

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

WRIT PETITION NO. 8193 OF 2013

Mr. Madhusudan Govind Joshi.	... Petitioner.
Versus	
Arunodaya Developers Pvt. Ltd.	... Respondents.

Mr. Nitin Dalvi, advocate for petitioner.

Mr. Anand S. Kulkarni, advocate for respondents.

**CORAM : SMT.SADHANA S. JADHAV,J
DATE : NOVEMBER 27, 2017**

P.C.:

1 Heard the learned Counsel for the petitioner and the learned Counsel for the respondents.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 The Petitioner herein happens to be the Defendant in Special Civil Suit No. 196 of 2003. The prayers in the suit are as follows :

“A) The suit of the plaintiff be decreed with costs ;

- B) The defendant be directed and ordered to hand over the possession of the suit property to the plaintiff;
- C) It be declared that the agreement of sale between plaintiff and defendant is cancelled and not binding on the plaintiff;
- D) Enquiry may kindly be made regarding mesne profit as per Order 20 Rule (1)(c) of the Civil Procedure Code.
- E) Other just and equitable orders be passed.”

4 During the pendency of the said suit, the complaint filed by the petitioner before the Consumer Court was allowed by Judgment dated 29/3/2007. Being aggrieved by the said Judgment, the respondent herein had filed appeal which was dismissed, thereby confirming the findings of the District Consumer forum. There was revision in respect of pecuniary jurisdiction of the courts and hence, Special Civil Suit No. 196 of 2003 which was initially filed before the Civil Judge, S.D. Solapur was transferred to the Court of Civil Judge, J.D. at Solapur and was registered as R.C.S. No. 708 of 2012.

5 The said suit is based upon an agreement dated 4/10/2001. On 14/10/2010 the present petitioner filed an application before the learned Civil Judge, S.D. under section 11 of the Code of Civil Procedure and had brought it to the notice of the court that pursuant to the judgment of the appellate court, execution petition was filed. The respondent had filed revision application. In the revision application, the respondent had submitted that an agreement is executed on 19/9/2008 and therefore, the revision application was withdrawn. The Petitioner herein had brought it to the notice of the civil court that the prayers in the plaint had become infructuous by virtue of the execution petition and the execution of the agreement on 19/9/2008. That the plaintiff has executed the sale deed in favour of the petitioner.

6 The only contention of the plaintiff was that the issue involved is not covered by section 11 or section 12 of the Code of Civil Procedure, 1908. It was specifically contended in the reply that the sale deed is executed as per the order of the Consumer Forum and it

is not the voluntary act of the plaintiff. The said application filed by the petitioner was rejected on 19/6/2012. Hence, this Writ Petition.

7 It is pertinent to note that in the said application filed below Exh. 5 under section 11 of the Code of Civil Procedure, 1908, the plaintiff i.e. the respondent has specifically stated that it was not voluntary act of the plaintiff, but it was pursuant to the order of the Consumer Court.

8 In any case, the issue involved was as to whether the prayers in the plaint have become infructuous by virtue of execution of the sale deed in favour of the petitioner. The present petition is of 2013. Interim relief was granted in favour of the Petitioner by an order dated 16/9/2013. The suit is pending for 14 years. It is contended by the learned Counsel for the respondent that he has oral instructions that an application was made for amendment of the pleadings. In fact, the plaintiff would be at liberty to file a fresh suit in case there is recovery of arrears.

9 It is further pertinent to note that the vakalatnama was filed on 7/12/2013. However, till today, learned Counsel for the petitioner has not filed affidavit of reply and therefore, it is not clear as to whether the application was filed for seeking amendment of the pleadings. In any case, this Court is of the opinion that without going into the issues as to whether the findings recorded by the Consumer Forum in Appeal would amount to res judicata or not, the core issue would be as to whether the prayers in the plaint are sustainable due to change in circumstances.

10 It is the contention of the Learned Counsel for the respondent that pursuant to judgment of the Consumer Courts at the time of execution of the sale deed, the respondent has received full and final payment towards the said premises. It is in these circumstances that even if the amendment application is filed, it could not have been allowed since it would change the very nature of the suit and the reliefs that are being sought. Moreover, this Court cannot be

oblivious of the fact that in respect of the application filed by the petitioner under section 11, the respondent has specifically stated that execution of the sale deed is not voluntary act. Although the challenge to the appellate court had failed, it would not have been proper on the part of the plaintiff to contend that the execution was carried out pursuant to the orders of the court. The orders have been abided by the plaintiff-respondent.

11 It is in these circumstances that this Court is of the opinion that basically prayers in the suit have become infructuous and therefore, the Petition deserves to be allowed.

12 The Petition is allowed. The order dated 19/6/2012 is hereby quashed and set aside. However, the Petitioner is at liberty to file an application under Order 7 Rule 11 and bring it to the notice of the court that the prayers in the plaint have become infructuous by virtue of the execution petition. The petitioner shall file the application on or before 15/12/2017 and the learned Civil Judge, J.D. Solapur seized

with the RSC No. 708 of 2012 shall decide the said application on or before 30/1/2018 without giving any unwarranted adjournment to either of the sides.

13 Rule is made absolute in the above terms. Petition is disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)