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| Decided on : | 20 th September 2017 |
| Duration : | 00 : 00 : 19 |
| | Year : Month : Days |

IN THE COURT OF ADDITIONAL DISTRICT JUDGE AT VADODARA

REVIEW APPLICATION NO.1 OF 2017

EXH.: 13

Applicant:

Vadodara Municipal Corporation
Khanderao Market, Vadodara.

Versus

Opponent:

Babubhai Mohanbhai Pardeshi
Bombay Shopping Center,
Nr. Ambedkar Circle,
RC Dutt Road, Vadodara.

Appearances:

Shri SS Acharya – Ld. Advocate for the applicant
Shri KK Kini – Ld. Advocate for the opponent

APPLICATION UNDER ORDER XLVII RULE 1
OF THE CODE OF CIVIL PROCEDURE, 1908

:: JUDGMENT ::

1. **THE** fulcrum of concern arising out of this application is 'whether the earlier order passed by this Court in Miscellaneous Civil Appeal No.91 of 2017 dated 24/08/2017 is required to be reviewed?'
2. *Review Application in short:*

In this application, it has been mainly averred thus: 'that the Miscellaneous Civil Appeal No.91 of 2017 was challenging the order

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below application for alleged breach of injunction committed by the Corporation and since the hawking policy was not a subject matter of the said appeal and since there was no specific query regarding the same, the said policy and the judgment of the High Court was not brought on record. That since the said judgment in MCA No.91 of 2017 has considered in depth the Street Vendors [Protection of livelihood and Regulation of Street Vending] Act, 2014, the judgment passed in LPA No.894/16 also requires to be considered by this Court and hence this review application is moved. That if the judgment of this Court is implemented verbatim, it may occasion a condition wherein the respondent corporation may be required to act in contradiction to the letter and spirit of the judgment of Hon'ble High Court in LPA No.894/16 and hence the application.'

3. *A brief introduction of parties:*

The applicant herein is the original defendant of RCS No.509/1997 and respondent of MCA No.91/17. The opponent is one of the plaintiffs of the said suit and the appellant of said appeal.

4. *Short facts before touching the merits of this application:*

- i. The opponent [original plaintiff No.4] along with other persons filed a Regular Civil Suit No.509 of 1997 against the defendant Corporation for declaration & permanent injunction wherein a temporary injunction application Exh.5 was moved before the trial Court for temporary injunction upon which at the time of filing of the suit the learned trial Court had passed the order of status quo which order was later on after hearing the parties vacated by rejecting the said application Exh.5. Being aggrieved by the impugned order of the learned trial Court, the plaintiffs of the said suit had preferred a Miscellaneous Civil Appeal No.26 of 1999 in which initially at the time of filing of the appeal an order was passed by the appellate Court to the effect of directing the defendant Corporation not to remove the

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plaintiffs till hearing of Exh.5 of the said appeal. Considering the judgment of the Hon'ble Supreme Court in the case of Ravi Rakesh Agrawal vs. Rajesh Prasad Agrawal reported in 2009 (1) GLH 655 (SC) and on finding the fact that the earlier stay order granted by it was in existence since long, without entering into the merits of the case, the then appellate Court had in the said appeal ordered both the parties to maintain status quo till the disposal of the aforesaid suit. It was also ordered to dispose of the said suit on merits within a period of one year. The defendant Corporation had removed the hand lorry [moveable cabin cart] of plaintiffs on 24.12.2016 and therefore, the plaintiffs through plaintiff No.4 moved three applications one after the another vide Exh.36 [for breach of the order of the appellate Court under O. 39 R. 2 A of the Code of Civil Procedure, 1908], Exh.38 [an application u/s. 151 & 94 of C. P. Code, 1908] & Exh.45 [an application u/s. 151 of C. P. Code, 1908]. The defendant corporation did not give reply to these applications. The learned trial Court after hearing both the parties dismissed all these applications. These orders of the learned trial Court were assailed before this Court by way of Miscellaneous Civil Appeal No.91 of 2017.

