Jabalpur Agrawal Sabha (A Registered ... vs Deepak Jain on 20 September, 2023

Author: Avanindra Kumar Singh

Bench: Avanindra Kumar Singh

IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE AVANINDRA KUMAR SINGH
ON THE 20 th OF SEPTEMBER, 2023
REVIEW PETITION No. 571 of 2023

BETWEEN:-
JABALPUR AGRAWAL SABHA (A REGISTERED SOCIETY BEARING REGISTRATION NO.3614) HAVING ITS OFFICE AT AGRASEN KALYAN MANDAPAM VIJAY NAGAR JABALPUR THROUGH ITS PRESIDENT AND SECRETARY PRESENT PRESIDENT SHRI YATISH AGARAWAL S/O SHRI SHANAKRLAL AGRAWAL AGED ABOUT 65 YEARS, R/O AGRAWAL JEWELER SARAF BAZAR, JABALPUR (MP) AADHAAR NO.735722969611, PRESENT SECRETARY SHRI ANOOP KUMAR AGRAWAL S/O LATE SHRI GOPI KRISHNA AGRAWAL AGED ABOUT 58 YEARS R/O 614, MOTI LAL NEHRU WARD (OLD), JAWAHARGANJ WARD (NEW) BHALDARPURA, JABALPUR DISTRICT JABALPUR (MADHYA PRADESH) AADHAAR NO.946580495486

(BY SHRI AVINASH ZARGAR - ADVOCATE)

AND
DEEPAK JAIN S/O LATE SHRI SUMER CHAND JAIN, AGED ABOUT 63 YEARS, OCCUPATION: ADVOCATE, R/O B-501, FIFTH FLOOR, KACHNAR SAMBHAR, NEAR ANAND TALKIES NAPIER TOWN DISTRICT JABALPUR (MADHYA PRADESH)

....

(BY SHRI PANKAJ DUBEY - ADVOCATE)

This review having been heard and reserved for judgment for pronouncement this day, the Court passed the following:

ORDER

This review petition under section 114 read with Order 47 Rule 1 of Code of Civil Procedure has been filed by the applicant seeking review of judgment dated 28.4.2023 passed in First Appeal

No.1090/2022 [Deepak Jain Vs. Jabalpur Agrawal Sabha].

2. In short, the case of the applicant is that respondent as plaintiff had filed a civil suit being RCSA No.112-A/2011 seeking relief of specific performance of agreement of sale dated 12.5.2000 executed by applicant/defendant in favour of respondent/plaintiff. Learned Second District Judge, Jabalpur dismissed the suit of the plaintiff vide judgment and decree dated 27.6.2022. The respondent/plaintiff challenged the judgment and decree of the learned trial Court in First Appeal No.1090/2022 under section 96 of CPC. The Court vide judgment and decree dated 28.4.2023 allowed the first appeal by setting aside judgment and decree of the trial Court and directed that on payment of balance sale consideration by the respondent/plaintiff to the applicant/defendant within a period of one month from the date of receipt of certified copy of the judgment and on making other incidental expenses as per agreement dated 12.5.2000 (Exhibit-P/1) the applicant/defendant shall execute sale deed in respect of suit property from the date of receiving balance sale consideration. It is this judgment and decree dated 28.4.2023 passed in First Appeal No.1090/2022, which is under review at the instance of applicant/defendant.

3. The ground urged by the applicant for seeking review are that no finding has been recorded for rejecting the ground raised in cross-objection to the effect that sale was not executed by the competent authority of the defendant, as the person who has executed the sale agreement was not authorized and Clause 14 of bye-laws (Ex-D/36) of defendant-Agrawal Sabha provides that sale and purchase can be made by defendant only by passing a resolution through general body with 3/4th majority and after obtaining sanction from Registrar, Firms & Societies. The agenda dated 01.3.2000 (Ex.D/31) of Executive Body of defendant does not refer to any resolution authorizing 'Bhawan Samiti' to sale the suit property. The Exhibits-P/2 & P/3 are not the resolutions of the General Body of applicant. The finding to the effect that respondent/plaintiff was ready and willing to perform his part under the contract, is based on "no evidence". The suit by the respondent/plaintiff was barred by law of limitation as it has been filed on 28.9.2011, whereas the defendant denied the agreement to sale for the first time on 24.2.2007 vide document (Ex-D/1) and 09.3.2007 (Ex.D/19) and hence, the period of limitation under Article 54 would start from date of denial. The agreement (Exhibit-P/1) is void as being uncertain.

