

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****CIVIL APPLICATION (ST) NO. 34840 OF 2015****IN****APPEAL FROM ORDER (ST) NO. 34408 OF 2015****Twin Developers****..... Appellant****VERSUS****Saeeda Banu Razak Bux & Anr.****..... Respondents**

Mr.Nitin Thakkar, Senior Advocate, a/w. Mr.N.Engineer, Mr.G.C.Mohanty, i/b. Mohanty & Associates for the Appellant.

Ms.K.P.Reshma Ravi, i/b. K.P.Ravi & Co. for Respondent No.1.

Ms.Gulekar, Representative of Court Receiver present.

CORAM : R.D. DHANUKA, J.**DATED : 29th FEBRUARY, 2016****P.C.**

By this civil application, the applicant (original defendant no.1) seeks stay of the impugned order dated 2nd December, 2015 passed by the learned trial judge passed in Notice of Motion No.273 of 2012 in favour of the original plaintiff in a suit for injunction. By a separate order passed by this court on 23rd December, 2015, the appeal from order filed by the original defendant no.1 is already admitted. By another order dated 23rd December, 2015 after giving a detailed reasons, this court has granted ad-interim relief in terms of prayer clause (a) of the civil application.

2. Mr.Thakkar, learned senior counsel appearing for the applicant (original defendant no.1) invited my attention to the Court Receiver's report dated 12th October, 2015 stating that on the date of the said report, the said Suit Gala No.167 was already demolished and now it is an open space except the temporary shed

and temporary structure of toilet. My attention is also invited to the averments made in the plaint filed by the original plaintiff who admittedly claimed through her husband her alleged right, title and interest in the suit property. It is not in dispute that before the trial court , both the parties had sought liberty to refer to and rely upon the suit filed by the husband of the original plaintiff Mr.Razak Bux (M.C.Suit No.299 of 2006)

3. A perusal of the plaint filed by the husband of the original plaintiff in Suit no.299 of 2006 clearly indicates that the husband of the original plaintiff had applied for injunction against the defendants to the said suit from entering upon or disturbing his alleged possession in the suit property. The appellant (original defendant no.1) was defendant no.4 in the said suit. My attention is also invited to the chamber summons filed by the husband of the present plaintiff inter alia praying for amendment alleging that he was illegally dispossessed by the defendants therein and inter alia praying for a declaration that the husband of the plaintiff was illegally dispossessed by the defendants.

4. Admittedly in the said suit filed by the husband of the plaintiff, the parties had filed consent terms. I have perused the order passed by the learned trial judge in the said Suit No.299 of 2006 and the consent terms filed by the parties thereto. The Roznama of the trial court in the said suit No.299 of 2006 clearly indicates that the husband of the plaintiff was present in the court and was duly represented by his advocate. The appearance of the advocate of the husband of the plaintiff was also shown in the Roznama. The consent terms were taken on record and the consent decree came to be passed by the City Civil Court in the said Suit No.299 of 2006. A perusal of the said consent terms indicates that the husband of the plaintiff had declared that he had no right, title or interest of any nature whatsoever

in the suit premises and would not claim right, title or interest in the said said premises. My attention is also invited to the certificate issued by Dena Bank certifying that a particular amount was credited to the account of the husband of the plaintiff. A perusal of the consent terms along with the certificate issued by the Dena Bank thus clearly indicates that the husband of the plaintiff had received some consideration from the defendants.

5. It is not in dispute that the City Civil Court thereafter had drawn up the decree. The husband of the plaintiff expired sometime in the year 2009. The plaintiff in the present proceedings thereafter filed notice of motion inter alia praying for setting aside the said consent decree and consent terms in Suit No.299 of 2006. There is no dispute that the said notice of motion filed by the original plaintiff in the said suit No.299 of 2006 has been dismissed for default. The said consent terms as well as consent decree are thus in force and are binding on the parties thereto and also the plaintiff in this suit who is claiming through her husband.

6. A perusal of the plaint filed by the original plaintiff in the present proceedings clearly indicates that it is not the claim of the original plaintiff that she is claiming possession of the suit property independently and not through her husband.

7. Learned counsel appearing for the original plaintiff invited my attention to some of the documents and mainly the original receipt issued by the revenue authority accepting some payment from the plaintiff in the month of January 2016. On the basis of such document, it is contended by the learned counsel for the plaintiff that the said payment was received in furtherance of the conversion of the

agricultural land into a non-agricultural land by the revenue authority. She submits that unless the revenue authority would have been satisfied that the plaintiff was in possession, no such amount could have been recovered from the plaintiff.

8. Learned counsel for the plaintiff also sought to canvass that since the husband of the plaintiff was in hospital on the date of filing of the consent terms, he could not have remain present personally in the court when the consent terms were taken on record and consent decree came to be passed.

9. It is contended by the learned counsel that this court cannot go into the issue of title in respect of the suit property.

10. Mr.Thakkar, learned senior counsel appearing for the appellant in rejoinder submits that insofar as filing of the consent terms and consent decree is concerned, since the notice of motion filed by the plaintiff herself in the said Suit NO.299 of 2006 is dismissed for default, the plaintiff cannot be allowed to argue contrary to the said terms of the said consent terms. He submits that even according to the plaintiff in the notice of motion filed by her husband was bedridden and was at home and thus he could not have gone to court whereas a false plea is raised in the affidavit in reply to the civil application that the husband was discharged from the hospital.

11. A perusal of the court receiver's report which was adverted to by the learned trial judge in the impugned order clearly indicates that the representative of the court receiver has recorded the statement made by the son of the plaintiff that the suit structure was already demolished. The representative of the court receiver who is present in this court also confirms that the report already submitted by the

court receiver which was considered by the learned City Civil Court judge clearly indicates that the suit structure was demolished.

12. A perusal of the letter addressed by the husband of the plaintiff annexed at page 152 of the compilation, during his lifetime clearly indicates that in the said letter addressed to the court receiver the husband of the plaintiff himself had admitted that the suit structure was demolished and after the said demolition of the suit structure and removing the fencing put by the court receiver, the area was merged into the property of M/s.Twins Construction developing the Rupa Compound.

13. A perusal of the impugned order passed by the learned trial judge clearly indicates that though the learned trial judge has adverted to the report submitted by the court receiver in the impugned order, he has decided contrary to the said report submitted by the court receiver. In spite of the admitted facts in various pleadings and documents on record that the suit structure was already demolished and not in existence, the learned trial judge in my view has totally overlooked the report of the court receiver and pleadings filed by both the parties and the documents which were forming part of the report before the learned trial judge has granted interim injunction in favour of the plaintiff. In my prima facie view the order passed by the learned trial judge is totally erroneous and thus deserves to be stayed.

14. Civil application is accordingly made absolute in terms of the ad-interim order passed by this court on 23rd December, 2015. No order as to costs.

[R.D. DHANUKA, J.]