

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

***APPEAL FROM ORDER NO.469 OF 2014
along with
CIVIL APPLICATION NO.547 OF 2014
in
APPEAL FROM ORDER NO.469 OF 2014***

Nirmala Gopal Naidu .. Appellant/Applicant
Vs.
M/s.Mass Developers & Ors. .. Respondents

Mr.J.N. Jayale for the appellant/applicant.
Mr.N.Engineer a/w Mr.Hemang Raythatta a/w Mr.Jayesh Mistry i/by
M/s.RMG Law Associates for the respondent nos.1 and 2.
Ms.Meenakshi Sakhare, AGP for the respondent no.3.

***CORAM : R.D. DHANUKA, J.
DATE : 18th November 2015***

P.C.

. By this Appeal, the appellant has impugned the order dated 23rd September 2013 passed by the learned Judge of the Bombay City Civil Court, Dindoshi dismissing the Notice of Motion No.555 of 2010 and two other connected notices of motion which were for interim reliefs taken out by the appellant.

2. Learned counsel appearing for the appellant invited my attention to various annexures to the appeal paper book and also to the pleadings and the reasons rendered in the impugned order passed by the learned trial judge. It is submitted that though no notice under Section 80(1) of the Code of Civil Procedure, 1908 (CPC) was required to be issued upon the respondent nos.1 and 2 being private parties, the learned trial judge has passed an order of return of the plaint to the

appellant and thereafter to seek reliefs against the respondent nos.1 and 2. He submits that the reliefs claimed in the plaint as well as in the notice of motion were not only against the respondent no.3 but were also against the respondent nos. 1 and 2 and thus even if the trial judge is right in holding that the notice to the respondent no.3 under Section 80(1) of the CPC, 1908 was mandatory, the plaint could not have been returned to the appellant in respect of the respondent nos.1 and 2.

3. In so far as the compliance with the ad-interim order passed by the learned trial judge on 17th February 2010 permitting the appellant to make an application to the City Survey Officer for demarcation is concerned, it is submitted by the learned counsel that since the respondents had filed affidavits, the appellant had withdrawn the appeal and pursued the notice of motion. He submits that the appellant thereafter had applied for extension of time to make deposit but the respondent no.3 refused to entertain the said application on that ground. The appellant thereafter filed a Notice of Motion No.1771 of 2013 for further interim relief by seeking extension of time.

4. Learned counsel appearing for the appellant submits that he is ready and willing to issue notice to the respondent no.3 under Section 80(1) of the CPC, 1908 and thereafter would present plaint as directed by the learned trial Court. Learned counsel submits that since the appellant could not comply with the ad-interim order passed by the learned trial judge permitting demarcation in view of the delay, the appellant should not suffer. He submits that the appellant would apply for appropriate interim relief before the learned trial Court and till such demarcation is done, her structure is required to be protected by this Court.

5. Learned counsel appearing for the respondent nos.1 and 2, on the other hand, submits that the learned trial judge was right justify in dismissing the notice of motion as well as in passing the order of the return of the plaint to the appellant for presentation after notice under Section 80(1) of the CPC, 1908 is issued by the appellant. He submits that though the learned trial Judge had granted an opportunity to apply for demarcation after rejecting the ad-interim relief, the appellant did not avail of the said opportunity by making an application within the prescribed time. He submits that this Court shall not make any observations on merits of the matter in view of the fact that the appellant has accepted to issue a notice under Section 80(1) of the CPC, 1908 to the respondent no.3. It is submitted that since the appellant has agreed to issue a notice to the respondent no.3, the respondent nos.1 and 2 do not press the submission that the reliefs claimed against the respondent nos.1 and 2 in the plaint were consequential to the reliefs prayed against the respondent no.3.

6. In view of the fact that the appellant has now agreed to issue a notice under Section 80(1) of the CPC, 1908 to the respondent no.3 and thereafter to present the plaint as directed by the learned trial judge, I do not propose to go into the issue whether such notice under Section 80(1) of the Code of Civil Procedure, 1908 was in fact mandatory or not. Statement made by the learned counsel for the appellant is accepted.

7. In so far as the request for demarcation of the property which was one of the reliefs in the notice of motion is concerned, it is not in dispute that though the learned trial judge while passing the ad-

interim order has initially refused to grant relief, however, at the request of the learned counsel for the appellant who appeared before the trial Court, thereafter, had granted such indulgence and permitted the appellant to apply for demarcation before the City Survey Officer in view of the pendency of the appeal, the appellant did not avail of the said opportunity. It is not in dispute that none of the respondents had challenged that part of the order before the appeal Court and the same was in force till disposal of the notice of motion as well as till the order of return of the plaint is passed by the learned trial judge.

8. In view of these facts, I am of the view that the appellant has come to present the plaint after issuance of the notice under Section 80(1) of the CPC and thereafter, present the plaint for reliefs claimed. Once such plaint is presented, the appellant can seek interim relief in the notice of motion. It is made clear that this Court has not expressed any views whether the appellant had made out a case for grant of any relief and the said issue is kept open. It is for the trial Court to consider whether the appellant (original plaintiff) has made out a case for grant of any relief or not. In view of the fact that the trial judge had allowed the appellant to apply for demarcation and in view of the fact that the respondent nos.1 and 2 have pressed for notice under Section 80(1) of the CPC, 1908 and that the appellant having accepted to issue such notice, the cause of action should not become infructuous. In view of thereof, the structure of the appellant is thus required to be protected for a period of 10 weeks from today to enable the appellant to issue a notice under Section 80(1) of the CPC, 1908 to the respondent no.3 and to present the plaint and to seek interim relief therein.

9. I therefore pass the following order :-

- (a) The appellant to give a notice under Section 80(1) of the CPC, 1908 to the respondent no.3 within a period of one week from today;
- (b) After expiry of notice period, the appellant shall present the plaint in terms of the order dated 23rd September 2013 passed by the trial judge. The appellant can seek interim relief before the trial judge by filing an appropriate notice of motion;
- (c) If any such notice of motion is filed by the appellant, the trial Court shall consider the same on its own merits and without being influenced by the observations made in the order dated 23rd September 2013;
- (d) The respondent nos.1 and 2 are directed not to demolish/remove the structure claimed to be in possession of the appellant for a period of 10 weeks from today;
- (e) If any notice of motion is filed by the appellant, the appellant shall serve such proceedings and notice 48 hours in advance upon the respondents;
- (f) Appeal from order is disposed of in aforesaid terms. No order as to costs;
- (g) In view of the disposal of the appeal, civil application filed by the appellant does not survive and is accordingly disposed of;
- (h) All contentions of the respondents including maintainability of the suit raised before the trial Court and this Court are kept open.

R.D. DHANUKA, J.