

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 1142 OF 2014
WITH
CIVIL APPLICATION NO. 1378 OF 2014 IN A.O. NO. 1142 OF 2014
WITH
CIVIL APPLICATION NO. 1379 OF 2014 IN A.O. NO. 1142 OF 2014

M/s. Shruti Enterprises	... Appellant/Applicant
Vs.	
Savita @ Savitri Ramdas Rodpalkar & Ors.	... Respondents

WITH
WRIT PETITION NO. 546 OF 2015

Savitri Ramdas Rodpalkar & Ors.	... Petitioners
Vs.	
M/s. Neel Developers & Ors.	... Respondents

Mr. A.V. Anturkar, Senior Advocate i/b. Mr. S.B. Deshmukh for the Appellant/applicant.

Mr. Sunil Jayakar a/w. Ms. Gunjan S. Jayakar i/b. Mihir Jayakar, Advocate for respondent nos. 3 and 4 in A.O. No. 1142 of 2014 and respondent nos. 1 and 2 in Writ Petition No. 546 of 2015.

Mr. Pankaj J. Das, Advocate for respondent no. 5 in A.O. No. 1142 of 2014.

Mr. S.G. Kudle a/w. Mr. Abhijit Patil i/b. Mr. Ajay S. Patil, Advocate for the petitioners in W.P. No. 546 of 2015.

CORAM	: MRS.MRIDULA BHATKAR, J.
RESERVED ON	: 29th SEPTEMBER, 2015
PRONOUNCED ON	: 13th OCTOBER, 2015

ORDER:

This Appeal from Order is directed against the judgment and order dated 25th September, 2014 passed by the Principal Judge, Raigad Alibag below Exhibit 19 in Civil Appeal No. 378 of 2014. The scope of this Appeal is limited, i.e., whether Appellate Court has power to pass orders under

Rule 11 Order 39 of Code of Civil Procedure in Appeal which is filed under Order 41 or 43 of the Code of Civil Procedure.

2. A Special Civil Suit No. 175 of 2006 was filed by the present respondent nos. 3 and 4 against the present respondent nos. 1, 2 and 5/ original defendants, for specific performance of the contract dated 9th May, 2002 in respect of suit land. The said suit was decreed with costs and defendant nos. 1 and 2/respondent nos. 1 and 2 were directed to execute the impugned contract after obtaining necessary permission from CIDCO the defendant no. 3/respondent no. 5 and defendant nos.1 and 2 were restrained from transferring the suit property in favour of third parties. The suit was decreed on 21st July, 2008 by learned Civil Judge Senior Division, Panvel. First Appeal No. 2091 of 2008 was filed on 21st October, 2008 and in that Civil Application No. 5372 of 2008 was filed and the High Court by the order dated 25th November, 2008 granted ad-interim relief in favour of defendant/respondent nos. 1 and 2 subject to condition that they shall not sell, transfer, alienate, create third party interest or part with possession of the suit property and maintain the status quo in respect of the suit property. This Appeal was transferred to District Court by virtue of amendment in the Civil Court Act in the year 2012 and the Appeal was numbered as 372 of 2012 in the District Court. During the pendency of the said Appeal, the original defendants nos. 1 and 2/the land owners

executed unregistered sale deed on 17th February, 2010 with the present appellant Shruti Enterprises. Therefore, the Application Exhibit 19 was made under Rule 11 Order 39 of the Code. Pending appeal, Shruti Enterprises/present appellant filed Application that they be allowed to intervene in the Appeal and then they were joined as a party to the Appeal, as they have purchased the suit property from defendant nos. 1 and 2. The Appellate Court found that there is breach of an order of High Court and therefore, Application Exhibit 19 was allowed and the Appeal was dismissed and appointed Court Receiver for a period of two months. Hence, this order is challenged in Appeal so also the original defendant nos. 1 and 2, who are judgment debtors, filed Writ Petition No. 546 of 2015 challenging the same order dated 25th September, 2014 passed by the learned Principal Judge, Alibag below Exhibit 19 in Civil Appeal No. 378 of 2012. Therefore, the Writ Petition and Appeal from Order are clubbed together by the order of the Hon'ble Chief Justice and now heard and disposed of by this common order.

