

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 737 OF 2026
WITH
INTERIM APPLICATION NO. 5665 OF 2026

1. Dkp Designers and Creators Private Limited
501, Kailas Plaza, V.B.Lane, Ghatkopar East,
Mumbai 400 075
2. Kishor Danabhai Patel,
Director of DKP Designers and Creators Pvt. Ltd.
501, Kailas Plaza, V.B.Lane, Ghatkopar East,
Mumbai 400 075
3. Anjali Kishor Patel,
Director of DKP Designers and Creators Pvt. Ltd.
501, Kailas Plaza, V.B.Lane, Ghatkopar East,
Mumbai 400 075
4. Manoj Kanjibhai Patel,
Director of DKP Designers and Creators Pvt. Ltd.
501, Kailas Plaza, V.B.Lane, Ghatkopar East,
Mumbai 400 075

...Appellant(s)

Versus

1. Majestic Construction and Developers,
A sole Proprietary Concern.
2. Lalit Satia,
Sole Proprietor of Respondent No. 1,
Both having their address at 401,
Atharva Building, V.B. Phadke Marg,
Mulund (E) Mumbai 400 081
3. Shreeshay Engineers Ltd.,
501, Kailas Plaza, V.B.Lane, Ghatkopar East,
Mumbai 400 075
4. Kishor Danabhai Patel,
Director and Authorized Representative
Shreeshay Engineers Ltd.
501, Kailas Plaza, V.B.Lane, Ghatkopar East,
Mumbai 400 075
5. Bhogin Danabhai Patel,
Director and Authorized Representative
Shreeshay Engineers Ltd.
501, Kailas Plaza, V.B.Lane, Ghatkopar East,

- Mumbai 400 075
6. Nisha Bhogin Patel,
Director and Authorized Representative
Shreeshay Engineers Ltd.
501, Kailas Plaza, V.B.Lane, Ghatkopar East,
Mumbai 400 075
 7. Harish Vrajlal Adhia,
Director and Authorized Representative
Shreeshay Engineers Ltd.
501, Kailas Plaza, V.B.Lane, Ghatkopar East,
Mumbai 400 075
 8. Jayantilal Jagshi Gala,
Director and Authorized Representative
Shreeshay Engineers Ltd.
501, Kailas Plaza, V.B.Lane, Ghatkopar East,
Mumbai 400 075

...Respondent(s)

-
1. Mr. Sachin Punde a/w Mr. Suraj Jadhav, Mr. Atharva Unde and Mr. Tejas Chitale, Advocates for Appellant.
 2. Senior Advocate Mr. Surel Shah a/w Mr. Mutahhar Khan a/w Mr. Dharmesh Joshi a/w Mr. Shubham Shinde a/w Ms. Akshita Vakharia a/w Ms. Supriya H., Mr. Gulnar Khan a/w Ms. Rutuja Mohite, Advocates for Respondent Nos. 1 and 2.
-

CORAM: AARTI SATHE, J.

DATE : 05th OCTOBER, 2026

P.C.

1. This present Appeal from Order has been filed under Order XLIII Rule 1 (r) read with Section 104 of the Code of Civil Procedure, 1908 ("CPC") impugning the order dated 15th July 2026 (hereinafter referred to as the "impugned order") passed in Notice of Motion No. 5021 of 2025 in S.C. Suit No. 4269 of 2024 by the learned City Civil Court Greater Bombay at Bombay (hereinafter referred to as the "Trial Court"), whereby the learned Trial Court partly allowed the aforesaid

notice of motion and thereby restrained the Appellants (Original Defendant No. 1 and Defendant Nos. 3 to 5) from alienating or creating any third-party interest in and around 1400 sq. ft. carpet area proportionate to the value of construction made by the Respondent Nos. 1 and 2 (Original Plaintiffs) known as “Kailas” on Final Plot No. 23 (part) of TPS III, CTS No. 5955 (part) of Village Ghatkopar Kirol situated, lying and being at Ghatkopar, Mumbai (hereinafter referred to as the “suit property”)

2. Briefly the facts are as follows: -

i. In 2017, the Appellant No. 1 approached the Respondent Nos. 1 and 2 through their directors and employees stating that they were in the process of constructing proposed building comprising of 2 basements plus ground plus 5 parking floor with E Deck plus 8 residential floors known as Kailas Nagar situated at M.G. Road, Ghatkopar (East), Mumbai-400077 (hereinafter referred to as the “project”). It is the contention of Respondent Nos. 1 and 2 that initially the Project on the suit property was to be completed under supervision of Project Management Consultant (PMC).

ii. It is Respondent Nos. 1 and 2’s contention that the Appellants requested them to give a quotation for the work to be carried out in the project, and accordingly Respondent Nos. 1 and 2 provided the quotation dated 10th April 2017. Subsequent to the aforesaid quotation, there were talks and negotiations between the parties, and a work order was given by Respondent Nos. 1 and 2 in favour of the Appellants by way of work order dated 25th April 2017.

