

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION STAMP NO.18929 OF 2015

- | | | |
|----|---|--------------------|
| 1] | Mayur Enterprises & A.O.P |] |
| | (Joint Venture) |] |
| | Regi. Office at Laxmi Market |] |
| | Near Ekbal Dabi, Kusumba Road |] |
| | Malegaon, Tal. Malegaon |] |
| | Dist. Nashik |] |
| | |] |
| 2] | Abdul Latif Anwar |] |
| | Age : 55 yrs. Occ : Business |] |
| | R/o. Room No.16, Hira Panna Colony |] |
| | Near HUDCO Colony, Kusumba Road, |] |
| | Malegaon, Tal. Malegaon |] |
| | Dist. Nashik |] |
| | |] |
| 3] | Sureshchandra Ramnivas Tapade |] |
| | Age : 42 yrs, Occ : Business |] |
| | A) R/o. Shivaji Nagar, Near Senior Citizen] |] |
| | Sanstha, Camp Road, Malegaon Camp |] |
| | Malegaon, Dist. Nashik |] |
| | B) Office : Shrinath Corporation |] |
| | Barrister Gopalchandra Complex |] |
| | Opp. Medicare Hospital |] |
| | Satana Road, Malegaon |] |
| | Dist. Nashik |]..... Petitioners |
| | versus | |
| | Shri Dwarkadas Balkisan Tapdiya |] |
| | Age : 70 yrs. Occ : Business |] |
| | R/o. Dwarkadhish Bungalow, |] |
| | Near Mauli Hospital, Camp Road, |] |
| | Malegaon, Tal. Malegaon |] |
| | Dist. Nashik |]..... Respondent. |

Mr. M N Sandhyanshiv for the Petitioners
Mr. P D Jadhav for the Respondent.

CORAM : R. M. SAVANT, J.
DATE : 26th August 2015

ORIGINAL JUDGMENT

1 Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 The writ jurisdiction of this Court is invoked against the order dated 25/03/2015 passed by the learned Civil Judge, Senior Division, Malegaon by which order the Application (Exhibit 11) filed by the Defendant No.2 seeking leave to defend the suit came to be allowed and leave to defend was granted subject to the Defendant Nos.1 to 3 jointly and severally furnishing a bank guarantee of Rs.15,00,000/- within the time stipulated in the operative part of the impugned order.

3 It is not necessary to burden this order with unnecessary details. Suffice it would be to state that the suit in question i.e. Summary Suit No.7 of 2013 has been filed by the Respondent herein for claiming an amount of Rs.20,81,156/- from the Petitioners who are the original Defendants. The said amount is claimed on the basis of a joint venture agreement which was entered into between the Petitioners and the Respondent in respect of carrying out the contract of collecting octroi as an agent of the Malegaon Municipal Corporation. It seems that the work under the contract was completed and refund of security deposit was made to the Defendant No.2 out of which security deposit it is the case of the Plaintiff that he had advanced a sum of

Rs.15,95,000/- to the Defendants. It seems that the Defendant No.2 who was also one of the constituents of the joint venture had issued a cheque for the said amount which cheque bounced resulting in a complaint being filed under Section 138 of the Negotiable Instruments Act, in which complaint the Defendant No.2 was acquitted. However, in the suit in question the Defendants on the summons being served applied for leave to defend. The original Plaintiff i.e. the Respondent herein replied to the said applications filed by the Defendants. It seems that on 26/2/2014 when the said applications were to be considered, the Plaintiff was unrepresented. The Trial Court allowed the said applications for leave to defend by passing the following order :-

“Perused & heard hence application for leave to defend
is hereby allowed”

4 After the said order came to be passed, the Plaintiff on the same day filed an application in which it was mentioned that though the order has been passed granting leave to defend, the same was in the absence of the learned Advocate for the Plaintiff and therefore the said order was passed ex-parte. It was therefore prayed that the said applications be heard de-novo and order be passed in accordance with law. It seems that a cognizance of the said application filed by the original Plaintiff on 26/2/2014 was taken by the Trial Court.

5 The Trial Court thereafter proceeded to consider the application for leave to defend de-novo and pursuant to the said exercise has passed the impugned order dated 25/3/2015, by which order conditional leave has been granted to the Defendant Nos.1 to 3 on they jointly and severally furnishing a bank guarantee of Rs.15,00,000/-. However, significantly in the impugned order there is no reference to the order passed on 26/2/2014 granting unconditional leave. There is also no mention in the impugned order as to whether the said order dated 26/2/2014 is set aside and whether the application filed by the Plaintiff on 26/2/2014 was treated as an application for review of the said order dated 26/2/2014.

6 In my view, therefore, the impugned order dated 25/3/2015 would have to be quashed and set aside and is accordingly quashed and set aside, and the matter is required to be relegated back to the Trial Court for a de-novo consideration of the application filed by the Plaintiff dated 26/2/2014. It is for the Trial Court to consider whether the said application filed by the Plaintiff can be treated as an application for review, and if it treats it so the Trial Court may proceed on the said basis and thereafter in the order that is to be passed would also mention the fate of the earlier order dated 26/2/2014 . On remand the Trial Court to consider the said application dated 26/2/2014 filed by the Plaintiff i.e. the Respondent herein expeditiously and not later than

31/10/2015. Needless to state that the said application would be tried on its own merits and in accordance with law uninfluenced by the instant order or the impugned order. The parties to appear before the Trial Court on 10th September 2015 at 3.00 pm. The above Writ Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]