

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

**REVIEW PETITION (STAMP) NO.31 OF 2015
IN
WRIT PETITION NO.4511 OF 2007**

Balakdas Tulshidas Bairagi and others

.. Review Petitioners

Versus

**Madhavdas Laldas Bairagi
(Since deceased through legal heirs)**

Bhagirathibai M. Bairagi and others

..Respondents

Mr. N. A. Mogre for the Review Petitioners.

Mr. P B. Shah for the Respondent No.1(a) to 1(e).

Mr. J. D. Gaikwad for the Respondent Nos.2 to 4.

Mr. P N. Joshi for the Respondent Nos.5 to 7.

CORAM : R. M. SAVANT, J.

DATE : 25th AUGUST, 2016

PC.

1 By an order passed today in Civil Application No.8 of 2015 the delay in filing the above Review Petition is condoned. By the consent of the Learned Counsel for the parties the Review Petition is taken up for hearing.

2 By the above Review Petition, review is sought of the order dated 05.09.2014 passed in the above Writ Petition. By which order, the settlement arrived at between the parties i.e. the Petitioners and the

Respondents as evidenced by the Consent Terms, has been recorded. The review of the said order dated 05.09.2014 is sought on the ground that a fraud has been practiced on the Petitioners i.e. original Respondent Nos.1(b) to 1(e) 1(f) and 1(h) by the original Respondent No.1(g) Mr. Gulab Tulshidas Bairagi who has executed the Consent Terms on behalf of the Respondent Nos.1(a) to 1(i).

3 In the context of the review sought of the said order dated 05.09.2014, it is required to be noted that the Consent Terms were signed on behalf of the Petitioners by the Petitioner No.2 Mr. Sunil Madhavdas Bairagi and on behalf of the Respondent Nos.1(a) to 1(i) by the Respondent No.1(g) Mr. Gulab Bairagi. Both Mr. Sunil Bairagi and Mr. Gulab Bairagi when put in the box and queried had stated that they have signed the said Consent Terms of their own free will and volition. In so far as the Respondent No.1(g) Mr. Gulab Bairagi is concerned, he has signed the said Consent Terms pursuant to the Power of Attorney which has been executed by the other Respondents in his favour which Power of Attorney is dated 05.08.2007. A reference to the said Power of Attorney and its clauses would be made a bit later.

4 In so far as the above Writ Petition No.4511 of 2007 is concerned, it arose out of the orders passed by the Civil Court in the

execution proceedings which were filed pursuant to the preliminary decree of partition. The above Writ Petition was admitted and was pending, hearing and final disposal when the Consent Terms were filed between the parties on 05.09.2014 evidencing the settlement which had been arrived at between the Petitioners and the Respondent Nos.1(a) to 1(i). As indicated above, the Consent Terms were signed on behalf of the Respondent Nos.1(a) to 1(i) by the Respondent No.1(g) i.e. Mr. Gulab Bairagi. It is required to be noted that the Respondent Nos.1(a) and 1(i) were also present in Court on the said day i.e. 05.09.2014 and when queried they also stated that the Consent Terms signed on their behalf by the Respondent No.1(g) are acceptable to them and that they have given their consent of their own free will and volition.

5 The main thrust of the submissions of the Learned Counsel appearing on behalf of the Review Petitioners was revolving around the fact that the Respondent No.1(g) i.e. Mr. Gulab Bairagi has misconducted himself in signing the Consent Terms and filing the same in the Court. The Learned Counsel appearing on behalf of the Review Petitioners would contend that the Power of Attorney dated 05.08.2007 though confers various powers on the said Mr. Gulab Bairagi, but does not confer the power to enter into the Consent Terms. The Learned Counsel drew this Court's attention to the various clauses of the Consent Terms to

buttress the said contention. The Learned Counsel would also contend that though it was provided in the Consent Terms that the Petitioners have paid an amount of Rs.15,00,000/- by cheque, in the affidavits in reply filed to the above Review Petition and the application for condonation of delay, it is stated that the said amount of Rs.15,00,000/- has been paid by cash and therefore the Consent Terms stand vitiated on the said ground. The Learned Counsel sought to place reliance on the judgment of the Apex Court reported in (1990) 1 SCC 189 in the matter of Dadu Dayal Mahasabha Vs. Sukhdev Arya and another and the judgment of a Learned Single Judge of the Delhi High Court reported in 2002 AIHC 275 in the matter of Dr. Manmohan Singh Daliwal Vs. Gurbax Singh Arora and others in support of his contentions.