3. The main bone of contentions of the appellant as submitted by the learned senior counsel is that Order 41 is a code by itself and the provisions which are applicable to the suits under Order 39 Rule 11 of the Code of Civil Procedure are not applicable in the Appeal. He buttressed that the words "pendency of the suits" used under Order 39 Rule 11

indicate its scope. The meaning of term “proceedings” defined under section 52 of Transfer of Property Act cannot be borrowed. The word 'pendency of suit' cannot be stretched to the proceedings “pending appeal”. He further submitted that the Appellate Court has no power to pass orders under Rule 11 Order 39 but powers are only restricted to the trial Court when the suit is pending. He pointed out that under Rules 19 and 17 of Order 41, special procedure is laid down in respect of dismissal of an Appeal and those provisions are not available to the trial Court. He further submitted that in fact there is no breach of the order dated 25th November, 2008 passed by the High Court because the sale deed dated 17th February, 2010 is an unregistered document and no right is created by unregistered document in favour of the appellant. He further argued that no right is created in the property even if an unregistered Agreement of Sale is executed. He, therefore, submitted that the said document is not contrary to the order passed by the High Court.

4. Learned counsel Mr. Kudle for respondent nos. 1 and 2 and the petitioners in the Writ Petition submitted that the Writ Petition filed by the petitioners is to be allowed. The order passed by the learned District Judge under Order 39 Rule 11 is against the provisions of Rule 11. He placed reliance on the proviso of the said Rule. He submitted that it was binding on the trial Court to issue notices to the respondents before

deciding the Application under Rule 11 Order 39. He submitted that as the Court did not issue notices under the proviso, the order is bad in law. He submitted that the Court ought not to have passed such drastic order under Rule 11 Order 39 of Code of Civil Procedure.

5. The learned counsel for respondent nos. 3 and 4 in this Appeal who are main contesting parties and decree holders, pointed out that the appellant Shruti Enterprises has filed earlier Writ Petition No. 11540 of 2013 against CIDCO and Ors. in respect of the same suit land. While dismissing the said Writ Petition, the Division Bench of this Court by order dated 5th November, 2014 held that the documents executed by the appellants in Civil Appeal No. 378 of 2012 will not create any right, title and interest in the transferee. He further submitted that respondent nos. 1 and 2/original defendants and land owners have further executed other sale deed with some other persons and have committed breach. He relied on the order passed by the Division bench which held that the transaction between the present appellant and respondent nos. 1 and 2 is not valid and has no effect in respect of title. In reply to the submissions of the learned senior counsel for the appellant on scope of Rule 11 Order 39, he relied on Section 107 of Code of Civil Procedure where the powers of the Appellate Court are mentioned. He submitted that the appellant was neither a party in the suit nor in the decree. The appellant came in picture

and joined as a party to Appeal when his Application Exhibit 26 was allowed on 16th November, 2013. He submitted that the Court Receiver is in possession of the suit property. The conduct of the judgment debtor is also to be taken into account, as the judgment debtor has entered into total four transactions with different persons including the present appellants in respect of suit land after the High Court has passed the order of status quo.

6. At the outset, the submissions of the learned senior counsel for the appellant that there is no breach of the order are not acceptable. Though the Agreement dated 17th February, 2010 is unregistered sale deed and no title can be transferred and no right can be created by unregistered agreement in respect of the immovable property, the High Court in the said order has directed the appellant to maintain status quo in respect of the suit property, which is undoubtedly flouted. Entering into Agreement in respect of suit property with third party is definitely a breach of the order to maintain status quo.

