

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8712 OF 2014

Anand Premchand Agrawal ... Petitioner
Vs.
M/s. Lalit Construction through its Partner
Nemichand Lalitaprasad Poddar and others ... Respondents

Mr. Shriram S. Kulkarni for Petitioner.
Mr. Swapnil S. Mhatre for Respondents No.1 and 2.
Mr. Rahul D. Motkari for Respondents No.3 and 4.

CORAM : R. G. KETKAR, J.
DATE : 6TH AUGUST, 2015

P.C. :

Heard Mr. Kulkarni, learned Counsel for petitioner, Mr. Mhatre, learned Counsel for respondents No.1 and 2 and Mr. Motkari, learned Counsel for respondents No.3 and 4 at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant No.1 has challenged the judgment and order dated 26.04.2014 passed by the learned 5th Joint Civil Judge, Senior Division, Nashik below exhibit-193 in Special Civil Suit No.588 of 2009. By that order, the learned trial Judge rejected the application filed by the petitioner for setting aside the 'No Evidence' order dated 25.10.2013 and for permission to lead evidence. The parties shall hereinafter be referred to as per their status in the trial Court.

3. In support of this Petition, Mr. Kulkarni submitted that defendants No.2 and 3 are the owners of the suit property. Defendants No.2 and 3 also executed Visar Pavati on 18.06.2006 in favour of the defendant No.1 enabling him to sell to the third party. Defendants No.2 and 3 executed agreement of sale on 23.11.2006 in favour of the defendant

No.1. Defendant No.1 in turn assigned rights in favour of the plaintiff. He submitted that defendants No.2 and 3 purportedly cancelled agreement of sale on 23.11.2006. Plaintiff has instituted Suit for specific performance of contract as also for possession and in the alternative, has claimed decree of Rs.5,37,00,000/- against the defendants along with interest @ 24% p.a. among other prayers. He submitted that defendant No.1 filed written statement at exhibit-56. He has taken me through the written statement of defendant No.1 and in particular, paragraphs 11 and 12. In paragraph 11, defendant No.1 asserted that the claim made by the plaintiff against defendants No.2 and 3 is valid and proper and defendant No.1 has no objection for passing the decree against defendants No.2 and 3. Defendants No.2 and 3 have accepted amount from defendant No.1 as also from defendant No.4 from time to time and executed agreement of sale. Defendant No.4 has executed documents at the instance of defendants No.2 and 3 in favour of the plaintiff. Defendants No.2 and 3 also authorized defendant No.1 to sell the suit property to the third party as per the Visar Pavati dated 18.06.2006. As per the authority given by that Visar Pavati and agreement for sale, defendant No.1 has sold the property to the plaintiff by executing the document. The said transactions are in tact. Defendant No.1 denied that he has signed on the document cancelling Visar Pavati as falsely contended by defendants No.2 and 3 in the written statement. In fact, no such document was executed. Defendants No.2 and 3 have forged signatures of defendant No.1 on the alleged cancellation of Visar Pavati and the said document is produced in the Court, which is a serious matter. The conduct of the defendants No.2 and 3 is also not honest.

4. In paragraph 12, defendants No.2 and 3 have annexed the bogus document cancelling the Visar Pavati along with the written statement

and the same is also used by them in support of their case which is a criminal act on their part. The said document is also produced with a view to misleading the Court and causing damage to the plaintiff.