6 The Learned Counsel appearing for the Respondent Nos.5 to
7 Mr. P. N. Joshi would support the contentions raised by Mr. N. A. Mogre on behalf of the Review Petitioners. It was also the submission of Mr. P. N. Joshi that the Consent Terms contemplate that if a sale is to be effected by the Power of Attorney then the consideration is to be accepted by cheque and not by cash.

7 Per contra, the Learned Counsel Mr. P. B. Shah appearing for the original Petitioners i.e. Respondent Nos.1(a) to 1(e) herein and the

Learned Counsel Mr. J. D. Gaikwad for the Respondent No.3 i.e. original Respondent No.1(g) would oppose the Review Petition and would contend that having regard to the Power of Attorney dated 05.08.2007 and especially having regard to the power conferred by the Power of Attorney on the said Mr. Gulab Bairagi, it could not be said that Mr. Gulab Bairagi did not have the authority to enter into the Consent Terms in the above Writ Petition. The Learned Counsel would contend that the parties have executed a Confirmation Deed dated 16.09.2014 wherein the payment of Rs.15,00,000/- by cash has been accepted.

8 Having heard the Learned Counsel for the parties, I have considered the rival contentions. The question is whether the powers of review are required to be exercised in the facts and circumstances of the present case. As indicated above, the review is sought of the said order dated 05.09.2014 on the ground that a fraud has been practiced on the Review Petitioners by the original Respondent No.1(g) Mr. Gulab Bairagi who was a co-Respondent with the Review Petitioners in the above Writ Petition and who was their Power of Attorney. The answer to the same therefore lies within the said Power of Attorney and especially this Court would have to see whether under the Power of Attorney the original Respondent No.1(g) had the power to enter into a compromise in the above Writ Petition. The Power of Attorney dated 05.08.2007 is a

General Power of Attorney which has been executed by the other Respondents in favour of the original Respondent No.1(g) to the above Writ Petition i.e. Mr. Gulab Bairagi. The Power of Attorney confers various powers on the said Mr. Gulab Bairagi in respect of the property in question which was the subject matter of the partition decree and the subject matter of the above Writ Petition. The Power of Attorney has been executed at the same contemporaneous time as the filing of the Writ Petition which was in the year 2007. Hence, the Power of Attorney has been executed by the other Respondents in favour of the Respondent No.1(g) so that he could represent the said Respondents in the various proceedings including in this Court and the Apex Court. A reading of the said Power of Attorney indicates that apart from the power of signing the Vakalatnama, leading evidence etc. in the context of the present Review Petition clauses 3(j) and 4 of the said Power of Attorney assumes importance and are reproduced hereinunder (English translation) :-

“3(j) If it is necessary to delete the names of the holder of the property in respect of the above property, then the said work to be completed by you. All necessary documentation needs to be completed by you. If it is decided to sell the said property, then you will have to find out the customer for the said property and also complete all documentation i.e. Agreement for Sale, Sale Deed, Receipts, etc and for completing the sale transaction, requisite permissions from the concerned authorities will have to be obtained by you and the said documents will have to be registered by you. Further, after completion of the sale transaction, the

consideration amount needs to be distributed by mutual consent according to the decided share. The consideration amount to be paid by the Cheque or Demand Draft and documents with respect to the said dealing will have to be made by you.

4 On our behalf you have to carry out all the necessary work as above in respect of the property. Although you have carried out the above work on our behalf it will be presumed that the said work is carried out by us and hence the same will be binding on us and our property. Apart from the above work, if any other work needs to be carried out in respect to the above property, then the same can be completed by you on our behalf as our General Power of Attorney holder.”

