

SUPREME COURT OF INDIA

Aviation Travels Pvt.Ltd.

Vs.

Bhavesha Suresh Goradia

C.A.No.1890-1891 of 2020

(R.Banumathi and A.S.Bopanna,JJ.,)

02.03.2020

JUDGMENT

R.Banumathi,J.,

SLP(C)No.5374-5375 of 2019

1. Leave granted.

2. These appeals arise out of the impugned judgment dated 09.07.2018 passed by the High Court of Judicature at Bombay in Appeal (Lodging) No.224 of 2018 in Notice of Motion No.580 of 2018 in Suit No.2865 of 1994 in and by which, the High Court dismissed the Notice of Motion filed by the appellant and declined to set aside ex-parte judgment and decree dated 07.10.2003 passed against the appellant in Suit No.2865 of 1994 and the impugned order dated 26.10.2018 passed in Review Petition (Lodg.) No.20 of 2018 whereby the review petition filed by the appellant was dismissed.

3. Brief facts which led to the filing of these appeals are as under:- Respondent No.1 filed a suit being Suit No.2865 of 1994 before the High Court of Bombay against the appellant and respondents No.3 to 24 for permanent injunction and compensation of Rs.1 crore for trespass, nuisance and damages allegedly made by appellant-Defendant No.1. It is stated that respondents No.3 to 6 are present trustees of a private trust known as "Parikh Goradia Trust" and respondents No.7 to 24 are beneficiaries of the said private trust. The appellant carries on business as travel agent and also inter alia of running a restaurant called "Woodlands Garden Cafe" i.e. respondent No.2. It was stated by respondent No.1 that the trust-Parikh Goradia Trust came into existence under an Indenture of trust dated 01.04.1976. Clause 3 of the said Indenture provides that the trust shall come to an end on 30.09.1985 and the trust fund will be divided amongst beneficiaries of the trust. However, despite the trust having come to an end on the stipulated date, the trustees thereof have failed and neglected to distribute the property and fund of the trust amongst the beneficiaries.

4. By an agreement dated 06.10.1978 executed between the trust and the petitioner and a letter dated 06.08.1982, the trust agreed to sell to the appellant a part of the said property for a consideration of Rs.10,00,000/-. Defendant No.1A-respondent No.2-M/s.

Woodlands Garden Cafe is a partnership firm registered under Indian Partnership Act, 1932 by virtue of a partnership deed executed on 01.04.1989. The appellant executed a leave and licence agreement dated 10.04.1989 with respect to the said premises in favour of respondent No.2-M/s. Woodlands Garden Cafe for a period of ten years to run the restaurant therein. Since the year 1989, respondent No.2-M/s.Woodland Garden Cafe is in occupation and possession of the said premises by doing restaurant business thereon. Case of the first respondent is that respondent No.2- M/s.Woodland Garden Cafe was closed down for repairs and renovations in the year 1992 and in the course of these repairs, the appellant caused considerable damage to the property and carried out unauthorized and illegal construction.

5. Respondent No.1 filed Suit No.2865 of 1994 to direct the appellant (defendant No.1) to pay a sum of rupees one crore to the trust together with interest @ 24% per annum and for permanent injunction restraining the appellant from carrying on repairs and renovations in the premises and also to ensure that no damage or loss or injury is caused to the said property of the trust either in the course of the renovation or the repairs carried out by the appellant and other reliefs. Vide order dated 07.10.2003, the Court noted that no written statement has been filed and the Court held that the first respondent's claim in the suit is clearly unchallenged. Vide ex-parte decree dated 07.10.2003, the High Court decreed the suit and directed the appellant and respondent No.2 to pay respondent No.1 and the beneficiaries of the said trust a sum of Rs.77,02,500/- with interest thereon @ 6% per annum from the date of filing the suit till the date of payment or realization. By the said ex-parte decree dated 07.10.2003, the Court also granted relief in terms of Clause (b), (c) and (g) (i.e. permanent injunction, mandatory injunction and costs of the suit) of the prayer clause against the appellant and respondent No.2.

