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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 130 OF 2016
IN
SUIT NO. 441 OF 2000

Chanda C. Kadam and ors. ... Appellants
Vs.
M/s. Wellworth Developers and ors. ... Respondents

Mr. Virag Tulzapurkar, Sr. Counsel a/w. Mr. Snehal Shah, Mr. Farid Karachiwala, Ms Sneh Mehta i/b Wadia Ghandy & Co. for the Appellants.

Mr. Aspi Chinoy, Sr. Counsel a/w. Dr. Birendra Saraf, Ms Pooja Kshirsagar, Mr. Pratik Kothari, Mr. Anand Chovatia i/b Yogesh Adhia for Respondent Nos.1 to 4.

CORAM : V. M. KANADE, AND
M. S. SONAK, JJ.

DATE : JUNE 07, 2016

P. C.

1] Heard learned senior counsel for the parties.

2] Mr. Chinoy, learned senior counsel for the Respondent Nos.1 to 4, has raised preliminary objection to the maintainability of the appeal, firstly on the ground that the impugned orders were made with the consent of learned counsel for the parties and secondly

that the impugned orders, being only procedural in nature, cannot be regarded as any appealable judgments.

3] On the other hand, Mr. Tulzapurkar, learned senior counsel for the Appellants, submitted that the subsequent impugned order dated 2 March 2015, in terms accepts that the statement as recorded in paragraph '2' of the first order dated 2 February 2015 was not made by the counsel appearing for the Appellants and therefore, the impugned orders, are not the orders made upon consent. Learned senior counsel also submitted that the impugned orders have virtually stayed the trial in the suit and therefore, such orders are clearly appealable.

4] The impugned orders have virtually stayed the trial in the Appellants' suit until disposal of Testamentary Suit Nos. 23 and 24 of 2002. Such orders are therefore, appealable.

5] In the order dated 2 February 2015, learned Single Judge at paragraph '2' has recorded thus:

“2. Counsel on behalf of both the parties state that the decision in this suit shall have a bearing upon the decision in the suit for probate. Hence this suit shall be tagged along with the Testamentary Suit Nos.23 and 24 of 2002 and shall be heard immediately after that suit by the same Court.”

6] As it is the case of the Appellants that no such statement was made by the learned counsel for the Appellants, a praecipe was filed for speaking to the minutes and for correction of the record on 16 February 2015.

7] The second impugned order dated 2 March 2015 has been made by the learned Single Judge whilst disposing of the aforesaid praecipe dated 16 February 2015. By this impugned order, learned Single Judge did not correct the order dated 2 February 2015, as prayed for in the praecipe. However, the statement of learned counsel for the Appellant was corrected in para '8' of the impugned order dated 2 March 2015.

8] Though, it is settled position in law that the record made by the Court is to be accepted and normally not questioned, we must note that the learned Single Judge in the impugned order made on 2 March 2015 has, at one place, observed that the Court did not recall as correct that the plaintiff's counsel did not make such statement (para 2). Similarly, in para '7', the learned Single Judge, upon adverting to circumstances, has observed as follows:

“7. Consequently both parties would made the statements in that regard.”

9] After having made the aforesaid observations, at para '8' of the impugned order dated 2 March 2015, however, learned Single Judge has observed as under:

“8. However, above statement that the decision of this suit would have bearing upon the decision in the suit for probate is seen to be an error. Counsel on behalf of the defendant accepts that it would be the other way round and the correction in that behalf can be made. Hence the first sentence of paragraph 2 of my order dated 2nd February 2015 shall be corrected as follows:

“Counsel on behalf of the both the parties state that the decision in the testamentary suit Nos.23 and 24 of 2002 shall have a bearing upon the decision in this suit”.

10] From the aforesaid, it does transpire that there was some ambiguity with regard to the statement recorded in the order dated 2 February 2015. Besides, after having made observations in paragraphs 2 and 7 of the impugned order dated 2 March 2015, the learned Single Judge has proceeded to record a statement exactly contrary to the one earlier recorded in the impugned order dated 2 February 2015.

11] In the aforesaid circumstances, we are of the view that it would be appropriate if the impugned orders dated 2 February 2015 and 2 March 2015 are set aside and the matter is remanded to the learned Single Judge for determining whether Suit No. 441 of 2000 is required to be stayed until disposal of Testamentary Suit Nos. 23 and 24 of 2002. Such a course of action will afford both the parties

reasonable opportunity of making their submissions upon this issue. We do so accordingly. We also request learned Single Judge to consider the question as to whether Suit No. 441 of 2000 can be heard before the testamentary suits are heard and disposed of, even before any issues are framed in Suit No. 441 of 2000.

12] All contentions of all parties are kept open for decision by the learned Single Judge.

13] The appeal is allowed to the aforesaid extent. There shall however, be no order as to costs.

[M. S. SONAK, J.]

[V. M. KANADE, J.]