4. During the course of arguments learned counsel for the applicant, to demonstrate that there is an error apparent on the face of record has placed reliance on the decisions in the cases of S.Madhusudhan Reddy Vs. V.Narayana Reddy and others, 2022 LiveLaw (SC) 685, Rathnavathi and another Vs. Kavita Ganashamdas, (2015) 5 SCC 223 and T.P.G.Pillay Vs. Mohd.Jamir Khan and another, 2020 SCC Online MP 1017.

5. Learned counsel for the respondent/plaintiff has opposed the prayer for review and submitted that judgment passed in First Appeal is just and proper. He in support of his contentions has placed reliance on decisions in Meera Bhanja (Smt.) Vs. Nirmala Kumar Choudhary (Smt.), (1995) 1 SCC 170 and Division Bench of this Court passed on 01.2.2022 in Review Petition No.539/2021 [M/sZigitza Health Care Ltd. Vs. Naresh Kumar Verma and others] and other connected matters.

6. Learned counsel for the applicant by referring to decision rendered by three-Judge Bench of Supreme Court in the case of S.Madhusudhan Reddy (supra) has submitted that there is distinction between an erroneous decision as against an error on the face of record. An erroneous decision can be corrected by the Superior Court, however, an error apparent on the face of the record can only be corrected by exercising review jurisdiction. If the error has to be detected by a process of reasoning, cannot be described as an error apparent on the face of the record for the court to exercise its powers of review. He further submitted that a review would be maintainable on (i) discovery of new and important matters or evidence which, after exercise of due diligence, were not within the knowledge of the applicant or could not be produced by him when the decree was passed or the other made (ii) on account of some mistake or error apparent on the face of the record; or (iii) for any other some sufficient reason. He has referred to paragraphs 11 to 26 of S.Madhusudhan Reddy (supra), which read as under:-

> "11. Section 114 of the CPC which is the substantive provision, deals with the scope of review and states as follows:
>
> "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 Code; 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."

12. The grounds available for filing a review application against a judgment have been set out in Order XLVII of the CPC in the following words:

> "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.

> (2) A party who is not appealing from a decree or Order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

1[Explanation-The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.]"

13. A glance at the aforesaid provisions makes it clear that a review application would be maintainable on (i) discovery of new and important matters or evidence which, after exercise of due diligence, were not within the knowledge of the applicant or could not be produced by him when the decree was passed or the order made; (ii) on account of some mistake or error apparent on the face of the record; or (iii) for any other sufficient reason.

14. In Col. Avatar Singh Sekhon v. Union of India10, this Court observed that a review of an earlier order cannot be done unless the court is satisfied that the material error which is manifest on the face of the order, would result in miscarriage of justice or undermine its soundness. The observations made are as under:

> "12. A review is not a routine procedure. Here we resolved to hear Shri Kapil at length to remove any feeling that the party has been hurt without being heard. But we cannot review our earlier order unless satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. In Sow Chandra Kante v. Sheikh Habib11 this Court observed:
>
> 'A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. ... The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality.'"

15. In Parsion Devi v. Sumitri Devi and Others, stating that an error that is not self-evident and the one thathas to be detected by the process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise the powers of review, this Court held as under:

> "7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In Thungabhadra Industries Ltd. v. Govt. of A.P.13 this Court opined:
>
> '11. What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an 'error apparent on the face of the record'. The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would

not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an 'error apparent on the face of the record', for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.'

8. Again, in Meera Bhanja v. Nirmala Kumari Choudhury14 while quoting with approval a passage from Aribam Tuleshwar Sharma v. Aribam Pishak Sharma15 this Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. 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 the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of this jurisdiction under Order 47 rule 1 CPC it is not permissible for an erroneous decision to be 'reheard and corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'".

