

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.170 OF 2016
IN
WRIT PETITION NO. 5416 OF 2004**

Sitaram Dharma Bond

..Applicant

Vs.

M/s Gabriel India Limited & Ors

..Respondents

Dr. S. T. Mane a/w Mr. Vijay Shiktode a/w Mr. Mohan Rawat for the Applicant

Mr. P. S. Dani Senior Advocate a/w Mr. Nirman Sharma a/w Ms Pinky Patel i/b Desai & Diwanji for the Respondent No.1

Mr. S. G. Karandikar for the Respondent No.5

CORAM : R. M. SAVANT, J.

DATE : 1st MARCH, 2017

P.C.

1 The above Civil Application has been filed by the Applicant herein i.e. the original Respondent No.1 in Writ Petition No.5416 of 2004 principally for the relief that the consent terms dated 7-3-2008 filed in Writ Petition No.5416 of 2004 between the Applicant and his family members and the Respondent No.1 herein be set aside. Since there is a delay in filing the above Civil Application, the Applicant has prayed for condonation of delay of 7 years which has taken place in filing the above Civil Application. Apart from the aforesaid two reliefs, the Applicant has also inter alia prayed for appointment of Receiver in respect of the property being Survey Nos.304 and 305 in Village Mulund, Taluka-Kurla, Mumbai Suburban District, for demolition of the

buildings constructed on the said lands and in the alternative to direct the Respondent No.1 herein to deposit the money earned by it by selling flats, shops, commercial premises etc., in the court and the Applicant be permitted to withdraw such amount from the Hon'ble Court that would be deposited by the Respondent No.1.

2 The application for setting aside the consent terms is founded mainly on two grounds namely that the papers and proceedings in Writ Petition No.5416 of 2004 were never served upon the Applicant and the Applicant never appeared before this Court and never signed any papers before any attesting authority. The second ground can be found in paragraph 4 of the above Civil Application wherein it has been averred that the Applicant does not know any Advocate by name of Mr. K. S.Deval and that he had never signed vakalatnama in his favour, nor instructed him to appear on his behalf.

3 The delay in filing the above Civil Application is sought to be explained by the averments made in paragraphs 7 and 11 of the above Civil Application. In paragraph 7, it has been stated that the Applicant is a senior citizen aged 75 years and that since last 10 years he has lost his vision as such he cannot see anything therefore he could not take appropriate steps in the matter. It is further the case of the Applicant that since he did not receive any intimation from the court, he started making enquiries with other family

members. On such enquiries, the family members informed the Applicant that the land has been sold out to the Runwal Builders who have constructed the buildings on the said property which according to the Applicant was without his consent or without informing him. It is further the case of the Applicant that thereafter he visited the office of the Tahsildar in which visit he came to know about the filing of the consent terms by the Applicant and the Respondents on 7-3-2008 in this court. It is the case of the Applicant that the said information he derived on 25-6-2015 from the Tahsildar's office. It is further the case of the Applicant that thereafter his daughter i.e. the power of attorney who has filed the instant Civil Application approached this court for procuring the copies of the papers and proceedings in the said Writ Petition No.5416 of 2004 and Writ Petition No.5644 of 2004. It is on obtaining the papers and proceedings that the Applicant became aware that a fraud was played with the Applicant and that this court was also cheated. It is thereafter that he has taken appropriate steps for getting the consent terms set aside.

In paragraph No.11 it has been averred that after getting the papers and proceedings of the above Writ Petition i.e. 5416 of 2004 on 27-7-2015 that the Applicant contacted his Advocate and filed the instant Civil Application and therefore there is no delay in filing the above Civil Application for the reliefs which have been sought for in the above Civil Application

4 On behalf of the Respondent No.1 M/s Gabriel India Ltd an affidavit in reply has been filed by one Mr. Sundeep Runwal as the Constituted Attorney of the Respondent No.1 which is affirmed on 23-4-2016, opposing the above Civil Application.

5 At this stage it would be apposite to refer to the said Writ Petition5 No.5416 of 2004 and Writ Petition No.5644 of 2004. In so far as Writ Petition No.5416 of 2004 is concerned, the same was filed by the Respondent No.1 herein challenging the order passed by the Divisional Commissioner dated 11-6-2004 directing the lands to be restored to the Respondents in the said Writ Petitions i.e. the signatories to the consent terms who are the Applicant and his family members. The restoration of the land was directed under the aegis of the Maharashtra Restoration of Lands to Scheduled Tribes Act 1974. The Second Writ Petition No.5644 of 2004 also challenges the same order dated 11-6-2004 passed by the Divisional Commissioner. However the said Writ Petition has been filed by the owners of the land which is a trust known as Nathulalji Trust.

