

Sequeira

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

*APPEAL FROM ORDER NO. 190 OF 2016
With
CIVIL APPLICATION NO. 264 OF 2016
and
WRIT PETITION NO. 12156 OF 2015*

Mayur Enterprises & A.O.P.
(Joint Venture) & ors.

... Appellants / Applicants
/ Petitioners

V/s.

Shri Dwarkadas Balkisan Tapdiya.

... Respondent.

Mr.Mahendra Sandhyanshiv, for Appellants in A.O No.190 of 2016 and Applicants in C.A No.264 of 2016 and Petitioners in W.P No.12156 of 2015.

Mr.N.R.Bubna, for the Respondent in A.O No.190 of 2016 and Petitioner in W.P No.12156 of 2015.

*Coram : N.M. Jamdar, J.
Thursday, 14 July 2016.*

Oral Order :-

By an administrative order passed, the Appeal from Order and the Writ Petition have been tagged together and by consent are taken up for disposal. Rule in the Writ petition is returnable forthwith. Respondent waives service.

2. The Appeal from Order No.190 of 2016 is filed challenging the order dated 5 October 2015 passed below Exhibit 26 in Suit No.

7 of 2013 and the Writ Petition No. 12156 of 2015 challenges the order passed by the Civil Judge Senior Division Malegaon, dated 25 March 2015 below Exhibit 11 in Summary Suit No.7 of 2013.

3. The Municipal Council of Malegaon had invited tenders for collection of Octroi on 31 May 2011. It appears from the pleadings that the Respondent-Plaintiff had deposited certain amounts with the Municipal Council for grant of tender. As per the case of the Respondent-Plaintiff since the tender was not granted, the amount was refunded to the Appellants. It was the contention of the Respondent-Plaintiff that an amount of ₹ 15,95,000 was due from the Appellants and accordingly, the Respondent-Plaintiff filed a Summary Suit on 18 March 2013. On 25 April 2013, the Appellants filed an application for leave to defend which was granted by the learned Civil Judge, on 26 February 2014. The Respondent-Plaintiff moved the Application below Exhibit 11 for recall of the order and by the order dated 25 March 2015, the learned Civil Judge allowed the Application and directed the Appellants to pay the amount of ₹15,95,000 by way of bank guarantee. The Appellants, thereafter filed Writ Petition No.18929 of 2015 which was disposed of by the learned Single Judge, setting aside the order dated 25 March 2015 and restoring the Application filed by the Respondent-Plaintiff below Exhibit 11 leaving it open to the learned Civil Judge to consider whether the Application should be treated as one for

review. Thereafter the learned Civil Judge by order dated 5 October 2015, allowed the Application below Exhibit 26 and the orders below Exhibit 11 and 21 were set aside. Thereafter the learned Civil Judge proceeded to consider the Application below Exhibit 11 and 21 and by order dated 23 October 2015 allowed the applications and directed the Appellants to secure the amount of ₹ 15,95,000 by way of bank guarantee and conditional leave to defend was granted accordingly. The Appellants / Petitioners have challenged both, the final order granting leave to defend, as well as the order reviewing the earlier order granting unconditional leave.

4. I have heard the learned counsel for the parties.

5. Taking up the Appeal from Order first, sole contention raised by the learned counsel for the Appellants is that the Application filed by the Respondent-Plaintiff, on 26 February 2014, cannot be considered as an Application for review. He submitted that under the provisions of Order 47, the Application filed below Exhibit 26 on 26 February 2014 could not have been entertained. The learned counsel for the Respondent-Plaintiff submitted that the earlier order passed is without any reason and the Application was moved on the same day.

6. If the order dated 26 February 2014 granting leave to defend is

perused it is only one line as follows -

'Perused & heard. Hence Application for leave to defend is hereby allowed.'

It is an admitted position that the Respondent-Plaintiff was not heard when this order was passed. There are absolutely no reasons at all as to why an unconditional leave to defend needed to be granted. Before granting leave to defend, the Court has to consider various options: such whether to grant unconditional leave or grant leave with some conditions. This deliberation requires application of mind which must be reflected in the order. The Respondent-Plaintiff having come to know that such order is passed moved an application on the same day. Having moved the Application in a hurry, on the same day elaborate detailed narration of facts may not have been possible, but if the tenor of the application is seen what essentially the Respondent-Plaintiff has sought is that the order granting conditional leave should be recalled and the decision being given after considering the arguments of both sides. In these circumstances merely on the basis of unsatisfactory drafting in the application the power exercised by the learned Judge in recalling the order, cannot be faulted. All that the learned Judge has done is to recall a non-speaking order and give opportunity to both the sides to put forth their case on merits. In these facts and circumstances, I am not inclined to interfere with the order passed by the learned Civil Judge to allow the Application below Exhibit 26 and give

opportunity to both the sides to give evidence which order is passed in furtherance of interest of justice.

7. Turning now to the Writ Petition wherein the order granting conditional leave to defend is challenged. The learned Judge while granting conditional leave has noted that the amount is paid by the Respondent-Plaintiff by demand draft and the amount is received by the Petitioners from the Municipal Corporation by demand draft. It is the case of the Respondent-Plaintiff that the amount was deposited for obtaining a tender and its refund was taken by the Appellants. While it is the case of the Appellants that the amount was towards the same. The learned Civil Judge considering the fact that the receipt of amount is not disputed, proceeded to grant conditional leave on securing the amount by way of bank guarantee.

8. When these matters had come up on board on 15 June 2016, following order was passed-

'Not on Board. Taken on Production Board.

2. The learned counsel for the Respondent submitted that the Appellants have given an undertaking on 17 February 2016 that a bank guarantee for the concerned amount will be given and time was sought from the trial Court, and without disclosing this fact to this Court, the Appellants had sought an interim order. The learned counsel for the Appellants seeks time to take instructions as regards the said undertaking. Stand over to 22 June 2016.

3. The ad-interim order granted earlier to continue till the next date and further continuation will be after hearing both the sides.'

Thereafter on 23 June 2016, following order was passed-

'The learned counsel for the Appellants on instruction states that the Appellants will comply with the undertaking given on 17 February 2016 in respect of bank guarantee. He states that three weeks time may be granted to furnish bank guarantee. Stand over to three weeks. If the Appellants fail to comply with this undertaking, it is made clear that the Appellants will not be made entitled to be heard on merits in this Appeal. By way of pure indulgence, ad-interim is continued till the next date.'

It is now informed that pursuant to the undertaking the Petitioners have furnished the bank guarantee. Considering this position and that no fault can be found with the impugned order by the learned Civil Judge, it is not necessary to interfere in the impugned order in the Writ petition. The bank guarantee furnished by the Petitioners shall be considered as in compliance with the order passed on 23 October 2015 and leave to defend sought is granted to the Petitioners accordingly. The Petitioners will keep bank guarantee alive during the pendency of the Suit, until further orders.

9. The Appeal from Order is dismissed. The Writ Petition is disposed of in above terms. Rule discharged. The Civil Application is disposed of accordingly.

(N.M. Jamdar, J.)