would be a mistake or error apparent on the face of record. I was taken through by the learned Counsel for the applicant through the provisions of Portuguese Civil Procedure and other provisions of law in order to show that the interpretation with regard to the limitation that is put by the learned Judge, is wrong. It seems to me that the learned Judge has considered all these provisions which were shown to him by the learned Counsel for the applicant. He has put his interpretation on these provisions and if he has put his interpretation on this provisions after considering them, that can hardly be a ground for review of the judgment. In view of this, I do not find any substance in the review application, the same is dismissed in limine.