[emphasis added]

16. The error referred to under the Rule, must be apparent on the face of the record and not one which has to be searched out. While discussing the scope and ambit of Article 137 that empowers the Supreme Court to review its judgments and in the course of discussing the contours of review jurisdiction under Order XLVII Rule 1 of the CPC in Lily Thomas (supra), this Court held as under:

"54. Article 137 empowers this court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Supreme Court Rules made in exercise of the powers under Article 145 of the Constitution prescribe that in civil cases, review lies on any of the grounds specified in Order 47 rule 1 of the Code of Civil Procedure which provides:

"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.' Under Order XL Rule 1 of the Supreme Court Rules no review lies except on the ground of error apparent on the face of the record in criminal cases. Order XL Rule 5 of the Supreme Court Rules provides that after an application for review has been disposed of no further application shall be entertained in the same matter.

XXXXXXXXX

56. It follows, therefore, that the power of review can be exercised for correction of a mistake but 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 like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised. However, this Court in exercise of its powers under Article 136 or Article 32 of the Constitution and upon satisfaction that the earlier judgments have resulted in deprivation of fundamental rights of a citizen or rights created under any other statute, can take a different view notwithstanding the earlier judgment.

XXXXXXXXX

58. Otherwise also no ground as envisaged under Order XL of the Supreme Court Rules read with Order 47 of the Code of Civil Procedure has been pleaded in the review petition or canvassed before us during the arguments for the purposes of reviewing the judgment in Sarla Mudgal case16. It is not the case of the petitioners that they have discovered any new and important matter which after the exercise of due diligence was not within their knowledge or could not be brought to the notice of the Court at the time of passing of the judgment. All pleas raised before us were in fact addressed for and on behalf of the petitioners before the Bench which, after considering those pleas, passed the judgment in Sarla Mudgal16 case. We have also not found any mistake or error apparent on the face of the record requiring a review. Error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. No such error has been pointed out by the learned counsel appearing for the parties seeking review of the judgment. The only arguments advanced were that the judgment interpreting Section 494 amounted to violation of some of the fundamental rights. No other sufficient cause has been shown for reviewing the judgment. The words "any-other sufficient reason appearing in Order 47 Rule 1 CPC"

> must mean "a reason sufficient on grounds at least analogous to those specified in the rule" as was held in Chajju Ram v. Neki Ram17 and approved by this Court in Moran Mar Basselios Catholicos. v. Most Rev. Mar Poulose Athanasius18. Error apparent on

the face of the proceedings is an error which is based on clear ignorance or disregard of the provisions of law. in T.C. Basappa v. T. Nagappa19 this Court held that such error is an error which is a patent error and not a mere wrong decision. In Hari Vishnu Kamath v. Ahmad20, it was held:

"It is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error, cease to be mere error and become an error apparent on the face of the record? Learned Counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated.

Mr. Pathak for the first respondent contended on the strength of certain observations of Chagla, CJ in - 'Batuk K Vyas v. Surat Borough Municipality'21, that no error could be said to be apparent on the face of the record if it was not self-evident and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is 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.

Therefore, it can safely be held that the petitioners have not made out any case within the meaning of Article 137 read with Order XL of the Supreme Court Rules and Order 47 Rule 1 CPC for reviewing the judgment in Sarla Mudgal case16. The petition is misconceived and bereft of any substance."

(emphasis added)

17. It is also settled law that in exercise of review jurisdiction, the Court cannot reappreciate the evidence to arrive at a different conclusion even if two views are possible in a matter. In Kerala State Electricity Board v. Hitech Electrothermics & Hydropower Ltd. and Others22, this Court observed as follows:

"10. ....In a review petition it is not open to this Court to reappreciate the evidence and reach a different conclusion, even if that is possible. Learned counsel for the Board at best sought to impress us that the correspondence exchanged between the parties did not support the conclusion reached by this Court. We are afraid such a submission cannot be permitted to be advanced in a review petition. The appreciation of evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the court records a finding of fact and

> reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has not been contended before us that there is any error apparent on the face of the record. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise."

