

Reserved on 19.04.2024.

Delivered on 26.04.2024.

A.F.R.

Neutral Citation No. - 2024:AHC:73463

Court No. - 53

**Case :- CIVIL MISC REVIEW APPLICATION No. - 417 of
2023**

Applicant :- M/S. M.M.I. Tobacco Pvt. Ltd. And Another

Opposite Party :- Iftikhar Alam

Counsel for Applicant :- Arvind Srivastava

Counsel for Opposite Party :- Santosh Kumar Tripathi

Hon'ble Kshitij Shailendra,J.

REVIEW AGAINST ORDER OF REMAND

1. This application under Section 114 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') has been filed by the plaintiffs of Original Suit No. 20 of 2022 (M/s. M.M.I. Tobacco Pvt. Ltd. and another vs. Iftikhar Alam) seeking review of my final judgment and order dated 07.08.2023 passed in First Appeal From Order No.77 of 2023 (Iftikhar Alam vs. M/s. M.M.I. Tobacco Pvt. Ltd. & Another). By the said order, I had allowed the appeal and remanded the matter to the trial court for fresh consideration of the injunction application with certain directions.

REMAND ORDER ALREADY GIVEN EFFECT TO

2. It is not disputed that pursuant to the order of remand, the trial court has already decided the injunction application afresh by order dated 30.01.2024, against which, First Appeal From Order No.411 of 2024 (M/s M.M.I. Tobacco Pvt. Ltd. and another vs. Iftikhar Alam) has been filed by the plaintiff-applicants before this Court that has been connected with this review application.

TWO ASPECTS INVOLVED

3. There are following two aspects associated with the present review application:-

- (i) Maintainability/entertainability of the review application in view of the subsequent order passed by the trial court, and
- (ii) Merits of grounds, on which review has been sought.

COUNSEL HEARD

4. Heard Sri T.P. Singh, learned Senior Counsel, assisted by Sri Arvind Srivastava as well as Sri Arvind Srivastava separately, learned counsel for the applicants in review and Sri Shashi Nandan, learned Senior Counsel, assisted by Sri Santosh Kumar Tripathi, for the respondent.

MAINTAINABILITY/ ENTERTAINABILITY OF THE
REVIEW APPLICATION

PRELIMINARY OBJECTION:

5. A preliminary objection has been raised by Shri Shashi Nandan, learned Senior Counsel for the respondent and, to some extent, by the Court itself, that since the order of remand sought to be reviewed has already been given effect to and the trial court has decided the injunction application afresh by order dated 30.01.2024, against which, an appeal has been preferred by the applicants, the review application has become infructuous and it would be an exercise in futility to entertain the same on merits at this stage.

CONTENTION OF APPLICANTS:

6. Shri T.P. Singh, learned Senior Counsel as well as Shri Arvind Srivastava, responding to the preliminary objection, argued with vehemence that review application would not lose its efficacy merely for the reason that pursuant to the order of remand, injunction application has again been decided by the trial court. Shri Srivastava submits that review application was filed prior to disposal of the injunction application but it remained pending in this Court and the court below, in the meantime, decided the injunction application. He, otherwise, submits that application for review has to be

heard on merits as there is no concept like “infructuous” in civil law, particularly, when multiple remedies available to a litigant under the Code do not prohibit consideration of one or the other on merits despite advancement of stage of proceedings. Shri Srivastava, by placing reliance on a recent judgment of this Court in the case of **Smt. Yasmeen Zia vs. Smt. Haneefa Khursheed and others, 2024 (2) ADJ 709**, submitted that even in a case where an order of remand is under challenge and, during pendency of the challenge, proceedings finally culminate and even in a case where a decree is also drawn, the challenge made to the order of remand would still survive and there is no prohibition under the law which can restrict consideration of the challenge made to the remand order. He has also placed reliance on the judgment of Supreme Court in the case of **Nagesh Datta Shetti & others vs. The State of Karnataka and others, (2005) 10 SCC 383**, on the same lines.

CONTENTION OF RESPONDENT:

7. *Per contra*, Shri Shashi Nandan, learned Senior Counsel submits that the judgments cited on behalf of the applicants are clearly distinguishable on facts and in the case of **Smt. Yasmeen Zia** (supra), the factual position was that the suit was decided by the trial court on a preliminary point; decree was reversed by the first appellate court and the matter was remanded to the trial court and, during pendency of challenge to the order of remand, the trial court decided the proceedings, against which order, an appeal was filed. He

further submits that ratio laid down in **Smt. Yasmeen Zia** (supra) would be read in relation to the decree and appeal arising therefrom and the said analogy cannot be applied in a case where review of remand order is sought. As regards the judgment of Supreme Court in **Nagesh Datta Shetti** (supra), he submits that in the said case, an appeal was preferred before the Division Bench of the High Court, aggrieved primarily by that part of the order of learned Single Judge who had remanded the matter to the tribunal and, though the appeal was admitted, the tribunal, in absence of an order of stay, finally decided the rights of the concerned party and the Supreme Court, in peculiar facts of that particular case, rendered its decision.

