

WITH
WRIT PETITION (ST.) NO.3847 OF 2016

Mr. P. K. Dhakephalkar, Senior Advocate i/b. Mr. Sachin Dhakephalkar for Petitioners in Writ Petition No.52 of 2016 and for Respondents No.1 and 2 in Writ Petition (St.) No.3847 of 2016.

Mr. T. D. Deshmukh for Respondent No.2 in Writ Petition No.52 of 2016 and for Respondent No.3 in Writ Petition (St.) No.3847 of 2016.

Mr. Vaibhav Sugdare i/b. Mr. Samrat K. Shinde for Petitioners in Writ Petition (St.) No.3847 of 2016 and for Respondents No.1A to 1E in Writ Petition No.52 of 2016.

CORAM : R. G. KETKAR, J.
DATE : DECEMBER 1, 2016

P.C. :

Heard Mr. Dhakephalkar, learned Senior Counsel for petitioners in Writ Petition No.52 of 2016 and respondents No.1 and 2 in Writ Petition (St.) No.3847 of 2016, Mr. Deshmukh, learned Counsel for respondent No.2 in Writ Petition No.52 of 2016 and respondent No.3 in Writ Petition (St.) No.3847 of 2016 and Mr. Sugdare, learned Counsel for petitioners in Writ Petition (St.) No.3847 of 2016 and respondents No.1A to 1E in Writ Petition No.52 of 2016.

2. Both these Petitions are directed against the judgment and order dated 27.10.2015 passed by the learned 2nd Joint Civil Judge Junior Division, Pune below exhibit-160 in Regular Civil Suit No.970 of 2009. By that order, the learned trial Judge partly allowed the application made

by the original plaintiffs and struck out the defence of the defendant No.1 and his legal heirs under Order 39, Rule 11 of C.P.C. The learned trial Judge rejected the application made by the plaintiffs for striking out defence of defendant No.2. Aggrieved by this part of the order, plaintiffs have instituted Writ Petition No.52 of 2016. Writ Petitions (St.) No.3847 of 2016 is instituted by the defendant No.1 as by the impugned order, the learned trial Judge has struck out the defence of the defendant No.1 and his legal representatives. The parties shall hereinafter be referred to as per their status in the trial Court. Rule. Learned Counsel for the respective respondents waive service. Having regard to the narrow controversy raised in these Petitions as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petitions are taken up for final hearing.

3. Plaintiffs have instituted Suit inter alia praying for partition of their 2/3rd share from the suit properties more particularly described in paragraph 1 of the plaint; for declaration that the alleged release deed dated 11.12.2006 executed between the plaintiffs and original defendant No.1, being without consideration, is fraudulent and void ab initio and not binding on the plaintiffs; for perpetual injunction restraining the defendant No.1, his agents, attorney, assignees from dealing with the property in any manner till the partition is effected. During the pendency of the Suit, plaintiffs took out application for temporary injunction. By order dated 29.01.2010, the learned trial Judge allowed the application and issued injunction restraining original defendant No.1 from dealing with the property as also disturbing the possession and carrying out construction in the suit property till the final disposal of the Suit. Aggrieved by that decision, original defendant No.1 preferred Miscellaneous Civil Appeal. The learned District Judge partly allowed the appeal and modified the injunction issued by the learned trial Judge.

The learned District Judge issued injunction restraining original defendant No.1 from transferring the suit property to the extent of 2/3rd share of the plaintiffs in the suit property as also from changing the nature of the suit property by way of raising construction otherwise changing nature of the suit property till the disposal of the Suit.

4. Aggrieved by the order passed by the District Court partly modifying the injunction, original defendant No.1 preferred Writ Petition No.9361 of 2012. By order dated 02.04.2013, this Court dismissed the Writ Petition. In other words, the injunction order as modified by the learned District Judge was upheld. During the pendency of the Suit, plaintiffs filed application for impleading defendant No.2 some times in the year 2011. However, that application was not pressed.

5. On 27.08.2013, plaintiffs filed application for amending the plaint and impleading defendant No.2 in the Suit. On 13.09.2013, the learned trial Judge rejected the application on the ground that it was filed when the Suit was fixed for final hearing. Plaintiffs challenged that order by way of Writ Petition. By order dated 15.04.2014, this Court allowed the Petition and permitted impleadment of defendant No.2. Defendant No.2 was granted liberty to file written statement. Accordingly, on 29.04.2014, defendant No.2 filed written statement.