6. The matter remained as such for quite some time. The appellant took Notice of Motion No.580 of 2018 dated 02.02.2018 praying to set aside the ex-parte judgment and decree dated 07.10.2003 and that the appellant be permitted to file written statement and defend the suit. It was stated that the summons of the original suit and the proceeding thereof were never served upon the appellant at its registered address and/or any other address where the appellant was carrying on its business and also on the ground that Rule 90 of the Bombay High Court (Original Side) Rules (for short "Bombay High Court Rules") has not been followed.

7. Vide order dated 19.04.2018, learned Single Judge dismissed the Notice of Motion No.580 of 2018. The learned Single Judge noted that the ex-parte decree dated 07.10.2003 shows that an advocate was engaged on behalf of the appellant and respondent No.2 and the said advocate has filed vakalatnama and there is no question of having to thereafter serve a party personally. The High Court held that along with the affidavit, a Power of Attorney dated 29.04.1993 was said to have been executed by the appellant in favour of one K. Shrinivas Rao and there is also a rubber stamp and circular common seal of the appellant in the Power of Attorney and the Power of Attorney is said to have been notarized in Mumbai and the seal of the Notary is also visible. Pointing out that the defendant No.1 through its Power of Attorney had engaged a lawyer and there was a validly executed vakalatnama by a constituted attorney K. Shrinivas Rao and also that writ of summons was in fact served on the appellant and

respondent No.2 (original defendant No.1A) by bailiff attached to the office of Sherrif of Mumbai, the learned Single Judge dismissed the Notice of Motion No.580 of 2018.

8. Being aggrieved, appellant preferred Appeal (Lodging) No.224 of 2018 challenging the order declining to set aside the ex-parte decree. The said appeal was dismissed by the Division Bench vide impugned judgment dated 09.07.2018. The Division Bench of the High Court opined that the appellant had engaged M/s. Narayanan & Narayanan, Advocates who placed on record of the suit a vakalatnama duly signed by the constituted attorney of the appellant. The Division Bench also noted that the record indicates that the advocate for the appellant represented the appellant in the suit on several dates including appearing at interlocutory application stage and engaging a senior advocate to argue on behalf of the appellant. The Division Bench held that appellant's Notice of Motion as well as the appeal is misconceived. The appellant then filed Review Petition (Lodg.) No.20 of 2018 along with the Notice of Motion for condonation of delay of 27 days in filing the review petition. The said review petition also came to be dismissed vide impugned order dated 26.10.2018 on the ground that there was no error apparent on the face of the order or any other ground is made out to entertain the review petition.

9. We have heard the submissions of Mr. R.F. Totala, learned counsel for the appellant and Mr. Shree Prakash Sinha, learned counsel for respondents No.1, 9 and 10 and carefully perused the contentions and impugned judgment and other materials on record.

10. The High Court has noted that on behalf of the appellant, M/s. Narayanan & Narayanan, Advocates has entered appearance and filed a vakalatnama duly signed by the constituted attorney of the appellant. The Power of Attorney dated 29.04.1993 was executed by the Chairman and Managing Director, Mr. Kudralli Subanna Nagraj of the appellant company and the same was executed before the Notary on 29.04.1993 and the signature of the executant was also identified by the advocate. The High Court noted that the said Power of Attorney inter alia authorized the attorney to accept the summons, notice and other processes issued to the advocate from any Court, Government or authority concerning the suit premises. The High Court also pointed out that there are several clauses in the Power of Attorney which authorize the constituted attorney to do acts in regard to the litigation. The High Court has referred to the affidavit filed by K. Shrinivas Rao in reply dated 20.07.1994 to the Notice of Motion No.1847 of 1994 for interim relief wherein, it was stated that he is a constituted attorney of the appellant (defendant No.1). K. Shrinivas Rao also stated that he was Director of appellant company till the year 1989 and at the time of filing the affidavit in 1994, he was a partner in respondent No.2-firm.