ANALYSIS OF RIVAL CONTENTIONS

8. Having heard learned counsel for the parties on maintainability/entertainability of the review application in the light of subsequent decision on injunction application, this Court finds that substantive provision of review of any judgment or order is contained under Section 114 of the Code and is governed by the procedure laid down under Order XLVII. The power of the appellate court to remand a case to the trial court is contained under Order XLI Rules 23, 23-A and 25 of the Code and this Court does not find any such provision under the Code, either express or implied, that would take away the right of a party aggrieved by order of remand to raise a challenge to the same, either before a superior court or before the same court by means of a review

application, merely because the remand order has been given effect to in terms of a subsequent order. The only prohibition against consideration of an application at an advanced stage of proceedings can be found in a case where an *ex-parte* decree drawn by the trial court merges into decree of appellate court and, in that event, application for setting aside the *ex-parte* decree would not lie before the trial court; vide Explanation attached to Rule 13 of Order 9 C.P.C

9. This Court is in agreement with the proposition of law laid down in the judgments rendered in **Smt. Yasmeen Zia** (supra) and **Nagesh Datta Shetti** (supra) and would read the ratio in favour of the review-applicants. The Supreme Court, in **Nagesh Datta Shetti** (supra), did not agree with the view taken by the High Court that had held the writ appeal as infructuous because of the subsequent decision of the tribunal and the Apex Court, in clear terms, observed that the Division Bench of the High Court should have considered the matter on merits instead of rendering the appeal as infructuous. Similarly, this Court, in **Smt. Yasmeen Zia** (supra), held that the right of appeal conferred by a Statute, being a substantive right, it would not be legitimate to read a statutory provision imposing any limitation or disability which the legislature did not deem appropriate to insert.

10. This Court does not agree with the submission of Shri Shashi Nandan that the factual background in which the cases of **Smt. Yasmeen Zia** (supra) and **Nagesh Datta Shetti** (supra) were decided and the one involved in the present case

is different so as to preclude the applicants to seek review of the order of remand. This Court is of the considered view that irrespective of the fact that both the said judgments had arisen from a situation where challenge to the remand order was made before appellate Court, an appeal as well as review, being creatures of statute, the right to lay a challenge, either by way of appeal or by review or otherwise, would fall on the same footings and merely because the remand order has been given effect to in terms of a subsequent decision, the same would not render the challenge as infructuous or not maintainable.

11. The Court may also notice that the instant review application was filed more than four months prior to the subsequent decision made by the trial court and though, this Court, by first order dated 11.09.2023 passed on the instant review application, made it clear that mere filing or pendency of the review application would not be deemed to passing of an interim order affecting operation of the order sought to be reviewed or further proceedings pursuant thereto, the mere fact that the injunction application has been decided on 30.01.2024, the review application cannot be held to be not maintainable and the challenge made cannot be thrown away on the ground of maintainability.

CONCLUSION ON FIRST ASPECT

12. In view of the above discussion, the applicants succeed on the first aspect and the instant review application

is held to be maintainable. Therefore, this Court proceeds to decide the same on merits.

MERITS OF REVIEW APPLICATION

CONTENTION OF APPLICANTS:

13. Learned counsel for the applicants, on merits of the review application, have vehemently argued that there is an error apparent on the face of record in the order dated 07.08.2023, in which, this Court had dealt with the concept of “prior user” of the concerned product and, on this ground, remanded the matter to the trial court for fresh consideration, although there was no pleading of the defendant/respondent in relation to prior user of the product. It is contended that since no evidence can be led beyond pleadings, the order dated 07.08.2023 needs to be reviewed. It is also urged that the defendant/respondent concealed material facts throughout the proceedings, particularly rejection of his rectification application by the Assistant Registrar of Trade Marks by an order passed in the year 2010, against which, an appeal was preferred by the respondent which was also dismissed in year 2011 by the appellate board, whereafter, a review application filed by the respondent was also rejected in year 2012 and further challenge made by him before the High Court of Calcutta also ended in terms of dismissal order passed in year 2013 but the respondent nowhere brought these facts on record which came to the notice of the applicants subsequently and, hence, order dated 07.08.2023 should be

reviewed on the ground of discovery of new and important material. It is also argued that concealment amounts to fraud that is sufficient to vitiate the entire claim or defence of a party and had the said proceedings been disclosed by the defendant/respondent before the Court below or this Court, the situation would have been adverse to him but he succeeded to obtain an order based upon gross concealment of material facts.

