

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (ST) NO. 8106 OF 2017
WITH
CIVIL APPLICATION (ST) NO. 8397 OF 2017
(FOR STAY)

Care Takers Exterior & Interiors Pvt. Ltd. .. Appellants
vs.
Kanchanganga Co-operative Housing
Society Limited & anr. .. Respondents

Mr. Shreepad Murthy i/b Mr. Abhishek Patil for the Appellants.
Mr. P.S. Dani, Sr. Advocate i/b K.B. Rajput for Respondent No.1.

CORAM : M. S. SONAK, J.
DATE : 05 APRIL 2017.

PC. :-

1] Heard Mr. Murthy, learned counsel for the Appellants and Mr.PS.Dani, learned senior advocate for respondent No.1.

2] The appeal challenges the order dated 9 March 2017, by which, the appellants' Notice of Motion No. 769 of 2017 stands rejected.

3] The prayer clauses in Notice of Motion No. 769 of 2017, read thus:

“(a) Pending the hearing and final disposal of the Suit, the Defendants, their servants, agents, members, and/or any other persons acting on their behalf be restrained by temporary order of injunction of this Hon'ble Court from floating any new tender and/or enetring into any agreement for the repair and painting work of the suit building viz. Kanchanganga CHS Ltd., J.P. Road, Andheri (West), Mumbai-400 058;
(b) Pending the hearing and final disposal of the Suit, the Defendant No.1 be directed to hand over the material to the

plaintiffs, which were lying and being in the secured premises, immediately;

(c) That pending the hearing and final disposal of the suit, the Hon'ble Court be pleased to appoint Court Commissioner, any government recognised institute such as VJTI or IIT as Structural Surveyor to inspect the suit building viz. Kanchangana Co-operative Housing Society Limited, Plot No. 9/10, Manish Nagar, J.P. Road, Andheri (west), Mumbai-400 053, and submit his structural report to this Hon'ble Court;"

4] The appellants were appointed as the Contractor to carry out certain works in connection with the building of the respondents. According to the respondents, they have now terminated the contract. The appellant states that the termination is illegal. Accordingly, such termination has been challenged in the suit.

5] Learned Trial Judge is quite right in saying that in matters of this nature, the Contractor, cannot seek any relief for specific performance. The prayer clause (a) of the notice of motion, if granted, would virtually amount to indirectly granting such relief or in any case would amount to disabling the respondents, who are the owners of the building from undertaking repairs through some other contractors. The relief in terms of prayer clause (a) was therefore, rightly denied by the learned Trial Judge.

6] Insofar as relief in terms of prayer clause (b) is concerned, again, these are highly contentious issues. The appellants state that its materials are lying at the site. The respondents dispute this position. This is ultimately, a matter of evidence. If ultimately, it is found that the appellants' materials are lying at the site and the same is appropriated or damaged by the respondents, it is always open for the appellants to sue for appropriate damages.

7] Insofar as prayer clause (c) is concerned, the Court Commissioner cannot be appointed, in order to enable the private parties to gather evidence for themselves. However, Mr. Murthy, learned counsel for the appellants, submits that the apprehension of the appellants is that if there is no proper record maintained for the work actually carried out by the appellant at the site, it is possible that in future any new contractor or respondents may urge that all this work had been carried out by the new Contractor. In such circumstances, Mr. Murthy submits that either Court Commissioner be appointed or some recognised institute like VJTI or IIT be deputed to undertake the inspection and to submit a report so that the precise position at the site is clear and documented. The submission of Mr. Murthy cannot be accepted in its entirety. However, liberty can always be granted to the appellants to engage the service of any Agency or structural Surveyor/Engineer/Architect to inspect the site, take measurements and photographs at the site, so that the appellants have some record of the position at the site. Such person or representative of such an agency can thereafter, be examined in the suit as a witness.

8] Accordingly, the appellants are granted liberty to engage services of any Agency or structural Surveyor/Engineer/Architect of its choice. Such Agency or structural Surveyor/Engineer/Architect is also permitted to inspect the site along with two representatives of the appellants, in order to carry out aforesaid exercise. One representative of the society can always be present in the course of inspection. However, it is made clear that there should be no interaction between the appellants' representative, Agency or structural Surveyor/Engineer/Architect and the representative of the society.

Further, the appellants or its Agency or structural Surveyor/Engineer/Architect is also permitted to take measurements, photographs in order maintain a record.

9] In order that the appellants take the benefit of the aforesaid order, the respondents are directed not to commence the repair works at the site for a period of 15 days from today. If for any reasons, the aforesaid exercise is not complete by the appellants or its Agency or structural Surveyor/Engineer/Architect within a period of 15 days from today, the appellants shall forfeit the benefit granted by this Court.

10] The appellants to furnish two days advance intimation to the respondent society of the date(s) of inspection. However, it is made clear that this entire exercise has to be completed within 15 days and after 15 days, the respondent society shall be free to undertake their construction/repairs activities.

11] It is made clear that all the contentions of all parties are kept open to be determined in the suit. The evidentiary value that is to be attached with this inspection report also to be also kept open for determination by learned Trial Judge in the course of suit.

12] The appeal from order is disposed of in the aforesaid terms.

13] In view of disposal of the main appeal, the civil application does not survive and the same is also disposed of.

14] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)

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