(emphasis added)

18. Under the garb of filing a review petition, a party cannot be permitted to repeat old and overruled arguments for reopening the conclusions arrived at in a judgment. The power of review is not to be confused with the appellate power which enables the Superior Court to correct errors committed by a subordinate Court. This point has been elucidated in Jain Studios Ltd. v. Shin Satellite Public Co. Ltd.23 where it was held thus:

> "11. So far as the grievance of the applicant on merits is concerned, the learned counsel for the opponent is right in submitting that virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had been negatived. Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.
>
> 12. When a prayer to appoint an arbitrator by the applicant herein had been made at the time when the arbitration petition was heard and was rejected, the same relief cannot be sought by an indirect method by filing a review petition. Such petition, in my opinion, is in the nature of 'second innings' which is impermissible and unwarranted and cannot be granted."

(emphasis added)

19. After discussing a series of decisions on review jurisdiction in Kamlesh Verma v. Mayawati24, this Court observed that review proceedings have to be strictly confined to the scope and ambit of Order XLVII Rule 1, CPC. As long as the point sought to be raised in the review application has already been dealt with and answered, parties are not entitled to challenge the impugned judgment only because an alternative view is possible. The principles for exercising review jurisdiction were succinctly summarized in the captioned case as below:

"20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in Chajju Ram v. Neki17, and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius18 to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd.25,.

20.2. When the review will not be maintainable:--

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition. (ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

20. In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma15, this Court was examining an order passed by the Judicial Commissioner who was reviewing an earlier judgment that went in favour of the appellant, while deciding a review application filed by the respondents therein who took a ground that the predecessor Court had overlooked two important documents that showed that the

respondents were in possession of the sites through which the appellant had sought easementary rights to access his home- stead. The said appeal was allowed by this Court with the following observations:

> "3 ...It is true as observed by this Court in Shivdeo Singh v. State of Punjab26 there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and pulpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court."

21. In State of West Bengal v. Kamal Sengupta27, this Court emphasized the requirement of the review petitioner who approaches a Court on the ground of discovery of a new matter or evidence, to demonstrate that the same was not within his knowledge and held thus:

> "21. At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review ex debito justitiae. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier."

(emphasis added)

22. In the captioned judgment, the term 'mistake or error apparent' has been discussed in the following words:

> "22. The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in

> law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision".

(emphasis added)

23. In S. Nagaraj v. State of Karnataka28, this Court explained as to when a review jurisdiction could be treated as statutory or inherent and held thus:

> "18. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court".

(emphasis added)

24. In Patel Narshi Thakershi v. Shri Pradyuman Singhji Arjunsinghji29, this Court held as follows:

> "4..... It is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. No provision in the Act was brought to notice from which it could be gathered that the Government had power to review its own order. If the Government had no power to review its own order, it is obvious that its delegate could not have reviewed its order....."

25. In Ram Sahu (Dead) Through LRs v. Vinod Kumar Rawat30, citing previous decisions and expounding on the scope and ambit of Section 114 read with Order XLVII Rule 1, this Court has observed that Section 114 CPC does not lay any conditions precedent for exercising the power of review; and nor does the Section prohibit the Court from exercising its power to review a decision. However, an order can be reviewed by the Court only on the grounds prescribed in Order XLVII Rule 1 CPC. The said power cannot be exercised as an inherent power and nor can appellate power be exercised in the guise of exercising the power of review.

