

ORDER BELOW EXH.68

1. This is an application filed by the plaintiff. The plaintiff is praying for the review of common order passed by this court below Exh.41 and Exh.45 dtd. 11/03/2019.

2. It is the contention of the plaintiff that, the present suit has been filed for the relief of partition and separate possession. Meanwhile, plaintiff has filed a pursis below Exh.41 Dtd. 14/06/2016 wherein he has submitted that, he wants to withdraw the present suit conditionally. The defendant No.3 has filed an objection to the said withdrawal pursis vide Exh.44. The defendant No.3 has not only took the objection to the said withdrawal pursis of plaintiff but also she has claimed that, she be transposed as plaintiff from defendant No.3. This court has passed a common order and rejected the pursis below Exh.41 and allowed the application of defendant No.3 below Exh.45 and thereby ordered defendant No.3 to transpose as a plaintiff.

3. It is the contention of the plaintiff that, the court has rejected the withdrawal pursis of the plaintiff therefore, status of plaintiff is still intact as a plaintiff. Therefore, defendant No.3 cannot be transpose as plaintiff in the suit. The plaintiff further contended that, the defendant No.3 has filed her written statement below Exh.19 wherein she has took the contrary view or statements to the plaintiff's plaint. The plaintiff's suit and the defence filed by defendant No.3 below Exh.19 are not identical. Therefore, as per the order XXIII Rule 1(A) of the Code of Civil Procedure (for short "C.P.C.") transposition of defendant No.3 to the plaintiff is illegal and bad in law. Therefore, plaintiff prayed to allow the application.

4. The Ld. Advocate for defendant No.3 has filed say on overleaf of application wherein he has submitted that, the present plaintiff has filed a Writ Petition No.10405/2019 in the Hon'ble High Court of Bombay and challenged the order passed below Exh.41 and Exh.45. The said writ has not been admitted. The present application filed by the plaintiff is after thought. The plaintiff has filed this application after 3 years. Therefore, the application is hopelessly barred by limitation. He further submits that, the common order passed below Exh.41 and Exh.45 are legal and proper. There is no any apparent error in order, so the application filed by plaintiff is

false and illegal. Hence, he prayed to reject the application with costs.

5. Heard Ld. Advocate for the plaintiff and defendant. The Ld. Advocate for plaintiff submitted that, the order passed below Exh.41 and 45 is erroneous as the status of plaintiff was intact due to the rejection of suit withdrawal pursis below Exh.41. He further submits that, review is maintainable in present case. He further argued that the written statement of defendant No.3 and plaintiff's plaint are not identical. Therefore, order to transpose defendant No.3 as a plaintiff passed below Exh.45 is bad in law. Therefore, he prayed to allow the review application.

6. The Ld. Advocate for defendant No.3 Shri. Pawar submitted that, substantial and legal order cannot be reviewed. He further submits that, there is no change in status or circumstances in present case which compel plaintiff to file this application. He further submits that, the present application is barred by limitation as well as he submits that, there is no injustice will cause to the plaintiff if, defendant No.3 is transposed as plaintiff. Hence ,he prayed to reject the application.

7. In present case it is necessary to reproduce here order XXIII Rule 1A. **When transposition of defendants as plaintiffs may be permitted** — Where a suit is withdrawn or abandoned by a plaintiff under rule 1, and a defendant applies to be transposed as a plaintiff under rule 10 of Order I the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants.

The said provision says that, Where a suit is withdrawn by a plaintiff under Order 23 rule 1, one of the opposite parties sometimes finds it necessary to be transposed as a plaintiff, so that he can pursue whatever claims he may have made against a co-defendant.

The application is for review of order therefore it is necessary to reproduce the relevant section 114 of C.P.C and it is necessary to reproduce the provisions of review under order XLVII.

Section.114. Review— Subject as aforesaid, any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred, (b) by a decree or order from which no appeal is allowed by this Court, or (c) by a decision on a reference from a Court of

Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

ORDER XLVII- Rule 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 of 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.

8. On perusal of Order XLVII Rule (1) it specifically says that, any person who from the discovery of new and important matter or evidence which after exercises of due diligence was not within his knowledge or cannot 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 record or any other sufficient reason desires to obtain review of the decree passed or order made against him may apply for review of judgment to the court which passed the decree or made the order. In present case plaintiff wants to review the order below Exh.41 and 45 on the ground that, the provisions of order XXIII Rule 1(A) was not properly considered by the court while passing order below Exh.45. It is the grievance of plaintiff that, the interest of plaintiff and defendant No.3 is not identical. Therefore, order passed by the court below Exh.45 has not been passed according to the provisions of order XXIII Rule 1(A) of C.P.C. and the order is bad in law. On perusal of order XLVII rule 1 it appears that, there should be discovery of new and important matter or evidence or which after the exercises of due diligence was not within knowledge of plaintiff for the review of order. Further such conditions mentioned in the said order are not brought on record by the plaintiff. The plaintiff is seeking the review of order passed by the same court without any concrete reason. The plaintiff is criticizing the order of court on the ground that the court has not considered the provisions.