5. Mr. Kulkarni submitted that plaintiff has prayed for specific performance and in the alternative, amount of Rs.5,37,00,000/- from defendants. He, therefore, submitted that it is necessary for defendant No.1 to lead evidence in opposition of the claim made by the plaintiff against the defendants for Rs.5,37,00,000/-. He submitted that defendant No.1 is a Cancer patient and he was not present on 25.10.2013 as he was taking treatment. The learned trial Judge passed order for closing the evidence of defendant No.1 and directing defendants No.2 and 3 to proceed with the evidence. Defendant No.1, therefore, filed application exhibit-193 on 03.03.2014 for setting aside no evidence order as also seeking permission to lead evidence. It is specifically asserted in that application that on 27.09.2013, defendant No.1 has signed affidavit of evidence in lieu of examination-in-chief before the Superintendent of the Court. However, the said affidavit could not be tendered as he was seriously ill. It is further asserted that defendant No.1 is suffering from mouth cancer and he was operated. Because of this, between 27.09.2013 and February, 2014, defendant No.1 was taking medical treatment and was advised complete rest. Defendant No.1 was finding it difficult to even speak or to swallow. Because of his serious illness, defendant No.1 was unable to speak and could not, therefore, give oral evidence. Along with the application, he has enclosed affidavit in lieu of examination-in-chief as also medical certificate showing that he was taking treatment.

6. Mr. Kulkarni submitted that the learned trial Judge rejected the application on the ground that since defendant No.1 admitted the claim

of the plaintiff, he can file application for passing decree under Order XII, Rule 6 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). Mr. Kulkarni submitted that in the facts and circumstances of the present case, Order XII, Rule 6 has no application. Defendant No.1 has not admitted entire claim of the plaintiff, and more particularly, the alternative claim of Rs.5,37,00,000/-. He further submitted that the learned trial Judge has not recorded any finding that by permitting defendant No.1 to lead evidence, any prejudice will be caused to defendants No.2 and 3. The learned trial Judge ought have accepted the explanation given by the defendant No.1 in his application at exhibit-193 and allowed that application.

7. On the other hand, Mr. Motkari supported the impugned order. He submitted that evidence of plaintiffs was over on 12.08.2013. Thereafter, dates were given to the defendant No.1 for leading evidence. He submitted that on all these dates, defendant No.1 did not lead evidence, and therefore, on 25.10.2013, the learned trial Judge passed the impugned order. Even after passing of the impugned order on 25.10.2013, six dates were given. Defendant No.4 thereafter led evidence on 08.01.2014 supporting the plaintiff's case. Thereafter, two dates were given. On 04.02.2014, defendant No.4 closed his evidence. On behalf of defendants No.2 and 3, original defendant No.2 has filed affidavit on 11.02.2014 and his cross is yet to begin. He further submitted that defendant No.1 has filed criminal case namely R.C.C.No.1152 of 2009. Defendant No.1 was present on 22.08.2013, 17.10.2013 and 27.12.2013 in that criminal case.

8. Mr. Kulkarni submitted that the submissions advanced by Mr. Motkari are not supported by the material on record including the reply filed by defendants No.2 and 3. The learned trial Judge has also not

referred to the various dates referred by Mr. Motkari in the impugned order. Mr. Motkari submitted that Roznama in Suit and R.C.C.No.1152 of 2009 support his submissions. Mr. Motkari submitted that the present application is filed on 03.03.2014 only after defendants No.2 and 3 have filed their affidavit of evidence in lieu of examination-in-chief. He has taken me through the reply filed by defendants No.2 and 3 opposing the application exhibit-193 and submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India, more so when the defendant No.1 did not produce any material to substantiate that he was suffering from serious illness.

9. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff has closed his evidence on 12.08.2013. Thereafter, five dates were given to the defendant No.1 for leading evidence which are as under:

- (i) 23.08.2013,
- (ii) 02.09.2013,
- (iii) 10.09.2013,
- (iv) 20.09.2013, and
- (v) 27.09.2013.