26. As can be seen from the above exposition of law, it has been consistently held by this Court in several judicial pronouncements that the Court's jurisdiction of review, is not the same as that of an

appeal. A judgment can be open to review if there is a mistake or an error apparent on the face of the record, but an error that has to be detected by a process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise its powers of review under Order XLVII Rule 1 CPC. In the guise of exercising powers of review, the Court can correct a mistake but not substitute the view taken earlier merely because there is a possibility of taking two views in a matter. A judgment may also be open to review when any new or important matter of evidence has emerged after passing of the judgment, subject to the condition that such evidence was not within the knowledge of the party seeking review or could not be produced by it when the order was made despite undertaking an exercise of due diligence. There is a clear distinction between an erroneous decision as against an error apparent on the face of the record. An erroneous decision can be corrected by the Superior Court, however an error apparent on the face of the record can only be corrected by exercising review jurisdiction. Yet another circumstance referred to in Order XLVII Rule 1 for reviewing a judgment has been described as "for any other sufficient reason". The said phrase has been explained to mean "a reason sufficient on grounds, at least analogous to those specified in the rule" (Refer : Chajju Ram v. Neki Ram17 and Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius and Others18).

7. Learned counsel for applicant also referred to paragraphs 41 and 42 of decision in Rathnavathi (supra) to contend that limitation under Article 54 of Limitation Act to file civil suit for specific performance of contract is 03 years. The Supreme Court in above paragraphs has held thus:-

> "41. Article 54 of the Limitation Act which prescribes the period of limitation for filing suit for specific performance reads as under:
>
> "54.
>
> For specific performance of a contract. Three years The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused."

42. A mere reading of Article 54 of the Limitation Act would show that if the date is fixed for performance of the agreement, then non-compliance with the agreement on the date would give a cause of action to file suit for specific performance within three years from the date so fixed. However, when no such date is fixed, limitation of three years to file a suit for specific performance would begin when the plaintiff has noticed that the defendant has refused the performance of the agreement."

8. Learned counsel for applicant has further referred to paragraphs 13, 14, 15 & 16 of decision in T.P.G.Pillay (supra) wherein sections 16(c) & 20 of Specific Relief Act have been appreciated to deal with an issue of "Readiness & Willingness". The said paragraphs read thus:-

> "13. Looking to foundation of the finding given by the Court- below in paragraph-16 of the judgment wherein the Court- below assigned the reasons and opined that the plaintiff/respondent No. 1 was ready and willing to perform his part of the contract as

he had arrangement to pay Rs. 15,00,000/-, in my opinion is vulnerable and is not sustainable for the reason that the same was based upon the presumption and assumption as no cogent and strong evidence was adduced by the plaintiff to substantiate that he had arrangement to pay the amount of Rs. 15,00,000/- to the defendant within the period of three months from the date of agreement. I also find substance in the contention made by learned counsel for the appellant that the condition for getting the land demarcated is not a mandatory one because at the time of execution of ex parte decree, the Court-below got the sale-deed executed in favour of respondent No. 1/plaintiff but even at that time, the defendant did not perform his part of the contract and got the land demarcated otherwise, the plaintiff should have asked the Court that firstly the defendant should have performed his part and thereafter would execute the sale-deed and then only he would pay the amount.

14. As per the requirement of Section 16(c) of the Specific Relief Act, 1963 which reads as under:--

16(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.- For the purposes of clause (c),-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

the plaintiff is under an obligation to plead and prove his readiness and willingness to perform his part of the contract. I find force in the submission made by learned counsel for the appellant as the Supreme Court in the case of Kalawati (supra) in paragraph-18 relying upon a judgment reported in (1996) 4 SCC 526paities being Acharya Swami Ganesh Dasji v. Sita Ram Thapar, has observed as under:--

"18. In Acharya Swami Ganesh Dassji v. Sita Ram Thapar

- (1996) 4 SCC 526 this Court drew a distinction between readiness to perform the contract and willingness to perform the contract. It was observed that by readiness it may be meant the capacity of the plaintiff to perform the contract which would include the financial position to pay the purchase price. As far as the willingness to perform the contract is concerned, the conduct of the plaintiff has to be properly scrutinised along with the attendant circumstances. On the facts available, the Court

> may infer whether or not the plaintiff was always ready and willing to perform his part of the contract. It was held in para 2 of the Report : (SCCp. 528) "2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised.... The factum of readiness and willingness to perform the plaintiffs part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bide for the time which disentitles him as time is of the essence of the contract."