iii. It is Respondent Nos. 1 and 2’s contention that during the monsoon of

2017, they commenced work of excavation on the basis of oral instructions provided by the Appellants. However, after the commencement of the work of the underground tank with raft slab, the Appellants unilaterally changed the drawing from raft slab to inverted beams and footings with change of time period. Further, the water-proofing work that was earlier given to the Respondent Nos. 1 and 2 was also cancelled. It is also the Respondent Nos. 1 and 2's contention that the Appellants did not provide the relevant material on time, and hence Respondent Nos. 1 and 2 had to undertake a lot of additional work, also because of change in plan by the Appellants. Respondent Nos. 1 and 2 submitted that they tried to complete the work of plinth by working overtime in the months of July-August 2017.

iv. It is Respondent Nos. 1 and 2's contention that in and around November 2019, the Appellants failed to provide necessary material as per the work order dated 25th April 2017 to Respondent Nos. 1 and 2 and also tried to stop payments to them. After various negotiations, a joint meeting was called in the last week of January, wherein all the Appellants were present, and they represented that they were undergoing some financial problems and were looking at getting financial assistance to make the aforesaid payments. It is Respondent Nos. 1 and 2's contention that they were assured that if the Appellants were unable to pay the balance due, they would allot flats in the sale building in the name of the Respondent Nos, 1 and 2 to safeguard their running cost.

v. A commitment was made by the Appellants to the Respondent Nos. 1 and 2 to release the payments on time, and the same was recorded in the letter by the

Appellants dated 6th September 2019.

vi. On 24th January 2020 Respondent Nos. 1 and 2 by an email of even date requested the Appellants to release payments which were outstanding. The Appellants had thereafter on the same date responded to the aforesaid email pointing out that Respondent Nos. 1 and 2 had raised demand of payment without paying attention to their sub-standard quality of workmanship, and that the Appellants had incurred losses due to Respondent Nos. 1 and 2's lapses. It is the Appellants' contention that they had requested Respondent Nos. 1 and 2 to rectify the mistakes made by them and finish the work within the stipulated timeline.

vii. It is the Appellants' contention that Respondent Nos. 1 and 2 by an email dated 29th January 2020 withdrew all allegations against the Appellants which had been made through various letters and emails and stated that they had created a detailed revised schedule for carrying out construction and completing the same within the time stipulated.

viii. It is the Appellants' contention Respondent Nos. 1 and 2 addressed a letter dated 19th March 2020, reiterating the contents of the letter dated 29th January 2020 and admitting delay in carrying out the work as per the revised schedule.

ix. It is the Appellant's contention that between 24th March 2020 and 14th April 2020 they paid a sum of Rs. 4,50,000/- to the labourers of Respondent Nos. 1 and 2, and that they had also paid their liability towards Good and Services Tax (GST) and filed the necessary returns.

x. On 28th May 2020, the Appellants by an email of even date addressed to

Respondent Nos. 1 and 2 terminated the work order dated 25th April 2017, citing the ground of delays by Respondent Nos. 1 and 2 in carrying out the work stipulated.

x. On 21st July 2020 the Appellants received the final bill dated 10th July 2020 pertaining to the work order dated 25th April 2017 from Respondent Nos. 1 and 2. The Appellants by an email dated 1st August 2020 denied the contents of the bill dated 10th July 2020.

xi. It is Respondent Nos. 1 and 2's contention that in July 2020, the Respondents appointed some other work contractors to carry out the pending work, and upon learning the same, the Respondent Nos. 1 and 2 immediately sent an email dated 28th July 2020 asking the other work contractors to stop work as the same would amount to criminal misappropriation of the Respondent Nos. 1 and 2's property. It is also Respondent Nos. 1 and 2's contention that more than 12 floors had been completed, and that more than 95% of the building work also stood completed. It was inspite of this that the Appellants had inducted third party workers to complete the remaining work.

xii. At around the same time in July 2020, the Respondent Nos. 1 and 2 filed S.C. Suit (St.) No. 4101 of 2020 before the learned Trial Court against the Appellants and Respondent Nos. 3 to 8 (Defendant Nos. 6 to 11 in the original suit) simpliciter for injunction, alleging that the Appellants had illegally terminated works order, and that they were using the movable items without authority. Respondent Nos. 1 and 2 further filed Notice of Motion No. 1409 of 2020 in the

aforesaid suit.

xiii. During the pendency of Notice of Motion No. 1409 of 2020, Respondent Nos. 1 and 2 also filed Notice of Motion No. 1329 of 2020 in S.C. Suit (St.) No. 4101 of 2020, for the appointment of a Court Receiver to take possession of the machinery lying at the suit property, and the appointment of a Court Commissioner to prepare an inventory of the machinery. The learned Trial Court by order dated 4th September 2020 had appointed a Court Commissioner and directed the parties therein to maintain status quo with respect to the machinery at the suit property.

xiv. Thereafter, on 12th November 2020 Notice of Motion Nos. 1409 of 2020 and 1329 of 2020 came up for final hearing, wherein the learned Trial Court dismissed both Notices of Motions. Respondent Nos. 1 and 2 thereafter filed an application under Exhibit-6 seeking leave under Order II Rule 2 to file a substantive suit. The learned Trial Court by order dated 15th December 2020 thereafter granted leave to Respondent Nos. 1 and 2 under Order II Rule 2.