9 A reading of clauses 3(j) and 4 makes it absolutely clear that the powers conferred on the said Mr. Gulab Bairagi were wide and in fact clause 3(j) provides for even effecting sale of the property. The aforesaid clause 4 can be said to be in addition to all the other clauses in the said Power of Attorney and it is provided in clause 4 that all the things done by the Power of Attorney would be deemed to be done by the Respondents and that the same would be binding on the Respondents as well as the property. It is further provided that apart from what has been provided for in the clauses before clause 4, if anything further is required to be done then the Power of Attorney is entitled to do it on behalf of the Respondents as their General Power of Attorney holder. Having regard to the said clauses 3(j) and 4 of the said Power of Attorney dated 05.08.2007 and having regard to the wide powers conferred by the said

clauses, it is not possible to accept the contention of the Learned Counsel appearing on behalf of the Review Petitioners that said Mr. Gulab Bairagi was not entitled to enter into a compromise and file Consent Terms in the above Writ Petition. In my view, the judgment of the Apex Court in *Dadu Dayal Mahasabha's* case (*supra*) would not aid the Review Petitioners in their endeavour to seek review of the said order dated 05.08.2007. In so far as the judgment of the Apex Court is concerned, a fraudulent representation was made to the Court and the suit in question was withdrawn. In the instant case, having regard to the Power of Attorney and the wide powers that are conferred on the said Mr. Gulab Bairagi, it cannot be said that the said Mr. Gulab Bairagi had made any fraudulent representation as regards representing the other Respondents i.e. Respondent Nos.1(a) to 1(i) in the above Writ Petition. In so far as the judgment of a Learned Single Judge of the Delhi High Court in *Dr. Manmohan Singh Daliwal's* case (*supra*), the facts in the said case can be clearly distinguished from the facts in the instant case. As in the said case, the application for withdrawal was signed by the Power of Attorney when the Plaintiff was abroad and the Power of Attorney signed the application at the place where the Plaintiff was mentioned thereby misleading the Court. In the instant case, as indicated above, the powers conferred on the Power of Attorney are so wide that they take within

their fold the power to enter into a compromise. It is required to be noted that in the affidavit in reply filed to the Review Petition the Respondent No.3 i.e. the original Respondent No.1(g) i.e. Mr. Gulab Bairagi has stated that he had informed the Review Petitioners of the said compromise. It is also required to be noted that the parties are closely related, the original Respondent Nos.1(a) and 1(i) have no objection to the Consent Terms as signed by the Respondent No.1(g) on behalf of the Respondents. The case of the Review Petitioners that they were not aware of the Consent Terms, gets dented since the Respondent Nos.1(a) and 1(i) were aware of the Consent Terms and have no objection to the same. The Review Petition filed after about three months therefore appears to be an after thought. In my view, therefore the ground on which review is sought namely that a fraud has been practiced on the Review Petitioners cannot be accepted having regard to the powers conferred by the Power of Attorney on the Respondent No.1(g) as also the aforesaid facts.

10 In so far as the other contention of the Learned Counsel for the Review Petitioners that though it has been stated in the Consent Terms that a cheque of Rs.15,00,000/- has been given to the said Mr. Gulab Bairagi i.e. Respondent No.1(g) on behalf of the other Respondents and in fact now in the affidavits in reply, it is stated that the amount has been paid by cash and therefore the order is vitiated, in my

view, it is not possible to accept the said contention. No doubt, it has come on record through the affidavits that the amount of Rs.15,00,000/- has been paid by cash. However, what is required to be noted is that a Deed of Confirmation dated 16.09.2014 has been executed in that regard between the parties in evidence of the fact that Rs.15,00,000/- has been paid by the original Writ Petitioners in cash. The said aspect therefore revolves around the modality of payment and would not vitiate the order.

The contention urged in that regard on behalf of the Respondent Nos.5 to 7 abovenamed would also have to be rejected on the ground that the said Respondents had not appeared in the execution proceedings as well as the above Writ Petition and were therefore deleted. It appears that the said Respondents have also relinquished their share in favour of one of the original Petitioners. However it is not necessary for this Court to go into the said aspect in the above Review Petition.

11 It appears that the main grievance of the Review Petitioners seems to be that they have not received the consideration under the Consent Terms or that the consideration mentioned in the Consent Terms is not the true consideration and something more has been paid to the Respondent No.1(g). That is an aspect which would not impinge upon

the Consent Terms. If the Review Petitioners have any grievance as regards they having not received their share of the consideration or if it is their case that they ought to have received a higher amount, then it is open for them to file appropriate proceedings to recover the said amount from the Respondent No.1(g), but that would not entitle them to seek review of the order dated 05.09.2014 which records the compromise. Hence, subject to the above, no case for review under any of the eventualities mentioned in Order 47 of the CPC is made out. The Review Petition is accordingly dismissed.

[R.M.SAVANT, J]