6. On 16.06.2014, plaintiffs filed composite application under Order 39, Rule 2-A and Order 39, Rule 11 against the defendants. By order dated 30.09.2014, the learned trial Judge rejected the application on the ground that the composite application is not maintainable. Review Petition filed by the plaintiffs was rejected on 22.01.2015. Aggrieved by the orders dated 30.09.2014 and 22.01.2015, plaintiffs instituted Writ

Petition in this Court. By order dated 09.09.2015, this Court disposed of the Petition by granting liberty to the plaintiffs to file separate application. Trial Court was directed to decide the said application within 3 months after deciding application under Order 39, Rule 11. In pursuance of that order, plaintiffs filed application under Order 39, Rule 11 against both the defendants on 21.09.2015. By the impugned order, the learned trial Judge partly allowed the application and struck out the defence of the defendant No.1 and dismissed the application qua defendant No.2. It is against these orders, plaintiffs and defendant No.1 have instituted the aforesaid Petitions.

7. In support of the plaintiffs' case, Mr. Dhakephalkar submitted that on 29.01.2010, the learned trial Judge has issued injunction restraining the defendant No.1 from dealing in the property among others. Despite that, on 31.12.2010, three sale deeds were executed by defendant No.1 and others in favour of the defendant No.2. In these sale deeds, reference of the present Suit instituted by sisters against defendant No.1 was made. He further submitted that in July 2012, legal representatives of defendant No.1 executed sale deed in favour of defendant No.2. Even in these sale deeds, reference of the present Suit instituted by the sisters against original defendant No.1 was made. In short, he submitted that defendant No.2 was fully aware of the Suit instituted by the plaintiffs as also the orders passed thereon. Despite injunction order issued against the original defendant No.1, defendant No.1 and also legal representatives of defendant No.1 executed the sale deeds in favour of defendant No.2. He submitted that by the impugned order, the learned trial Judge struck out the defence of the defendant No.1 alone. The learned trial Judge, however, rejected the application for striking out defence of defendant No.2 on the grounds set out in paragraph 6. He submitted that the learned trial Judge rejected the application on the

ground that defendant No.2 was not impleaded as a party defendant when the injunction order was issued in the year 2011. Defendant No.2 was impleaded as a party in the Suit in the year 2014. In other words, the injunction order was issued only against defendant No.1. The learned trial Judge further observed that though reference of pendency of the Suit was made in the sale deeds, no intimation of injunction order was given to the defendant No.2 and thus, it cannot be said that the defendant No.2 was having knowledge of temporary injunction and its contravention. He submitted that the said reason is contrary to the recitals in the sale deeds. Defendant No.2 was aware of the Suit and orders passed therein. He, therefore, submitted that the order in so far as rejection of the application made by the plaintiffs for striking out defence of defendant No.2 is liable to be set aside. Defence of defendant No.2 is liable to be struck out.

8. In support of this submissions, he relied upon the following decisions:

- a. ***Ramavatar Surajmal Modi Vs. Mulchand Surajmal Modi*, AIR 2004 Bombay 212**, and in particular paragraph 8 thereof;
- b. ***Pralhad Vs. Sitabai*, 2011 (4) Mh.L.J. 136**, and in particular paragraphs 16 and 17 to contend that transfer made in violation of order of injunction confers no right, title and interest on a transferee as it is no transfer in the eyes of law.

9. On the other hand, Mr. Deshmukh supported the impugned order. He submitted that plaintiffs have executed registered relinquishment deed in favour of defendant No.1 on 11.12.2006. The Suit is instituted in the year 2009 challenging the said relinquishment deed. Plaintiffs have claimed partition of their 2/3rd share from the suit properties. After defendant No.2 was impleaded, he filed written statement on

29.04.2014. He submitted that initially, plaintiffs filed composite application on 16.06.2014 under Order 39, Rule 2-A and Order 39, Rule 11 against the defendants. That was rejected by the trial Court on 30.09.2014 by holding that the composite application is not maintainable. Amended written statement was filed by defendant No.2 on 18.10.2014. The application filed by the plaintiffs for review was dismissed. Plaintiffs challenged the order rejecting the composite application and the order rejecting review petition by instituting Writ Petition in this Court. This Court disposed of the Petition by granting liberty to the plaintiffs to file separate application under Order 39, Rule 11 of C.P.C. On 21.09.2015, plaintiffs instituted application under Order 39, Rule 11 which was dismissed by the learned trial Judge against defendant No.2 on 27.10.2015. Defendant No.2 has filed affidavit of evidence on 26.11.2015. Plaintiffs have cross-examined defendant No.2 and evidence of defendant No.2 is over. The Suit is at the stage of final arguments, and therefore, no case is made out for interfering with the impugned order.