further, the Supreme Court in the case of Ritu Saxena (supra) while dealing with the material produced by the plaintiff to show his readiness and willingness has observed that the statement of the plaintiff and his witnesses in the nature of ipse dixit and without support of any corroborating evidence is not enough to show the financial condition to perform his part of the contract. The Supreme Court in the case of Ritu Saxena (supra) has observed as under:--

> "15. Coming to the facts of the present case, the sole document relied upon by the appellant to prove her readiness and willingness is the approval of loan on 30-7-2004 by ICICI. Such approval was subject to two conditions viz. furnishing of income tax documents of the appellant and the property documents. M/s ICICI has sent an email on 12-5-2005 to the husband of the appellant requiring an agreement to sell on a stamp paper of Rs. 50 to be executed between the parties, as per the legal opinion sought from the empanelled lawyer, without which ICICI will not be able to disburse the loan. Admittedly, no agreement was executed on stamp paper, therefore, the appellant could not avail loan of Rs. 50 lakhs from ICICI. Independent of such loan, there is mere statement that the appellant and her husband have income of Rs. 80 lakhs per annum unsupported by any documentary evidence : Such statement will be in the nature of ipse dixit of the appellant and/or her husband and is without : any, corroborating :
>
> evidence. Such : self-serving statements without any proof of financial resources cannot be relied upon to return a finding that the appellant was ready and willing to perform her part of the contract. The appellant Has not produced any income tax record or the bank statement in supports of Her plea of financial capacity so as to be ready and willing to perform the contract Therefore mere fact that the bank Has assesse the financial capacity of the appellant while granting loan earlier in respect of another, property is not sufficient to discharge of? proof of financial capacity in the facts of the present case to hold that the appellant was ready and willing to perform

her part of the contract Such is the finding recorded by both the courts below as well"

15. In the present case the plaintiff did not produce any evidence except the oral evidence to substantiate his readines willingness and his financial capacity to pay the remaining sale consideration of Rs. 15,00,000/-. He did not produce any income tax return bank statement and financial business condition of his family on the basis of which the trial Court has presumed in paragraph 16 of the judgment that it was not difficult for he plaintiff to pay Rs. 1-5,00,000/- In absence of any cogent evidence and also taking note of the fact that in the judgment of the trial Court there was no answer about the contention of the appellant/defendant by the Court that at the time of executions of the sale deed the plaintiff has deposited only Rs. 13,00,000/- but not total remaining sale consideration of Rs. 15,00,000/-. Thus in absence of any denial of the said fact this Court has not hesitation to hold that the plaintiff has not paid the remaining sale consideration of Rs. 15,00,000/- but paid only Rs. 13,00,000/-. Accordingly, Is am of the opinion that the trial Court was not right in holding and deciding the issue No. 3 in favour of the plaintiff in resct of his readiness and willingness The Supreme Court in the case of Surinder Kaur (supra) has observed as under:--

> "6. The aforesaid provisions have to be read along with Sections 16(c) of the Specific Relief Act 1963 which clearly lays down that the specific performance of a contract cannot be enforced in favour of a person who fails to prove that he has performed or was always ready and willing to perform the essential terms of the contract which were to be performed by Him;
>
> 7. We shall also have to take into consideration that the specific performance of contract of an immovable property is as discretionary relief in terms of Section 20 of the Specific Relief Act as it stood at the time of filing of the suit:
>
> 8. Section. 20 of the Specific Relief Act lays down that the jurisdiction to decree a suit for specific performance is a discretionary jurisdiction and the court is not bound to grant such relief merely because it is lawful.
>
> 9. The first issue is whether the promises were reciprocal promises or promises independent of each other. There can be no hard-and-fast rule and the issue whether promises are reciprocal or not has to be determined in the peculiar facts of each case. As far as the present case is concerned, the vendor, who was a lady received less than 20% of the sale consideration but handed over the possession to the defendant, probably with the hope that the dispute would be decided soon, or at least within a year. Therefore, Clause 3 provided that if the case is not decided within one year, then the second party shall pay to the first party the customary rent for the land. It has been urged by the respondents that the High Court rightly held that this was not a reciprocal promise and had nothing to do with the sale of the land. One cannot lose sight of the fact that the land had been handed over to Bahadur Singh and he had agreed that he would pay rent at the customary rate.

