

(1994) 08 BOM CK 0081

In the Bombay High Court

Case No : Misc. Civil Application No. 15 of 1982 in S.A. No. 72 of 1970

Nathu Yeshwantrao Bhusari since deceased by L.Rs. and
Others

APPELLANT

Vs

Sonabai Ganar and Others

RESPONDENT

Date of Decision : 19-08-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 114
Limitation Act, 1963 — Section 26
Transfer of Property Act, 1882 — Section 53A

Citation : (1994) 96 BOMLR 397

Hon'ble Judges : R.M. Lodha, J;M.B. Ghodeswar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—An application for review filed in the year 1982 seeking review of the judgment of the learned Single Judge of this Court passed on 19.12.1981 in Second Appeal No. 72 of 1970 arising out of the suit filed in the year 1965 is the subject matter of decision by us.

2. The original plaintiff Nathu son of Yeshwantrao Bhusari filed a suit for possession of the land in question comprising of Khasra Nos. 50/1 and 111 situated at village Sirpur in Umred Tahsil against the original defendants Jagannath Sitaram Ganar and Motiram Sitaram Ganar and Ors. in the Court of Civil Judge, Junior Division, Umrer, The original plaintiff also prayed for decree for mesne profits for the years 1962-63 and 1963-64 amounting to Rs. 1500/- and subsequent period prayed for an inquiry into mesne profit from the date of suit till delivery of possession. It was inter alia averred by the plaintiff that under the registered sale-deed dated 5.7.1956 he had purchased the disputed property, and the defendant No. 1 was his servant, who* was looking after maintenance of the field and growing vegetables in these "two fields, but the defendant No. 1 did not properly render the account and, therefore, his services were terminated. According to the plaintiff, even thereafter the defendant Nos. 1 and 2, who are

father and son, continued to be in possession of the property.

3. The original defendant Nos. 1 and 2 filed the joint written statement and denied the averments of the plaint. In specific pleadings, the defendant Nos. 1 and 2 set up the defence that the property in question was sold by publication in the year 1951-52 by one Shri Chitnavis of Nagpur and the plaintiff, defendant Nos. 1 and 2 and defendant No. 3 had entered into an agreement that this property along with other property should be purchased by them in the auction. According to the agreement, the plaintiff and the defendant No. 3 were to contribute Rs. 4500/-, and the defendant No. 1 was to contribute Rs. 1000/-. The defendant No. 1 paid Rs. 1000/- to the plaintiff and it was agreed between the parties that the defendant No. 1 would take the aforesaid land in question as his land. The defendant No. 3, Atmaram, who was to bid at the auction, was not prepared to offer any bid for more than Rs. 10,000/-, and since the plaintiff was interested in purchasing that property of Chitnavis, he negotiated the transaction with Shri Chitnavis at Nagpur. According to the defendant No. 1, at this time Rs. 1000/- was paid by him to the plaintiff. Since the plaintiff had no sufficient funds at that time, it was sold to Rangnath and Bajirao on 7.8.1952 and thereafter the plaintiff purchased the entire property from Rangnath and Bajirao including the land in question on 5.7.1956. According to the defendant No. 1, since it was agreed that the disputed land would belong to defendant No. 1 and he had already paid Rs. 1000/- to the plaintiff as per the agreement, the defendant No. 1 was put in possession by the plaintiff in part performance of the said agreement. The specific plea set up by the defendant Nos. 1 and 2 in para 7 of the specific pleadings in the written statement reads as under:

7. As per paras 2 to 4 of the specific pleadings of this written statement, plaintiff agreed to sell the suit fields to defendants for Rs. 1000/- and took Rs. 1000/- in cash from these defendants and gave possession of the fields to these defendants. Since then defendants are in possession. Plaintiff is bound to sell it to defendants. As per Rule 53A of Transfer of Property Act (by analogy) plaintiff cannot claim possession from defendants. Also this suit is not maintainable as these defendants are not the trespassers.

4. In view of the pleadings of the parties, the Trial Court framed seven issues and after recording the evidence and hearing the counsel for the parties, dismissed the plaintiffs suit vide judgment and decree dated 30.9.1967.