10. Mr. Sugdare appearing on behalf of legal representatives of defendant No.1 submitted that defendants No.1 and 2 were represented by the same Advocate. Reply was filed to the application filed by the plaintiffs for striking out defence only on behalf of the defendant No.2. He has taken me through the reply filed on behalf of the defendants. In other words, he submitted that perusal of the reply filed on behalf of the defendants would disclose that the reply is filed by defendant No.2. He submitted that opportunity may be given to LRs of defendant No.1 to file reply.

11. Mr. Sugdare submitted that basically, plaintiffs have no locus to maintain the Suit as they have executed the registered relinquishment

deed in favour of original defendant No.1 on 11.12.2006. In other words, after execution of the relinquishment deed, Suit instituted by the plaintiffs is not maintainable. The learned trial Judge has not considered this aspect. He further submitted that the learned trial Judge has not recorded adequate reasons. Mr. Sugdare further submitted that Order 39, Rule 11 is directory and not mandatory. However, that aspect is not considered by the learned trial Judge. He submitted that the Division Bench of this Court in **Ramavatar Surajmal Modi** (*supra*) has held that Order 39, Rule 11(1) is directory. He also relied upon the decision of the Apex Court in the case of **Thomson Press (India) Ltd. Vs. Nanak Builders and Investors P. Ltd.**, AIR 2013 SC 2389, and in particular paragraph 52 thereof.

12. In reply, Mr. Dhakephalkar submitted that even legal representatives of defendant No.1 were fully aware of pendency of the present Suit and the orders passed therein. The learned trial Judge was, therefore, justified in striking out defence of defendant No.1 and no case is made out for interfering with this part of the order.

13. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In the case of **Ramavatar Surajmal Modi** (*supra*), Division Bench of this Court has considered the decision of the Apex Court in *M/s. Babbar Sewing Machine Co. v. Tirlok Nath Mahajan*, AIR 1978 SC 1436. That decision considered provisions of Order 11, Rule 21 of C.P.C. In that case, the Apex Court held that the power for dismissal of a suit or striking out of the defence under Order 11, Rule 21 should be exercised only where the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party. It was

further observed that an order striking out defence under Order 11, Rule 21 should be made unless there has been obstinacy or contumacy on the part of the defendant or wilful attempt to disregard the order of the Court. In paragraph 8, the Division Bench, after referring to the decision in **M/s. Babbar Sewing Machine Co. (supra)**, observed that power of dismissal of suit or striking out the defence, as the case may be, under Order 39, Rule 11(1) of C.P.C. should be exercised **for adequate reasons**; where the defaulting party fails ultimately in complying with the order of the Court or the undertaking; where the default is wilful and the conduct of the defaulting party contumacious and that results in causing substantial or serious prejudice to the opposite party. Division Bench further held that Order 39, Rule 11 is directory and the discretion exercisable by the Court in passing the order under Order 39, Rule 11(1) has to be in consonance and in conformity with the legal position laid down by the Apex Court in **M/s. Babbar Sewing Machine Co. (supra)**.

15. Applying the tests laid down to the facts of the present case, in my opinion, the learned trial Judge has not given adequate reasons while dismissing the application for striking out defence of defendant No.2. In paragraph 6, the learned trial Judge has observed that sale deeds refer to pendency of the Suit. However, from the sale deeds prima facie nowhere it appears that intimation of injunction order was given to the defendant No.2. Prima facie, the learned trial Judge has not considered the recitals of the sale deed. The recitals of the sale deed clearly show that defendant No.1 had given all the requisite information and documents of the Suit instituted by the plaintiffs and defendant No.2 had obtained all the information in that regard. Prima facie, therefore, it cannot be said that defendant No.2 was unaware of any injunction order issued by the Court. Apart from that, as observed by the Division Bench in **Ramavatar Surajmal Modi (supra)**, and in particular paragraph 8,

the Court has to record finding by giving adequate reasons as regards whether there is willful default on the part of the defendant No.2. In view thereof, order insofar as not striking out defence of defendant No.2 is not sustainable and is liable to be set aside thereby restoring the application for deciding it afresh.

