SUPREME COURT OF INDIA

Inderchand Jain (D) Th.Lrs.

Vs.

Motilal (D) Th.Lrs.

C.A.No.4584 of 2009

(S.B. Sinha and Deepak Verma JJ.)

21.07.2009

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. The jurisdiction of a Court and/or the extent thereof to review its own decision is the question involved in this appeal. It arises out of a judgment and order dated 13.10.2006 passed by a learned Single Judge of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in S.B. Civil Review Petition No.33/2006 in S.B. Civil First Appeal No.36 of 1976 and and S.B. Civil First Appeal No.36 of 1976.

3. Before adverting to the aforementioned question, we may notice the admitted facts.

An agreement was entered into by and between the parties on or about 15.10.1972 whereby and whereunder Inder Chand Jain-appellant had agreed to sell a `haveli' to Motilal - respondent for a consideration of Rs.1,15,000/-, out of which a sum of Rs.20,000/- was paid in advance. Respondent filed a suit for specific performance before the District Judge, Jaipur City, in which a decree was passed on 11.11.1975. Being dissatisfied, the appellant filed Civil First Appeal before the High Court which was allowed on 12.03.1987 whereby the judgment and order of the trial court was set aside.

On an intra court appeal filed by the respondent, a Division Bench of the High Court by its order

dated 26.10.2005 remanded the matter back to the learned Single Judge for deciding the appeal afresh. By an order dated 11.08.2006, a learned Single Judge of the High Court allowed the appeal once again and set aside the judgment and decree of the trial court.

4. Both the parties filed review petitions before the learned Single Judge of the High Court under Order XLVII Rule 1 of the Code of Civil Procedure seeking review of the judgment dated 11.08.2006. By the impugned judgment and order the learned Single Judge while allowing both the review petitions recalled its earlier judgment and order dated 11.08.2006 and directed the appeal to be listed for rehearing.

5. Thus, the appellant-defendant is before this Court.

6. Mr. C.A. Sundaram, learned Senior Counsel appearing on behalf of the appellant would urge :-

i) That the High Court exceeded its jurisdiction in exercise of its review jurisdiction in so far it, for all intent and purport, acted as an appellate court.

ii) The High Court in its review jurisdiction neither could re- appreciate the evidence brought on record by the parties nor could exercise its discretionary jurisdiction under Section 20 of the Specific Relief Act, 1963.

iii) On the face of the findings of the Division Bench of the High Court that the plaintiff-respondent had not been ready and willing to perform his part of the contract as provisions of Section 20(2)(b) of the Specific Relief Act, 1963 could be invoked only in a case when the High Court had come to the conclusion that the plaintiff has made out a case of grant of decree for specific performance and not otherwise. iv) A finding of fact having been arrived at that the purported contention of the plaintiff that the agreement for sale was modified in terms whereof in place of Rs.1,15,000/- the plaintiff-respondent was to pay a sum of Rs.80,000/- having been disbelieved, the High Court committed a serious error in passing the impugned judgment.

7. Mr. K.K. Venugopal, learned senior counsel appearing on behalf of the respondent, on the other hand, would urge that the High Court while passing the judgment dated 26.10.2005 took into consideration the salient features of this case as also the subsequent events and, thus, was justified in passing its order, viz.:

(i) the possession of the premises in question had already been delivered;

(ii) the settlement arrived at by and between the parties with regard to the reduction of the amount of consideration stood admitted inasmuch as according to the appellant himself in the event the tenants were evicted a sum of Rs. 11000/- may be deducted from the amount of consideration. (iii) The plaintiff- respondent had deposited the entire balance amount on 25.09.1975, i.e., two months prior to the passing of the decree and, thus, there could not be any doubt or dispute that the plaintiff-respondent had all along been ready and willing to perform his part of contract.

(iv) Appellant, after passing of the decree by the learned Trial Court despite having preferred an appeal having himself agreed for execution of the sale deed must be held to have accepted the judgment and, thus, could not have been permitted to turn round and contend that the plaintiff was not ready and willing to perform his part of contract. (v) Withdrawal of an amount of Rs. 35,000/-

in terms of the judgment of the Trial Court by the appellant without any demur would not in law alter the situation. (vi) A registered deed of sale having been executed pursuant to the order of the Executing Court and the appellant having been put in possession of the premises in suit having expended a huge amount by way of renovation of the `haveli', the learned Judge rightly found that it would be inequitable to refuse to pass a judgment of specific performance of contract.