11. Insofar vakalatnama dated 20.07.1994 filed by M/s. Narayanan & Narayanan, Advocates on behalf of the appellant and respondent No.2, contention of the appellant is that they never instructed the said M/s. Narayanan & Narayanan, Advocates to appear on behalf of the appellant in the original suit. Case of the appellant is that vakalatnama dated 20.07.1994 was signed by K. Shrinivas Rao claiming himself to be a constituted attorney of defendant No.1. The stand of appellant is that defendant No.1 never authorized the said K. Shrinivas Rao to sign vakalatnama on behalf of the appellant in the original suit. Insofar as the Power of Attorney dated 29.04.1993 is concerned, the appellant contends that it was a general Power of Attorney and the appellant company never passed any

board resolution nor executed any such Power of Attorney authorizing K. Shrinivas Rao to sign vakalatnama on behalf of the appellant in the suit; the said K. Shrinivas Rao signed the vakalatnama for and on behalf of respondent No.2. Stand of the appellant is that the appellant never authorized K. Shrinivas Rao to appear on behalf of the appellant in the original suit No.2865 of 1994.

12. The High Court rejected the stand of the appellant and observed that page 18 of the Power of Attorney is a typed name of the Chairman and Managing Director and there is also a rubber stamp and circular common seal of the appellant and the Power of Attorney was executed by the Chairman and Managing Director of the appellant company Mr. Kudralli Subanna Nagraj. The High Court has also pointed out that the Power of Attorney dated 29.04.1993 has been notarized in Mumbai on 29.04.1993 and the seal of the Notary is also seen in the Power of Attorney.

13. On behalf of the appellant, it was contended before the High Court that even assuming that the vakalatnama was filed on behalf of the appellant through Power of Attorney, Rule 79 of the Bombay High Court Rules requires personal service of the writ of summons on a defendant even if appearance was entered on his behalf by an advocate. To the said contention, the High Court opined that Rule 79 of the Bombay High Court Rules speaks of a waiver of the requirement of serving the writ of summons personally, if the advocate undertakes in writing to accept service of that writ of summons and to file a vakalatnama. The High Court pointed out that Rule 79 contemplates a stage before the vakalatnama is in fact filed and once the vakalatnama is filed, there is no question of having to serve a party personally thereafter. The High Court pointed out that in Suit No.2865 of 1994, vakalatnama was filed by the Power of Attorney in the suit itself and there is no question of having to thereafter serve a party personally. After referring to the affidavit in reply at pages 62 and 63 of the paper book, the High Court observed that summons was in fact served on the advocates for the appellant and respondent No.2 by bailiff attached to the office of Sherrif of Mumbai and there is an affidavit of service dated 18.08.1999 made by the bailiff's clerk to that effect. Observing that the Court has personally checked the original affidavit of the bailiff and the file and pointing out that there is no affidavit in rejoinder, the learned Single Judge has dismissed the Notice of Motion No.580 of 2018.

14. According to the appellant, the High Court erred in holding that the Power of Attorney dated 29.04.1993 is genuine. It was urged that the alleged Power of Attorney is said to have been notarized at Mumbai before Advocate Raja who was representing respondent No.2 in the original suit whereas, the appellant company is located in Bangalore. Learned counsel for respondent No.1 has submitted that the appellant herein surrendered and/or sold all its rights and interest in the property in question to respondent No.2 on 30.04.1993 and the present appeal is a proxy litigation on behalf of respondent No.2. It is the contention of respondent No.1 that since K. Shrinivas Rao duly constituted the Power of Attorney of the appellant has filed his reply on 20.07.1994 and the said reply was filed through M/s. Narayanan & Narayanan, Advocates in which the appellant through the Power of Attorney has stated that the premises in question was acquired by the appellant with the contribution made by respondent No.2- M/s. Woodland Garden Cafe and therefore, respondent No.2 also should be heard before any order is passed in the suit. It was submitted that based on the reply affidavit filed by K. Shrinivas Rao,

