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Bombay High Court (Nagpur Bench)

Case No: Misc. Civil Application (Review) No. 1100 Of 2018 In Writ Petition No. 5282 Of 2015

Arjun s/o Chandulal Kewalramani		APPELLANT
	Vs	
Shri Dharamdas s/o Tekchand Kewalramani (dead) through LRs Shri Parag s/o Gulab Kewalramani & Ors		RESPONDENT

Date of Decision: Nov. 11, 2024

Acts Referred:

- Code of Civil Procedure, 1908 - Order 41 Rule 27, Order 41 Rule 27(1)(aa), Order 41 Rule 27(1)(b), Order 47 Rule 1

Hon'ble Judges: Anil L. Pansare, J

Bench: Single Bench

Advocate: M.G. Bhangde, S.N. Tapadiya, H.D. Dangre

Final Decision: Dismissed

Judgement

Anil L. Pansare, J.

1]. This review application arises out of judgment dated 6/9/2018 passed by this Court (Coram : Rohit B. Deo, J.) in Writ Petition No. 5282/2015,

whereby this Court was pleased to dismiss the writ petition challenging the judgment and order dated 30/6/2015 passed by the District Judge â€" 11,

Nagpur, in Regular Civil Appeal No. 59/2014. The First Appellate Court had dismissed the appeal and, thus, confirmed the decree of eviction dated

11/12/2013 passed by the Additional Judge, Small Causes Court, Nagpur, in Regular Civil Suit No. 67/2010, which was filed by the respondent â€" late

Shri Dharamdas Kewalramani, who is/ was represented by legal representatives.

2] Mr. M.G. Bhangde, learned Senior Counsel appearing for the review applicant (hereinafter referred to as â€œtenantâ€), submits that this Court,

while dealing with application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (for short â€œthe Codeâ€), was required to examine the

aspect of â€˜due diligenceâ€™ and nothing else. He submits that the application was filed under Order XLI Rule 27(1)(aa) of the Code, but the Court

considered the same under Order XLI Rule 27(1)(b) of the Code. He has invited my attention to paragraph 13 of the judgment, which deals with the

application so filed by the tenant, which reads thus :

â€œ13. The petitioner has preferred Civil Application 1897/2015 under Order XLI Rule 27 of the Civil Procedure Code, 1908 (â€œCodeâ€ for short) for

permission to produce additional documents-evidence on record. The said application is predicated on the assertion that after the judgment and order of the

appellate Court dated 2272015, MSEDCL provided certain documents to the petitioner-defendant under the Right to Information Act including a copy of the

NOC issued by the plaintiff to the defendant at the time of obtaining the electricity connection. The NOC, which could not be produced on record earlier inspite of

exercise of due diligence and tire less efforts made to procure a copy thereof from MSEDCL, would clinchingly prove that the defendant is not a gratuitous

licensee, is the contention. The contention is based on a reference in the NOC to defendant as tenant. In view of the settled position of law, the application under

Order XLI Rule 27 of the Code is considered only at the time of final hearing. The learned Counsel Shri Akshay Naik did make a valiant attempt to persuade this

Court to allow production of additional evidence. Shri Akshay Naik would submit that the reference to the defendant as tenant in the NOC is virtually an

admission on the part of the plaintiff that the defendant is a tenant. In rebuttal, Shri Harish Dangre, learned Counsel for the plaintiff would submit that tenant is

statutorily defined in subsection (15) of Section 7 and licensee is defined in subsection (5) thereof and the very sine qua non for entitlement to the protection of

the Maharashtra Rent Control Act, 1999 is the payment of either rent or licence or charge. Shri Harish Dangre would submit that even if it is assumed arguendo

that the plaintiff referred to the defendant as a tenant in the NOC issued to enable the defendant to obtain an electricity connection, in the absence of proof that

the defendant is paying either rent or licence fee or charge to the plaintiff, such a reference would not clothe the defendant with the status of tenant. The

submission of Shri Harish Dangre, is well merited. In the teeth of the concurrent findings recorded by the Courts below that the defendant did not prove payment

of rent or licence fee or charge, and I am not inclined to take a different view, mere reference in the NOC to the defendant as tenant would not confer the status of

tenant upon the defendant. It is axiomatic, that in view of the concurrent findings recorded by the Courts below, with which findings I concur, the production of

the NOC on record and permission to adduce additional evidence would not be necessary for effective adjudication or for just decision.â€