xv. Sometime in 2021, the Respondent Nos. 1 and 2 filed the present Suit (L) No. 1474 of 2021 against the Appellants and Respondent Nos. 3 to 8 before this Court for a recovery of an amount of Rs. 3,19,79,334.58/- towards unpaid bill, return of movable property which is valued at Rs. 1,64,90,350/- and certain other reliefs relating to the work order dated 25th April 2017.

xvi. Respondent Nos. 1 and 2 further filed an interim application praying for the appointment of a suitable person as a Commissioner to visit the suit property and

conduct necessary investigation to ascertain the area constructed by Respondent Nos. 1 and 2, and this Court by order dated 4th January 2022 appointed M/s Shetgiri and Associates as the Court Commissioner. It is the Appellants' contention that in the aforesaid order this Court had clarified that the acceptance of the report tendered by the appointed Court Commissioner would only happen after hearing the Appellants and would be subject to trial. This Court had thereafter on 16th March 2022 taken on record the report prepared by the aforesaid Court Commissioner.

xvii. On 18th July 2022, the Appellants affirmed an affidavit-in-reply objecting to the report of the Court Commissioner submitted before this Court and further pointing out that an amount of Rs. 66,15,354/- had been paid by the Appellants on behalf of Respondent Nos. 1 and 2 towards GST liability.

xviii. On 24th August 2022, a Public Announcement of Open Offer was issued to Mr. Jignesh Thobhani for acquisition of Respondent No. 3 due to the execution of a share-purchase on the same date, by which Mr. Jignesh Thobhani acquired 72.73% equity stake in Respondent No. 3.

xix. Form No. MGT-7, which was filed by Respondent No. 3 pertaining to Financial Year (FY) 2022-2023 further showed that the initial directors of Respondent No. 3, i.e., Respondent No. 4 to 8 had resigned. It is Respondent Nos. 1 and 2's contention that the aforesaid information was suppressed by the Appellants from the learned Trial Court and this Court.

xix. Suit (L) No. 1474 of 2021 filed before this Court was later transferred to the

Trial Court after the rise in pecuniary jurisdiction. Respondent Nos. 1 and 2 had also filed an interim application in Notice of Motion No. 5021 of 2025 for multiple reliefs, however, Respondent Nos. 1 and 2 restricted the prayers for interim relief in the form of a temporary injunction restraining the Appellants from alienating or creating any third party interest in the units and flats constructed on the suit property under the work order dated 25th April 2017 commensurate with the value of construction executed by the Respondent Nos. 1 and 2.

xx. The Appellants filed their affidavits-in-reply in Suit (L) No. 1474 of 2021 and Notice of Motion No. 5021 of 2025, wherein they denied the contents of the said suit.

xxi. It is Respondent Nos. 1 and 2's contention that an Agreement for Sale was executed on 10th July 2025 between Appellant No. 1 and Appellant No. 2 for Commercial Shop No. G1 and Shop No. F1 for a total consideration of Rs. 13,50,00,000/-. It is further Respondent Nos. 1 and 2's contention that on 5th September 2025 another Agreement for Sale was executed between Appellant No. 1 and Ms. Punita Haresh Mehta and Mrs. Trishla Amit Shah for a consideration of Rs. 7,00,00,000/-

xxi. The learned Trial Court by the impugned order dated 15th July, 2026 granted injunction in favour of Respondent Nos. 1 and 2, restraining the Appellants from alienating or creating third party interest in the the suit property. It is being aggrieved by the aforesaid impugned order that the Appellants have preferred this present Appeal from Order.

3. Learned counsel Mr. Sachin Punde, along with Mr. Suraj Jadhav, Mr. Atharva Undem and Mr. Tejas Chitale appeared on behalf of the Appellants. Learned Senior Counsel Mr. Surel Shah, along with Mr. Mutahhar Khan, Mr. Dharmesh Joshi, Mr. Shubham Shinde, Ms. Akshita Vakharia, Ms. Supriya H., Mr. Gulnar Khan, and Ms. Rutuja Mohite, appeared on behalf of Respondent Nos. 1 and 2.

4. Learned counsel Mr. Sachin Punde on behalf of the Appellants vehemently submitted that the impugned order has been passed in contravention of the provisions of the CPC, in as much as the suit has been filed by the Appellants for recovery of an amount of Rs. 3,19,79,334.58/- for unpaid bills towards work contract, for return of movable property which was valued at Rs. 1,64,90,350/-, and other reliefs relating to work order dated 25th April 2017, and once that being the case, when the suit itself does not relate to an immovable property, any injunction thereon could not be granted mechanically in a routine manner.

5. He further submitted that the Appellant No. 1 was the owner of the suit property, and therefore, the owner of the property could not be enjoined from dealing with the property until and unless Respondent Nos, 1 and 2 were in a position to claim and establish any right, title, or interest in the immovable property which was the subject-matter of dispute. He further submitted that neither the plaint, nor the motion filed by Respondent Nos. 1 and 2 before the learned Trial Court had given any description in so far as the suit property was concerned. He submitted that the learned Trial Court failed to make a distinction between the suit for an immovable property and a suit for a money claim and erred

in granting the orders restraining the Appellants.