6 It seems that the order dated 11-6-2004 passed by the Divisional Commissioner was preceded by the proceedings which were initiated by the Applicant herein along with his other family members before the Sub Divisional Officer for restoration of the lands. The Application filed by the

Applicant herein and his other family members came to be rejected by the SDO which resulted in the Applicant herein and his family members being required to file the proceedings before the Maharashtra Revenue Tribunal challenging the order passed by the SDO. However since at the relevant time the Maharashtra Revenue Tribunal was not functional, the powers were vested with the Divisional Commissioner of the respective Divisions. However, it seems that the directions was issued to the Divisional Commissioner not to decide the matters finally one way or the other. It seems that having regard to the said position, the Applicant and his other family members withdrew the proceedings filed before the Divisional Commissioner and addressed a letter to one of the Hon'ble Minister's in the State Government, complaining that the lands are required to be restored to the Applicant and his other family members. The said representation it seems was forwarded by the Hon'ble Minister to the Divisional Commissioner for consideration. The Divisional Commissioner pursuant to the directions received passed the order which was impugned in the said Writ Petitions i.e. the order dated 11-6-2004 directing that the lands be restored to the Petitioners.

7 The above Writ Petitions had come up for admission before a Learned Single Judge of this Court on 20-4-2005. In so far as Writ Petition No.5416 of 2005 is concerned, the Learned Single Judge granted Rule and interim reliefs in terms of prayer clause (c) of the said Petition as also recorded

therein that if the Petitioner carried on further development, he will do so at his own risk. In so far as prayer clause (c) is concerned, the said prayer was in respect of the stay of the order dated 11-6-2004 passed by the Divisional Commissioner, in so far as in Writ Petition No.5644 of 2004 is concerned, the Learned Single Judge admitted the said Writ Petition and directed it to be heard along with Writ Petition No.5416 of 2004. In the context of the present Civil Application what is significant to note is that the Applicant herein and his brother Arjun Bond who were the Respondent Nos.1 and 2 in the said Writ Petition were represented by Counsel Shri A. K. Abhyankar alongwith Advocate on record Mr. K. S. Dewal. In the companion matter also, the same appearance was shown on behalf of the Applicant and the Respondent No.2 who was his brother i.e. Arjun Bond. The record i.e. the details downloaded from the website of the High Court, Bombay which is annexed to the affidavit in reply of the Respondent No.1 discloses that Advocate Mr. Dewal had filed vakalatnama on behalf of the Applicant and his other family members who were the Respondents in the said Writ Petition.

8 Hence at the admission of the said Writ Petitions, the Applicant who was the Respondent No.1 in the said Writ Petitions was represented by a Counsel as also by the Advocate on record. This assumes importance in the context of the allegations made by the Applicant in the above Civil Application in so far as the authorisation of Mr. K. S. Dewal is concerned.

In so far as the Writ Petitions are concerned, it is required to be noted that the affidavits in reply were filed by the Applicant's brother Arjun Bond on behalf of the Applicant as well as the Respondents in the said Writ Petitions. The affidavit in reply in Writ Petition No.5416 of 2004 was numbered as 7556 of 2004 and the affidavit in reply in Writ Petition No.5644 of 2004 was numbered as 7555 of 2004. Hence the filing of the affidavits is indicative of the fact that the Writ Petitions were seriously contested on behalf of the Applicant and his brother Mr. Arjun Bond. This fact assumes significance in the light of the condonation of delay which has been sought by the Applicant. It is also required to be noted that the Applicant has filed a Criminal Writ Petition in this Court in the year 2015 in which Criminal Writ Petition, the Applicant has in paragraph 10 has accepted the fact that the affidavit in reply has been filed by the Applicant in Writ Petition No.5644 of 2004 and in paragraph 12 it has been averred that in the year 2009 the development activities were started on the property by the Respondent No.7. It is averred in the said paragraph 12 that a copy of the order dated 20-4-2005 passed in Writ Petition No.5416 of 2004 was made available to the Applicant meaning thereby that in the year 2009 itself the said copy was made available to the Petitioner. The aforesaid facts are also relevant for the consideration of the Applicant's case for condonation of delay.

9 Hence in so far as the condonation of delay is concerned, as mentioned hereinabove, the case of the Applicant is that only on his visit to the Tahsildar's office in the year 2015 that he became aware of the filing of the consent terms and thereafter on procuring copies of the papers and proceedings from the registry of this court in August 2015 that steps could be taken to file the instant Civil Application.

10 At this stage, it would be necessary to refer to the consent terms. The consent terms evidencing the settlement arrived at between the Respondent No.1 herein and the Applicant and his family members were executed before the notary public one Ms Prachi Shah on 7-3-2008. The said notary public has entered the notarisation of the said document at Sr. No.268 at page No.2 of the notarial register and the entry bears the dated 7-3-2008. The said consent terms bears the thumb impression as well as the signature of the Applicant, the signatures of Mr. Arjun Bond, Mr. Raju Bond, Ms Renuka Bond and the thumb impressions of Ms Indu Bond and Smt. Bhimabai Bond respectively. The said consent terms also disclose that the Applicant and his family members who were the Respondent Nos.1, 2, 3A to 3C and 4 were identified by Advocate Mr. Ashok Paranjpe and an endorsement to the said effect appears on the consent terms. In so far as Advocate Mr. Dewal is concerned, he has signed the consent terms for identification. The consent terms have also been signed on behalf of the Respondent No.1 herein by its