WRITTEN SUBMISSIONS:

14. Written submissions have also been filed on behalf of the applicants raising various contentions including a dispute regarding the serial no. of trademark on which it is registered. The proceedings held in Calcutta have also been described and it has been contended that there being error apparent on the face of the order sought to be reviewed, an adjudication made without there being pleadings; certain facts and documents having been discovered subsequently; the order dated 07.08.2023, having been obtained by making concealment of material facts and proceedings, the review application should be allowed. Reliance has been placed on the following authorities in support of all contentions raised:-

- (a). Srinivas Raghavendrarao Desai (Dead) By Lrs. vs. V. Kumar Vamanrao @ Alok and others, AIR 2024 (SC) 1310;
- (b). Ganga Prasad Rai vs. Kedar Nath Rai and another,

(2019) 3 ARC 624;

(c). Bachhaj Nahar vs. Nilima Mandal, (2008) 17 SCC 491;

(d). S. Bagirathi Ammal vs. Palani Roman Catholic Mission, (2009) 10 SCC 464;

(e). Board of Control of Cricket in India vs. Netaji Cricket Club (2005) 4 SCC 741;

(f). Mukhtar Ahmad vs. Addl. District Judge, 1978 ARC 118;

(g). The Selection Committee for Admission to the Medical and Dental College, Bangalore vs. M.P. Nagaraj, AIR 1972 Mys 44;

(h). Natesa Naicker vs. Sambanda Chettiar, AIR 1941 Madras 918;

(i). Tinkari Sen vs. Dulal Chandra, AIR 1967 Cal. 518;

(j). M.M. Thomas vs. State of Kerala, (2000) 1 SCC 666;

(k). M.V. Elisabeth vs. Harwan Investment & Trading (P) Ltd., AIR 1993 SC 1014;

(l). A.R. Antulay vs. R.S. Nayak, (1988) 2 SCC 602;

(m). Green View Tea & Industries vs. Collector, Golaghat, (2004) 4 SCC 122;

(n). Common Cause vs. Union of India, (1999) 6 SCC 667;

(o). Board of Control for Cricket in India vs. Netaji Cricket Club, (2005) 4 SCC 741;

(p). Rajesh D. Darbar vs. Narasingrao Krishnaji Kulkarni, (2003) 7 SCC 219;

- (q). Smt. Yasmeen Zia vs. Smt. Haneefa Khursheed and others, 2024 (2) ADJ 709;
- (r). Nagesh Datta Shetti vs. State of Karnataka, (2005) 10 SCC 383;
- (s). Naresh Shridhar Mirajkar and others vs. The State of Maharashtra and another, AIR 1967 SC 1;
- (t). State of U.P. and others vs. Shyam Lal, 2021 (0) Supreme (All) 750.

CONTENTION OF RESPONDENT:

15. Shri Shashi Nandan, learned Senior Counsel appearing for the respondent, vehemently opposed the grounds of challenge by contending that since the appeal that had been allowed by this Court, had arisen out of disposal of the injunction application, strict rules of pleadings would not apply, inasmuch as, objections filed by any party against the injunction application never fall within the meaning and import of “pleadings”. As regards defence of the respondent based on prior user of the product, Shri Shashi Nandan has referred to ‘para 9’ of the counter affidavit supporting objections filed against injunction application and submits that user of the concerned product based upon assignment made by Ishrat Jahan in the year 1983 was clearly stated whereas, as per ‘paragraph 14’ of the plaint of the suit, the case of the plaintiffs was based upon deeds of assignment executed in their favour which were subsequent in point of time. It is, therefore, contended that prior user, having already

been brought on record by both the sides as their claim and defence, the basic ground of challenge contained in review application is not tenable. As regards the alleged concealment of documents and proceedings, it is contended by both the sides that the said disputed aspect was brought to the notice of the trial Judge after order of remand, by filing documents to that effect.

ANALYSIS OF RIVAL CONTENTIONS

16. First of all, as regards the proceedings held before the Assistant Registrar-Trade Marks, the Appellate Board as well as the Calcutta High Court, I find that these proceedings have been brought on record by the review-applicants by means of supplementary affidavits dated 12.12.2023 and 01.01.2024, i.e. prior to 30.01.2024, the date on which fresh decision on the injunction application was made by the trial court. It is submitted by the learned counsel for the applicants that the documents pertaining to said proceedings were filed before the trial court, but there is no consideration of the same in the order dated 30.01.2024.

17. This Court is not hearing an appeal against the order dated 30.01.2024, inasmuch as, the said order is already under challenge in First Appeal From Order No.411 of 2024 and, therefore, all the contentions based upon any document or otherwise, are still open to be argued by both the sides in the said appeal. The review is restricted to the grounds mentioned

under Order XLVII Rule 1 of the Code. The law as regards review is well settled and there is no quarrel with the proposition of law laid down in the judgments cited on behalf of the applicants but it is necessary to give a broader view of the review jurisdiction of a Court of law.