8. Section 114 of the Code of Civil Procedure (for short the Code) provides for a substantive power of review by a Civil Court and consequently by the appellate courts. The words subject as aforesaid occurring in Section 114 of the Code means subject to such conditions and limitations as may be prescribed as appearing in Section 113 thereof and for the said purpose, the procedural conditions contained in Order 47 of the Code must be taken into consideration.

9. Section 114 of the Code although does not prescribe any limitation on the power of the court but such limitations have been provided for in Order 47 of the Code; Rule 1 whereof reads as under: 17. The power of a civil court to review its judgment/decision is traceable in Section 114 CPC. The grounds on which review can be sought are enumerated in Order 47 Rule 1 CPC, which reads as under:

1. Application for review of judgment.--(1) Any person considering himself aggrieved-- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of 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 was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

An application for review would lie inter alia when the order suffers from an error apparent on the face of the record and permitting the same to continue would lead to failure of justice. In Rajendra Kumar v. Rambai [AIR 2003 SC 2095], this Court held : The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgment/order cannot be disturbed.

The power of review can also be exercised by the court in the event discovery of new and important matter or evidence takes place which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. An application for review would also lie if the order has been passed on account of some mistake. Furthermore, an application for review shall also lie for any other sufficient reason.

10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A re-hearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order. Review is not appeal in disguise.

In Lily Thomas v. Union of India [AIR 2000 SC 1650], this Court held :

56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated an appeal in disguise.

11. Respondent in his plaint inter alia raised a plea of novation of contract. Such a plea was advanced on the premise that a substantial amount was to be expended for eviction of the tenants who were occupying the premises in question.

For the said purpose, reference was made to Clause 13 of the agreement dated 15.10.1972. Undoubtedly, defendant - appellant denied and disputed that any modification in the said agreement had taken place as a result whereof the balance amount payable was Rs. 80,000/. A bare perusal of Clause 13 of the said agreement categorically shows that the expenses for vacating the tenant were to be made through the defendant - appellant only. It was for the defendant - appellant to accept any payment from the plaintiff - respondent. Clause 13 does not envisage any expenditure on the part of the plaintiff on the said account. It may, however, be correct that the defendant - appellant in his deposition accepted that he had made a representation to the plaintiff that in the event the tenants are evicted on payment of the sum specified therein, the amount so paid may be deducted from the amount of consideration. According to him, the amount in question was a sum of Rs. 11,000/-. He, however, contended that no amount was paid to the tenant. Before the learned Trial Judge, both the parties adduced their respective evidences. The plaintiff - respondent in cross-examination was asked the following question:

Whether or not you are prepared to purchase the house, even if Sardarmalji and Inderchandji could not settle the dispute of Rathiji, as has been mentioned by you in your paper? In answer thereto, he stated as under:

If the defendant Inderchandji is prepared ready to set off Rs. 30,000/- against the cost of the house, then I am prepared to purchase the house.

12. The readiness and willingness on the part of the plaintiff in view of his categorical admission, therefore, was a conditional one. It was not absolute. Probably keeping in view the effect of such conditional offer made by him, he deposited the entire balance amount of consideration in the court on 25.09.1975.

13. Section 16(c) of the Specific Relief Act, 1963 mandates that the discretionary relief of specific performance of the contract can be granted only in the event the plaintiff not only makes necessary pleadings but also establishes that he had all along been ready and willing to perform his part of contract. Such readiness and willingness on the part of the plaintiff is not confined only to the stage of filing of the plaint but also at the subsequent stage, viz., at the hearing. It has been so held in Umabai and Another v. Nilkanth Dhondiba Chavan (Dead) By LRs. And Another [(2005) 6 SCC 243] in the following terms: 30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The

conduct of the plaintiff- respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records.