5. Taking exception to the aforesaid judgment and decree dated 30.9.1967 passed by the 5th Joint Civil Judge, Jr. Dn. Nagpur, whereby the plaintiffs suit was dismissed, the plaintiff filed Regular Civil Appeal No. 330 of 1967, which was heard by the Assistant Judge, Nagpur. The learned Assistant Judge, Nagpur found concurrently with the trial Court that the defendant No. 1 was not the servant of the plaintiff. On Issues Nos. 2 and 3, however, the first appellate Court disagreed with the findings of the trial Court and held that the defendant No. 1 had failed to prove that the plaintiff had agreed to sell the disputed land to him for Rs. 1,000/-. On issue No. 4 which reads as "Has the respondent No. 1

Jagannath not proved that he has been in possession of suit fields in part performance of the aforesaid agreement of 1951-52 ?", the first appellate Court disagreed with the learned trial Court and held that issue No. 4 has not been proved by the defendant No. 1, and in the absence of contract in writing, the question of part performance cannot arise. After considering the complete evidence on record and giving its findings on all the issues, the first appellate Court allowed the appeal, set aside the judgment and decree passed by the trial Court and decreed the plaintiffs suit directing the defendant Nos. 1 to 8 to deliver the possession of the disputed land to the plaintiff. The first appellate Court further passed a decree for mesne profits for a sum of Rs. 1500/- for the years 1962-63 and 1963-64.

6. The defendant Nos. 1 and 2 aggrieved by the judgment and decree passed by the learned Assistant Judge, Nagpur on 16-10-1969 preferred Second Appeal before this Court, which was registered as Second Appeal No. 72 of 1970 (Jagannath and Anr. v. Nathu (since deceased) and Ors.. The said second appeal came up for hearing before Palshikar, J. (as he then was) and the learned Single Judge allowed the second appeal vide his judgment dated 19-12-1981 and set aside the judgment and decree passed by the Assistant Judge, Nagpur and consequently dismissed the plaintiffs suit. The learned Single Judge after observing that the first appellate Court found that the defendant No. 1 Jagannath failed to prove that there was an agreement to sell of these fields to him for Rs. 1000/- and that Section 53A of the Transfer of Property Act has no application, proceeded to find out whether there was any such agreement between the plaintiff and the defendant No. 1 that the suit fields be sold to the defendant No. 1 for Rs. 1000/-. The learned Single Judge thus held:

From all this evidence on record, in my view, defendant Nos. 1 and 2 were in possession of the fields in question not as a servant but in part performance of the agreement between the parties. It does not appear that the plaintiff has, therefore, any right of possession to the fields in question. The learned Assistant Judge was not right in decreeing the suit of the plaintiff. In my view, the learned trial Judge was right in dismissing the suit of the plaintiff.

It appears that the plaintiff has already obtained the possession of the suit land in execution of the decree passed by the Assistant Judge, Nagpur, on 16.10.1969.

7. The plaintiff has filed the present application for review of the judgment of the learned Single Judge passed on 19-12-1981 in the said Second Appeal No. 72 of 1970 whereby his suit was dismissed by the learned Single Judge of this Court. Since the learned Judge, who passed the judgment dated 19-12-1981, was no longer attached with this Court, the matter came to be placed before Division Bench of this Court and review application was admitted on 10-2-1982 and status quo order regarding possession of the land in question which was taken by the plaintiff in execution of the decree passed in his favour by the Assistant Judge, Nagpur, was maintained during the pendency of the review application. After more than 12 years of pendency of the review application the matter has

now come up for final hearing before us. In the meanwhile the plaintiff and some of the respondents have died, and their legal representatives have been brought on record and duly served. The only contention raised by Mr. S.V. Manohar, learned Counsel for the review applicants is that the learned Single Judge ought to have seen that the alleged agreement of sale even if assumed to have been entered into in favour of the defendant No. 1 by the plaintiff, was oral and as such the defendant Nos. 1 and 2 could not have protected their possession of the land in question in part performance of the alleged oral agreement. According to the learned Counsel, the learned Single Judge overlooked the provisions of Section 53A of the Transfer of Property Act, 1882 and committed a glaring and manifest error by applying Section 53A of the Transfer of Property Act to an oral agreement and the said error stares one in the face and therefore, there could reasonably be no two opinions entertained about it. Therefore, an error apparent on the face of record which has been committed by the learned Single Judge in the judgment passed on 19.12.1981 deserves to be recalled.

8. Mr. Deopujari, learned Counsel for respondent No. 1, on the other hand submitted that the judgment passed by the learned Single Judge on 19.12.1981 in the aforesaid second appeal does not suffer from any error apparent on the face of record and, therefore, cannot be a subject matter of review. The learned Counsel also submitted that the defendant No. 1 as a matter of fact had jointly purchased the land in question with the plaintiff and paid the full consideration of Rs. 1000/- in so far as the disputed land was concerned and, therefore, the learned Single Judge was justified in holding that the defendant Nos. 1 and 2 were in possession of the fields in question not as servants, but in part performance of the agreement between the parties and the plaintiff does not appear to have any right of possession to the fields in question. Mr. Deopujari also submitted that even if the learned Single Judge has committed any error in passing the judgment, the erroneous judgment cannot be a subject matter of review. In support of his contention the learned Counsel for the respondent No. 1 relied upon the Division Bench's judgment of this Court in *Raj Kumar Ramavtar Chourasia Vs. Mathew Charian Christian*, .

