

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 91 OF 2014
WITH
CIVIL APPLICATION NO. 122 OF 2014**

Shri Kanhaiyalal Motilal Talera

... Appellant
(Original Plaintiff)

Vs.

Shri. Madhav Maruti Dhadge Since
Deceased through LRS & Others

... Respondents
(Original Defendants)

**ALONGWITH
CIVIL APPLICATION NO. 140 OF 2016**

Shri. Sagar Udhavrao Dhadge

... Applicant

Vs.

Shri. Kanhaiyalal Motilal Talera & Ors.

... Respondents.

....

Mr.Madhav Jamdar for the Appellant.

Mr.Sanjiv Sawant for the Respondent No. 2(ii).

Ms.Shradha Achliya i/b ALMT Legal for the Respondent No. 2(i).

Ms.Ruchita Kadam i/b Mr. Himanshu Kode for the Respondent No. 2(iii).

....

**CORAM : A.A. SAYED, J.
DATE : 2 MARCH 2017**

P.C:

1 The challenge in this Appeal is to the interlocutory order dated 6 December 2012 passed by the Civil Judge, Senior Division, Pune. By the impugned order, the Application of the Appellant/Original Plaintiff under Order XXXIX Rule-11 (High Court Amendment-Bombay) of the Code of Civil Procedure, 1908 for striking out the defence of the Respondents/original Defendants in the suit came to be rejected. The Appellant shall hereinafter also be referred to as the Plaintiff and the Respondents as the Defendants.

2 The Plaintiff has filed the suit for specific performance of an Agreement for Sale dated 2 November 1981 in respect of the suit property. The Appellant had earlier filed an Application in the Trial Court for appointment of Court Receiver. By an order dated 29 April 1999 a Receiver was appointed in respect of the suit property and certain directions were also issued by the Trial Court.

3 Being aggrieved by the said order dated 29 April 1999, the original Defendant No. 2 i.e. Udhavrao Maruti Dhadge (since deceased) had filed Appeal from Order No.1065/1999 in this Court. On 12 January 2000, this Court passed an ad-interim order staying the order dated 29 April 1999 on the condition that the Applicant/Defendant No.2 shall not part with the suit property by creating right of third party.

4 On 15 December 2004 while disposing of the Appeal from Order No.1065 of 1999, this Court passed the following order:

“4 In these circumstances, the impugned order is stayed. However, the parties will maintain status quo as of today. Respondent No. 1 may take such action as is necessary in the event he is of the view that the orders of the Court have been flouted by the Appellant. Leaving this liberty open, the Appeal from Order is disposed of. The Trial Court is requested to decide the matter as expeditiously as possible and in any event, before 31.12.2005.”

(emphasis supplied)

5 In 2008, the Appellant filed Contempt Petition No.248 of 2008 alleging willful disobedience of the order passed by this Court dated 12 January 2000. By order dated 2 December 2011, the learned single Judge of this Court dismissed the Contempt Petition. While dismissing the Contempt Petition, the Court noted the order dated 15 December 2004 of the Court in Appeal from Order No.1065 of 1999 whereby the trial Court was directed to decide the suit as expeditiously as possible and in any event before 31 December 2005, and since the suit was still pending, the learned single Judge again directed the trial Court to decide the suit expeditiously.

6. The Appellant also preferred another Application before the Trial Court for amendment of the plaint, which came to be dismissed and that order was unsuccessfully carried to this Court and the Apex Court. The Appellant thereafter preferred an Application dated 16-11-2012 (Exh.217) before the Trial Court under Order XXXIX Rule 11 for striking out the defence of the Defendants. It was contended in the said Application that the Applicant (Appellant herein) during the pendency of the suit came across a public notice published in "Daily Prabhat" dated 31-10-2012 by Advocate Kiran G. Ganjkar given on behalf of Sagar Udhavrao Dhadge i.e. Defendant 2(ii) stating that Defendant No.2(iii) i.e. Smt.Sadhana Udhavrao Dhadge executed and registered a

Release Deed in favour of said Sagar Udhavrao Dhadge i.e. Defendant No.2(ii) on 3-02-2011 in respect of survey No.53/A1 and 53/A, which shows that the Defendants had created third party interest in the suit property despite the order passed by this Court on 15-12-2004 directing status-quo to be maintained. On 6-12-2012, the Trial Court dismissed the said Application (Exh.217), which order is impugned in the present Appeal, which is filed on 8 October 2013.

7 During the pendency of the present Appeal, the Appellant had also filed Contempt Petition No.488 of 2013 in this Court alleging breach of the order dated 15 December 2004.

8 Much water has flown under the bridge since the filing of the present Appeal from Order and in this Appeal from Order and in the Contempt Petition No.488 of 2013 several orders came to be passed by this Court.