- ii. In MCA No.91 of 2017, this Court had after meticulous analysis and after considering various judgments of Hon'ble Gujarat High Court as well as the Hon'ble Apex Court and the various provisions of the Street Vendors [Protection & Regulation of Street Vending] Act of 2014 and after giving the learned Advocates Shri Acharya & Kini ample time for their respective submissions, arrived at the following final conclusion:

"Conclusion: [i] This Miscellaneous Civil Appeal partly succeeds and is hereby partly allowed. [ii] In exercise of my inherent powers streaming u/s. 151 of the CPC, I direct the

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respondent - Corporation to restore the hand lorry [mobile cabin cart] of the appellant - plaintiff at the place from where it was removed within 10 days of the passing of this order and further direct the Corporation to allow the appellant to carry on his business of newspaper distribution unless & until the Committee under the said Act of 2014 is formed and until he is evicted/removed/relocated in accordance with the procedure established under the law (viz. the Street Vendors [Protection & Regulation of Street Vending] Act, 2014). [iii] Exh.8 moved by the respondent is hereby rejected and is accordingly disposed of in view of the aforesaid legal discussions. [iv] This Misc. Civil Appeal accordingly stands disposed of with costs. Costs shall be the costs in cause."

5. *Certain facts that are required to be noted:*

Detailed arguments were advanced by both the sides in MCA No.91 of 2017. The Act of 2014 including all the judgments of the Hon'ble Supreme Court as well as the Hon'ble High Court of Gujarat were referred to and discussed at length. Ample opportunities were given to both the sides to argue at length and to reply in turn. It took several sittings for completion of the arguments. This Court had after going through the various judgments/orders passed by the Hon'ble Supreme Court/Gujarat High Court passed the judgment in MCA No.91 of 2017. Admittedly, no appeal has been filed against the said order of this Court.

6. Heard Ld. Advocate Shri SS Acharya for the applicant and Shri KK Kini for the opponent.

7. **Shri Acharya on the application:**

- i. Shri Acharya has at the outset submitted that he is not submitting that the earlier order passed by this court in MCA 91 of 2017 is illegal or that it is bad in law but according to

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him, in view of the order passed by the Hon'ble Gujarat High Court in Sp. C. A. No.7421 of 2016 dated 16.06.17 necessary orders are required to be passed after reviewing the earlier order.

- ii. He has drawn the attention of this Court to the said order of the Hon'ble Gujarat High Court and has submitted that in a similar matter before the Hon'ble High Court, the order has been passed which would surely call for the review of the earlier order passed by this Court. While referring to paragraph No.7 of this review application, he has argued that the place where this Court has ordered to restore the hand lorry of the opponent is a non hawking zone and there is difficulty of traffic congestion at that place.
- iii. According to the learned Advocate, the present application falls under the purview of O. 47 Rule 1 of the Code of Civil Procedure, 1908. He has submitted that the corporation could not produce the said order of the Hon'ble Gujarat High Court at the relevant time before this court and therefore it falls under O. 47 of the Code of 1908.
- iv. He has also drawn the attention of this Court to the affidavit [Exh.11] of the Ward Officer viz. Savitaben P. Desai. He has also argued that alternate places were shown to the opponent during the pendency of this review application. He has therefore submitted that in light of the aforesaid facts, appropriate orders may kindly be passed.

8. Shri KK Kini's response:

- i. Shri Kini on the other hand has while strongly opposing this application contended that the order upon which the applicant - corporation is relying upon is '*sub silentio*'. He has vehemently argued that the said order of the Hon'ble Gujarat High Court is

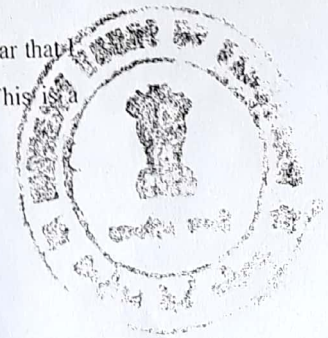
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not discussing anything on the various provisions of the Street Vendors [Protection of livelihood and Regulation of Street Vending] Act, 2014. He has therefore submitted that the doctrine of *stare decisis* is not applicable in this case. According to him, this is a summary order and a tentative decision in nature. He has thereafter submitted that the scheme of hawking and non-hawking zone is hit by Section 33 of the Act of 2014 read with the first schedule appended thereto.

- ii. He has then drawn the attention of this court to the judgment of the Hon'ble Bombay High Court produced at List B passed in Writ Application No.224 of 2011 with Public Interest Litigation No.36 of 2010.
 - iii. He has also relied upon AIR 1964 SC 1372, AIR 1965 CAL 845 and has vehemently argued that no law was founded by the Hon'ble Gujarat High Court in the order relied upon by the Corporation. He has while concluding his submissions vehemently argued that the order & directions issued by this Court are required to be complied with first. He has emphasized on the point that the dignity of the Court is required to be maintained in its true spirit. According to him, the review application is deliberately moved and therefore heavy costs should be imposed upon the concerned officers of the Corporation from their personal salary and the entire costs should be deposited in the District Legal Services Authority, Vadodara.
 - iv. I have gone through the judgments relied upon by him and the ratio laid down therein. The provisions flowing through O. 47 R. 1 of the C. P. Code, 1908 are sufficient to determine this review application.
9. Before I delve upon the merits of this application, I make it clear that I am not re-hearing the Misc. Civil Appeal No.91 of 2017. This is a

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review application. It would therefore be worth to go through the relevant provisions streaming through Order 47 Rule 1 of the Code of Civil Procedure, 1908. They stream as under-

"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, 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.