6. He submitted that the learned Trial Court erred in not considering that it was the specific case of the Appellants and Respondent Nos. 3 to 8 that the work carried out by Respondent Nos. 1 and 2 was of a sub-standard nature, and that there was gross delay on the part of Respondent. Nos. 1 and 2 while executing the aforesaid project, and in fact, Respondent Nos. 1 and 2 had midway abandoned the said project.

7. He further submitted that the learned Trial Court erred in relying upon the Court Commissioner's report holding that Respondent Nos 1 and 2 had made out a *prima facie* case. He further submitted that the Appellants had raised serious objections to the Court Commissioner's report, and therefore the same could not be considered for the purpose of granting interim reliefs in favour of the Respondent Nos. 1 and 2. He submitted that the learned Trial Court had failed to take into consideration the records of the case such as e-mails, correspondences, GST payments, payment certification by PMC, etc., which supported the submissions of the Appellants and clearly reflected on the conduct of the Respondent Nos 1 and 2 and their dishonest claims for the unpaid bills.

8. He also sought to bring to the attention of this Court that the provisions of Order XXXVIII Rule 5 of the CPC regarding attachment before judgment have not been complied with, and went on to submit that the impugned order, which was passed under Order XXXIX Rules 1 and 2 of the CPC, in fact, tried to import the provisions of Order XXXVIII Rule 5. He submitted that nowhere in the plaint

or in the interim applications/notices of motion in S.C. Suit No. 4269 of 2024 is it a case pleaded by Respondent Nos 1 and 2 that the Appellants will defeat the realization of the decree that may ultimately be passed in their favour. He further submitted that no case has been made out to show that the Appellants are attempting to disposed of or remove from the jurisdiction of the Court their movables. He submitted that it is a well settled principle of law that merely having a just or valid claim or a *prima facie* case will not entitle the Respondent to order an attachment before judgment, and Respondent Nos. 1 and 2 would have to establish that the Appellants are attempting to remove or dispose of their assets with the intention of defeating the decree that may be passed eventually. He submitted that the power under Order XXXVIII Rule 5 is a drastic and extraordinary power, and such powers should not be exercised mechanically or merely for asking, and should be used sparingly and strictly in accordance with the rule and the purpose of the Order XXXVIII Rule 5, which is not to convert an unsecured debt into a secured debt. He submitted that any attempt by Respondent Nos. 1 and 2 to utilize the provisions of Order XXXVIII Rule 5 is a leverage for coercing the Appellants to settle the suit claim and should be discouraged. He sought to place reliance on the decision of Raman Tech. & Process Engg. Co. and Anr. V. Solanki Traders¹ in support of the aforesaid proposition.

9. He therefore submitted that the learned Trial Court had failed to assign any reasons restraining the Appellants from alienating or creating third-party interest in around 1400 sq. ft. carpet area, and further that the impugned order did not show

1 (2008) 2 SCC 302

any assessment, basis, or guess work for consideration about the calculation of the area of 1400 sq. ft. carpet area. He submitted that the suit filed was not a summary suit but was a seriously disputed money claim of Respondent Nos. 1 and 2. He therefore submitted that the Appeal from Order in the facts of the present case be allowed and the impugned order dated 15th July 2026 be set aside.

10. *Per contra*, learned counsel on behalf of Respondent Nos. 1 and 2 submitted that the learned Trial Court has passed a reasoned order and requires no interference in the facts of the present case. He submitted that the injunction which the learned Trial Court had granted in favour of Respondent Nos. 1 and 2 was primarily to secure their claim on basis of the agreed amounts and the admitted construction which had been carried out. He further submitted that the Appellants had not come before this Court or before the learned Trial Court with clean hands, in as much as they had not placed on record the change in constitution of Appellant No. 1, and also the fact that Respondent No. 3 has been acquired by one Mr. Rajesh Thobani. He also submitted that learned counsel on behalf of the Appellant has not brought to the attention of this Court and the learned Trial Court that third-party rights have been sought to be created by the Appellants in respect of the suit property, and therefore, the protection granted by the learned Trial Court is on the basis of the aforesaid apprehension.

11. He further submitted that even though the relief as granted by the learned Trial Court could be construed as a relief which had been granted in Order XXXVIII Rule V, yet the same was rightly applied by the learned Trial Court, considering the conduct of the Appellants in creating third-party rights in the suit

property, which would amount to defeating the decree which may ultimately be passed. He, therefore, submitted that keeping aside an area of 1400 sq. ft., which was sufficient to satisfy the monetary claim of Respondent Nos. 1 and 2 as per the rate fixed in the work order dated 25th April 2017 between the Appellants and Respondent Nos. 1 and 2, would not in any manner prejudice the rights of the Appellants, and hence, no interference could be made in the order of the learned Trial Court. He sought to place reliance on the affidavit-in-reply filed by Respondent No. 2 to bring on the record the facts which had led to the Respondents seeking injunction/interim protection against the Appellant. The relevant paragraphs of the aforesaid affidavit are reproduced below:-

7. I state that through a letter dated 6th December, 2017, the Appellant Company informed us that all the work at the Suit Property was assigned to the Respondent No. 3 Shreeshay Engineers Ltd. due to their internal understanding. I state that I was aware that the Directors of the Appellant Company and the Directors of the Respondent No. 3 Company were the same and were sister concerns. Annexed and marked herewith is the copy of the said letter dated 6th December, 2017 as Exhibit "A" and the copy of the name plate from the office of the companies as Exhibit "B".