10. Mr. Motkari submitted that defendant No.1 has filed criminal case namely R.C.C.No.1152 of 2009 and he was present in the Criminal Court on 22.08.2013. Despite giving five dates to the defendant No.1 for leading evidence, he chose not to lead evidence. It is in these circumstances, the learned trial Judge passed 'No Evidence' order against the defendant No.1 on 25.10.2013. It is also material to note that thereafter six dates were given and on 08.01.2014, defendant No.4 led his evidence supporting plaintiff's case. Thereafter, again two dates

were given. On 04.02.2014, defendant No.4 closed his evidence. On 11.02.2014, affidavit of evidence in lieu of examination-in-chief on behalf of defendants No.2 and 3 was filed. Mr. Motkari submitted that cross-examination of witness on behalf of defendants No.2 and 3 is yet to begin. It is at this stage, on 03.03.2014, defendant No.1 filed application exhibit-193. Opposing that application, defendants No.2 and 3 filed reply. In paragraph 2 of that reply, it is asserted that defendant No.1 claims that on 27.09.2013, he has signed affidavit in lieu of examination-in-chief before the Court Superintendent but there is no satisfactory explanation as to why the said affidavit was not tendered either on previous dates or on 25.10.2013. Likewise, no application was made by the defendant No.1 in earlier point of time, and for the first time, the present application is filed on 03.03.2014, which is not bonafide.

11. In paragraph 3, it is asserted that defendant No.1 has made this application only after evidence of defendant No.4 was over and affidavit in examination-in-chief of defendants No.2 and 3 is filed on record. The said attempt is with a view to helping the plaintiff. In paragraph 4, it is contended that no medical certificate is produced to substantiate defendant No.1's case that between 25.10.2013 and February, 2014, because of the health ground, defendant No.1 could not remain present in the Court. In paragraph 5, it is contended that defendant No.1 was given sufficient opportunity to lead evidence. Even when defendant No.4 was leading evidence that time also, no application was given by the defendant No.1. If at this stage, defendant No.1 is permitted to lead evidence, it will allure to the benefit of the plaintiff and defendant No.1, which will not be in the interests of justice. No rejoinder was filed by the defendant No.1 controverting the facts stated in reply.

12. Mr. Kulkarni submitted that in the reply filed by defendants No.2 and 3, no reference is made to various dates given to defendant No.1 for leading evidence in the Suit as also dates in R.C.C.No.1152 of 2009 when defendant No.1 was present . Even the impugned order does not refer to this aspect. I do not find merit in this submission. Mr. Motkari relied upon the Roznama in support of his submission.

13. After considering the submissions advanced by Mr. Motkari as also having regard to the fact that the defendant No.1 was given several opportunities to lead evidence between 23.08.2013 and 27.09.2013 as also having further due regard to the fact that defendant No.1 was present on 22.08.2013, 17.10.2013 and 27.12.2013 in R.C.C.No.1152 of 2009 in the Criminal Court, I do not find that any sufficient cause is made out by the defendant No.1 in not attending the Court for leading evidence. Mr. Kulkarni submitted that the learned trial Judge has not decided the application on the basis of the reply filed by defendants No.2 and 3. The learned trial Judge was of the view that defendant No.1 can file application under Order XII, Rule 6 C.P.C. for passing decree on admission. The said reason is patently erroneous. Even if I accept the submission of Mr. Kulkarni that Order XII, Rule 6 C.P.C. is not applicable, the learned trial Judge has recorded a categorical finding that no satisfactory reason is given by the defendant No.1 in the application. No medical certificate is also produced on record. In view thereof also, I do not find that the learned trial Judge has committed any error in passing the impugned decree. In my opinion, the application filed by the defendant No.1 is nothing short of abuse of process of Court as also abuse of process of law. As the defendant No.1 claims to be Cancer patient, I refrain from imposing exemplary costs on him.

14. In the light of the aforesaid discussion, no case is made out for

invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

15. At this stage, Mr. Kulkarni orally applies for continuation of the ad-interim order dated 08.12.2014 in terms of prayer clause (b) for a period of 8 weeks from today. Mr. Motkari opposes this application.

16. Having regard to the fact that the ad-interim order is operating since 08.12.2014 as also having further due regard to the fact that petitioner intends to challenge this order in the higher Court, I find that the request made by Mr. Kulkarni is reasonable. Hence, notwithstanding dismissal of the Petition, ad-interim order dated 08.12.2014 shall remain in force for the period of 8 weeks from today. Order accordingly.

(R. G. KETKAR, J.)

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