power of attorney and by the Advocate Mr. P. R. Patel for the Respondent No.1 who were the Petitioners in the said Writ Petition. To the affidavit in rejoinder filed on behalf of the Applicant in the above Civil Application is annexed the extract of the register of the notary public Mr. Prachi N Shah, against the entry No.268 of the Applicant and his family members have again signed and affixed their thumb impressions on the register. Hence in so far as the notarisation of the consent terms are concerned, they can be said to be complete as the notarised document bears the entry made in the notarial register and the extract from the notarial register fortifies the endorsement made on the document. The said consent terms were executed on 7-3-2008 but were filed before a Learned Single Judge of this Court on 6-5-2008. Hence there was a good two months gap between the execution of the consent terms and the filing of the consent terms in this court. It is therefore impossible to believe that the Applicant was not aware of the consent terms, when his other family members were also signatories to the same.

11 It is in the aforesaid factual back drop that the prayer for condonation of delay is required to be considered. The case of the Applicant that he was not aware of the filing of the Writ Petition No.5416 of 2004 as it was not served upon him and that he had not authorised any person to appear for him is fortified by the material on record. The first document is the order dated 20-4-2005 passed by a Learned Single Judge of this Court in both Writ

Petitions in which Writ Petitions the Applicant was represented by Counsel and the Advocate on record. Related to the same is the fact that the Applicant and his brother Arjun Bond had filed an affidavit in the said Writ Petition which affidavit was numbered as 7556 of 2004. The second document is the Criminal Writ Petition filed by the Applicant in this Court wherein in paragraph 12 the Applicant has specifically averred that a copy of the said order dated 20-4-2005 passed in Writ Petition No.5614 of 2004 was served upon the Applicant. The Applicant's case is further dented having regard to the averments made in paragraph 11 of the said Criminal Writ Petition where he has averred that the Applicant was aware that the Respondent No.7 had started construction activities in the year 2009. Implicit in the said fact is the fact that the Applicant was aware of the construction being put up which would also imply that the Applicant was also aware of the filing of the consent terms in the said Writ Petition. In so far as Advocate Mr. Dewal is concerned, it is required to be noted that he was not the only Advocate who has signed the consent terms, the Advocate for the Petitioner had also signed the consent terms evidencing the settlement arrived at between the parties, the consent terms also bear the signature of Advocate Mr. Ashok Paranjpe. As indicated above, the Applicant and his other family members who are the Respondents in the said Writ Petitions and who have signed and affixed their thumb impressions were identified by Advocate Mr. Ashok Paranjpe. Significantly none of the aforesaid facts finds a place in the above Civil Application. It is

only after the Respondent No.1 filed its affidavit in reply opposing the above Civil Application that the Applicant has chosen to file a rejoinder wherein some of the facts have been stated for the first time. Pertinently in the rejoinder it is admitted by the Applicant that Writ Petition No.5614 of 2004 and Writ Petition No.5644 of 2004 were clubbed together. It is therefore impossible to believe and accept the case of the Applicant that he was not aware of the said Writ Petition No.5614 of 2004 and that he became aware of the consent terms only in August 2015. In the affidavit in reply filed on behalf of the Respondent No.1 it is stated that massive construction has been carried out on the land in question in the last 8 years. The photographs of the towers constructed have been annexed to the affidavit in reply. It is stated that there are 6 towers consisting of 487 flats. It is obvious that the said construction has not come about overnight and it would therefore have to be presumed that the said construction was to the knowledge of the Applicant. In my view therefore, no case for exercise of discretion in the matter of condoning the delay of 7 years in filing the above Civil Application is made out.

12 Even on merits, this court does not find any reason to interfere with the consent terms. Significantly the above Civil Application is filed by the Applicant only and his other family members who were parties in the said Writ Petitions and who had signed and affixed their thumb impressions have not joined the Applicant in filing the above Civil Application. In so far as the

allegations made against Mr. Dewal are concerned, in my view they are in bad taste having regard to the order dated 20-4-2005 passed in the Writ Petitions at the admission stage wherein Mr. Dewal had appeared along with a counsel representing the Applicant and his other family members. The fact that Mr. Dewal was engaged as an Advocate by the Applicant and his other family members is also fortified by the letter dated 19-10-2015 addressed by Advocate Mr. Ganesh Iyer on behalf of the Applicant to the Commissioner of Police, Mumbai. In the said letter in paragraph 15 it is accepted by the Applicant that Mr. Dewal was appearing on behalf of the Applicant, however thereafter allegations have been made against Mr. Dewal that he has misconducted himself. As indicated hereinabove the fact that Mr. Dewal was authorised to appear for the Applicant and his other family members is fortified by the record i.e. the details downloaded from the website of the High Court which is annexed to the affidavit in reply filed on behalf of the Respondent No.1. In the facts and circumstances of the case, the above Civil Application filed by the Applicant after the consent terms were executed and filed in this court is merely an after thought and the motives of the Applicant become clear from the relief claimed vide prayer clause (e) of the above Civil Application. Hence no relief can be granted to the Applicant, the Civil Application is accordingly rejected.

[R.M.SAVANT, J]