31. In terms of Forms 47 and 48 appended to Appendix A of the Code of Civil Procedure, the plaintiff must plead that he has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice or the plaintiff is still ready and willing to pay the purchase money of the said property to the defendant. The offer of the plaintiff in the instant case is a conditional one and, thus, does not fulfil the requirements of law. Yet again in Sita Ram Ors. v. Radhey Shyam, [AIR 2008 SC 143], while referring to Ardeshir H. Mam v. Flora Sassoon [AIR 1928 PC 208] this Court opined as under :

the Privy Council observed that where the injured party sued at law for a breach, going to the root of the contract, he thereby elected to treat the contract as at an end himself and as discharged from the obligations. No further performance by him was either contemplated or had to be tendered. In a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part

14. It is no doubt true that the learned Trial Judge decreed the suit inter alia opining that in terms of the modified contract, the plaintiff was to pay a further sum of Rs. 80,000/- only to the defendant. The defendant did not accept the said finding. He preferred an appeal. Admittedly, he filed three applications for stay. The learned Single Judge before whom the third stay application came up for hearing, by an order dated 9.11.1977 recorded as under:

This is the 3rd stay application. No new ground exists for grant of stay. Indeed, the equities are not in favour of the defendant. Since the defendant was not in a position to deliver the vacant possession of the Haveli in suit, the plaintiffs were entitled to a decree for specific performance, on payment of Rs. 80,000/- in the shape of its price. Admittedly, the plaintiffs deposited Rs. 20,000/- on 15.10.1972 and Rs. 95,000/- on 24.09.1975, i.e., Rs. 1,15,000/- in all, towards the price of the Haveli on the expectation that the defendant would deliver vacant possession.

The contention that the plaintiffs are not entitled to execute the decree because a sum of Rs. 60,000/- is not in deposit, is wholly unwarranted. The plaintiffs had actually deposited Rs. 1,15,000/, as stated above. The deposit was tantamount to payment.

As the 2nd condition becomes operative, the plaintiffs withdrew the excess amount of Rs. 35,000/- as well as the costs amounting to Rs. 7075/-. They were entitled to their costs and therefore could deduct the same under Order XX rule 6(3) of the Code of Civil Procedure and, therefore, Rs. 7075/- have to be deducted from Rs. 60,000/-. The order sheet of the executing court dated 15.10.1977 shows that a creditor of the defendant has withdrawn Rs. 6952.37 p. There is no non-compliance of the terms of the decree on the part of the plaintiffs and they are entitled to get the 2 sale-deeds registered in the terms of the decree and no question of requiring the plaintiffs to deposit the further sum of Rs. 7000/- arises.

The application for stay is, therefore, rejected.
It was in the aforementioned situation, Mr. Sundaram may be justified in contending that the appellant had no other option but to agree to the execution of the document.

The learned Single Judge by an order dated 12.03.1987 allowed the appeal and the judgment of the Trial Court was set aside.

15. On an intra-court appeal by the respondent, the matter was finally heard by the Division Bench. As regards, the effect of unconditional withdrawal of the amount during pendency of the appeal, the Division Bench noticed:

It appears that S.B. Civil First Appeal No.36/1976 was filed on April 22, 1976 by the defendant - respondent and during pendency of the first appeal, the amount deposited by the plaintiff was withdrawn by the defendant unconditionally and the Executing Court thereafter registered the sale deed in pursuance of the decree of the lower court. However, at the time of deciding the First Appeal, this fact escaped attention of the learned Single Judge. In our opinion, it was necessary for the learned Single Judge to analyse the effect of unconditional withdrawal of money by the defendant during the pendency of appeal.

16. Keeping in view the aforementioned finding, the Division Bench could have remitted the matter for a limited purpose. It, however, did not do so. It unjustifiably remitted the entire matter. Legality of such an order is, however, not in question.

17. The learned Single Judge of the High Court upon consideration of all materials and evidences available on record allowed the appeal and set aside the judgment and decree passed by the learned Trial Judge by an order dated 11.08.2006, stating :

...Thus, in view of the evidence brought on record it must be concluded that the plaintiff respondent has not been able to prove the said oral agreement with respect to the reduction of sale price by Rs. 35,000/-. It has not been established as to at which place and on what date the alleged oral agreement between the parties had taken place. Meaning thereby, the plaintiff Motilal, in my considered view, was not ready and willing to purchase the haveli in question at any point of time...