8. I state that I was further instructed to raise the invoices in the name of the Respondent No. 3 Company. That during this time, multiple invoices were raised. However, all these invoices were either underpaid or remained unpaid or withheld. Subsequently, vide an email dated 28th May, 2020, the Appellant Company terminated the Work contract dated 25th April, 2017 on account of not carrying out work. Annexed and marked herewith is the copy of the email dated 28th May, 2020 as Exhibit "C".

9. I state that we had preferred the captioned Suit before the Hon'ble Bombay High Court which was later transferred to the Ld. City Civil Court, Greater Bombay owing to the change in the pecuniary jurisdiction.

10. I state that we had preferred the captioned Notice of Motion for ad-interim reliefs. That while the matter was sub-judice before the Hon'ble Court, we learnt that the Appellant Company had been conducting sale of the units of the Suit Property. That in the captioned Suit, we had sought specific directions against the Appellant Company, Respondent No. 3 Company and/their Directors from alienating, encumbering, or parting with the possession or in any manner dealing with the unencumbered units and flats in the Suit Property. I state that we had filed an Additional Affidavit along with 5 such Sale Agreements and a Compilation of Documents seeking urgent directions in terms of Prayer a2 of the Notice of Motion which is reproduced herewith for the sake of brevity –

“a2. Pending the hearing and final disposal of the Suit, this Hon’ble Court may be pleased to pass an order and direct the Defendants, their servants, agents, officers, person and / or persons claiming through or under them from alienating, encumbering, parting with possession or in any manner dealing with unencumbered units and flats in the buildings constructed /under construction on the Suit Property as Kailash Nagar, situated at MG Road, Ghatkopar East, Mumbai-400 077 or any other assets or properties equivalent to the value of the Plaintiff’s claim i.e. Rs, 4,84,69,684.58/-“

The said Additional Affidavit and the Compilation of Documents is not the part of the captioned Appeal from Order and thus, marked and annexed herewith is the copy of the Additional Affidavit filed on behalf of the Org. Plaintiffs along with its exhibits and Compilation of Documents as Exhibit “D Colly”.

11. I state that the Ld. Judge was pleased to allow the Notice of Motion vide order dated 15th July, 2026 and restrain the Appellant Company from alienating or creating any third-party interest in around 1400 sq. ft. carpet area in the Suit Project. I state that at the time of the hearing of this Notice of Motion, there was only | Advocate appearing for both the Appellant Company and Respondent No. 3 Company and its Directors.

12. I state that when the Appellant Company herein preferred this Appeal from Order before this Hon’ble Court, we observed that the Respondent No. 3 Company has been impleaded as a Respondent. We then carried out search of the Records of the Company from the website of the Ministry of Corporate Affairs and learnt that the Respondent No. 3 Company has been acquired by one Mr. Jignesh Thobhani.

13. I state that till the Financial Year 2021-22, the Respondent No. 3 Company was under the holding of the Appellant Nos. 2 to 4 and the extended Patel Promoter Group. Annexed and marked herewith is the copy of the Form No. MGT-7 for Financial Year 2019-2020 as Exhibit “E”.

14. I state that on 24th August, 2022, an Open Offer was issued to Mr. Jignesh Thobhani for acquisition of the Respondent No. 3 Company and subsequently, a Share Purchase Agreement dated 24th August, 2022 was executed and a total of 72.73% of the total equity / share capital (96,03,396 shares) were acquired for a total consideration of Rs. 4,033.43 Lakhs. Annexed and marked herewith is the copy of the Public Announcement dated 24th August, 2022 as Exhibit “F”.

15. I state that in the Form No. MGT-7 for Financial Year 2022-2023, the initial Directors of the Respondent No. 3 Company are shown “Resigned”. Annexed and marked herewith is the copy of the Form No. MGT-7 for Financial Year 2022-2023 as Exhibit “G”.

16. I state that from the perusal of the Form No. MGT-7 for the Financial Year 2024-2025, it is evident that there are change of hands with regards to the Respondent No. 3 Company as the new management led by Mr. Jignesh Thobhani has taken over the control and management of the Respondent No K.S 3 Company. That the said Form does not bare any details of erstwhile Patel Directors in the management details. Annexed and markedis2136 the copy of the Form No. MGT-7 for Financial Year 2024-2025 as Exhibit “H”.

17. I state that the acquisition of the Respondent No. 3 Company was in fact suppressed before the Ld. City Civil Court where the Suit has been sub-judice. I reiterate that even during the hearing of the Notice of Motion, there was only 1 advocate on record who appeared for both the Appellant Company and the Respondent No. 3 Company and now the same company is impleaded as a

Respondent in this Appeal from Order.

