



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO. 11824 OF 2024
IN
FIRST APPEAL NO. 1400 OF 2024

Excellent Constructions Pvt. Ltd.
11 Indian Merchantile Insurance Building,
4 ORE, V.B. Gandhi Marg, Mumbai
By its duly authorized signatory
Rajan Bulchand
Age: 59 years, Occu.: Service,
R/o Nicolas Estevanez 21,
Las Palmas 35007, Spain
At present having address at
202, Aspect Tower,
Business Bay, Dubai

..APPLICANT

VERSUS

1. Seema Sharad Mutha
Age: Adult, Occu.: Business,
2. Shilpa Sharad Mutha
Age: Adult, Occu.: Business,
Both R/o 83, Maniknagar,
Nagar-Pune Road, Ahmednagar
3. Sharad Mansukhlal Mutha
(since died on 25.03.2019,
through his Lrs)
- 3A. Mangala Sharad Mutha
Age: 68 years, Occu.: Business,
- 3B. Nirmal Sharad Mutha
Age: 41 years, Occu.: Business,
- 3C. Shilpa Sharad Mutha
(Original Defendant No.2)
Age: 46 years, Occu.: Business,
- 3D. Seema Sharad Mutha
(Original Defendant No.1)
Age: 43 years, Occu.: Business,

4. M/s Sharad Mutha Housing Development Ltd.
83, Maniknagar, Nagar-Pune Road,
Ahmednagar
By its Directors

4A. Ashok Bansilal Mutha
Age: Adult, Occ.: Business,
R/o 83, Maniknagar, Nagar-Pune Road,
Ahmednagar

4B. Mansukhlal Manikchand Mutha (Deceased)

4C. Sharad Mansukhlal Mutha (Deceased)

5. Zari Khan Wallikhan
Age: Adult, Occu.: Business,
R/o Dinshaw House,
6th Floor, Above Oriental Bank,
Synagogue Stree, Camp, Pune

6. Amit Rasiklal Kothari
Age: 44 years, Occu.: Business,
R/o Chandrakor, Maniknagar,
Station Road, Ahmednagar

7. Shweta Amit Kothari
Age: 43 years, Occu.: Business,
R/o Chandrakor, Maniknagar,
Station Road, Ahmednagar

8. Saten Champala Gundecha
Age: 48 years, Occu.: Agri. & Business,
R/o Survey No. 131, F-5, Maniknagar,
Chandan Estate Road, Ahmednagar

..RESPONDENTS

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Mr. V.D. Sapkal, Senior Advocate a/w Ms. Nandini Chittal and Rohit Patil,
Advocates i/b Mr. P.P. Kothari, Advocate for applicant
Mr. R.R. Sancheti and Mr. D.R. Deshmukh, Advocates for Respondent Nos. 1
to 4

Mr. A.M. Gholap, Advocate for respective nos. 6 and 7
Mr. A.A. Bhandari, Advocate for respective no.8

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CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.
RESERVED ON : 31st JANUARY, 2025
PRONOUNCED ON : 05th FEBRUARY, 2025

ORDER :

1. This application has been moved by the original plaintiff / appellant herein for the following main reliefs :

“(b) To grant mandatory / permanent injunction restraining Respondent Nos. 6 to 9 from creating third party rights or interests in the land lying and situate at Gut No. 327 at Village Bhingar, Tal. Nagar, Dist. Ahmednagar being two portions of land admeasuring 4 hector 80 ares and 1 hector 61 ares purchased in view of the Sale Deeds bearing Nos. 2459/2021 and 2764/2021 registered on 31.03.2021 and 04.05.2021 with the office of Sub-Registrar, Ahmednagar-2;

(b)-1 Pending hearing and final disposal of the above Appeal, by an order and/or direction restrain/injunct Respondent No.6 to 9 from creating third party rights or interests in the land lying and situate at Gut No. 327 at Village Bhingar, Tal. Nagar, Dist. Ahmednagar being two portions of land admeasuring 4 hector 80 ares and 1 hector 61 ares purchased in view of the Sale Deeds bearing Nos. 2459/2021 and 2764/2021 registered on 31.03.2021 and 04.05.2021 with the office of Sub-Registrar, Ahmednagar-2;”

2. Heard.

3. While deciding the similar application (Civil Application No. 6127 of 2024) preferred against present Respondent Nos.1 to 4 / Original

defendants in Special Suit, No. 116 of 2002, we held the plaintiff / applicant (appellant herein) to have made a prima facie case to grant the reliefs similar to those have been prayed in this application.

4. With a view to avoid repetition, we do not propose to reiterate the submissions made by learned Senior Counsel for the applicant herein. Suffice it to say, the facts as have been delineated from the pleadings and the evidence in the suit would be our reasons for deciding the present application. A somewhat detailed reference would be made to the case of Respondent Nos.6 to 8 herein.