18. Section 114 of the Code of Civil Procedure, being the substantive provision for review, clearly uses the words “the Court may make such order thereon”. It means that power to allow or reject a review application depends on discretion of the Court in given facts and circumstances of a particular case and the Court is not bound to allow the application in every case and situation. In **Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh AIR 1964 SC 1372**, the Supreme Court observed that a review is, by no means, an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. In **Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma 1979 (4) SCC 389**, the Supreme Court observed that there are definitive limits to the exercise of the power of review. It held that 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. The power of review is not to be confused with appellate powers which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court. In **Meera Bhanja v. Nirmala Kumari Choudhury AIR 1995 SC 455**, the Apex Court 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.

19. In **Parsion Devi and others Vs. Sumitri Devi and others 1997 (8) SCC 715**, it was held that an error, which is not self evident and has to be detected by process of reasoning, can hardly be said to be error apparent on the face of the record justifying the court to exercise powers of review. In **Rajendra Kumar Vs. Rambai, AIR 2003 SC 2095**, the Supreme Court elaborated about limited scope of judicial intervention at the time of review of the judgment and observed that the limitations on exercise of the power of review are well settled. The first and foremost requirement 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 judgement/order cannot be disturbed.

20. Thus, review is not an appeal in disguise. Rehearing of the matter is impermissible in the garb of review. It is an

exception to the general rule that once a judgment is signed or pronounced, it should not be altered. In **Lily Thomas Vs. Union of India AIR 2000 SC 1650**, the Supreme Court said that power of review can be exercised for correction of a mistake and not to substitute a new view. Such powers can be exercised within limits of the statute dealing with the exercise of power. The aforesaid view was reiterated in **Inderchand Jain Vs. Motilal (2009) 4 SCC 665** and in **Kamlesh Verma Vs. Mayawati and others 2013 (8) SCC 320**, the Supreme Court observed that mere disagreement with the view of the judgment cannot be the ground for invoking review jurisdiction. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.

CONCLUSION ON SECOND ASPECT

21. Having heard learned counsel for the parties and having examined the ratio laid down in the authorities referred to hereinabove and after carefully examining the order sought to be reviewed in the facts and circumstances of this case, I find that while remanding the matter to the trial court for a fresh decision on the injunction application, this Court did not record any finding on merits of the rival contentions. The only reason for remanding the matter was the cryptic nature of the order dated 10.10.2022, by which, the injunction application had been allowed by the trial court without recording any finding on three basic ingredients

necessary for grant or refusal of temporary injunction. The appeal was decided by this Court after perusing voluminous documentary evidence filed by the parties alongwith various affidavits and it was clearly observed in 'paragraph 24' of the order that the documents annexed to the counter and rejoinder affidavits, either did not appear to form part of the record of the trial court or, in case, they formed part of the record, there was absolutely no discussion of the same in the order granting injunction. The Court also permitted the parties to lead additional evidence in support of their respective cases *vide* 'paragraph 28' of the order, particularly, considering the nature of proceedings where valuable rights of the parties arising out of Trade Marks Act, 1999 were involved and both the parties were vehemently pressing and defending their claims *qua* the product.

22. It is well settled that injunction application is decided on the basis of stand taken in the affidavits as well as documents annexed thereto and focus is on prima facie case, balance of convenience and irreparable loss only. The consideration of an injunction application cannot be equated with holding of full-fledged trial of the suit itself where decision is made on the basis of primary and secondary evidence led by the parties during the course of trial. Before this Court, at the time of hearing of the appeal, both the parties vehemently pressed documents annexed to their affidavits, either before the Court below or before this Court and pressed and defended their alleged rights *qua* trademark as well as user/prior user of the product. Despite the same,

this Court neither expressed any final or even tentative opinion on the merits of rival claims of the parties nor did it record any finding thereon, and, admittedly, the parties led additional evidence before the trial court in pursuance of the order of remand. If the documents already on record or those subsequently filed as additional evidence have or have not been considered or wrongly interpreted by the trial court in its subsequent order dated 30.01.2024, it may be a matter of scrutiny in pending appeal against the said order but cannot be a ground for reviewing the remand order.

23. In view of the above discussion, the respondent succeeds on second aspect and I do not find any error apparent on the face of the record nor any other ground to review my order of remand. As noted above, the appeal against the order dated 30.01.2024, passed by the trial court pursuant to the remand order, is already pending. Hence, I do not find it a fit case to exercise my jurisdiction under Section 114 read with Order XLVII Rule 1 of Code of Civil Procedure, 1908 to review the order of remand.

24. The review application, though held maintainable, is dismissed on merits leaving all contentions on rival claims open to be argued by both the sides in First Appeal From Order No. 411 of 2024.

Order Date:-26.04.2024

Jyotsana

(Kshitij Sailendra, J.)