...Since the plaintiff accepted the payment after execution of decree by registration of sale deed through court on 24.02.1978, therefore,

withdrawal/ acceptance of Rs. 45972/- in compliance of executing court's order dated 10.03.1978 cannot be said to have an adverse effect on the case of the defendant appellant.

18. The said judgment was accepted as no appeal was preferred thereagainst. It was only thereafter a review application was filed by both the parties.

19. Whereas the defendant - appellant filed a review application confined to the question that he was entitled to the restitution of the property and mesne profit in respect whereof the learned Single Judge of the High Court did not pass any specific order, the application for review filed by the respondent was on the merit of the judgment. The relevant grounds of review which have been placed before us relate to : (i) Unconditional withdrawal of some amount by one of the creditors of the defendant as also the defendant himself; (ii) The defendant's application before the Executing Court that he was ready and willing to get the sale deed executed on receipt of amount in cash and the said admission allegedly was not brought to the notice of the court;

(iii) While holding that there was no agreement to reduce the sale consideration, the High Court had ignored the fact that it was an admitted case of the parties, as stipulated in the contract, that the defendants would get the premises vacated from the tenants within three months.

(iv) Appellant had prayed for an alternative relief, viz., that he was ready to get the decree for specific performance of contract by paying Rs. 1,15,000/-. The court did not consider the evidence of DWs 1 to 6 in their proper perspective. (v) The court did not consider that the property could not be restored back to the defendant - appellant and as such the court should have exercised its discretionary jurisdiction.

20. The issues raised before the appellate court, viz., whether there had been a novation of contract or whether the plaintiff was ready and willing to perform his part of contract, as is required under Section 16(c) of the Specific Relief Act, are essentially questions of fact. The Trial Judge had determined the said issues which were appealed against. An appeal is a continuation of the suit. Any decision taken by the appellate court would relate back unless a contrary intention is shown to the date of institution of the suit. There cannot be any doubt that the appellate court while exercising its appellate jurisdiction would be entitled to take into consideration the subsequent events for the purpose of moulding the relief as envisaged under Order 7, Rule 7 read with Order 41, Rule 33 of the Code of Civil Procedure. The same shall, however, not mean that the court would proceed to do so in a review application despite holding that the plaintiff was not entitled to grant of a decree for specific performance of contract. For the purpose of obtaining a decree for specific performance of contract, the court must arrive at a conclusion that the plaintiff not only pleaded but also established his readiness and willingness to perform his part of contract throughout. Exercising the discretionary jurisdiction one way or the other having regard to Section 20(2)(b) would depend thereupon arriving at a finding of such fact. Balancing of interest would be necessary provided a suit is to be decreed and not when the suit is to be dismissed.

21. The sequence of events to which we have adverted to heretobefore clearly go to show that the appellate court were all along aware of the main issues touching the merit of the matter. They were also aware as to the effect or otherwise of the withdrawal of the amount by the appellant unconditionally as also by his creditor. The plaintiff - respondent on the aforementioned premise was entitled to contend and in fact contended that unconditional withdrawal of a part of the deposited amount would preclude the appellant from pursuing the appeal. The question as to whether by reason of such withdrawal, he had accepted the judgment passed by the learned Trial Judge and, thus, was estopped and precluded from pursuing his appellate remedy was one of the points which fell for consideration before the appellate court. Keeping in view the entirety of the facts and circumstances of the case, the appellate court arrived at two crucial findings: (i) The plaintiff had not been all along ready and willing to deposit the balance sum of Rs. 95,000/-. (ii) The unconditional withdrawal on the part of the defendant was involuntary.

The events which had taken place subsequently, viz., registration of the said deed of sale, purported taking over of possession of the suit premises by the plaintiff and alleged expenditure incurred by him for renovation of the building, were within the knowledge of the parties and the court. It was, therefore, not a discovery of a new fact which despite due diligence the plaintiff could not bring to the notice of the court.