9. I have perused written statements filed by the defendant No.3 Exh.19 it appears that, she is also claiming her share in suit property. Therefore, her interested is also identical to the plaintiff. Therefore, there is no ground for the plaintiff to challenge the order passed below Exh.45.

10. The plaintiff is seeking review of order passed below Exh 41 wherein the plaintiff wants to withdraw suit. The common order has been passed below Exh.41 and 45, the said order was reasoned and it does not find any apparent error. It is the contention of the plaintiff that the pursis Exh.41 was rejected means the status of plaintiff is still as it is .Now the situation in suit is that the plaintiff Shrikant Kale's satus is intact as plaintiff and therefore he is not interested to proceed in matter and therefore he is avoiding the amendment which is necessary to execute the order passed below Exh.45. The plaintiff is avoiding to amend the plaint and not ready to carry amendment with respect to the transposition of defendant No.3 as plaintiff. The defendant No.3 has filed a separate application for amendment below Exh.59 which is still pending. Therefore how to execute the order of transposition is another issue pending below Exh.59 .In that context I am of view that this application is only with respect to review of order,I am of view that the plaintiff is arguing on the merits of application and the legality of order however, he has not mentioned any apparent error or grounds on which review is maintainable. Moreover the review application is filed after four years of order without delay condonation application.

11. The plaintiff is trying to compel this court to exercise the powers of appellate court and get corrected the common order passed below Exh.41 and Exh.45 . The Ld. Advocate for plaintiff relied upon the judgment passed in the case of **Sou. Nalini @ Madhavi Madhukar Murkute Vs. Shri Deepak Manohar Gaikwad & Ors.** (2023(4) All MR 498) wherein Hon'ble Bombay High Court held that, transpose of defendant as plaintiff in case of part abandonment of suit claim by plaintiff is permissible provided defendant seeking transpose has identical interest with plaintiff vis a vis both contesting defendants and subject matter property. On perusal of facts of cited authority it appears that the interest of plaintiff and defendant who wants transposition were different and not identical. However in case in hand the plaintiff and defendant No.3 are seeking the partition and their interests are identical . Therefore, facts of cited authority and case in hand are different hence the cited

authority is not applicable.

12. The ld Adv. for defendant has relied upon the judgment of Hon'ble Supreme court in the case of 1) **Shri Ram Sahu (Dead) Through LRS V/s. Vinod Kumar Rawat and others** (Spl. leave petition No.28150/2017) wherein it is held by Hon'ble Supreme Court that , an application for review is more restricted than that of an appeal and the Court of review has limited jurisdiction as to the definite limit mentioned in Order 47 Rule 1 CPC itself. The powers of review cannot be exercised as an inherent power nor can an appellate power can be exercised in the guise of power of review

2) **Union of India V/s. Sandur Manganese and iron ores Ltd.,** (Civil Appeal No.7944/2010) wherein it has been reiterated by Hon'ble Supreme Court that the power of review jurisdiction can be exercised for the correction of mistake and not to substitute a view.

3) **Arun Dev Upadhyay V/s. Integrated sales services Ltd,** (Civil appeal No.8345-8346/2018) wherein it is held by Hon'ble Supreme Court that the error on the face of record must be such an error which mere looking at the record should strike and it should not require any long drawn process of reasoning on the points where there may conceivably be two opinions.

4) **Parison Devi and others V/s. Sumitri Devi and others,** (AIR 1997 SC 3) wherein it is held by Hon'ble Supreme Court that, a review is by no means an appeal in disguise whereby an erroneous decision is reheard corrected. but lies only for patent error. There is clear distinction between an erroneous decision and error apparent on face of record.

The all above cited authorities were with respect to the question that in which circumstances review is maintainable and on what grounds and in what circumstances the review petition can be allowed. Therefore all above authorities applicable in present case. The Ld. Advocate for defendant No.3 relied on the judgment passed in **T Arivandandam V/s. T.V. Satyapal,** (1977 AIR SC 2421) wherein Hon'ble Supreme Court observed that Bar will be readily forthcoming to the bench for spending judicial time on worthwhile disputes and avoiding the distraction of sham litigation. The issue discussed in cited authority was with respect to sham litigation and costs. Therefore, this authority is not applicable in present case in hand.

13. Considering the above discussion and provision of section 114, Order XLVII and Order XXIII, I am of view that, the plaintiff has filed this review petition after lapse of 3 years from the order and prolonging the matter without any reasonable or justifiable ground. Therefore application deserves to be rejected. Hence ,I pass following order -

ORDER

Application below **Exh.68** is hereby rejected.

Daund

Dated :09.10.2024

(S.N. Patil)

3rd Jt. Civil Judge Junior Division,
Daund

Certificate

I affirm that the contents of this PDF file judgment is same word to word as per the original judgment.

A. Name of the Stenographer :- M.M. Chintale

B. Court :- 3rd Jt. CJJD, Daund, Dist. Pune

C. Judgment signed by P.O. on :- 09.10.2024

D. Judgment uploaded on :- 14.10.2024.