3] As could be seen, this Court noted the contentions of the tenant that in spite of exercise of due diligence, copy of NOC, issued by original plaintiff

(hereinafter referred to as â€˜landlordâ€™) to the defendant/ tenant for obtaining electricity connection, was procured from MSEDCL subsequent to

the judgment and order dated 22/7/2015 passed by the First Appellate Court. The Court has then considered the submissions made by the tenant that

NOC is a document, which in clear terms, is an admission on the part of the landlord that the applicant is a tenant. The Court then referred to the

arguments made in rebuttal by the learned Counsel appearing for the landlord, wherein it was contended that even if it is assumed arguendo that NOC

was so issued for obtaining electricity connection, in absence of proof that the tenant is paying either rent or license fee or charge to the original

plaintiff, such reference would not cloth the original defendant with the status of tenant. This Court found merit in the aforesaid arguments made in

rebuttal and taking note of concurrent finding of both the Courts below that since the defendant did not prove payment of rent or license fee,

production of NOC on record and permission to adduce additional evidence would not be necessary for effective adjudication or for just decision.

4] The last line of paragraph 13 indicates that this Court has considered the application under Order XLI Rule 27(1)(b) of the Code.

5] Mr. Bhangde, learned Senior Counsel submits that this Court could not have taken recourse to Clause (b) of sub-rule (1) of Rule 27 of Order XLI

of the Code. In support, he has relied upon the judgment passed by the Honâ€™ble Supreme Court in the case of K.R. Mohan Reddy Vs. Net Work

Inc. Represented Through MD [(2007) 14 SCC 257] . The Supreme Court considered, in detail, the scope of Order XLI Rule 27 of the Code and held

thus :

â€œ15. The High Court, in our opinion, failed to apply the provisions of Order 41 Rule 27 CPC in its correct perspective. Clauses (a), (aa) and (b) of sub-rule (1)

of Rule 27 of Order 41 refer to three different situations. Power of the appellate court to pass any order thereunder is limited. For exercising its jurisdiction

thereunder, the appellate court must arrive at a finding that one or the other conditions enumerated thereunder is satisfied. A good reason must also be shown as

to why the evidence was not produced in the trial Court.

16. The respondent in its application categorically stated that the books of accounts had been misplaced and the same were discovered a few days prior to the

filing of the said application while the office was being shifted. The High Court, unfortunately did not enter into the said questions at all . As indicated

hereinbefore, the High Court proceeded on the basis as if clause (b) of sub-rule (1) of Rule 27 of Order 41 CPC was applicable.

17. It is now a trite law that the conditions precedent for application of clause (aa) of sub-rule (1) of Rule 27 of Order 41 is different from that of clause (b). In the

event the former is to be applied, it would be for the applicant to show that the ingredients or conditions precedent mentioned therein are satisfied. On the other

hand if clause (b) to sub-rule (1) of Rule 27 of Order 41 CPC is to be taken recourse to, the appellate court is bound to consider the entire evidence on record and

come to an independent finding for arriving at a just decision; adduction of additional evidence as has been prayed by the appellant was necessary. The fact that

the High Court failed to do so, in our opinion, amounts to misdirection in law. Furthermore, if the High Court is correct in its view that the respondent-plaintiff

had proceeded on the basis that the suit is entirely based on a cheque, wherefor, it was not necessary for it to file the books of accounts before the trial court,