[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.]"

10. Seen thus, the sombre scenario that unfurls out of the aforesaid provisions of the Code of 1908 is that an error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of record. With the explanation appended to this rule 1 of O. 47 by the Amending Act of 1976, the scope of review has become very much limited. It has not to be forgotten that the power of review has to be exercised on the discovery of new and important matter or evidence which the person seeking review could not know and which could not be produced before the order was made. It cannot be exercised on the ground that the decision was erroneous on merits. At the outset, it has not to be forgotten that it

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is not the case of the Corporation that it was not aware of the passing of the said order of LPA No.894 of 2016 or that it could not be produced before the order was passed by this Court in MCA No.91 of 2017. Thus, at the outset, in my view there is no scope of review in this application.

11. Nonetheless, when Shri Acharya has submitted that there is no illegality in the earlier order passed in MCA No.91/17 and when the same has not been challenged before the Higher Court, in the entire scope of the provisions flowing through Rule 1 of O. 47, entertainment of this review application, in my considered view, would indeed be subversive of judicial discipline. I strongly believe that this review application is nothing but is an appeal in disguise and an act on the part of the Corporation to evade from implementing the earlier order of this Court. Earlier, detailed arguments were advanced by both the sides in MCA No.91/17. Ample opportunities were given to argue. It took several sittings for completion of the arguments. The Act of 2014 and the various judgments of the Hon'ble Gujarat High Court as well as the Hon'ble Supreme Court were a part of the debate before this Court and on thorough considerations of all the legal points involved, the earlier order was passed. Thus, the say of the Corporation that at the relevant time when MCA No.91/17 was heard and decided, the hawking policy was not a subject matter of the said appeal is an incorrect statement on the part of the Corporation.
12. I have gone through the entire order of the Hon'ble Gujarat High Court passed in LPA No.894 of 2016. The facts before the Hon'ble Gujarat High Court were completely different. The submissions of Shri Kini to the effect that in the said LPA, the provisions of Sections 3 & 33 of the Act of 2014 as well as the first schedule therein were not discussed cannot be discarded. The Hon'ble Gujarat High Court has in the said order referred to one resolution passed by the Corporation and in that particular case has passed an order for not interfering with the earlier order passed by the Hon'ble High Court in Sp. C. A. No.7421 of 2016.

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The facts involved in the instant case are completely different. Had this order of LPA been helpful to the Corporation, it would have surely relied upon the same when MCA No.91 of 2017 was heard and finally decided. The Corporation in its wisdom knowing fully well of this fact did not produce this order before this Court at the relevant time in MCA No.91 of 2017. It has also not to be forgotten that this order of LPA was very well within the possession and knowledge of the Corporation when the arguments were advanced by it before this Court in the earlier matter. It is also not their case that they had forgotten to produce or rely upon the said order. I am constrained to observe that a detailed meticulous reasoned judgment has been passed by this Court in MCA No.91 of 2017. After considering the earlier judgments of the Hon'ble Supreme Court & the Hon'ble High Court of Gujarat, MCA No.91 of 2017 was disposed of on merits and the Corporation was directed to restore the hand lorry of the opponent within seven days of the passing of the said order and other ancillary orders were also passed. The said order of the Hon'ble Gujarat High Court based upon which review is sought for was passed in peculiar facts & circumstances of the case before it. The said order in LPA does not lay down any *ratio decidendi* or *obiter dictum*. It has therefore no applicability with the case on hand. It has not to be forgotten that the Corporation was aware of the passing of the said order since long as admittedly submitted by Shri Acharya. Then what was the reason for the Corporation to withhold the said order and not produce it before this Court at the relevant time? There is no justification advanced on the part of the Corporation to that extent. The Corporation knew that the said order is not going to be helpful to it. And therefore it was not produced by it before this court at the relevant time.

13. I have already dealt with the various judgments/orders passed by the Hon'ble Supreme Court & the Hon'ble Gujarat High Court along with the Street Vendors [Protection & Regulation of Street Vending] Act, 2014 in my earlier judgment. I ^{✓ ✓ ✓} need not need to discuss the same again.

