

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****CIVIL APPLICATION NO. 2724 OF 2019****IN****FIRST APPEAL NO.1299 OF 2018**

Shri Santosh Ravikumar ... Appellant/Applicant/
Original Defendant

V/s.

Shri Hansraj Laxmidas Merchant (since deceased)
through Smt. Damayanti Hansraj
Merchant and others ... Respondents

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Mr.Rajshekhar V. Govilkar with Ms.Shaba Khan for the Appellant/Applicant.
Mr. Anand Sharma with Mr.Anand Pai, Ms. Shradha Achliya and Mr.Rutvij
Solanki i/by Mr.Devang Shah for Respondent Nos.1 and 2.

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**CORAM : S.J. KATHAWALLA AND
R.I. CHAGLA, JJ.**

DATED : FEBRUARY 24, 2020.

P.C. :-

1. The present application is in the nature of review/recall of Order dated 10-6-2020 passed in Civil Application No.3081 of 2018. Therefore, before dealing with the present application, it is necessary to refer to the Civil Application No.3081 of 2018 filed by the Applicant and the Order dated 10-6-2019.

2. The Court of Civil Judge, Senior Division, Raigad, at Alibag has by a judgment and decree dated 17-11-2017 passed in a civil suit awarded damages of Rs.10,00,00,000/- payable by the Applicant in favour of the Respondent. The Applicant has filed a First Appeal and by way of Civil Application No.3081 of 2018 sought stay of the judgment and decree. Civil Application No.3081 of 2018 was heard and decided by a Division Bench to which one of us (Kathawalla, J.) was a party. The findings made in the Order dated 10-6-2019 are set out below:

“4. *In the context of the civil application for stay, we had heard learned counsel for the parties at considerable length. The decree being in the nature of money decree, while staying the execution an implemenatation of such decree, we would have to put the appellant-original defendant to some suitable terms. Defendant cannot expect unconditional stay. Learned counsel for the appellant submitted that instead of providing bank gaurantee for any portion of decreetal amount, the suit property itself may be taken as security. He stated that the appellant is the sole owner and the suit property which is unencumbered.*

5. *However, the record of the case suggests that the appellant has taken completely contradictory stand before the Trial Court. In the written statement- Exhibit 22 he had stated that:-*

“This Defendant says that in fact this Defendant has already created third party rights concerning this

Defendant's properties and also received consideration amounts from the purchaser."

Thus, as per this averment made in the written statement the defendant had already created third party rights in relation to the suit property upon receiving consideration from the purchaser. The oral statement of the counsel for the appellant that the said position is incorrect, cannot be accepted. If at all, this shows that the appellant is unreliable and raises defence to suit his requirement whether correct or not. Further, in his deposition in the form of examination-in-chief he had further stated that:-

"I say that as provided in clause 10 of the said Agreement. The Plaintiffs know that there was a kool (i.e. a Protected Tenant) and that the said kool was in exclusive use, occupation, possession and enjoyment of the said property with structure standing thereon. The said kool is not agreeable to release his right nor to vacate the said Property. I deny the rest of the allegations contained in the said paragraph."

As per this averment, thus according to the appellant there was protected tenant on the land in question. He was occupying a residential premise situated on the suit land and he had refused to vacate the property.

6. *In view of such stand taken by the appellant before the Court below, his oral statement before us that the suit property is unencumbered and is of clear title cannot be accpeted. His offer*

of the suit property being taken as security to the satisfaction of the decretal amount, therefore, is not accepted.

7. *In the result, execution and implementation of the impugned judgment and the decree would stand stayed upon the appellant furnishing unconditional bank guarantee before this Court to the extent of 50% of the decretal amount. If such bank guarantee is not furnished latest by 20th July, 2019, this stay order shall stand automatically vacated without further reference to the Court. It is further provided that the appellant shall maintain the status-quo as on today regarding title and possession of the suit land. Civil Application is disposed of. Rule made absolute.”*

3. The Order dated 10-6-2019 also records the appearance of the Applicant himself at the time of the hearing since factual submissions were made on behalf of the Applicant on instructions from the Applicant. The Order dated 10-6-2019 was a conditional order of stay of the decree dependent on Applicant furnishing an unconditional bank guarantee for 50% of decretal amount latest by 20-7-2019. *Needless to say that the direction to furnish a bank guarantee of only 50% of decretal amount was passed after hearing the Applicant’s submissions including submissions as regards financial position of the Applicant.* The Order has not been complied with and the stay on the decree stands vacated since 20-7-2019.