5. The special suit (116 of 2002) was filed by “Excellent Constructions Pvt. Ltd.”, a company registered under the Companies Act, against Respondent Nos. 1 to 5 herein. It is a suit for recovery of a sum, little over Rs.43 crores with a further prayer for realisation of the said amount by sale of the agricultural lands, Gut Nos. 326/1 and 327, mortgaged by the original defendants in favour of the plaintiff – company for securing a loan of Rs.3 crores raised from IndusInd Bank. The record indicates the person, who operate or run the business of the plaintiff – company, was based in foreign country (Spain). The original defendants / Respondent Nos. 1 to 4 made a default in repayment of the loan. The plaintiff – company came with a case to have repaid the entire loan amount. According to the company, an

agreement dated 02nd May, 1997 was entered into between the plaintiff – company and the original defendants. It was agreed that the defendants would pay the plaintiff - company interest @ 18% p.a. for initial period and thereafter 2.5% p.m. besides funding charges @ 3% p.m. The transaction took place way back in 1997. According to the plaintiff – company, since the amount was not paid, it swelled equal to the amount claimed in the suit.

6. Pending the suit, there was injunction order restraining the original defendants from creating third party interest in respect of the lands (Gut Nos. 326/1 and 327) (suit lands). In spite of the same, the defendants sold major portion of the suit lands to Respondent Nos.6 to 8 herein. Since the transaction took place when the injunction order was in operation, the sale-deed would necessarily be invalid. However, the suit was dismissed on merits. Meaning thereby, the injunction that was operating, stood vacated.

7. Against the judgment and decree dismissing the plaintiff's suit, the first appeal, wherein the present application has been moved, came to be filed. We have admitted the appeal. Needless to mention, the appeal is continuation of the original suit. The sale transactions that took place were first invalid in view of there being injunction order and would also be subject to the principle of *lis pendens*.

8. The purchasers / Respondent Nos. 6 to 8 have filed their respective affidavits-in-reply resisting the grant of relief prayed in the application. We have perused those affidavits-in-reply. Also heard learned counsel for the respective parties. These respondents claimed to have been the bonafide purchasers for valuable consideration without notice of the pendency of the suit and claim of the plaintiffs. Our attention was drawn to one of the clauses in the sale-deed, wherein the defendants/vendors claimed to have clear marketable title to the land sold. It was also submitted that in the 7/12 extract of the said land, there were only two encumbrances. The entries in the 7/12 extract were in the nature of notice to the original plaintiffs. It was further submitted that Respondent No.8 mortgaged the land to a co-operative credit society / bank and raised loan. The bank, before granting the loan, took search and legal opinion as well. It was further submitted that the land has been developed into plots. Respondent No.8 has entered into an agreement for sale of some portion of the land to someone else. It was also submitted that in the suit, the original agreement dated 02nd May, 1997 had not been produced. There was no evidence at all to indicate the plaintiff – company to have paid the entire loan. Our attention was adverted to some of the paragraphs in the judgment of the trial Court to suggest the impugned judgment was well reasoned. It was also submitted that the transaction between the original plaintiff – company and the defendants would be hit by Usurious Loans Act, 1977. It was further

submitted that the land in possession of the original owners / defendants is sufficient to meet the suit claim. For breach of injunction order, the plaintiff – company has an alternative efficacious remedy under Order XXXIX Rule 2A of the Code of Civil Procedure. It was further submitted that the injunction order was only in the nature of a clog on title of Respondent Nos. 6 to 8. When the suit would be dismissed on merits attaining finality, the original vendors would not be required to re-execute the sale-deed. It was further submitted that the suit was hit by non-joinder of necessary parties. The person, in whose favour the original power of attorney was executed, was not made party to the suit. IdusInd Bank has also not been a party. In the liquidation proceeding, original defendant no.5 had appeared on behalf of the plaintiff – company. The trial Court has rightly observed that the said Power of Attorney was acting on behalf of his principal (plaintiff – company). The Power of Attorney had every authority to file the suit and enter into compromise. The original suit has thus been disposed of with a compromise decree passed therein. The present suit is, therefore, hit by principle of res judicata / Order II Rule 2. It was also submitted that this Court passed order against unsold property, meaning thereby the property purchased by these respondents have been saved and was not subject to any restraint order.