9. Since the controversy about the scope of review has been raised by the learned Counsel for the parties, we would like to examine the scope of review first.

10. In AIR 1949 106 (Federal Court) it was held:

...however, the Court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way, that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order 47; Rule 1. Civil Procedure Code.

Again the Federal Court examined the scope of review in *Mst. Jamna Kuer v. Lal Bahadur* AIR 1950 FC 131, and it was observed as under:

There can be no doubt that this appeal must be allowed. The mistake as to the items of property regarding which Mst. Jamna Kuer had laid a claim is apparent on the face of the record. The trial Judge had clearly stated in his judgment that Jamna Kuer's claim to properties 3 to 37 of the gazette notification. In para 15 of her amended objection petition, she had laid down claims to all the properties left by Kunj Behari. On 29th April, 1942, it was admitted by the pleader of the applicants that all these properties related to the estates of Kunj Behari and that so far as the debtors were concerned, they were owners of only two properties mentioned in the gazette notification. In this situation it would have been appropriate if the High Court had corrected this error on the review petition and saved the appellant the trouble and expenses of an appeal to the Privy Council or to this Court. Whether the error occurred by reason of the counsel's mistake or it crept in by reason of an oversight on the part of the Court was not a circumstance which could affect the exercise of jurisdiction of the Court to review its decision. We have no doubt that the error was apparent on the face of the record and in our opinion, the question as to how the error occurred is not relevant to this enquiry. A mere look at the trial Court's decision indicates the error apart from anything else.

11. Though the scope and amplitude of the power of review has come up for consideration before the Apex Court number of times, it would be advantageous to refer to the decision of the Apex Court in *Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh*, wherein the Supreme Court held as follows :

...where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

12. Rajasthan High Court in *Jairam v. Gopiram* 1954 RLW 148, held that:

A review of the case law clearly leads us to the conclusion that where the mistake or error of law is not merely one in the exposition of law relevant to a case but is a more radical error and amounts to completely ignoring a positive rule of law, and the error is so manifest or patent that it admits of no doubt or dispute, such an error of law is one on the face of the record and is sufficient to satisfy the conditions of Order XLVII, Rule 1, Civil Procedure Code. We are of opinion that the error in the case before us is an error of this kind. If the attention of the learned Judges had been directed to Section 26 of the Limitation Act of the former State of Bikaner, or assuming that their attention had been directed to it, if they had applied their minds to that mandatory provision of statute law and discussed the contention raised before them, we have no doubt that they would not have fallen into the error into which they did. We are accordingly of the opinion that the error in the present case is an error apparent on the face of the record and satisfies the conditions of Order XLVII, Rule 1, Civil Procedure Code.

13. The scope of review under Order 47, Rule 1, CPC was also elaborately considered by the Rajasthan High Court in *State of Rajasthan Vs. Mehta Chetan Das Kishandass*, and it was held that error in deciding applicability of particular provision and overlooking the dictum of the Supreme Court while giving finding on particular issue amounts to an error apparent on the face of record is a valid ground for review.

14. In *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, the Apex Court held that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature and it must be left to be determined judicially on the facts of each case.

15. A Division Bench of this Court in *Rajkumar's case* (cited *supra*) has held as under:

Thus the consistent view is that a decision erroneous in law is certainly no ground for ordering a review. If a Court had decided a point, but decided it erroneously, the error cannot be said to be one apparent on the face of the record or even analogous to it. In the present case also the learned single Judge relied upon certain observations of an earlier Division Bench decision in *Indra Singh's case* AIR 1948 Bom. 347, as certain provisions of the local Rent Act were in part *materia* with the provisions of the Bombay Rent Act and found, though erroneously, that the quit notice founded upon the grant of permission by the Controller was ineffective, the permission being *sub judice* and the suit as such was not tenable. It cannot be said that it was a mistake apparent on the face of the record. It was at best a mistake of erroneous application of the law as was laid down in *Indra Singh's case*.

16. The statement of law relating to the scope and amplitude of power of review u/s 114 read with Order 47, Rule 1 of the CPC which emerges from the aforesaid decisions is that an error which may be corrected in review must be an error apparent on the face of record. The error should be so glaring and manifest that no court would permit such an error to remain on record. An erroneous view or erroneous judgment is not a ground for review, but the judgment or order which completely ignores a positive rule of law and the error is so patent that it admits of no doubt or dispute, such an error must be corrected in the review. In other words, as the Supreme Court has said, where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of record would be made out.