4. By the present application, the Applicant seeks the following reliefs:

- “(a) the delay of 9-10 days in filing of the Civil Application for recalling/review/modification of the order dated 10-6-2019, be condoned;
- (b) the order dated 10-6-2019 be modified to the effect that the Applicant be permitted to offer the suit land itself as security to the satisfaction of the decretal amount;
- (c) the direction to the Applicant to furnish unconditional Bank Guarantee before this Hon’ble Court to the extent of 50% of the decretal amount be quashed and set aside and the Applicant be permitted to furnish security by way of suit land itself;
- (d) In the alternative, the Applicant be permitted to sell the suit land under the control and supervision of this Hon’ble Court with a condition that the prospective purchaser be directed to deposit an amount of Rs.5 Crores which is 50% of the decretal amount in this Hon’ble Court by way of security to the satisfaction of the decretal amount with further direction that on final disposal of the First Appeal No.1299 of 2019, the said amount of Rs.5 Crores along with interest accrued thereon be permitted to withdraw by the party which would succeed in the Appeal;

(e) Such other and further reliefs as this Hon'ble Court deems fit and proper in the facts and circumstances of the case, be granted in favour of the Applicant/Appellant.”

5. The present application seeks review on the ground that the Applicant has realised that the averments in the written statement before Trial Court were made in circumstances and facts that then existed and are of legal consequence. It is stated that there were some talks of a transaction with a third party but the same did not materialise and there is no claim of any third party. As regards the averments in the Affidavit of Evidence of the Applicant as regards a protected tenant on the suit property, it is stated that there was no protected tenant as is understood under the Bombay Tenancy and Agricultural Lands Act. It is also stated that if there was a kool i.e protected tenant, the protected tenant would have initiated a proceeding for declaring himself as a tenant.

6. The Respondent has filed its Affidavit in Reply opposing the application stating that the averments in the present application effectively make the same submissions made at the time of hearing of Civil Application No.3081 of 2018 which have already been dealt with in Order dated 10-6-2019. It is therefore stated that no ground for review is made out.

7. *On 13-1-2020, this matter was heard and on request of the Advocate for the Applicant the matter was adjourned to enable the Applicant to get a buyer of the suit property.* Thereafter, the matter has been listed on 27-1-2020, 10-2-2020 and again listed on 24-2-2020. However, the Applicant has not been able to get a buyer of the Suit Property. In effect, since 20-7-2019 being the last date for furnishing the bank guarantee, neither the Order dated 10-6-2019 has been complied with nor the opportunity granted by the Court to get a buyer has been utilised by the Applicant.

8. The grounds for review/recall raised in the present application effectively again dispute the statements made by this very Applicant before the Trial Court on oath. Now in appeal from a decree passed against the Applicant by the Trial Court, the Applicant states that his own statements before the Trial Court must be ignored and the property must be treated as an unencumbered property and be taken as security for stay of the decree. This submission has already been considered in the Order dated 10-6-2019 and the Court has observed that such a submission cannot be accepted. The Court has also observed that “If at all, this shows that the appellant is unreliable and raises defence to suit his requirement whether correct or not.” Since no error apparent is pointed out in the Order dated 10-6-2019, there is absolutely no ground for review/recall

of the Order dated 10-6-2019.

9. As regards the alternate relief seeking modification of the Order dated 10-6-2019, *to enable the Applicant to secure the rights of the Respondent decree holder, at the time of hearing of the application on 13-1-2020, the Court made enquiries with the Applicant as to whether the Applicant has any other unencumbered asset. However, the Court was orally informed that no asset is available.* In view of the same, an opportunity was given to the Applicant to get a buyer for purchase of the land i.e suit property. However, even after the matter has been listed on 27-1-2020 and 10-2-2020 and on 24-2-2020, the Applicant has been unable to get a buyer for the land i.e suit property.

10. In fact, when the matter was listed on 24-2-2020 and called out in the morning session, the Advocate for the Applicant submitted that an application has been made by the Applicant for survey of the land and the same may take time. Upon enquiries being made by the Court about the details of such application, the matter was kept back at 3 pm to enable the Advocate for the Applicant to obtain the details. When the matter was called out at 3 pm, the Advocate for the Applicant stated that he was carrying an incorrect impression and no such application has been made but is proposed to be made. The above events establish that despite being given repeated opportunities, the Applicant's

conduct does not inspire confidence.

11. The application is dismissed. No order as to costs.

(R.I. CHAGLA, J.)

(S.J. KATHAWALLA, J.)