finding contrary thereto could not have been arrived at that the same was in fact required to be proved so as to enable the appellate court to arrive at a just

conclusion.â€

6] Thus, the Supreme Court has held that the conditions precedent for application of Clause (aa) of sub-rule (1) of Rule 27 of Order XLI of the Code

are different from that of Clause (b). The Court further held that if Clause (aa) is to be applied, it would be for the applicant to show that the

ingredients or the conditions precedent therein are satisfied and if recourse is to be taken to Clause (b), the Appellate Court is bound to consider the

entire evidence and then to come to an independent finding for arriving at a just decision. In the said case, like in the present case, the application was

filed under Clause (aa) of sub-rule (1) of Rule 27 of Order XLI of the Code. The High Court, however, took recourse to Clause (b) thereof.

Accordingly, the Supreme Court held that the High Court misdirected itself in law.

7] Accordingly, Mr. Bhangde, learned Senior Counsel has argued that this Court has also misdirected itself when it took recourse to Clause (b) of sub-

rule (1) of Rule 27 of Order XLI of the Code. This error is said to be an error apparent on the face of record.

8] As against, Mr. H.D. Dangre, learned Counsel for the landlord argued that the application filed by the tenant has been rejected by this Court since

it found that to permit the tenant to adduce additional evidence would be a futile exercise, considering the fact that the tenant failed to prove that he

continued to pay rent or license fee in terms of the provisions of the Maharashtra Rent Control Act, 1999. He has then invited my attention to the

grounds pleaded to review the judgment to contend that none of the grounds would satisfy the ingredients of Order XLI of the Code.

9] The first ground deals with the application preferred by the tenant under Order XLI Rule 27 of the Code. As such, in the said ground, the tenant

has not really put forth the case in terms of the provisions of Order XLI Rule 27 of the Code, which necessitates consideration of different parameters

for applications filed under sub-clause (aa) or sub-clause (b) of sub-rule (1) of Rule 27 of Order XLI of the Code, as has been argued by the learned

Senior Counsel. The said ground takes up a plea that since the status of review applicant as tenant was not disputed, there was no requirement to

prove payment of rent or license fee by the tenant. In that sense, the argument advanced by the learned Senior Counsel is not in consonance with the

grounds raised in the review application. Nonetheless, Iâ€™ll deal with this issue a little later.

10] The argument of Mr. Dangre, learned Counsel for the landlord, is that none of the grounds would attract ingredients of Order XLI of the Code and

in that context, he submitted that the first ground, as has been raised, cannot be said to be an error apparent on the face of record. So far as other

grounds are concerned, the tenant has quoted excerpt from the evidence to contend that this part of evidence has been not considered by this Court

and, therefore, there appeared apparent error. He submits that if at all this Court has not considered the evidence, the finding so rendered can be said

to be erroneous or perverse, but is not an error apparent on the face of record. Accordingly, he submits that the application is devoid of merit and

requires dismissal.

11] He has relied upon the judgment of the Supreme Court in the case of Parsion Devi And Others Vs. Sumitri Devi And Others [(1997) 8 SCC

715], wherein the Supreme Court, while dealing with the scope of review, held that under Order XLVII Rule 1 of the Code, a judgment may be open

to review inter alia if there is a mistake or an error apparent on the face of record. The Supreme Court held that an error, which is not self-evident

and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record justifying the Court to exercise its

power of review under Order XLVII Rule 1 of the Code. The Supreme Court then held that while exercising such jurisdiction, it is not permissible for

an erroneous decision to be â€˜re-heard and correctedâ€™. The Supreme Court noted that there is clear distinction between an erroneous decision

and an error apparent on the face of record. The Supreme Court held that an erroneous decision can be corrected by the higher forum, but the error

apparent on the face of record can be only corrected by exercise of review jurisdiction.

12] The question, therefore, is whether there occurred error apparent on the face of record while dealing with application filed under Order XLI Rule

27 of the Code. The answer would be in the negative for more than one reason.

