
(2018) 01 CAL CK 0089
In the Calcutta High Court
Case No : 52 of 2018

Sugam Mercantile Pvt. Ltd.		APPELLANT
	Vs	
Sanjay Kumar Gupta & Ors.		RESPONDENT

Date of Decision : 19-01-2018

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 47Rule 1](#)

Citation : (2018) 01 CAL CK 0089

Hon'ble Judges : Biswanath Somadder, Ashis Kumar Chakraborty

Bench : Division Bench

Advocate : Jayanta Mitra, Utpal Bose, P.K. Jhunjhunwalla, Alpana Chaudhuri, Mahendra Prasad Gupta, Animesh Paul, N.C. Bihani, Papiya Banerjee

Final Decision : Dismissed

Judgement

1. At the very outset we may point out that the present advocate-on-record of the applicant in this review application filed his vokalatnama, in the Department, after obtaining "No Objection" from the erstwhile advocate-on-record who represented the applicant in the appeal mentioned hereinafter. Therefore, in view of the deeming provisions contained in the Explanation to sub-rule (2) of Rule (4) under Order III of the Code of Civil Procedure there is no defect in filing of the review application as sought to be pointed out by the Additional Stamp reporter.
2. With consent of parties both the review application, R.V.W. 2 of 2018 and the stay application CAN 52 of 2018 are taken up for hearing. The respondent no. 7 in the appeal, being MAT No. 617 of 2017 (Sri Sanjay Kumar Gupta & Ors. vs. Howrah Municipal Corporation & Ors) has prayed for review of the judgment and order dated November 24, 2017 passed by this Division Bench.
3. The subject matter of challenge in the above appeal was the judgment and order dated March 23, 2017 passed by a learned Single Judge of this Court in W.P. No. 1291(W) of 2016 with CAN 3597 of 2016 (hereinafter referred to as "the said writ petition") thereby, dismissing the said writ petition filed by the present

opposite party nos. 1 to 31 holding the same to be devoid of any merit.

4. The opposite party nos. 1 to 31 herein had filed the said writ petition challenging an order dated January 20, 2016 passed by the Commissioner of Howrah Municipal Corporation, respondent no.2 in this writ petition, whereby it was held that since the Howrah Municipal Corporation (in short "HMC") accepted the retention fee from the present applicant to regularise the unauthorised construction of two floors, the 5th and 6th floors of the two buildings at premises no. 295/2, G.T. Road (North) Howrah, the latter is entitled to retain such unauthorised construction. In the said writ petition, the present opposite party nos. 1 to 31, as the petitioners also prayed for an order to direct HMC to initiate a proceeding for demolition of the illegal and unauthorised construction of the 5th and 6th floors of all the three buildings of the said premises. As mentioned earlier, by the said judgment and order dated March 23, 2017 a learned Single Judge of this Court dismissed the said writ petition, by holding that the same was devoid of any merit. While dismissing the writ petition the learned Single Judge held as follows: "That as per the provisions of the HMC Building Rules and Regulations admittedly, prior sanction has to be obtained by submitting revised plan and by not doing so, the respondent no. 7 has violated the provisions of law to that extent only, but the same was submitted before construction was over and further the same was duly regularised by the corporation as the said construction is within the permissible limits. The learned Single Judge further held that approving the revised plan and regularising the structures thereon by compounding the same, by charging the retention fee amounts to post sanction of the plan and by doing so the Municipal Commissioner has only committed a procedural irregularity and the latter was within its jurisdiction while compounding the revised plan and regularising the structures."

5. In the appeal filed by writ petitioners, by the judgment and order dated November 24, 2017 this Division Bench set aside the above judgment and order dated March 23, 2017. While passing the judgment and order dated November 24, 2017, which is sought to be reviewed by the present applicant, this Division Bench held, inter alia, as follows: ".....Further, in the affidavit-in-opposition filed by the respondent nos. 1 to 4 in the second writ petition before the learned Single Judge, nothing was disclosed to substantiate the statutory provisions invoked by the respondent nos. 2 and 3 for their decision to regularise the admitted unauthorised construction of the 5th and 6th floor of the two buildings of the said premises by the respondent no. 7. By the order dated January 4, 2016 the respondent no. 2 directed the Law Officer of the respondent no. 1 Corporation to justify by virtue of a relevant order and judgment of relevant Courts whether acceptance of retention fee by the corporation is legal or illegal. From the order dated January 20, 2016 passed by the respondent no. 2 it is evident that the Law Officer of the respondent no. 1 could not submit any relevant order or judgment of any Court of law to substantiate that acceptance of retention fee by the respondent no. 1 from the respondent no. 7 is lawful. Even in the said order dated January 20, 2016 the respondent no. 2 has not referred