But I would move in line with Shri Kini to the effect that the first

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schedule appended to the said Act of 2014 do make mention in "PLAN FOR STREET VENDING (3) (e)" that 'till such time as the survey has not been carried out and the plan for street vending has not been formulated, no zone shall be declared as a no-vending zone.' Shri Acharya has not submitted that the plan for street vending has been formulated. Annexure C produced by Shri Acharya is nothing but a list [yadi] of proposed area to be declared as non-hawking zone as per the report. The submissions of Shri Kini to the effect that it has no legality in view of the provisions of the new Act of 2014 more particularly Section 33 of the said Act which has an overriding effect bear merits and substance.

14. It is made absolutely clear that this Court is simply deciding the review application and the question before this Court is whether the earlier order passed by this Court is required to be reviewed or not? This application in view of the discussions made herein above does not fall within the purview of Order 47 Rule 1 of the Code of 1908. The ingredients of O. 47 R. 1 of the Code of 1908 are not at all satisfied in this case. In my considered view, there is no need to review the earlier order passed by this Court in MCA No.91 of 2017. I am of the considered view that from all the four corners, I do not find that there is any mistake apparent on the face of the record committed by this Court while passing its earlier order in MCA No.91/17. The order of the Hon'ble Gujarat High Court in LPA No.894/16 which was never relied upon by the Corporation at the relevant time cannot be a ground for review. Merely because that the Corporation now thinks that the said order passed in LPA is helpful to them and that some alternate place was shown to the opponent during the pendency of this review application, it cannot be said that it is a mistake apparent on the face of the record. In my considered view, production of the said order of LPA which was not brought to the notice of this Court earlier in MCA No.91/17 is not at all a sufficient ground for granting a review. *The question is therefore answered accordingly.*

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15. Before I close, let it be absolutely clear to the Corporation that the Sanctity & dignity of Court & its orders/judgments has to be maintained by each & every one, may it be a Corporation, other local body, the Government or any ordinary litigant. Court's order/judgment has to be obeyed and implemented in its true spirit.
16. I am constrained to observe that the conduct exhibited by the concerned officials of the Corporation in not ensuring compliance of the Orders passed by this Court surely calls for strict administrative actions against them. The corporation on its own has assumed that this Court's operative order in MCA No.91 of 2017 is suspended which in fact is not ! The request made by Shri Acharya to stay the order passed in MCA No.91 of 2017 was turned down. Thus, the Corporation had to comply with the said order. It is different thing that this Court has not chosen to initiate actions against the Corporation's inaction at this juncture but then, it has to be abundantly made clear that it is not only the power but the duty of each & every Court to uphold and maintain the dignity of Courts and the majesty of law & which may in certain set of circumstances call for an extreme step. In the case on hand, for proper administration of justice and to ensure due compliance with the orders passed by this Court, I would not hesitate in taking a stern view by imposing exemplary costs. I hope and believe that the order passed by this Court in MCA No.91 of 2017 shall now be implemented by the Corporation in its true spirit and that the concerned officials including the learned Commissioner of the applicant - Corporation would not put this Court in a situation so as to initiate appropriate actions against all the concerned for the disobedience.
17. The submission of Shri Acharya for the applicant, though attractive at first blush, does not appear to be sustainable on the facts and in the circumstances of the present case. Indeed, without further ado, I agree with the submissions of Shri Kini. The fact that the earlier order was passed on 24/08/2017 and till date the same is not complied with in its



true spirit cannot be ignored and it galvanizes me into adopting this approach and arriving at the following final conclusion:

18. **CONCLUSION:** [i] This Review Application **FAILS** and is accordingly dismissed with exemplary costs. I therefore, deem it appropriate to impose exemplary costs quantified at Rs.1,00,000/- (Rupees One Lac only) to be paid by the Vadodara Municipal Corporation. The said amount is to be paid to District Legal Services Authority within three days of the passing of this order as compensation for the loss of valuable judicial time of this Court and the same may be utilized by the District Legal Services Authority in furtherance of its objects & goals. In failure to deposit the said costs, the DLSA Vadodara shall be at liberty to recover the same in accordance with law as the arrears. [ii] A copy of this order be sent to the DLSA Vadodara. [iv] This Review Application accordingly stands disposed of.

Pronounced in the Open Court, today on this
20th day of September, 2017

Rohit K. Chudawala
(ROHEN K CHUDAWALA) 20/09/17
ADDITIONAL DISTRICT JUDGE
VADODARA
UID CODE No.GJ01317

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21/9/17

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