13] The argument made by Mr. Bhangde, learned Senior Counsel for the applicant, that this Court misdirected itself in law when it took recourse to

Clause (b) of sub-rule (1) of Rule 27 of Order XLI of the Code, completely overlooks that it is not the Court, which misdirected itself, but the Counsel

appearing for the tenant has solicited the said direction. A careful reading of paragraph 13 of the judgment would show that it is tenantâ€™s Counsel,

who did not really argue on exercise of due diligence but made this Court to focus on the importance of placing on record NOC issued by the landlord

to the tenant. The tenantâ€™s Counsel submitted that NOC is a self-speaking admission of landlord-tenant relationship. Having made such

submission, this Court was required to consider the said argument and to proceed to note that even if the said argument is to be considered, mere

production of NOC, in absence of proof of rent or license fee to permit the tenant to lead additional evidence, will be a futile exercise. Accordingly,

the Court refused to permit to lead additional evidence. The said finding having been fetched by the tenant himself, he cannot now argue that this

Court misdirected itself in law. Why did the Counsel, who appeared for the tenant in writ petition, focused on production of NOC and not on due

diligence, is for him to answer. Now, the Counsel has been changed, so also a Judge, and a fresh plea is being put up before the Court by relying upon

the Supreme Courtâ€™s judgment, which was never placed for consideration before my predecessor. This, to my mind, is beyond the scope of review

jurisdiction.

14] It is worth mentioning here that the Supreme Court in the case of Tamil Nadu Electricity Board And Another Vs. N. Raju Reddiar And

Another [(1997) 9 SCC 736] has deprecated the practice of filing review petition by an Advocate, who neither appeared nor was party in the main

case. The Supreme Court observed thus :

â€œ1. â€¦. When an appeal/special leave petition is dismissed, except in rare cases where error of law or fact is apparent on the record, no review can be filed;

that too by the Advocate-on-Record who neither appeared nor was party in the main case. It is salutary to note that the court spends valuable time in deciding a

case. Review petition is not, and should not be, an attempt for hearing the matter again on merits. Unfortunately, it has become, in recent time, a practice to file

such review petitions as a routine; that too, with change of counsel, without obtaining consent of the Advocate-on-Record at earlier stage. This is not conducive

to healthy practice of the Bar which has the responsibility to maintain the salutary practice of profession. In Review Petition No. 2670 of 1996 in CA No. 1867 of

1992, a Bench of three Judges to which one of us, K. Ramaswamy, J., was a member, had held as under:

â€œThe record of the appeal indicates that Shri Sudarsh Menon was the Advocate-on-Record when the appeal was heard and decided on merits. The review

petitionÂ hasÂ beenÂ filedÂ byÂ ShriÂ Prabir Chowdhury who was neither an arguing counsel when the appeal was heard nor was he present at the time of

arguments. ItÂ isÂ unknownÂ onÂ whatÂ basisÂ heÂ has written the grounds in the review petition as if it is a rehearing of an appeal against our order. He

did not confine to the scope of review. It would not be in the interest of the profession to permit such practice. That apart, he has not obtained â€˜No Objection

Certificateâ€™ from the Advocate-on-Record in the appeal, in spite of the fact that Registry had informed him of the requirement for doing so. Filing of the â€˜No

Objection Certificateâ€™ would be the basis for him to come on record. Otherwise, the Advocate-on-Record is answerable to the Court. The failure to obtain the

â€˜No Objection Certificateâ€™ from the erstwhile counsel has disentitled him to file the review petition. Even otherwise,Â theÂ reviewÂ petitionÂ hasÂ no

merits, It is an attempt to reargue the matter on merits.