7. The main submissions are pertaining to scope of Rule 11 of Order 39 of Code of Civil Procedure, the rule reads as follows:

"11. Procedure on parties, defying orders of Court and committing breach of undertaking to the Court.— Where the Court orders any party to a suit or proceeding to do or not to do a thing during the pendency of the suit or proceeding, or where

any party to a suit or proceeding gives any undertaking to the Court to do or to refrain from doing a thing during the pendency of the suit or proceeding, and such party commits any default in respect of or contravenes such order or commits a breach of such undertaking, the Court may dismiss the suit or proceeding, if the default or contravention or breach is committed by the plaintiff or the applicant, or strike out the defences, if the default or contravention or breach is committed by the defendant or the opponent.

(2) The Court may, on sufficient cause being shown and on such terms and conditions as it may deem fit to impose, restore the suit or proceeding or may hear the party in defence, as the case may be, if the party that has been responsible for the default or contravention or breach as aforesaid makes amends for the default or contravention or breach to the satisfaction of the Court:

Provided that before passing any order under this sub-rule notice shall be given to the parties likely to be affected by the order to be passed.' (1.10.1983) and (1.4.1987).

8. The Appeal is a continuation of the suit and the Appellate Court under sub-sections 1 and 2 of Section 107 of Code of Civil Procedure has power to pass orders in Appeal. Section 107 of Code of Civil Procedure reads thus:

107. Powers of appellate court.- (1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power—

- (a) to determine a case finally,
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the appellate court shall have the same

powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on courts of original jurisdiction in respect of suits instituted therein.

9. By virtue of this, the Appellate Court has power to grant temporary injunction and pass interlocutory orders covered under Order 39 of Code of Civil Procedure. Under Order 41 and under section 107 of the Code, the Appellate Court enjoys the power to entertain and conduct the Appeal. Sections in CPC and rules codified in the orders are co-related and complementary to each other. Under Rule 17 Order 41, the Appellate Court has power to dismiss the Appeal for appellant's default and under Rule 19 Order 41, if such Appeal is dismissed in default, it can be readmitted. However, it cannot be inferred that as these powers under Order 41 are given to the Appellate Court, hence there is bar to enjoy other powers available under Order 39 on the Appellate Court. Under Order 39 Rule 11, the words "pendency of the suit or proceedings" are used, thus it is not only restricted to suit but also to proceedings and the term of proceedings cannot be read with restriction to only the proceedings in the trial Court because the word "proceeding" is to be given a liberal meaning which can be extended to the proceedings in appeal also. Under section 107, the Appellate Court has similar power to the power enjoyed by the Courts of the original jurisdiction in respect of the suit instituted therein. Thus, the powers of the Appellate Court are co-

extensive with the powers of the Court of the original jurisdiction and these powers are conferred expressly and also by necessary implication.

10. The submissions of learned senior counsel Mr. Anturkar that the meaning of proceedings under Order 39 Rule 11 does not cover the proceedings before the Appeal Court are not convincing. In the case of Shaikh Samsul Hudda & Ors. vs. M/s. Khayber Properties & Investment Pvt. Ltd. & Ors., reported in AIR 2004 Bom. 126, a Single Judge while dealing with the same issue of Order 39 Rule 11 of Code of Civil Procedure has held in paragraph 4 as under:

“4. The Rule 11 of Order XXXIX of the Code, as is in force in the State of Maharashtra, empowers the Court to dismiss the suit, if the plaintiff defies or defaults in complying with the order. Certainly such power can be exercised by the Appellate Court in relation to appeals also. But it is purely a discretionary power to be exercised judiciously and in cases where the party deserves such harsh penalty and not merely because the other side feels aggrieved by the failure on the part of the plaintiff to comply with the order.”

11. If the order passed by the trial Court or the Appellate Court is breached willfully, then the Appeal Court can take notice of the events which have happened after the institution of the suit or after filing the Appeal. Considering the possibility of the breach of order of the Court, the Appellate Court is justified in taking action under Order 39 Rule 11. It is purely a discretionary relief based on the facts and nature of the breach. In

the present case, considering the nature of breach and in view of the finding of the Division Bench, the order of the Appellate Court cannot be faulted with.

12. Hence, Appeal from Order and Writ Petition both are dismissed. In view of dismissal of Appeal from Order, Civil Applications do not survive and are accordingly disposed of.

(MRIDULA BHATKAR, J.)