Therefore, the possession of the land was given to him only on this clear-cut understanding. This was, therefore, a reciprocal promise and was an essential part of the agreement to sell.

10. Admittedly, Bahadur Singh did not even pay a penny as rent till the date of filing of the suit. After such objection was raised in the written statement, in replication filed by him, he instead of offering to pay the rent, denied his liability to pay the same. Even if we were to hold that this promise was not a reciprocal promise, as far as the agreement to sell is concerned, it would definitely mean that Bahadur Singh had failed to perform his part of the contract. There can be no manner of doubt that the payment of rent was an essential term of the contract. Explanation (ii) to Section 16(c) clearly lays down that the plaintiff must prove performance or readiness or willingness to perform the contract according to its true construction. The only construction which can be given to the contract in hand is that Bahadur Singh was required to pay customary rent.

11. It has been urged that no date was fixed for payment of rent. Tenancy can be monthly or yearly. At least after expiry of one year, Bahadur Singh should have offered to pay the customary rent to the vendor which could have been monthly or yearly. But he could definitely not claim that he is not liable to pay rent for 13 long years.

12. The learned counsel for the respondents urged that in case of non-payment of rent the plaintiff was at liberty to file suit for recovery of rent. We are not impressed with this argument. A party cannot claim that though he may not perform his part of the contract he is entitled to specific performance of the same.

13. Explanation (ii) to Section 16(c) of the Specific Relief Act lays down that it is incumbent on the party, who wants to enforce the specific performance of a contract, to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract. This the plaintiff miserably failed to do insofar as payment of rent is concerned.

14. A perusal of Section 20 of the Specific Relief Act clearly indicates that the relief of specific performance is discretionary. Merely because the plaintiff is legally right, the court is not bound to grant him the relief. True it is, that the court while exercising its discretionary power is bound to exercise the same on established judicial principles and in a reasonable manner. Obviously, the discretion cannot be exercised in an arbitrary or whimsical manner. Sub-clause (c) of sub-section (2) of Section 20 provides that even if the contract is otherwise not voidable but the circumstances make it inequitable to enforce specific performance, the court can refuse to grant such discretionary relief. Explanation (2) to the section provides that the hardship has to be considered at the time of the contract, unless the hardship is brought in by the action of the plaintiff."

16. In view of the above, it is clear that a person who seeks a decree of specific performance of contract then the same cannot be enforced in his favour unless he proves that he was always ready to perform the essential terms of the contract which was to be performed by him. Here, in this case, the plaintiff did not give any notice to the defendant showing that he had an arrangement to pay Rs. 15,00,000/-, the remaining sale consideration. Even in notice i.e. Ex.P/4 dated 24.10.2011, he has asked the defendant to perform his part to get the land demarcated and then execute the sale-deed

but in the said notice even there was no reference of readiness of the plaintiff that he had an arrangement of Rs. 15,00,000/-. Further, despite the notice served upon respondent No. 1, he did not turn up to contest the case, therefore, in absence of any specific observation in the impugned judgment and decree passed by the trial Court as to whether, the plaintiff had deposited Rs. 15,00,000/- at the time of execution of the sale-deed, the submission made by learned counsel for the appellant has to be accepted because the said fact was referred by the trial Court in paragraph-8 of its judgment but remained unanswered, therefore, it is infact undisputed that the plaintiff has not paid Rs. 15,00,000/- but has deposited only Rs. 13,00,000/- at the time of execution of the sale-deed in the CCD. The Supreme Court in the case of Syed Dastagir (supra) has observed as under:--

> "11. Section 16(c) of the Specific Relief Act, 1963 is quoted hereunder:
>
> "16. Personal bars to relief.-- Specific performance of a contract cannot be enforced in favour of a person--
>
> (a)-(b) * * *
>
> (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.
>
> Explanation.-For the purposes of clause (c),-
>
> (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;
>
> (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