to any provision of the HMC Act, 1991 or to any Rule of the HMC Building Rules or any other legal provision to justify the impugned actions of itself or of the respondent no. 3 to regularise the admitted unauthorised construction of the 5th and 6th floor of the said building at the said premises, by the respondent no. 7 upon payment of retention fee by the latter. Accordingly, in view of the settled principle of law as laid down by the Supreme Court in the cases of Mohinder Singh Gill (supra) and Dipak Babaria (supra) we find that the learned Single Judge clearly erred in law to hold that the respondent no. 2 was within its jurisdiction to regularise the admitted unauthorised construction of the 5th and 6th floors of the two buildings by the respondent no. 7 upon payment of retention fee by the latter and to uphold the order dated January 20, 2016 passed by the respondent no. 2 only on the grounds urged by the respondent no. 7 in its affidavit-in-opposition. Further and in any event, the purported decision of the respondent no. 2 to regularise the admitted unauthorised construction of 5th and 6th floor of the said building, without any notice or opportunity of hearing to the present appellants, the admitted owners of the various flats of the said building, is void."

6. As mentioned earlier, it is the above judgment and order dated November 24, 2017 which is sought to be now reviewed in the present application. In support of the application, Mr. Mitra, learned Senior Advocate appearing for the applicant first contended that while passing the judgment and order dated November 24, 2017, this Court did not consider the provisions contained in Rules 61 and 62 of the Building Rules of HMC. He urged that Rule 61 of the Building Rules of HMC confers power on HMC to regularise any construction in deviation of the sanctioned building plan upon receipt of retention fee from the person responsible. He submitted that in the case at hand, the applicant had submitted an as made plan for the construction of the additional two floors, the 5th and 6th floors on each of the three buildings in question and the Commissioner of the HMC, the respondent no. 2 in the writ petition and the appeal rightly, in exercise of powers under the said Rules 61 and 62 of the HMC Building Rules, regularised the construction of the said additional floors of each of the three buildings in question after receiving retention fee. It was argued that since the applicant did not obtain the Completion Certificate under Rule 62 of the HMC Building Rules, it was entitled to construct the two additional floors of the three buildings, beyond the sanctioned plan. The second ground urged by Mr. Mitra was that once the present applicant paid Rs. 29.85,071 to the HMC on account of retention fee, this Court ought not to have passed the order dated November 24, 2017 directing the Commissioner of HMC, the respondent no. 2 in the appeal, to take steps for demolition of the 5th and 6th floors of the three buildings in question. The third ground argued for the applicant was that in any event, the applicant is entitled to submit a fresh plan to the HMC for construction of 5th and 6th floors of the three buildings but the applicant has been deprived of its said right as by the order dated November 24, 2017 the Division Bench permanently restrained it from carrying out any construction work at any of the three buildings. It was finally

contended on behalf of the applicant that the direction passed by the order dated November 24, 2017 in the appeal directing the respondent no. 2, the Commissioner of HMC to take steps for demolition of the 5th and 6th floors of the buildings in question could only be passed by the said Commissioner against whose decision the applicant would have a right to prefer an appeal before the Municipal Tribunal but in the present case the applicant has been deprived of such right.

7. According to Mr. Mitra this Court passed the judgment and order dated November 24, 2017 by overlooking the above facts and, therefore, the said judgment and order is vitiated by errors apparent on the face of the record.

8. On the other hand, Mr. Mahendra Prasad Gupta, learned advocate appearing for the present opposite party nos. 1 to 31, the writ petitioners and the appellants in the said appeal raised strong objection to the maintainability of this review application. He contended that it is well settled law that a party can seek review of a judgment and order/decreed only when there is a discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree/order was made or when there is some mistakes or error apparent on the face of the record or when the party substantiates any other sufficient reason for review of the said judgment. Mr. Gupta further submitted that in the present case from a reading of the judgment and order dated November 24, 2017, it is clear that this Division Bench passed the same after considering all the respective arguments advanced by the present applicant, as well as the present appellants in the said appeal. It was contended that in this application it is not the case of the applicant that it has discovered any matter or evidence after passing of the said judgment and order dated November 24, 2017, nor could it point out any mistake or error appearing on the face of the record. It was argued for the present opposite party nos. 1 to 31 (the writ petitioners-appellants), that the present applicant could not point out that either the findings in the said judgment or the operative portion of the said order was either contrary to the records of the case or contrary to any decision of any Court. Therefore, according to Mr. Gupta, the applicant could not make out any ground for review of the judgment and order dated November 24, 2017 under Order 47 of the Code of Civil Procedure which are applicable in this case. He lastly submitted that if the present applicant is aggrieved with any finding or direction in the said judgment and order dated November 24, 2017 passed by this Division Bench, its remedy lies in challenging the said decision before the Hon"ble Supreme Court. Urging all these grounds the writ petitioners-appellants, prayed for dismissal of this review application.