17. Adverting to the present case and applying the aforesaid principles of review would be apparent that the judgment of the learned Single Judge is not only an erroneous decision or based on erroneous application of law, but it suffers from such glaring and obvious substantial point of law relating to Section 53A of the

Transfer of Property Act which stares one in the face, and there could reasonably be no two opinions entertained about it that a person who was taken in possession in part performance of contract in writing by him or on his behalf that possession could be protected. Contract in writing is sine qua non for applicability of the provisions of Section 53A of the Transfer of Property Act. Under this section an act of part performance by taking possession (an act done in performance of a contract), is only protected if contract is in writing and not otherwise. Any possession which is taken pursuant to an oral agreement cannot be protected by the person in possession by placing reliance in his defence u/s 53A of the Transfer of Property Act.

18. Section 53A of the Transfer of Property Act reads as under:

53A. Part performance,- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration, who has no notice of the contract or of the part performance thereof.

The conditions necessary for making out the defence of part performance u/s 53A of the Transfer of Property Act came up for consideration before the Apex Court in Nathulal Vs. Phoolchand, , and the Apex Court held that the conditions necessary for making out the defence of part performance to an action in ejectment by the owner are:

(1) that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(2) that the transferee has, in part performance of the contract, taken possession of the property, or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract;

(3) that the transferee has done some act in furtherance of the contract; and

(4) that the transferee has performed or is willing to perform his part of the contract.

19. In the present case, the plaintiff filed the suit for possession against the defendants on the basis of his title and registered sale deed. Undisputedly the defendant No. 1 set up the defence that he was in possession of the disputed property pursuant to the agreement of sale for consideration of Rs. 1000/-, and since he is in possession pursuant to the said agreement of sale in part performance of the contract, the plaintiff could not claim possession from him. There is no dispute that there is no written agreement under which the defendant No. 1 is put into possession and the agreement relied upon by the defendant for protection of his possession is the oral agreement. The learned Single Judge even if it be assumed to have rightly held that there was an agreement to sell between the parties, which was oral, committed a glaring and patent error by holding that the defendant No. 1 is in possession in part performance of such agreement. The learned Single Judge overlooked the provisions of Section 53A of the Transfer of Property Act which only permits the protection of possession, if it is in part performance of contract, which is in writing. The judgment suffers from radical error and amounts to completely ignoring the positive rule of law u/s 53A of the Transfer of Property Act and not noticing the judgment of the Supreme Court in *Nathumal's* case (cited *supra*) wherein the Supreme Court has in unequivocal and categorical terms held that one of the conditions necessary for making out the defence of part performance to an action in a suit for possession by the owner is that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf. The error committed by the learned Single Judge is so glaring and gross that such an error cannot be permitted to remain on record. In this view of the matter, the judgment of the learned Single Judge, dated 19.12.1981 allowing the second appeal and dismissing the plaintiffs suit suffers from an error apparent on the face of record.

20. Consequently we recall the judgment dated 19.12.1981 passed by the learned Single Judge. Since the judgment, which has been recalled, pertains to the year 1981 in Second Appeal of 1970, we do not intend to send the case back to the learned Single Judge, and for the reasons stated hereinabove, we dismiss the Second Appeal filed by the defendant Nos. 1 and 2 and restore the judgment and decree passed by the learned Assistant Judge, Nagpur on 16.10.1969 in Regular Civil Appeal No. 330 of 1967 decreeing the plaintiffs suit for possession and mesne profit.

21. Before we part with this review application, we are constrained to observe

about the procedure prevalent in this High Court under the Bombay High Court Appellate Side Rules, 1960, according to which if the Single Judge whose judgment or order is under review, is not available or, attached to this Court or has ceased to be Judge of this Court, the review of the judgment or order of such Single Judge is heard and disposed of by the Division Bench. There is no logic or reason behind this Bench structure. If a Judge sitting singly whose judgment or order is under review and is not available at the seat or Bench where the judgment was passed or order made for a particular period or is not attached to this Court or has ceased to be Judge of this Court, the matter should be placed before any other Single Bench according to the directions of Chief Justice, and there is no necessity that it should be heard and decided by the Division Bench. With the arrears and pendency of cases mounting in the High Court, perhaps time has come that we consider whether this Court can afford the luxury of having the matters of review of judgments or orders passed by the Single Judge to be heard by the Division Bench in the circumstances referred to hereinabove. We do not deal further and direct the Registrar, High Court of Bombay (Appellate Side) to bring this procedure to the notice of the Hon''ble Chief Justice and/or the Rule Committee, if any, constituted by the Hon''ble Chief Justice and before the Full Court for consideration of suitable amendment in the Bombay High Court Appellate Side Rules, 1960.