It is significant that this explanation carves out a contract which involves payment of money as a separate class from Section 16(c). Explanation (i) uses the words "it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court", (emphasis supplied) This speaks in a negative term what is not essential for the plaintiff to do. This is more in support of the plaintiff that he need not tender to the defendant or deposit in court any money but the plaintiff must [as per Explanation (ii)] at least aver his performance or readiness and willingness to perform his part of the contract. This does not mean that unless the court directs the plaintiff cannot tender the amount to the defendant or deposit in the Court. The plaintiff can always tender the amount to the defendant or deposit it in court, towards performance of his obligation under the contract. Such tender rather exhibits the willingness of the plaintiff to perform his part of the obligation. What is "not essential" only means need not do but does not mean he cannot do so. Hence, when the plaintiff has tendered the balance amount of Rs. 120 in

court even without the Court's order it cannot be construed adversely against the plaintiff under Explanation (i). Hence, we do not find any merit in the submission of the learned counsel for the respondents."

[Emphasis Supplied] Now it is clear that the plaintiff had to discharge his obligation to deposit the remaining amount of sale consideration even though he has not been directed by the Court to deposit the said amount. The Supreme Court in the case of Jagjit Singh (supra) has observed as under:--

> "4. It is settled law that a plaintiff who seeks specific performance of contract is required to plead and prove that he was always ready and willing to perform his part of the contract. Section 16(c) of the Specific Relief Act mandates that the plaintiff should plead and prove his readiness and willingness as a condition precedent for obtaining relief of grant of specific performance. As far back as in 1967, this Court in Gomathinayagam Pillai v. Palaniswami Nadar [Gomathinayagam Pillai v. Palaniswami Nadar, (1967) 1 SCR 227 : AIR 1967 SC 868] held that in a suit for specific performance the plaintiff must plead and prove that he was ready and willing to perform his part of the contract right from the date of the contract up to the date of the filing of the suit. This law continues to hold the field and it has been reiterated in J.P. Builders v. A. Ramadas Rao [J.P. Builders v. A. Ramadas Rao, (2011) 1 SCC 429 : (2011) 1 SCC (Civ) 227] and P. Meenakshisundaram v. P. Vijayakumar [P. Meenakshisundaram v. P. Vijayakumar, (2018) 15 SCC 80 :
>
> (2018) 5 Scale 229]. It is the duty of the plaintiff to plead and then lead evidence to show that the plaintiff from the date he entered into an agreement till the stage of filing of the suit always had the capacity and willingness to perform the contract."

10. On the contrary, learned counsel for the respondent/plaintiff has referred to paragraph 15 of decision in Meera Bhanja (Smt.) (supra) the Hon'ble Supreme Court has observed that approach of Division Bench dealing with review proceedings clearly shows that it has overstepped its jurisdiction under Order 47 Rule 1 CPC by merely styling the reasoning adopted by the earlier Division Bench as suffering from a patent error. It would not become a patent error or error apparent by doing so. The Review Bench has re- appreciated the entire evidence, sat almost as court of appeal and has reversed the findings reached by the earlier Division Bench. Even if the earlier Division Bench's finding were found to be erroneous, it would be no ground for reviewing the same, as that would be the function of an appellate Court. Right or wrong the earlier Division judgment had become final so far as the High Court was concerned. It could not have been reviewed by reconsidering the entire evidence with a view to finding out the alleged apparent error justifying the invocation of review powers. Only on that short ground, therefore, this appeal is required to be allowed.

11. After having heard the learned counsel for the rival parties and perusal of record of the case and judgment of which review is sought and after analyzing the grounds urged by learned counsel for the applicant and in the light of above decisions as referred to by both the parties, this Court is of the considered opinion that this case does not fall in the category, in which there is an error apparent on

the face of record. On the contrary, the grounds urged reflect that entire pleadings of the parties, oral and documentary evidence of parties and findings arrived at are to be re-shuffled, which in any case cannot be termed as an error apparent on the face of record and hence, is not a matter of review. It is also well settled principle that in the garb of review, parties cannot be allowed to argue the matter de novo.

12. In the result, the review is sans merit and hence, stands dismissed.

(AVANINDRA KUMAR SINGH) JUDGE RM