22. Order 41, Rule 1 of the Code stipulates that filing of an appeal would not amount to automatic stay of the execution of the decree. The law acknowledges that during pendency of the appeal it is

possible for the decree holder to get the decree executed. The execution of the decree during pendency of the appeal would, thus, be subject to the restitution of the property in the event the appeal is allowed and the decree is set aside. The court only at the time of passing a judgment and decree reversing that of the appellate court should take into consideration the subsequent events, but, by no stretch of imagination, can refuse to do so despite arriving at the findings that the plaintiff would not be entitled to grant of a decree. Discretionary jurisdiction, it is trite, can be exercised provided there is any room for the court to so same and not otherwise. The court while exercising its jurisdiction would not act arbitrarily or beyond the contours of law. The contention of the plaintiff that he had also prayed for grant of a decree in the alternative, viz., in the event the court came to the conclusion that there had been no novation of contract, he was ready and willing to deposit the entire amount. No conditional offer was permissible in a suit for specific performance of contract.

23. Contention of Mr. Venugopal that the defendant having accepted novation of contract but only the quantum of the amount being different, the court could have asked the plaintiff - respondent to deposit a further sum of Rs. 24,000/- cannot be accepted for more than one reason. Apart from the fact that such a contention had never been raised before the appellate court, keeping in view the finding of fact arrived at that there had in fact been no novation of contract, such a course of action was not open. In any view of the matter, the same would amount to re- appreciation of evidence which was beyond the review jurisdiction of the High Court.

24. We have noticed hereinbefore, that under what circumstances the aforementioned amount of Rs. 1,15000/- was deposited by the respondent. He might have been advised to do so keeping in view the fact that, according to him, he was ready and willing to perform his part of contract provided the balance amount of consideration was reduced to Rs. 80,000/.

25. The High Court had rightly noticed the review jurisdiction of the court, which is as under:

The law on the subject - exercise of power of review, as propounded by the Apex Court and various other High Courts may be summarized as hereunder:

(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 C.P.C.

(ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on the points where there may be conceivable be two opinions.

(iii) Power of review may not be exercised on the ground that the decision was erroneous on merits.

(iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an Advocate.

(v) An application for review may be necessitated by way of invoking the doctrine `actus curiae neminem gravabit'.

26. In our opinion, the principles of law enumerated by it, in the facts of this case, have wrongly

been applied. In Board of Control for Cricket in India Anr. v. Netaji Cricket Club Ors. [(2005) 4 SCC 741], this Court held : 89. Order 47 Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.

90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words sufficient reason in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit. It was furthermore observed:

94. In Rajesh D. Darbar and Ors. v. Narasingrao Krishnaji Kulkarni and Ors. (2003)7SCC219 , this Court noticed:

4. The impact of subsequent happenings may now be spelt out. First, its bearing on the right of action, second, on the nature of the relief and third, on its importance to create or destroy substantive rights. Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts. The courts can take notice of the subsequent events and can mould the relief accordingly. But there is a rider to these well established principles. This can be done only in exceptional circumstances, some of which have been highlighted above. This equitable principle cannot, however, stand in the way of the court adjudicating the rights already vested by a statute. This well settled position need not detain us, when the second point urged by the appellants is focused. There can be no quarrel with the proposition as noted by the High Court that a party cannot be made to suffer on account of an act of the Court. There is a well recognised maxim of equity, namely, actus curiae neminem gravabit which means an act of the Court shall prejudice no man. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, lex non cogit ad impossibilia, i.e. the law does not compel a man to do that what he cannot possibly perform. Furthermore, in Ors. [(2007) 7 SCC 38], this Court held :

It is furthermore evident that Order 47 Rule 1 of the Code of Civil Procedure does not preclude the High Court or a court to take into consideration any subsequent event. If imparting of justice in a given situation is the goal of the judiciary, the court may take into consideration (of course on rare occasions) the subsequent events.

27. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed. However, it would be open to the plaintiff - respondent to file an appropriate application for recovery of such amount or amounts which he might have expended towards renovation of the building, which may be considered on its own merits. The court shall furthermore determine the amount of mesne profit which became payable to the appellant. It would be open to the court to adjust the amount payable by the plaintiff to the defendant and vice-versa.