A SHREE CHAITANYA CONSTRUCTIONS

v.

SUDHIR POONAMCHAND PARAKH & ORS.

(Civil Appeal No.5620 Of 2019)

B JULY 17, 2019

[R.F. NARIMAN, SANJIV KHANNA AND SURYA KANT, JJ.]

Natural Justice – Right to be heard – Suit for specific performance against several members of one family/defendants – Rejected by the Trial Court – However, High Court by judgment dated 14.2.2018 decreed in favour of the plaintiff – Respondent No.1/defendant No. 5 filed review petition and stated that in the appeal before the High Court he never appeared and he was represented by a counsel who was not appointed by him – High Court allowed the review petition and recalled its judgment – On appeal, held: Advocate, who appeared for respondent no.1, did not make any argument 'collusive' in nature or against the respondent no.1 – Even in equity, the respondent No.1 has no case – Various affidavits were filed by the relatives of respondent No.1 stating that the said advocate was agreed to be engaged by all the family members/close relatives – Also, despite service of appeal, respondent No.1 chose not to appear before High Court, now he cannot say that he was not heard – Impugned Judgment of the High Court recalling its judgment dated 14.2.2018 set aside.

Allowing the appeal, the Court

F **HELD: 1. It is clear that notices of the appeal were repeatedly served on respondent No.1. The first time when service was effected, the bailiff remarked that since Respondent No.1 was not found at the address at which he resides, service was effected by "affixation on the door" of his residence. The High Court still felt that it was necessary under the rules to effect proper service, as a result of which, by its order, it directed that service be made by Registered Post A.D. This was ultimately done and notices were returned unserved with postal remarks "unclaimed, hence returned to sender". After this happened,**

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steps were then taken for service through paper publication, which was duly done by a notice issued in the Newspaper "Prabhat" which has a wide circulation in Pune. Pursuant to all these steps, by a formal order in First Appeal No. 295 of 2013, it was stated that service to the respondents was complete. As correctly contended by the appellant that after service is effected, had respondent No.1 not appeared at all, he could not have complained of the same since, after service has been effected, he has chosen not to appear, and this being the position, he cannot then turn around and say that as he was not heard and that the appellate judgment should be set aside and the appeal restored. This Court has also perused the impugned judgment dated 14.02.2018. A large portion thereof is the recording of the submissions of 'D' Senior Advocate, on behalf of Respondent No.1, which are all submissions ranging from maintainability of the specific performance suit; the MoU being unstamped and therefore not admissible in evidence; and otherwise that on facts it would be inequitable to enforce specific performance in favour of the plaintiff. On the facts of the case, not a single argument has been pointed out which could be said to be "collusive" in nature; that is while appearing to defend the Respondent No.1, an argument was made in the nature of a "hit wicket" which would really favour the plaintiff. [Paras 10, 11] [1057-B-H]

2. It may also be pointed out that even in equity, the Respondent No.1 has no case. This Court has perused the affidavit of 'V' dated 26.07.2018 in which he states that being a son-in-law/close relative of one of the brothers of Respondent No.1, he was in charge of and handling this litigation. According to him, he was given an express oral assurance by all the brothers, including Respondent No.1, to engage the services of 'MS', Advocate who would then brief a Senior Advocate and appear on behalf of Respondent No.1. 'MS' in an affidavit of the same date, has affirmed these facts. Even otherwise, the father of Respondent No.1 has also, by an affidavit dated 02.08.2018 stated the same thing which has been agreed to by all the family members/close relatives, save and except Respondent No.1. There is no reason to disbelieve these affidavits. [Para 12] [1058-A-C]

3. It is clear that had the Respondent No.1 not chosen to appear at all, the judgment dated 14.02.2018 could not possibly have been recalled. Therefore, even if the submissions made by 'D' in the appeal are discounted and the case of Respondent No.1 is accepted that he never, in fact, appointed either 'MS' or 'D' to represent him, since the result of the appeal would have been the same. Thus, the impugned judgment is set aside. [Para 14] [1058-G-H; 1059-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5620 of 2019

From the Judgment and Order dated 27.09.2018 of the High Court of Judicature at Bombay in Review Petition No. 3 of 2018 in First Appeal No. 295 of 2013

R. Basant, Sr. Adv., Makarand D. Adkar, Braj K. Mishra, Vijay Kumar, Ms. Bharti Tyagi, Advs. for the Appellant.

Mrs. Anjani Aiyagari, Ajay Choudhary, Advs. for the Respondents.

