

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

**CIVIL APPLICATION NO.4843 OF 2016
IN
FIRST APPEAL NO.686 OF 2016**

Paresh Bhawanji Soni Applicant

In the matter between :

M/s Hemal Builders Appellant

versus

Arumogham Thankappan Nadar ... Respondent

.....

- Mr.Sham Walve, Advocate for Applicant.
- Mr.Rafique Dada, Senior Counsel a/w Mr.S.M. Oak a/w Mr.S.A. Joshi, Advocate for Appellant in FA No.686/16.
- Ms.Neeta Karnik, Advocate for Respondent.

**CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.
DATE : 18th APRIL, 2019.**

P.C. :

1. This praecipe is taken out by the intervenor/Applicant.
He had filed a Civil Application seeking permission to join in
First Appeal No.686/16 filed by the Original Defendant. The
Plaintiff's suit having been decreed, the Original Defendant has

filed the First Appeal which is pending before the Court. In the meantime, the intervenor in the Civil Application contended that he was necessary and proper party; despite which he was not joined as a co-defendant. Such Civil Application was disposed of by Division Bench of this Court by order dated 18/01/2018 in following terms;

“15. We heard both sides at length. It is to be noted that bare reading of the plaint in the said suit shows that the Plaintiff was seeking specific performance of agreement dated 13.08.2004 and supplementary agreement dated 16.12.2006. Initially the Plaintiff has entered into an agreement with the Defendant for development of the suit property. Thereafter the Plaintiff, Defendant and the Applicant entered into supplementary agreement dated 16.12.2006. It is specifically stated in the supplementary agreement dated 16.12.2006 that the Applicant has to perform the same. It is specifically stated in clause 8 of the supplementary agreement that if the Defendant and the Applicant intervenor consume the TDR of any other property for additional construction in the commercial building above second floor in that case they have to provide /allot to the Plaintiff 21% of such additional construction, if made free of cost, towards the cost of terrace. This itself shows that the liability

goes on the Applicant also. The Apex Court in the matter of **Kasturi Vs. Iyyamperumal & Ors. 2005 (6) SCC 733** held that tests for determining the necessary parties are that there must be right to some relief against such party in respect of the controversy involved in the proceeding or (2) no effective decree can be passed in his absence.

16. *In the case in hand the supplementary agreement clearly shows that the Applicant has right in the suit property. Considering these facts and the effect of section 43 of the Indian Contract Act and the legal notice issued by the Defendant dated 30.04.2016 to the Applicant, we are of the opinion that it is necessary to give audience to the Applicant to put up his case before the court. Instead of allowing prayer clause (a) of the Civil Application, we are of the view that the Review Application made by the Applicant before the trial court is required to be decided on its own merits and till that time the Plaintiff should not proceed with the execution of the impugned judgment and decree.*

17. *Hence, the Civil Application is partly allowed as under:*

a. *The learned Jt. Civil Judge, Senior Division, Thane before whom the Review Application bearing M.A. No.432/2016 made by the Applicant in the judgment and decree dated*

17.02.2016 in Special Civil Suit No.815/2009 is pending, is directed to decide the same on its own merits.

b. The parties are directed to maintain status quo in respect of the suit property as of today and the Plaintiff / Respondent shall not proceed with the execution of the judgment and decree dated 17.02.2016 in Special Civil Suit No.815/2009 till decision of Review Application bearing M.A. No.432/2016 and for further period of two weeks to enable the parties to approach this Court.

c. The trial court to decide the Review Application on its own merits without being influenced by this order.

d. Civil Application stands disposed of accordingly.

e. No order as to costs."

2. Pursuant to the said order, the trial Court has disposed of the Review Petition of the present Applicant by the Judgment dated 02/04/2019. The request of the Applicant is that interim protection granted under the order dated 18/01/2018 be

continued further to enable the Applicant to challenge the said review judgment of the trial Court. We are not inclined to accept the request. Firstly, the Applicant has had sufficient time to challenge the judgment. Secondly, protection was granted to the Applicant by this Court, which would enure beyond the date of the judgment of the trial Court on the Review Petition. In other words, the judgment would stand stayed irrespective of the outcome. Such extraordinary measure, we are not inclined to extend on a praecipe. If the Applicant has an arguable case, surely the Applicant can make out such a case in a full fledged proceedings to which the concerned Court would surely apply its mind before deciding interim measure to be taken. Lastly, the decree is not even against the Applicant. The execution obviously therefore is not filed against the Applicant.

3. For such reasons, the request is refused.

(SARANG V. KOTWAL, J.)

(AKIL KURESHI, J.)