9. We have considered the submissions advanced. Perused the pleadings and the evidence adduced in the suit.

10. It is not in dispute that the original defendants availed a loan of Rs.3 crores from IndusInd Bank way back in 1997. The plaintiff – company acted as a go-between for the loan transaction. The original defendants mortgaged the suit land in favour of the plaintiff - company as a security for the loan. The record indicates that while there were defaults in repayment of loan and the amount on the loan account swelled close to Rs.4 crores, the same came to be repaid. The plaintiff – company had produced in evidence certain documents indicating the loan amount to have been recovered from its account. The trial Court did not exhibit the said document. The plaintiff – company may adduce additional evidence in appeal. One of the defendants was examined as a witness. In paragraph nos.5 and 6 of his cross-examination, he made following admission:-

“७. हे म्हणणे खरे आहे की, प्रतिवादी नं.४ कंपनीने इन्डसिंड बँकेकडून स्वकम रु. तीन कोटीचे कर्ज घेतले होते व त्या रकमेस वादी कंपनी जामीनदार होती. त्या कर्जाचा खातेउतारा अंगर करार आमचेकडे नाही. त्या कर्जाची परतफेड झालेली आहे. त्या कर्जाची परतफेड मी केलेली नाही. त्या कर्जाची परतफेड वादी कंपनीने केली आहे हे मला माहित नाही. प्रतिवादी नं.४ - कंपनीने व्याजापोटी काही स्वकम भरलेली आहे. ती स्वकम भरल्याचे दर्शविणारा लेखी पुरावा माझेकडे आहे. तो पुरावा याकामी हजर करणेस मी तयार आहे.

६. मी रामचंद्र बुलचंद यांचे लाभात सन १९९७ मध्ये गहाणखत केलेनंतर दोन वर्षे कोणतीही स्वकम त्यांना देवू शकलो नाही. त्यानंतर जी स्वकम दिली त्याबाबतचे कागद पुढील तारखेस हजर करणेस मी तयार आहे.”

11. No evidence was adduced to indicate any of the defendants to have repaid the entire loan amount/or a farthing thereof.

12. The plaintiff - company had appointed one Mr. Gautam Raye as its constituted Power of Attorney to lookafter the affairs of its properties including the suit lands. A copy thereof is on record. Clause No.3 thereof indicates that the Power of Attorney was authorised to appoint anyone to act on his behalf (sub-agent). Close reading of the said deed of power of attorney would indicate that only following powers were granted to him :-

- “a) To file/present/institute suit for foreclosure/sale/recovery of amount etc. in respect of property describe in para no.1.*
- b) To plead/depose/affirm in the any suit filed by me/my behalf/filed against me in any court of India.*
- c) To appoint/engage advocate/advocates, pleader/council on my behalf in respect of my case regarding the property describing para no.1.*
- d) To represent me to any court/Govt. Office etc. in respect of my claim in the property described in para no.1.*
- e) To file/present any appeal/revision/write petition in any court or to defend me in any suit appeal/revision writ petition and any other legal proceeding.*
- f) To file written statement, affidavit in any court cases and also files counter claim, cross objection and other monetary claim to any suit appeal, revision, etc.”*

13. Mr. Raye, in turn, appointed Defendant No.5 as the sub-agent. Defendant No.5 appears to have played mischief by joining hands with the original defendants. He filed a suit, Special Suit, No. 147 of 2001, for recovery of sum of Rs.1.20 crores only as against a sum of little over Rs. 3.80 crores which was said to have been paid by the plaintiff – company towards the loan raised by the defendants, alongwith interest thereon. In the said

suit, the defendants appeared and admitted the suit claim. The parties to the suit requested the Court to pass the judgment on admission. Accordingly, a decree on admission of the suit claim came to be passed within fifteen days of filing of the suit. Immediately i.e. on the day on which the suit was decreed on admission, Defendant No.5 executed a document (deed of redemption) releasing the suit property from the encumbrance in the nature of mortgage. After having realised the same, the plaintiff company filed the suit, which has been dismissed and against which the appeal wherein this application has been preferred, came to be filed.

14. It is said that behind every fortune there is a crime. Be that as it may. The facts and circumstances referred to hereinabove prima facie lead us to infer the plaintiff – company to have a strong prima facie case. It is the sub-agent, who duped it by joining hands with the defendants. The same is evident from the fact of filing a special suit, no. 147 of 2001, on 05th October, 2021 and obtaining a decree therein on 15th day i.e. on 20th October, 2021 with releasing the mortgaged properties. The sub-agent acted beyond the authority of himself and the one conferred on Shri. Raye, who appointed him.

15. Necessarily, the balance of convenience tilts in favour of the plaintiff – company. If these respondents are permitted to create further third party interest in respect of the suit properties, it would be the plaintiff -

company which will suffer irreparably. Whatever the grounds as regards maintainability of the subsequent suit, non-joinder of necessary parties, etc. would be decided on its own merits, while appeal would be heard finally.

16. For all the aforesaid reasons, civil application is allowed in terms of prayer clause (b)-1.

SSD (NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)