16. In so far as Writ Petition instituted by legal representatives of defendant No.1 is concerned, the learned trial Judge has allowed the application on the ground that the original defendant No.1 and his legal representatives disobeyed the injunction order and executed the sale deed. Mr. Sugdare invited my attention to the reply filed on behalf of the defendants. Perusal of this reply shows that it was essentially setting out the stand of the defendant No.2. Reply does not reflect the stand of legal representatives of original defendant No.1. The learned trial Judge has given reasons in paragraph 7 while striking out defence of original defendant No.1 and his LRs. Defendants No.1A to 1E were brought on record on 04.12.2012 after the demise of original defendant No.1. It was observed that sale deeds at exhibits 157, 158 and 159 prima facie reflect that they were executed by defendants No.1A to 1E in favour of defendant No.2 regarding the suit property in the month of June 2012. Legal heirs of defendant No.1 did not dispute that the appeal was preferred by their father against the injunction issued in favour of the plaintiff. It prima facie shows that the legal heirs of defendant No.1 were having knowledge of dismissal of Writ Petition and they disobeyed the injunction order and executed the sale deed. Mr. Sugdare submitted that the learned trial Judge has not applied the tests laid down by this Court in paragraph 8 of **Ramavatar Surajmal Modi** (*supra*). He further submitted that this Court has held that Order 39, Rule 11(1) is directory. Mr. Sugdare submitted that the LRs of defendant No.1 may be permitted to file reply to the application exhibit-160 opposing the prayer

of striking out their defence. He submitted that the learned trial Judge may also be directed to decide application exhibit-160 afresh in the light of the decision of the Apex Court in the case of **Thomson Press (India) Limited** (*supra*) and of this Court in **Ramavatar Surajmal Modi** (*supra*).

17. Mr. Dhakephalkar relied upon the decision in the case of **Pralhad** (*supra*). The said decision is considered by the Division Bench of this Court in **Prakash Gobindram Ahuja vs Ganesh Pandharinath Dhonde, 2016 (6) Bom.C.R. 262**. This decision has also considered the Apex Court decision in **Thomson Press (India) Ltd.** (*supra*). In paragraph 52, in a separate but concurring judgment, Hon'ble Mr. Justice T. S. Thakur (as the learned CJI then was) has observed thus,

“52. There is, therefore, little room for any doubt that the transfer of the suit property pendente lite is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the plaintiff in the pending suit. Although the above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent Court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent Court may issue in the suit against the vendor.”

18. The effect of striking out defence under Order 39, Rule 11 has a drastic consequence. Perusal of the reply filed on behalf of the defendants does not reflect stand of defendants No.1A to 1E. In view thereof, they should be given opportunity to file reply. The learned trial Judge has also not applied the tests laid down by the Division Bench of this Court in **Ramavatar Surajmal Modi** (*supra*). The decision of **Thomson Press (India) Ltd.** (*supra*) was not cited. Mr. Sugdare assures that within 10 days from today, defendants No.1A to 1E will file

reply and serve copy on the other side. In view thereof, order striking out the defence of original defendant No.1 and his legal representatives is required to be set aside thereby restoring the application exhibit-160 for deciding it afresh. Hence, the following order:

- a. Impugned order dated 27.10.2015 is quashed and set aside. Application at exhibit-160 is restored to the file of the learned trial Judge;
- b. Legal representatives of defendant No.1 are permitted to file reply within 10 days from today. Reply shall be served during this period on the other side;
- c. The learned trial Judge is requested to decide the application in the light of the decisions in **Ramavatar Surajmal Modi** (*supra*) and **Thomson Press (India) Ltd.** (*supra*) as also in accordance with law;
- d. All the contentions of the parties on merits are expressly kept open;
- e. Rule is made absolute in the aforesaid terms in both the Petitions with no order as to costs.

(R. G. KETKAR, J.)

Minal Parab