The Judgment of the Court was delivered by

R. F. NARIMAN, J. 1. Leave granted.

2. The present dispute arises out of a specific performance suit that had been filed on 15.10.2010 by the plaintiff against several members of one family. There were 8 defendants in all. However, only Defendant No.5, who is the Respondent No.1 in this appeal, filed a written statement on 04.02.2011. Defendant No.5 neither led any evidence nor did he avail of any opportunity to cross-examine the plaintiff before the trial Court. The Trial Court, by its judgment dated 07.11.2012, rejected the prayer for specific performance and instead directed that a sum of Rs.2,26,40,370/- be paid as refund of part consideration already given. The First Appeal against the aforesaid judgment was filed by the plaintiff on 03.04.2013.

3. Meanwhile, in an *inter se* litigation between the members of the defendants family, a partition suit had been filed by the present Respondent No.1 being O.S. No. 1298 of 1999 against the original Defendant Nos. 1-4 and certain others for partition of as many as 22 properties. The property with which the specific performance suit is concerned is stated to be Item No.7 in the Schedule that is appended to

this suit. In this suit, an interim injunction had been passed restraining the defendants from creating third party rights. This was done on 22.03.2007. Since Suit No. 1298 of 1999 stood dismissed for non-prosecution on 18.11.2014, the said interim injunction would stand automatically vacated.

4. Meanwhile, a Memorandum of Understanding (MoU) was entered into between the plaintiff and Defendant Nos. 1-8. What is important to note is that the present Respondent No.1, when he filed his written statement in the specific performance suit, admitted the factum of this MoU.

5. An appeal that had been filed against the trial Court judgment in the specific performance suit was heard and finally decided by the High Court, in which the trial Court judgment was set aside and specific performance decreed in favour of the plaintiff. It may be mentioned that in this appeal, one Mr. Mandar Soman and Mr. P.S. Dani, learned Senior Advocate, appeared for the respondent No.1 and submitted a number of arguments and cited a number of judgments in favour of Respondent No.1. These have all been noted in the judgment dated 14.02.2018, and after turning down Mr. Dani's arguments, the High Court allowed the appeal.

6. The Respondent No.1 then filed a review petition against the aforesaid judgment, in which it was stated that he received a copy of the High Court judgment dated 14.02.2018 two days later, i.e. on 16.02.2018, and was shocked to find that he was represented by counsel who he had never appointed. It is his case before us, and this is not disputed by Mr. Basant, learned Senior Advocate for the appellant, that there was, in fact, no written Vakalatnama executed by Respondent No.1 in favour of Mandar Soman, who appeared to represent the Respondent No.1 in the appeal before the High Court.

7. This being the case, the review petition was disposed of by the impugned judgment dated 27.09.2018, in which the High Court recalled its judgment of 14.02.2018 on the ground that since it is clear that the advocate who appeared on behalf of Respondent No.1, appeared without any written Vakalatnama (and appeared merely on alleged oral assurances, said to be given by Respondent No.1) the order must be recalled and Respondent No.1 must be heard. The High Court, therefore, allowed the review petition and restored the appeal.

A 8. Mr. R. Basant, learned Senior Advocate, appearing for the appellant, has meticulously taken us through the relevant judgments and documents, and has argued that there can be no dispute as to the fact that the Respondent No.1 was duly served in the appeal. If despite service he had chosen not to appear at all, then obviously no ground for review would have been made out. Also, he was at pains to point out B that nowhere in the review petition had Respondent No.1 stated that upon reading the judgment the arguments made by Mr. Dani were against the interest of his client. He pointed out that as many as five points had been made by Mr. Dani, beginning from maintainability of the suit to reasons for non-grant of specific performance, all of which had first to C be dealt with by the High Court judgment dated 14.02.2018 before it could upset the trial Court judgment. According to him, therefore, the non-filing of Vakalatnama by Respondent No.1 in favour of Mr. Mandar Soman should not be given any heed as no question of collusion could be made out on the facts of this case. He also argued that, in any event, the non-filing of a Vakalatnama is at best an irregularity which can be cured D later on. Quite obviously, if the judgment had been given in favour of Respondent No.1 and this was pointed out, the Respondent No.1 would forthwith have cured such irregularity by doing the needful. Therefore, on facts, according to him, the High Court was incorrect in allowing the review petition.

E 9. Ms. Anjani Aiyagari, learned counsel, appearing for the Respondent No.1, has strenuously contended that her client, on the one hand, and his father and brother on the other, were at loggerheads through out as a result of which, as a matter of fact, in contempt proceedings between them, Mr. Dani appeared for the family members/close relatives F of Respondent No.1 against Respondent No.1, who was the contempt petitioner in those proceedings; she referred to and relied upon an order dated 18.04.2006 in this behalf. According to her, the only argument that should have been made and that was never made on behalf of Respondent No.1 in the appeal, is the fact that the property, which is the subject-matter of the specific performance suit, could not possibly have G been alienated inasmuch as there was an interim injunction interdicting the same. This argument has never been made, and had it been made, according to her, the result in the appeal would have been against decreeing specific performance. She also stated that earlier orders that were passed would show that the parties were exploring a settlement, H and that, for this reason, the Respondent No.1 could not appear is another

important factor to be taken into account before the judgment dated 14.02.2018 was passed. Also, according to her, in point of fact, the Respondent No.1 did not have any knowledge of the appeal proceeding and, therefore, this Court ought to be not to interfere with the impugned judgment, which has only ultimately done justice in favour of her client.

