

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

APPEAL FROM ORDER NO.595 OF 2016

Twin Developers

..Appellant

V/s.

Saeeda Banu Razak Bux & Anr.

..Respondents

Mr.R.A. Thorat, Senior Advocate a/w Mr.Shanay Shah i/by
Mr.G.C. Mohanty for the Appellant.

CORAM : M. S. SONAK, J.

DATE : 06 JANUARY 2017.

P.C.

1. Heard Mr.Thorat learned Senior Advocate for the
appellant along with Mr.Shanay Shah.

2. Neither the respondent nor their advocates are
present.

3. This appeal is directed against the order dated
02-12-2015 made by the City Civil Court, Mumbai (Trial Court)
allowing Notice of Motion No.273 of 2012 taken out by
respondent No.1(Original Plaintiffs) and restraining the

appellants from entering the suit gala or in any way interfering with the exclusive possession of the respondent No.1 in respect of the suit gala.

4. On 23 December 2015, this Court, by detailed order, granted ad-interim relief staying the impugned order. By further detailed order dated 29-02-2016, ad-interim relief granted on 23-12-2015 was confirmed. At the stage of making orders dated 23-12-2015 and 29-02-2016. The learned counsel for the respondent no.1 were duly heard at the time of making these orders.

5. Mr.Thorat learned Senior Advocate for the appellant submits that the husband of the respondent no.1 had filed S.C Suit No.299 of 2006 against the appellant, in respect of the suit structure, seeking, virtually, the same relief as has been applied for in the present suit. Consent terms were filed in the said suit and the consent decree was drawn out. Thereafter, the respondent no.1 made an attempt to seek the setting aside of the consent decree. However, such attempt was

not successful.

6. Mr.Thorat further submits that the statutory authorities, after following the due process of law have already demolished the suit structure. This fact is evident from the reports of the Court Receiver dated 01-09-2015 and 12-10-2015. Mr.Thorat submits that since the respondent no.1 had instituted a suit for injunction simplicitor there was no question of grant of any interim reliefs, since, suit structure itself was not in existence and there was no question of the respondent no.1 claiming possession in respect of non existing structure.

7. For the aforesaid reasons, Mr.Thorat submits that the impugned order is liable to be set aside.

8. As noted earlier, the respondent no.1 is not present. Her advocates are also not present.

9. The record indicates that in respect of the very suit

structure the husband of respondent No.1 had instituted Suit No.299 of 2006. The Roznama in the said suit indicates that the husband of respondent No.1 was very much present in the Court when consent terms were filed in the said suit. On the basis of the such consent terms, a consent decree was also drawn.

10. The consent terms record that the husband of the respondent No.1 claims no right, title or interest in respect of the suit structure. Although, no details of the amount paid to the husband of the respondent no.1 are reflected in the consent terms, it is the case of the appellant that an amount of Rs.3,30,000/- was in fact paid to him. Since, the receipt of any such amount was denied, the appellants have produced on record statement issued by the Dena Bank, Marol Andheri Branch certifying that the cheque No.671645 in an amount of Rs.50,000/- and a pay order no.745292 in an amount of Rs.2,80,000/- was issued in favour of the husband of respondent No.1 and that the same have been honored on 02-07-2009 and 23-07-2009 respectively from the account of

the appellants. Record also indicates that the Notice of Motion No.220 of 2014 taken out by the respondent No.1 herein for setting aside a consent terms in suit No.299 of 2016 is dismissed for default.

11. The Court Receivers report dated 12-10-2015 categorically indicates that the Suit Gala is demolished and now there is only open space, some temporary shed and temporary structure of toilet.

12. In view of the aforesaid, there is no justification granting any interim relief to the respondent no.1. If at all, the respondent no.1 has any rights in respect of the suit structure, it is open for her to raise appropriate claim in that regard, by seeking amendment to the plaint. At this stage however, there was no case made out for grant of any interim relief.

13. This Court, in its order dated 29 February 2016, at paragraphs 11,12 and 13 had made the following observations:-

“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 were 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 pleading filed by both the parties and 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. Upon examining the material on record, I am satisfied that the respondent No.1 has failed to make out any prima-facie case for grant of interim order. Besides, the interim relief, at this stage, would operate extremely harshly upon the appellant, since, on account of the same, they may not be in position to use the suit property in an effective manner. Since the suit is pending, needless to add any activities that the appellants undertake upon the suit property will be subject to further orders will be made in the suit.

15. Accordingly, this appeal is allowed, impugned order is set aside.

16. It is made clear that the observations in this order need not influence the learned Trial Judge while disposing of suit finally on its own merits and in accordance with law.

17. All concerned to act on the basis of an authenticated copy of this order.

(M. S. SONAK, J.)