respondent No.1 filed application for amendment and the amendment application was allowed on 26.07.1994 and respondent No.2 was impleaded as defendant No.1A. It is therefore, submitted that filing of vakalatnama on behalf of the appellant by its duly constituted Power of Attorney K. Shrinivas Rao and subsequent impleading of respondent No.2 clearly shows that the appellant and respondent No.2 were duly served and participated in the proceedings and were aware of the decree dated 07.10.2003. It was contended that the appellant has not approached with the correct averments and in view of the incorrect stand taken by the appellant, the High Court rightly rejected the Notice of Motion refusing to set aside the ex-parte decree dated 07.10.2003.

15. Though various contentions have been raised as to whether appellant was served or not and entered appearance in the suit, we are not inclined to go into the merits of the contentions. In our view, an opportunity has to be given to the appellant for contesting the suit. It is because the suit was filed for recovery of damages of Rs.1 crore and respondent No.1 claimed interest @ 24% per annum. By the judgment dated 07.10.2003, the Court has directed the appellant and respondent No.2 to pay a sum of Rs.77,02,500/- and Rs.42,70,772.46, total amount payable under decree is Rs.1,20,03,282.96. The Court also directed the payment of subsequent interest @ 6% per annum on the said amount of Rs.77,02,500/- till date of reliasation.

16. As pointed out earlier, the suit claim was for damages. The damages to the property if any, can be ascertained only after the parties adduce the oral and documentary evidence. We have no reason to believe that the appellant would have benefitted by deliberately not contesting the suit as they would in any event be saddled with interest if their conduct was to drag and prolong the suit. Considering the nature of the claim and other facts and circumstances and in the interest of justice, we are of a view that an opportunity has to be given to the appellant to contest the suit subject to terms. The appellant has also in that regard shown its bona fide by depositing Rs.60,00,000/- in compliance of the order dated 18.02.2019. By the order dated 24.01.2020, we have also directed the appellant to deposit further sum of Rs.35,00,000/- for which the appellant sought for some more time for compliance. Considering the request, two months further time is granted to the appellant for deposit of the said amount.

17. Insofar as the amount of Rs.60,00,000/- deposited by the appellant, by our order dated 24.01.2020, we have permitted respondent No.1-plaintiff to withdraw the said amount. Since there are number of other beneficiaries of the trust viz. respondents No.7 to 24, the amount has to be disbursed to the trustees/beneficiaries as per their entitlement. It is open to respondent No.1 and other trustees/beneficiaries of the trust to file appropriate application before the High Court for disbursement of the amount (pending disposal of the suit) and the High Court shall consider and pass appropriate order as per the entitlement of the respective parties. The disbursement of the said amount will be subject to the outcome of said suit. Permission for withdrawal of the amount of Rs.60,00,000/- by respondent No.1 and other trustees/beneficiaries is without prejudice to the contention of both the parties in the suit.

18. In the result, the impugned judgment dated 09.07.2018 passed by the High Court of Judicature at Bombay in Appeal (Lodging) No.224 of 2018 in Notice of Motion No.580 of 2018 in Suit No.2865 of 1994 and the impugned order dated 26.10.2018 passed in

Review Petition (Lodg.) No.20 of 2018 are set aside and these appeals are allowed. The Suit No.2865 of 1994 is ordered to be restored. The appellant and respondent No.2 shall file their written statement within four weeks from today and learned Single Judge of the High Court shall afford sufficient opportunity to both the parties to adduce evidence and dispose the said suit in accordance with law.

19. Insofar as direction for deposit of Rs.35,00,000/-, two months further time is granted to the appellant for deposit of the said amount and on such deposit, the same shall be invested in a nationalized Bank for a period of six months with a provision of auto renewal. Deposit of Rs.35,00,000/- would be subject to the outcome of the suit. No costs.