(emphasis supplied)

12. He also sought to place reliance on the decisions of Ambalal Sarabhai Enterprises Limited Vs. K.S. Infraspace LLP and Anr.² to contend that the conduct of parties is an important consideration which must be borne in mind in so far as the granting of injunction is concerned. He also sought to place reliance on the decision of Ramakant Ambalal Choksi Vs. Harish Ambalal Choksi³ to advance his contention regarding the powers of the High Court in its appellate jurisdiction under Order XLIII Rule 1 of the CPC. He therefore submitted that the learned Trial Court had rightly passed the impugned order and that no interference was required in the facts of the present case.

ANALYSIS & FINDINGS

13. I have heard learned counsel on behalf of the parties and perused the papers and proceedings and the impugned order passed by the learned Trial Court. At the very outset, it has to be borne in mind that in the present case, the dispute is regarding the payment of Rs. 3,19,79,334.58/- along with interest which is payable by the Appellants to Respondent Nos. 1 and 2 pursuant to the work order dated 25th April 2017 between the Appellants and Respondent Nos. 1 and 2 in respect of the work carried out by Respondent Nos. 1 and 2 on the suit property, and movable property valued at Rs. 1,64,90,350/-. The prayers in the plaint filed by the Respondent Nos. 1 and 2 also seek the aforesaid relief, and further seek various

2. (2020) 5 SCC 410

3. (2024) 11 SCC 351

other reliefs, including injuncting the Appellants from alienating, encumbering, or parting with, or in any manner interfering with all the materials, equipment's, goods, etc. which would be lying on the suit property. The plaint also prays for directing the Appellants to furnish security of an amount of Rs. 4,84,69,684.58/- pending the hearing and final disposal of the suit, and further to injunct the Appellants or their agents to carry out any work, construction, or otherwise at the suit property. It is, therefore, clear that though the aforesaid claim of the Respondent Nos. 1 and 2 is primarily monetary in nature, yet considering that disputes in respect of the work order dated 25th April 2017 have arisen between the Appellants and the Respondents, the protection to secure the claim of the Respondents has been rightly granted by the learned Trial Court.

14. I am of the view that the learned Trial Court has proceeded on the basis of the status of the construction carried out by Respondent Nos. 1 and 2, which is up to 12th floor, and the same remains an undisputed position by both the Appellants and the Respondent Nos. 1 and 2. The status of the construction has further been corroborated by the report of the Court Commissioner who was appointed by order of this Court dated 4th January 2022. The Court Commissioner inspected the suit property and submitted a detailed report and came to a conclusion that the Respondents had constructed the suit property up to 12th floor. Though the Appellants have objected to the aforesaid report of the Court Commissioner, however, the learned Trial Court has rightly held that the same could be tested at the time of the trial, and once it was an undisputed position that the construction at the suit property was completed up to 12th floor by Respondent Nos. 1 and 2,

then the relief as granted by the learned Trial Court by placing reliance on the Court Commissioner's report cannot be disputed by the Appellants.

15. It is further my view that even under an application made under Order XXXIX Rules 1 and 2 of the CPC, the relief as sought for by Respondent Nos. 1 and 2 could have been granted. This is in view of a clear reading of the provisions of Order XXXIX Rules 1 and 2 of the CPC, and it would be beneficial to reproduce the provisions of the same, which read as follows:-

1. Cases in which temporary injunction may be granted.—Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to[defrauding] his creditors,

(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property [or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.

2. Injunction to restrain repetition or continuance of breach.—(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained, of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(emphasis supplied)

On a clear reading of Order XXXIX Rules 1 and 2, particularly clause (b) of Rule 1, it is clear that if a Defendant threatens or intends to remove or dispose of his property with a view to defrauding his creditors, then in that event also, the Court may by an order grant a temporary injunction restraining such act, or make such

other order for the purpose of preventing the wasting, damaging, alienating, sale, removal, or dispossession of the property or dispossession of the Plaintiff, or otherwise causing injury to the Plaintiff in relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further orders. The relief of injuncting the Appellants from alienating or creating third-party interest in and around 1400 sq. ft. carpet area proportionate to the value of construction made by the Respondent Nos. 1 and 2 on the suit property was a relief given by the learned Trial Court in accordance with the powers conferred upon it under Order XXXIX Rule 1(b) of CPC, in as much as the Appellants owed Rs. 3,19,79,334.58/- to Respondent Nos. 1 and 2, and further Respondent Nos. 1 and 2 apprehended that the Appellants had created third-party rights in the suit property and the project. The argument of learned counsel on behalf of the Appellant, therefore, that the provisions of Order XXXVIII Rule V have in fact have been invoked under the guise of Order XXXIX Rule 1 and 2 would be an argument which requires to be dismissed at its very threshold.

16. I am also of the view that the learned Trial Court has rightly come to the conclusion that in so far as the objection of the Appellant regarding the quality of work carried out by Respondent Nos. 1 and 2, the same was raised at a rather belated stage and only upon completion of the 12th floor of the building on the suit property. The learned Trial Court has therefore come to the conclusion on a *prima facie* basis that the said plea of the Appellant was a mere afterthought, with the sole intention of unlawfully and unjustifiably defeating Respondent Nos. 1 and 2's rights and claims. I am also of the view that the learned Trial court on examining

the Agreements for Sale placed on record by Respondent Nos. 1 and 2 has come to a *prima facie* view that the Appellants have commenced with the sale of the flats in the building on the suit property to prospective purchasers, and considering that the aforesaid sales have been carried out, there was a high possibility that to defeat the rights of Respondent Nos. 1 and 2, the Appellants would sell all the flats, which would cause prejudice to Respondent Nos. 1 and 2's rights. I am also of the view that even otherwise, the learned Trial Court has only enjoined the Appellant from creating third-party interest in or alienating an area of around 1400 sq. ft. carpet area, which is proportionate to the claim made by Respondent Nos. 1 and 2 in the suit in respect of the construction carried out by them and their monetary claim.