9. Mr. Bihani, learned advocate appearing for the Commissioner, Mayor and the Executive Engineer of HMC (the respondent nos.2, 3 and 4 in the writ petition and the appeal) submitted that during the hearing of the writ petition before the learned Single Judge, he relied on the provisions contained in Rules 61 and 62 of

the HMC Building Rules. However, in his usual fairness, Mr. Bihani admitted that during the course of hearing of the appeal, no argument was advanced on behalf of HMC or its officials to support the judgment and order dated March 23, 2017 passed by the learned Single Judge dismissing the said writ petition.

10. We have carefully considered the materials on record, as well as the arguments advanced by the learned counsel appearing for the respective parties. It is well settled law that the grounds of review contemplated under Order 47 Rule 1 of the Code of Civil Procedure, 1908 (in short, "the Code") are also applicable in case of a writ petition. Accordingly, the specific grounds of review provided under Order 47 Rule 1 of the Code are also applicable in this appeal. It is trite law that a party cannot maintain an application for review of a judgment and order to reargue the case. In the instant case, the applicant has sought for review the judgment and order dated November 24, 2017 on the ground that the same is vitiated by an error apparent on the face of the record. Even in the Memorandum of Review, the applicant has admitted the unauthorised construction of the additional 5th and 6th floors of each of the three buildings. From the judgment and order dated November 24, 2017, as quoted above, it is evident that the Division Bench held that when neither the affidavit-inopposition filed by the Commissioner of HMC, nor the order dated January 20, 2016 passed by the same respondent referred to any provision of the HMC Act, 1992 or the Buildings Rules of HMC or any other legal provision to justify the retention of the admitted unauthorised construction of the 5th and 6th floors of the said buildings, the learned Single Judge erred in law to hold that the Commissioner of HMC was within its jurisdiction to regularise such unauthorised construction. While arriving at such conclusion, the Division Bench relied on the decisions of the Supreme Court in the cases of Mohinder Singh Gill & Anr. vs. Chief Election Commissioner, New Delhi & Ors. reported in 1978 (1) SCC 405 and Dipak Babaria & Anr. vs. State of Gujrat & Ors. reported in (2014) 3 SCC 502 and it is not the case of the applicant in the present application, that the said decisions of the Supreme Court have no application in this case. Therefore, we find that the first ground urged by the present applicant in this application for review of the judgment and order dated November 24, 2017 has no merit. The second ground urged by the applicant with regard to the approval of HMC the unauthorized construction of two additional floors, upon payment of retention fee by the applicant has been set aside by us by the judgment and order dated September 24, 2017 and if the applicant is aggrieved by such decision it has to challenge the same before the superior forum and cannot maintain this review application. The third ground urged by the petitioner was not argued before us during the hearing of appeal. Even the said ground is not mentioned in the Memorandum of Review. In any event, such ground cannot be considered to construe an error apparent on the face of the record. When even in this review application, the applicant has admitted the construction of the 5th and 6th floors of the buildings in question to be unauthorised, we are unable to accept the contention raised by the applicant that it can make a fresh application for obtaining sanction of the said additional

floors, that too as a ground of review of the judgment and order dated November 24, 2017. In any event, no such ground was urged by the present applicant during the course of hearing of the appeal.

11. With the direction against the respondent no. 2 in the writ petition, the Commissioner of HMC to take steps for demolition of the unauthorised construction of the 5th and 6th floors of the three buildings by the said order dated November 24, 2017 the Division Bench allowed the prayer of the writ petitioners in the said writ petition and, as such, the fourth ground urged by the applicant on the basis of its right to prefer an appeal before the Municipal Building Tribunal against any order of demolition passed by the respondent no. 2, cannot be a ground of review of the aforementioned order and the same is devoid of any merit. In any event, the said contention was also not argued by the present applicant at the time of hearing of the appeal.

12. For all the foregoing reasons, we find that this review application has no merit and is not maintainable. Accordingly, the same stands dismissed. In view of the dismissal of the review application, CAN 52 of 2018 also stands rejected. There shall, however, be no order as to costs. Urgent certified website copies of this judgment, if applied for, be made available to the parties subject to compliance with all requisite formalities.