9 On 14 July 2014 the following order was passed:

“1 Heard the learned counsel for the parties.

2 At the request of advocate for respondent no. 2, matter is adjourned to Thursday, 17.07.2014 to take instruction whether these respondents are ready and willing to cancel the Relinquishment Deed dated 3.2.2011 executed by defendant no.2(iii) in favour of defendant no. 2(ii).

3 Stand over to 17.07.2014.”

10 On 18 July 2014, another order was passed by this Court. It reads thus:

- “1. Heard the learned counsel for the parties. The learned counsel for Respondent No.2(2), after taking instructions from his client makes a statement that they are ready and willing to cancel the relinquishment deed dated 3rd February 2011 executed by Defendant No.2(3) in favour of Defendant No.2(2) within three weeks from today. Statement is accepted. This statement is made by the learned counsel for Respondent Nos.2(2) without prejudice to their rights and contentions in other proceedings.
2. Till next date, further proceedings in Special Civil Suit No. 1193 of 1988 pending before the Civil Judge, Senior Division, Pune is stayed. S.O. to 8th August 2014.
3. Liberty to the parties to move for urgent orders before returnable date.”

11. On 16 February 2015, while admitting the AO, the following order came to be passed:

- “1 Heard the learned counsel for the appellant.
- 2 The learned counsel for the appellant submits that till today respondent failed and neglected to comply the order passed by this court on 18.7.2014 i.e. cancellation of relinquishment deed dated 3.2.2011.
- 3 Considering these facts, following order is passed:
 - A Admit.
 - B Ad interim relief granted on 18.7.2014 to continue till the hearing and final disposal of the Appeal from Order.
 - C The learned counsel for the respondents waives service.”

Thus, by virtue of the aforesaid order dated 16 February 2015, the ad-interim relief granted on 18 July 2014 staying further proceedings in the suit was continued till the hearing and final disposal of this Appeal.

12 On 17 October 2016, Contempt Petition No.488 of 2013 came to be disposed of by passing the following order:

“1. Pursuant to the order passed by this Court on 26th September, 2016, the respondent no. 1 in contempt petition and the respondent no.2(2) in the appeal from order has executed a document dated 6th October, 2016 thereby cancelling a document at page nos. 110 to 113 of the contempt petition i.e. the document dated 27th July, 2015. Mr. Sawant, learned counsel appearing for the respondent no. 1 states that the said document dated 27th July, 2015 is unconditionally cancelled by the document dated 6th October, 2016 and his client would not rely upon the said cancelled document in future. The statement is accepted. He submits that the power of attorney, which is referred to in the said document dated 27th July, 2015 also stands cancelled and will not be relied upon by his client in future. The statement is accepted.

2. Though at one stage this Court proposed to take action of contempt against the respondent no. 1, in view of the respondent no. 1 having belatedly complied with the order passed by this Court and has purged the contempt, in my view interest of justice would be met with if the contempt petition is disposed of upon the respondent no. 1 giving a donation of Rs. 10,000/- to Kirtikar Law Library within two weeks from today. It is ordered accordingly. A copy of the receipt issued by the Kirtikar Law Library shall be produced before the Sheristadar of this Court at the earliest after making payment.

3. The contempt petition in accordingly disposed of in aforesaid terms.
4. Place the appeal from order on board for hearing and final disposal on 30th November, 2016.”

(emphasis supplied)

13 I have heard the learned Counsel for the Appellant and the learned Counsel for the Respondents. Learned Counsel for the Appellant relied upon the following judgments.:

- 1 *Satyabrata Biswas and Others Vs. Kalyan Kumar Kisku and Others, (1994) 2 SCC 226.*
- 2 *Ramavatar Surajmal Modi Vs. Mulchand Surajmal Modi, AIR 2004 Bombay 212.*

14 Learned Counsel for the Respondents, on the other hand has placed reliance upon the following judgments.:

- 1 *Bababar Sewing Machine Company Vs. Trilok Nath Mahajan 1978(4)SCC 188*
- 2 *Ramavatar Surajmal Modi Vs. Mulchand Surajmal Modi, 2004(2) Mh.L.J. 1*
- 3 *Sheshrao Raibhan Ingale Vs. Shilpa Sheshrao Ingale, 2005(1) Mh.L.J. 188*
- 4 *V.G. Quenin & Ors. Vs. Bandekar Brothers Pvt. Ltd. & Anr. 2015(1) Mh.L.J. 421*

15 At this juncture it would be apposite to extract Order XXXIX Rule 11 of the Code of Civil Procedure, 1908 under which provision the Appellant had filed the Application (Exh.217) before the trial Court for striking out the defence of the Defendants. It reads thus:

“11. Procedure on parties defying order of court, and committing breach of undertaking to the Court. (1) Where the Court orders any party to a suit or proceeding to do or not to do a thing during the pendency of the suit or proceeding, or where any party to a suit or proceeding gives any undertaking to the Court to do or to refrain from doing a thing during the pendency of the suit or proceeding, and such party commits any default in respect of or contravenes such order or commits a breach of such undertaking, the Court may dismiss the suit or proceeding, if the default or contravention or breach is committed by the plaintiff or the applicant, or strike out the defences, if the default or contravention or breach is committed by the defendant or the opponent.