On these grounds, we dismiss the review petition.â€â€

15] The Co-ordinate Bench of this Court in the case of Shobha Bajirao Damodar Vs. Triratna Krida and Shikshan Prasarak Mandal, Akola

and others [2008 SCC OnLine Bom 1024] has, by relying upon the judgment in Tamil Nadu Electricity Boardâ€™s case, deprecated the practice of

filing review application by changing the Advocate. The Co-ordinate Bench, in a way, took a view that Vakalatnama filed by an Advocate in the main

petition would continue in review application unless the Advocate, who appeared in main petition, seeks discharge. The Court observed thus :

â€œ20. Learned Adv. Mr. DCR Mishra states that this being first occasion of the type, the Court may not take a serious view of the matter, and further that the

client may have own difficulties in doing so. The tenor of submission is that learned Advocate, who was appearing earlier, was indicated by the respondent No. 1 -

present applicant that he should not conduct the case. These oral submissions are not supported by any material on record. It is not demonstrated that power of

Advocate was withdrawn, cancelled or terminated. If applicant had any difference of opinion or conflict with Advocate, who had appeared for her and argued,

she would have appeared before Court to cancel the Vakalatnama or taken such steps as available in law. Nothing of this type is brought on record, which would

justify change of Advocate on facts to file a Review Application. Yet learned Advocate has argued with vigour.â€

16] What follows from the above rulings is that in review petition, presence of Advocate, who appeared in main petition, will be necessary for

appropriate decision. In the present case, the question as to why did the Advocate then appearing focused on production of NOC and not on due

diligence, could have been answered only by him, had he appeared in the review petition. In absence of such assistance, one cannot jump to the

conclusion that this Court of its own has carried the matter in a particular direction and to blame it to have committed error apparent on the face of

record. There is, thus, no substance in the argument that this Court misdirected itself in law. The contention is accordingly rejected.

17] That apart, if the tenant is required to rely upon a judgment to argue that mistake/error, if any, has been committed by the Court, the said

mistake/error can be never said to be a mistake/error apparent on the face of record. To refer to authorities to explain as to what amounts error

apparent is justified but to rely upon the authority to contend that the decision taken by the Court is not in consonance with the law laid down, will

amount to detection of error, which is not permissible. In other words, if the mistake/error is self-evident, the party, applying for review, may not

require to take recourse to various judgments to show that such mistake/error is apparent. In such eventuality, the Court will have to then arrive at a

decision of mistake/error having been committed only by relying upon the judgments so referred by the party seeking review, which then fall in the

category of finding mistake/ error by a process of reasoning.

18] Mr. Bhangde, learned Senior Counsel for the applicant, has then relied upon the judgment of the Supreme Court in the case of Green View Tea &

Industries Vs. Collector, Golaghat, Assam And Another [(2004) 4 SCC 122]to contend that failure of this Court to consider the relevant part of

evidence would constitute error apparent on the face of record.

19] I have gone through the said judgment to find that the Supreme Court has found error apparent on the face of record because the High Court

therein, despite material available on record as regards status of the land in question, failed to consider the same. Such is not the case here. This Court

has, in paragraph 14 of the judgment, noted that it has considered the entire evidence on record in the light of the submissions made by the parties and

opined that the findings recorded by the Courts below were not perverse. The Court has considered admissions of the defendants in paragraph 15 to

the extent necessary and held that the concurrent finding recorded by the Courts below do not suffer from any infirmity.

20] It is well settled that the writ court will be slow in disturbing concurrent finding on facts. Accordingly, the detailed assessment of evidence appears

to be deliberately not taken recourse to, which can be said to be a conscious decision taken by this Court. Such finding cannot be said to be an error

apparent on the face of record. In the present case, the assessment of evidence by the courts below was found to be in order. In fact, the tenant can

be said to be aware of correctness in assessment and, therefore, sought permission to bring on record the additional evidence. The contention,

therefore, that this Court has not considered relevant evidence is incorrect. The judgment in Green Viewâ€™s case will be, thus, not relevant.

21] There is, thus, no merit in the application.

The same is accordingly rejected.