

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

**CIVIL APPLICATION NO.263 OF 2017
IN
APPEAL FROM ORDER (ST) NO.35311 OF 2016**

Shri.Mahesh Matadin Varma & Ors. ..Applicants/Appellants
V/s.

M/s.Sun Constructions & Ors. ..Respondents

Mr.I.K. Tripathi i/b Mr.P. K. Gautam for the
Applicants/Appellants.

None present for the Respondents.

CORAM : M. S. SONAK, J.

DATE : 05 APRIL 2017

P.C.

1. Mr.Tripathi, learned counsel for the applicants/appellants states that service is completed upon the respondents and necessary affidavit of service will be filed in the course of the day.

2. This Court, on 29 March 2017, had made it clear that endeavor shall be made to dispose of the appeal finally, at the stage of admission.

3. The delay of 17 days in instituting the appeal is sufficiently explained and accordingly the delay is condoned.

The Civil Application No.263 of 2017 is disposed of.

4. The challenge in this appeal is to the order dated 25 October 2016, by which, the appellants (Original Plaintiffs) Notice of Motion No.2891 of 2016 has been dismissed.

5. Mr.Tripathi, learned counsel for the appellant submits that in fact, the matter was posted for consideration of ad-interim relief. However, the Notice of Motion itself, has been disposed of by an order, is comprises mainly only one paragraph. He submits that there is no discussion whatsoever in the impugned order as to whether any *prima-facie* case is made out by the appellant and if so, where the balance of convenience lies. He submits that even at the ad-interim stage of the appellants are seeking was a restraint upon the respondent for creating third party rights in respect of the suit property, since, the appellant, seeks to imposed rights of the preemption in respect thereof.

6. Mr.Tripathi, now submits that in case fresh hearing is directed on the Notice of Motion, the appellant, will press for relief in terms of prayer clause (a) of the Notice of Motion which reads as follows :-

“(a) Pending the hearing and final disposal of the suit this Hon'ble court by order of temporary injunction be pleased to restrain defendant No.1 to

4 and their agents and servants from creating third party rights, selling, assigning, mortgaging and/or parting with possession in respect of the suit Property viz. Plot bearing CTS No.1632, 1632 (pt 1 to 12) corresponding to TPS final Plot No.323 adms. About 504 sq. mtrs. consisting of the building, structures standing thereon and/or part or portion thereof.”

7. Mr.Tripathi, however, clarifies that though, the appellant, will not press for reliefs as set out in remaining prayer clauses of the Notice of Motion, at the interim stage, they will, in accordance with law, urge that such reliefs may have to be granted at the stage of the final disposal of the suit. He submits that substantive prayers, infact, have already been made in the plaint.

8. From the perusal of the impugned order, it does appear that the learned Trial Judge has only adverted to the issue of alleged delay in the institution of the suit. Although, delay, may in a given case, may be a relevant factor, it is not appropriate to dispose of the entire Notice of Motion by only adverting to the said alleged factor. Mr.Tripathi, is right that all the contentions are required to be considered and appreciated and thereafter, it could have been concluded as to whether there was any delay and if so, what should be the impact of the

such delay. He submits that at this stage, the appellants were not praying for restoration of any status-quo ante, but, for only seeking restraint in the matter of creation of any third party rights in the suit property.

9. At this stage, although, it is not for this Court to go into the merits of the matter, it does appear that all the contentions of the appellants have not been duly considered. Since, the Notice of Motion was been considered and not merely, grant or refusal of ad-interim relief, it was necessary for the Trial Court to have adverted to all the contentions of all the parties and thereafter decide whether case made out for grant of interim relief or not. On this short ground and without going into further merits of the order the impugned order dated 25 October 2016 is hereby set aside. The Notice of Motion No.2891 of 2016 is restored to the file of the learned Trial Judge. The learned Trial judge to dispose of the notice of motion in accordance with law and its on merits after afford of opportunity to all parties. The motion is disposed of as expeditiously as possible and in any case within a period of four months from today.

10. In so disposing of the Notice of Motion, the learned Trial Judge need not be influenced any observations in the

order dated 25 October 2016 which, in any case, is hereby set aside as also observations in the present order. All contentions of all parties are left open.

11. The appeal is disposed of in the aforesaid terms. The Civil Applications therein are also disposed of in the aforesaid terms.

(M. S. SONAK, J.)