(2) The Court may, on sufficient cause being shown and on such terms and conditions as it may deem fit to impose, restore the suit or proceeding or may hear the party in defence, as the case may be, if the party that has been responsible for the default or contravention or breach as aforesaid makes amends for the default or contravention or breach to the satisfaction of the Court.

Provided that before passing any order under this sub-rule notice shall be given to the parties likely to be affected by the order to be passed.” (emphasis supplied)

16 I have considered the rival contentions of the parties and perused the material on record including the orders passed by this

Court from time to time and judgments cited by the learned Counsel for the parties. It is seen that despite the order dated 15 December 2004 of this Court granting status-quo while disposing of the Appeal from Order No.1065 of 1999, the Defendant No.2(iii) had executed a Release Deed dated 27 July 2015 in favour of her brother, Defendant No.2(ii). The Defendants however have now made amends by executing a Cancellation Deed dated 6 October 2016 (and Rectification of Cancellation Deed) cancelling the Release Deed dated 27 July 2015 and the Release Deed dated 27 July 2015 now stands cancelled and as observed by this Court in the order dated 17 October 2016, Sagar Dhadge [Defendant No.2(ii)] has purged the contempt. Learned Single Judge, therefore, disposed of the Contempt Petition with a direction to the said Sagar Dhadge [Defendant No.2(ii)] to donate a sum of Rs.10,000/- to Kirtikar Law Library. It is thus required to be noted that under the orders of this Court the Defendant No.2(ii) has made amends by cancelling the Release Deed dated 27 July 2015 and in view thereof status-quo ante has been restored.

17 In the case of **Ramavatar Surajmal Modi vs. Mulchand Surajmal Modi**, AIR 2004 Bombay 212, the Division Bench of this Court has held that Order XXXIX Rule 11(1) as applicable in Maharashtra is directory in nature and not mandatory and it is not obligate the Court to exercise power that vests in it to dismiss the suit

or proceedings where the default is by the Plaintiff and strike off the defence of the Defendant where the defaulter is Defendant, in every case of default and the power of striking off the defence should be exercised where the default is willful and conduct of the defaulting party is contumacious resulting in serious prejudice to the other side.

18 In the present case, inasmuch as, the Defendant No.2(ii) has made amends and status-quo ante has been restored, no prejudice can be caused to the Appellant, if the Defendants are allowed to defend the suit. Though it is contended by the learned Counsel for the Appellant that the Defendant No.2(ii) has sought to somehow even avoid cancelling the Release Deed dated 27 July 2015, considering the clauses in the Cancellation Deed and that the Cancellation Deed was ultimately required to be rectified by a Rectification Deed (of the Cancellation Deed), I am not inclined to read much in that as it is now an undisputed position before the Court that the Release Deed stands cancelled in toto.

19 Considering the facts and circumstances of the case and the fact that the exercise of the power of striking out the defence is discretionary and as the Defendants have made amends and restored the status-quo ante, I am satisfied that the impugned order of the Trial Court dismissing the Application of the Appellant for striking out the

defence of the Defendants does not call for interference at the hands of this Court. The judgment in the case of **Satyabrata Biswas Vs. Kalyan Kumar Kisku** (*supra*) cited on behalf of the Appellant does not assist the Appellant in any manner. Considering the manner in which the matter has proceeded, I am prima facie of the opinion that the Appellant is more interested in prolonging the hearing of his own suit after obtaining interim orders in his favour.

20 Considering the language of Order XXXIX Rule 11, the learned Counsel Mr.Sawant, on instructions, makes a statement that the Defendant No.2(ii) will pay a sum of Rs.15,000/- to the Kirtikar Law Library within eight weeks from today. The statement is accepted.

21 The Appeal from Order is accordingly dismissed. Civil Applications are also disposed of.

22. After the judgment was dictated, learned Counsel for the Appellant sought stay of the operation of this order. Having regard to the facts and circumstances of the case and inasmuch as the suit (which is part-heard) is of the year 1988 and there is already an order passed by this Court to dispose of the suit before December 2005 and several orders passed thereafter to decide the suit expeditiously, I am not inclined to grant stay. The request for stay of operation of this order is refused.

23. It is expected of the trial Court to dispose of the suit on priority basis. The parties to appear before the Trial Court on 5 May 2017, when it shall issue appropriate directions as to further hearing of the suit.

(A.A. SAYED, J.)