17. I am therefore of the view that by enjoining the Appellants from disposing off the aforesaid area to secure the money claim of Respondent Nos. 1 and 2 in the suit which is pending adjudication before the Trial Court, no serious prejudice would be caused to the Appellants. I am further of the view that considering that the learned Trial Court has rightly exercised its jurisdiction under Order XXXIX Rule 1(b) in protecting the rights of Respondent Nos. 1 and 2, who are creditors of the Appellants, the reliance by learned counsel on behalf of the Appellants on the decision of Raman Tech & Process Engg. Co. & Anr. Vs. Solanki Traders (supra) would not be applicable to the facts of the present case. In the aforesaid case, an application under the specific provisions of Order XXXVIII Rule V was made by the Plaintiff therein, praying for a direction to the Defendant to furnish security for the said claim, and if they failed to do so, for an attachment before the judgment. It

was in those circumstances that the Trial Court dismissed the aforesaid application and noted that though the Plaintiff therein had alleged that two postdated cheques given by the Defendants towards payment of the bill amount were dishonoured, it had neither disclosed the particulars of the said cheques, nor the dates on which they were dishonoured, and by merely making a bald statement that Rs. 99,200/- was due from the Defendants was not sufficient to make out a *prima facie* case. Against this order, the Plaintiff therein moved the Andhra Pradesh High Court in appeal, and the High Court in its revision jurisdiction allowed the relief to the Plaintiffs under Order XXXVIII Rule V. The matter was thereafter carried to the Supreme Court by the Defendants therein, and the Supreme Court had held that in the absence of the Plaintiff showing *prima facie* that his claim was bonafide and valid, and also without showing that the Defendants were about to remove or dispose of a whole or part of his property with the intention of obstructing or delaying the execution of any decree that may be passed against him, the provisions of Order XXXVIII Rule 5 of the CPC could not be invoked, as the same are drastic and extraordinary in nature and need to be exercised sparingly. In the facts of the present case, no such application has been made by the Respondent Nos. 1 and 2 before the learned Trial Court. In fact, the impugned order is an order passed under Order XXXIX Rules 1 and 2 of the CPC, where the injunction in respect of alienating or creating third party rights in respect of an area of around 1400 sq. ft. in the suit property has been rightly granted by the Trial court. The Appellants, therefore, to my mind cannot seek any leverage on the basis of non-compliance of the conditions of Order XXXVIII Rule 5 to contend that the Trial Court had erred

in passing the impugned order, in as much as no such application was made by the Respondent Nos. 1 and 2 before the learned Trial Court seeking such a relief.

18. I am, therefore, of the view that the learned Trial Court has on an appreciation of the evidence and facts, and also on the basis of the *prima facie* case made out by Respondent Nos. 1 and 2, and the fact that the Appellants had entered into agreements with third parties to sell the flats had rightly secured the monetary claim of Respondent Nos. 1 and 2 by granting the aforesaid injunction. I am, therefore, in agreement with the reliance placed by learned counsel on behalf of the Appellant on the case of Ambalal Sarabhai Enterprises Limited Vs. K.S. Infraspace LLP and Anr. (supra) to contend that conduct of the parties has to be taken into consideration while granting interlocutory reliefs.

19. In view of the aforesaid, I am of the view that no interference is called for in the order of the learned Trial Court, and the same is a well-reasoned order which does not require interference at this stage. The learned Trial Court has rightly followed the parameters as mandated under Order XXXIX Rules 1 and 2 of the CPC to hold that the Appellant did not make out a *prima facie* case, and that the balance of convenience squarely lay in favour of Respondent Nos. 1 and 2, in as much as if the Appellants were permitted to alienate or create third-party rights in respect of all the flats or units in the project during the pendency of the suit, Respondent Nos. 1 and 2's ability to secure and realize the amount would be prejudiced, and such prejudice could not be removed at a later stage and would therefore constitute irreparable injuries. I am therefore of the view that the view taken by the learned Trial Court was a plausible view, and the same cannot be

substituted by this Court in its appellate jurisdiction. I am further in agreement with the submission made by learned counsel on behalf of the Respondent Nos. 1 and 2 that the present Appeal from Order deserves to be dismissed, and am of the view that the reliance of learned Counsel on behalf of Respondent Nos. 1 and 2 on the case of Ramakant Ambalal Chokshi Vs Harish Ambalal Chokshi & Others (supra) is apposite to the facts of the present case, in as much as it upholds the view as laid down in Wander Ltd. v. Antox India (P) Ltd.⁴ The relevant paragraphs of the decision rendered in Ramakant Ambalal Chokshi Vs Harish Ambalal Chokshi & Others (supra) are reproduced below –

16.4. Injunction was granted by the trial court by way of a well-reasoned order after taking into consideration all the detailed facts and contentions of both the parties. The appellate court should remain slow in substituting its own discretion with the one exercised by the court of first instance unless the exercise of discretion by the first court was shown to be malicious, capricious, perverse or having been exercised in ignorance of the settled principles of law regulating the grant or refusal of interlocutory injunctions.