10. Having heard the learned counsel for both parties one thing stands out. What is clear is that notices of the appeal were repeatedly served on respondent No.1. The first time when service was effected, the bailiff remarked that since Respondent No.1 was not found at the address at which he resides, service was effected by "affixation on the door" of his residence. The High Court still felt that it was necessary under the rules to effect proper service, as a result of which, by its order dated 27.10.2015, it directed that service be made by Registered Post A.D. This was ultimately done on 03.11.2015, and notices were returned unserved with postal remarks "unclaimed, hence returned to sender". Not only this, after this happened, steps were then taken for service through paper publication, which was duly done by a notice issued in the Newspaper "Prabhat" which has a wide circulation in Pune, on 18.01.2016. Pursuant to all these steps, by a formal order dated 22.02.2016 in First Appeal No. 295 of 2013, it was stated that service to the respondents was complete.

11. It is in this backdrop that the present appeal needs to be considered. As correctly contended by Mr. Basant, after service is effected, had respondent No.1 not appeared at all, he could not have complained of the same since, after service has been effected, he has chosen not to appear, and this being the position, he cannot then turn around and say that as he was not heard and that the appellate judgment should be set aside and the appeal restored. We have also perused the impugned judgment dated 14.02.2018. A large portion thereof is the recording of the submissions of Mr. Dani, learned Senior Advocate, on behalf of Respondent No.1, which are all submissions ranging from maintainability of the specific performance suit; the MoU being unstamped and therefore not admissible in evidence; and otherwise that on facts it would be inequitable to enforce specific performance in favour of the plaintiff. On the facts of the case, not a single argument has been pointed out which could be said to be "collusive" in nature; that is while appearing to defend the Respondent No.1, an argument was made in the nature of a "hit wicket" which would really favour the plaintiff.

A 12. It may also be pointed out that even in equity, the Respondent No.1 has no case. We have perused the affidavit of Mr. Vinit Jain dated 26.07.2018 in which Mr. Jain states that being a son-in-law/close relative of one of the brothers of Respondent No.1, he was in charge of and handling this litigation. According to him, he was given an express oral assurance by all the brothers, including Respondent No.1, to engage the B services of Mandar Soman, Advocate who would then brief a Senior Advocate and appear on behalf of Respondent No.1. Mr. Soman, in an affidavit of the same date, has affirmed these facts. Even otherwise, the father of Respondent No.1 has also, by an affidavit dated 02.08.2018 stated the same thing which has been agreed to by all the family members/ C close relatives, save and except Respondent No.1. We have no reason to disbelieve these affidavits. The only point in favour of the Respondent No.1 is the fact that there is no written Vakalatnama in favour of the counsel who represented him in the above appeal. The fact that Mr. Dani appeared against him in a contempt petition filed by Respondent D No.1, which was disposed of in 2006, does not lead us very far. At that point of time, when the parties were at loggerheads, Mr. Dani did appeared for family members against the Respondent No.1. However, when the parties i.e. the Respondent No.1's father and his brothers were all co-defendants in a specific performance suit in which their interest was common (that is, to oppose specific performance) it is difficult to E appreciate that Mr. Dani's appearance of 2006 should be put against his appearing in 2018 when Mr. Dani contested the specific performance suit tooth and nail.

13. We also fail to appreciate Ms. Anjani Aiyagari's other argument that had an argument based on the injunction granted in the partition suit F been made, the appeal would have been decided differently. As correctly pointed out by Mr. Basant even this is incorrect. Para 33 of the judgment dated 14.02.2018 makes it clear that this aspect was argued and considered. The point about the parties exploring settlement earlier to the impugned judgment is again neither here nor there inasmuch as G obviously when such settlement talks failed, the appeal had to be set down for hearing.

14. It is clear that had the Respondent No.1 not chosen to appear at all, the judgment dated 14.02.2018 could not possibly have been recalled. Therefore, even if we were to discount the submissions made

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by Mr. Dani in the appeal and accept the case of Respondent No.1 that he never, in fact, appointed either Mr. Soman or Mr. Dani to represent him, since the result of the appeal would have been the same, we set aside the impugned judgment and allow the appeal.

Ankit Gyan Appeal allowed.