

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

APPEAL FROM ORDER NO. 494 OF 2013

M/s Shreyas Builders & Anr.

..... Appellants

Versus

Smt. Hansaben Balkrishna Mehta

.....Respondent

Mr. A. A. Kumbhakoni, Senior Advocate, i/by Mr. Sandesh Patil, for
Appellants

None for Respondent

***CORAM : N. M. Jamdar J.
Thursday 7 July, 2016***

P. C.

The appellants challenge the order passed by the learned District Judge-2, Kalyan dated 26 April, 2013 restraining the appellants from creating any third party rights or carrying out any construction or developing the suit land till disposal of the appeal.

2. The respondent/plaintiff filed Special Civil Suit No. 14/2011 in the Court of Civil Judge, Senior Division, Kalyan seeking an order of injunction against the appellants from creating any third party rights. It was her contention that by taking advantage of the entries in the revenue record, the appellants were trying to create third party rights and carry on construction. The

learned Civil Judge (Senior Division), Kalyan by Judgment and Order dated 18 October, 2011 on a preliminary issue framed as regards limitation, dismissed the suit holding that the suit was barred by limitation. In Civil Appeal No. 44 of 2013, filed by the respondent/plaintiff, interim order was passed on 26 April, 2013 by the learned District Judge granting injunction.

3. The present appeal was admitted on 7 May, 2013. At the time of admission of the appeal, in the Civil Application No. 611 of 2013 following order was passed :

“ P.C.

Heard learned counsel for the parties.

2. Admittedly, the suit was initially filed on 8th January, 2011. The suit is dismissed on the ground of limitation on 18th October, 2011. In an appeal filed against the dismissal of the suit, injunction is granted for the first time on 26th April, 2013. As of today, there is a finding of the trial Court that the suit is beyond limitation. In that view of the matter, I find that the impugned order deserves to be stayed during the pendency of the appeal.

3. In that view of the matter, civil application is allowed. The impugned order is stayed during the pendency of the appeal.”

4. Heard Mr. Kumbhakoni, the learned Senior Advocate for the Appellant.

5. Mr. Kumbhakoni, the learned Senior Advocate placed on record the decision of the learned Single Judge of this Court

(R. M. Savant J.) dated 24.6.2013 in the case of M/s Shreyas Builders & Anr. V/s Smt. Hansaben Balkrishna Mehta in Writ Petition No. 3930 of 2013. Mr. R. M. Savant, J. after taking review of earlier decisions, held that when an order is passed by the First Appellate Court under the provisions of Order 39 Rule 2 of the Code of Civil Procedure granting an interim order in injunction for the first time in the appeal, the appropriate remedy for the aggrieved parties is to file an Appeal from Order. In view of this decision, the appeal is taken for consideration on merits.

5. The appeal had come up on board on 27 August, 2015, 8 October, 2015, 26 November, 2015, 10 December, 2015 and 30 June, 2016, when none appeared for the respondent. On 30 June, 2016, the following order was passed.

“P.C.

The learned Counsel for the Appellants states that the order of injunction passed in Civil Application has been stayed since 7 May, 2013. None appears for the respondent. None appeared earlier as well.

2. Stand over to 7 July, 2016. To be listed under the caption for “directions”. The Respondent will show cause why the interim order granted in this Appeal from Order is not continued till disposal of the Appeal. If none appears, the Court will proceed to pass orders on merits.”

6. The injunction was granted by the learned District Judge, Kalyan for the first time in the appeal 1 ½ years after the

dismissal of the suit. Once the suit was dismissed as beyond the period of limitation, in the facts of the case, such order of injunction ought not to have been granted. The injunction was stayed by this Court almost immediately after hearing both the sides and the stay has continued for last three years. The respondent has shown no interest in contesting the appeal. It is informed that the appeal is still pending before the District Court.

7. In the circumstances, the impugned order passed on 26 April, 2013 need not to be continued. The Appeal from Order is accordingly allowed. The impugned order passed by the learned District Judge dated 26 April, 2013 is quashed and set aside. It will be open to the parties to make request to the learned District Judge to take up the appeal at an early date. All contentions of the parties on merits of the Appeal are kept open.

8. No costs.

(N. M. Jamdar, J.)