

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

REVIEW PETITION NO.3/2018
WITH
CIVIL APPLICATION NO.200/2018
IN
FIRST APPEAL NO.295/2013

Sudhir Poonamchand Parakh

... Petitioner

V/s.

Shree Chaitanya Constructiion & Ors.

... Respondents

Mr. Arvind A. Taral for the Petitioner

Mr. Makarand Adkar with Shrikrishna G. with Aashit Kankariya I/b.

S.R. Ganbawale for Respondent No.1

Mr. Vinit V. Jain for Defendant Nos.1 to 4

Mr. Virendra Tulzapurkar, Senior Advocate for Adv. Mandar Soman.

**CORAM: K.K. TATED &
SARANG V. KOTWAL, JJ.**

**DATED : SEPTEMBER 27, 2018
(In Chamber at 2.45)**

P.C. :

1 Heard. For the sake of convenience the parties will be referred to as per their nomenclature in the suit i.e. the Review Petitioner – as Defendant No.5, Respondent No.1 – as Plaintiff and Respondent Nos. 2 to 5 - as Defendant Nos.1 to 4 respectively.

2 In the present proceedings, the Plaintiff had filed First Appeal No.295/2013 in which the Defendant Nos.1 to 5 shown as Respondent Nos.1 to 5.

3 The Defendant No.5 seeks review of the order dated 14.02.2018 passed by this court allowing the First Appeal.

4 It is the main contention of the learned counsel for the Defendant No.5 that he has never instructed either Adv. Mr. Mandar Soman or Senior Advocate Mr. P. S. Dani to appear on behalf of him in the First Appeal. He further submits that he has not signed any vakalatnama in favour of these two Advocates. Therefore, the order dated 14.02.2018 be recalled and the matter be heard on merits.

5 The learned counsel for Plaintiffs vehemently opposed the Review Petition. He submits that in the First Appeal, all the parties were duly served. In spite of service, if some one remains absent, that cannot be a ground for review petition. He further submits that in the present proceedings, initially, Plaintiffs had filed Regular Civil Suit No.2080/2010 before the Civil Judge, Senior Division, Pune for specific performance, injunction and damages. He submits that in that suit, except Defendant No.5, none had filed written statement. Except filing written statement by Defendant No.5, he has not contested the said suit before the Trial Court. Therefore, there is no question of allowing the review petition.

6 The learned counsel for Plaintiff submits that in the present proceedings, neither the Defendant No.5 nor Defendant Nos.1 to 4 filed any cross-objection as required under Order 41 Rule 22 of the Code of Civil Procedure, 1908. He submits that the entire finding of the Trial Court is in favour of the Plaintiff. He submits that the Trial Court has dismissed his suit only on the ground that the transaction between the

parties took place when there was injunction in another proceedings. He submits that before the Trial Court, the Defendant Nos.1 to 4 remained silent. Indirectly, they supported the Plaintiff. Now, to come out of that defect, they are before this court, through Review Petition / original Defendant No.5, depriving the Petitioner's valuable rights, therefore that should not be allowed. In support of this submission, he is relying on affidavit dated 26.07.2018 filed by Adv. Mr. Vinit Jain, particularly paragraph 4, which reads thus:

“4. I say that the said First Appeal has been coming up before this Hon'ble Court since the year 2013. I say that after the papers in the said First Appeal were perused by me as well as Mr. Mandar Soman, we realised that the main arguments had to be made by Respondent No.5, since he alone had filed written statement in Civil Suit No.2080 of 2010 from which the said First Appeal arose. I informed, Mr. Mandar Soman Advocate, that I had discussed this matter with the Respondents and they requested me to ask Mr. Mandar Soman to appear as a counsel for Respondent No.5 and also requested me to engage and instruct Senior Advocate, and when the said First Appeal was to be finally heard.”

7 On all these grounds, the learned counsel for Plaintiff submits that there is no substance in the Review Petition and same may be dismissed with costs.

8 The learned senior counsel for advocate Mr. Mandar Soman submits that he has appeared in the First Appeal as per the instructions given by Adv. Vinit Jain. To accept these facts, Adv. Vinit Jain has already filed his affidavit dated 26.07.2018.

9 The learned counsel for Defendant Nos.1 to 4 submits that it was his (i.e. Adv. Mr. Vinit Jain) mistake. Because he had specifically

directed Adv. Mr. Mandar Soman to appear as a Counsel on behalf of the Review Petitioner i.e. the Defendant No.5. These facts are stated by him in his own (Advocate's) affidavit dated 26.07.2018. He submits that the Defendant No.5 has instructed him to take care of his interest in the First Appeal along with other Respondents. Because of family relation with the Defendant No.5 and Defendant Nos.1 to 4, he was under impression that they will execute Vakalatnama in his favour.

10 It is to be noted that the submissions made by the learned counsel for the Plaintiff are on merits. There is no question of considering the merits of the First Appeal for deciding the present Review Petition. The issue involved in the present petition is altogether different i.e. whether the Defendant No.5 had permitted Adv. Mr. Mandar Soman and Mr. P. S. Dani, Senior Advocate to appear in the First Appeal on his behalf or not. Therefore, it is not necessary to give detail reasons for rejecting the Plaintiff's submissions.

11 We heard both sides at length. Overall, it seems that the Adv.Mr. Mandar Soman and Mr. P. S. Dani, Senior Advocate appeared on behalf of Defendant No.5 without any authority and/or Vakalatnama. It has happened because of the assurance given by Adv. Mr. Vinit Jain, who is relative of Defendant No.1 to 5. Adv. Mr. Vinit Jain has specifically stated in his affidavit that all the Defendants had instructed him to take appropriate steps in the First Appeal to protect their interest. To protect the interest of the parties, he had requested Adv. Mr. Mandar Soman to appear on behalf of Defendant No.5 as counsel and if required, to engage a Senior Advocate.

12 Considering these facts and affidavits on record, we are of the opinion that in the interest of justice and to hear the Review Petitioner - Defendant No.5 at time of deciding the First Appeal, the Review Petition deserves to be allowed.

13 In view of the aforesaid discussion, following order is passed:

- a. Order dated 14.02.2018 passed in the First Appeal is recalled.
- b. First Appeal No.295/2013 is restored to file for hearing on merits.
- c. Office is directed to place the matter before appropriate Court for hearing.
- d. Liberty granted to the parties to move before the appropriate Court for early hearing.
- e. In view of disposal of the Review Petition, the Civil Application No.200/2018 stands dismissed as infructuous.
- f. No order as to costs.

(SARANG V. KOTWAL, J.)

(K. K. TATED, J.)