...

21. With regard to (a), this Court held thus: (Wander case-, SCC p. 733, para 14)

"14.... In such appeals, the appellate court will not interfere with the exercise of discretion of the court of the first instance and substitute its own discretion, except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely, or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. ...The appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below.... If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

22. This Court, while arriving at the above findings, relied on its earlier judgment in Printers (Mysore) (P) Ltd. v. Pothan Joseph, wherein it was held thus: (Printers case, SCC OnLine SC para 9)

"9.... as has been observed by Viscount Simon LC in Charles Osenton & Co. v. Johnston-, the law as to reversal by a court of appeal of an order made by a Judge below in the exercise of his/her discretion is well established, and any difficulty that arises is due only to the application of well-settled principles in an individual case."

...

24. In Evans case, Lord Wright made it clear that while adjudicating upon the discretion exercised by the trial court, the appellate court is obliged to consider the case put forward by the appellant in favour of its argument that the trial court exercised its discretion arbitrarily or incorrectly in the circumstances.

25. What flows from a plain reading of the decisions in Evans and Charles Osenton is that an appellate court, even while deciding an appeal against a discretionary order granting an interim injunction, has to:

(a) Examine whether the discretion has been properly exercised i.e. examine whether the discretion exercised is not arbitrary, capricious or contrary to the principles of law; and

(b) In addition to the above, an appellate court may in a given case have to adjudicate on facts even in such discretionary orders.

26. The principles of law explained by this Court in Wander have been reiterated in a number of subsequent decisions of this Court. However, over a period of time the test laid down by this Court as regards the scope of interference has been made more stringent. The emphasis is now more on perversity rather than a mere error of fact or law in the order granting injunction pending the final adjudication of the suit.

27. In Neon Laboratories Ltd. v. Medical Technologies Ltd., this Court held that the appellate court should not flimsily, whimsically or lightly interfere in the exercise of discretion by a subordinate court unless such exercise is palpably perverse. Perversity can pertain to the understanding of law or the appreciation of pleadings or evidence. In other words, the Court took the view that to interfere against an order granting or declining to grant a temporary injunction, perversity has to be demonstrated in the finding of the trial court.

28. In Mohd. Mehtab Khan v. Khushnuma Ibrahim Khan, this Court emphasised on the principles laid down in Wander- and observed that while the view taken by the appellate court may be an equally possible view, the mere possibility of taking such a view must not form the basis for setting aside the decision arrived at by the trial court in exercise of its discretion under Order 39 CPC. The basis for substituting the view of the trial court should be mala fides, capriciousness, arbitrariness or perversity in the order of the trial court. The relevant observations are extracted below: (SCC p. 230, para 20)

"20. In a situation where the learned trial court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the appellate court could not have interfered with the exercise of discretion by the learned trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The appellate court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not be understood to have said that the appellate court was wrong in its conclusions what is sought to be emphasised is that as long as the view of the trial court was a possible view the appellate court should not have interfered with the same following the virtually settled principles of law in this regard as laid down by this Court in Wander Ltd. v. Antox India (P) Ltd."

29. This Court in Shyam Sel & Power Ltd. v. Shyam Steel Industries Ltd. observed that the hierarchy of the trial court and the appellate court exists so that the trial court exercises its discretion upon the settled principles of law. An

appellate court, after the findings of the trial court are recorded, has an advantage of appreciating the view taken by the trial Judge and examining the correctness or otherwise thereof within the limited area available. It further observed that if the appellate court itself decides the matters required to be decided by the trial court, there would be no necessity to have the hierarchy of courts.

30. This Court in *Monsanto Technology LLC v. Nuziveedu Seeds Ltd.*, observed that the appellate court should not usurp the jurisdiction of the Single Judge to decide as to whether the tests of prima facie case, balance of convenience and irreparable injury are made out in the case or not.

31. The appellate court in an appeal from an interlocutory order granting or declining to grant interim injunction is only required to adjudicate the validity of such order applying the well-settled principles governing the scope of jurisdiction of the appellate court under Order 43 CPC which have been reiterated in various other decisions of this Court. The appellate court should not assume unlimited jurisdiction and should guide its powers within the contours laid down in *Wander* case.

20. Considering the aforesaid facts and the settled position of law, I am of the view that the impugned order has been passed after duly appreciating the facts and the applicable law. The view taken by the learned Trial Court is a plausible view and does not warrant interference by this Court in its appellate jurisdiction.

21. In view thereof, the Appeal from Order fails and is accordingly dismissed. The learned Trial Court is directed to dispose of suit expeditiously. There shall be no order as to costs.

22. In view of the dismissal of the Appeal from Order, pending Interim Application(s), if any do not survive and are accordingly disposed of.

(AARTI SATHE, J.)