

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6010 OF 2021

M/s. Omkar Developers Through
Its Partners Vishwasrao S. Patil
& Ors.

..

Petitioners

Vs.

Rakesh Ramesh Miraje

..

Respondent

...

Mr. Balwant V. Salunkhe for the petitioners.

...

CORAM : SMT. BHARATI DANGRE, J.

DATED : 25TH OCTOBER, 2021.

P.C:-

1. The petitioners are aggrieved by an order passed by the Principal District Judge, Sangli in Regular Civil Appeal No.158 of 2016, below Ex-41.

2. Pertinent to note that the Regular Civil Suit No.357 of 2009 was instituted by the respondent for specific performance of the sale deed and for possession of the suit land. On 03/03/2015, learned Civil Judge, Senior Division, Sangli has

decreed the said suit. The present petitioners being aggrieved and dissatisfied by the judgment and decree, preferred an appeal before the Principal District Judge, Sangli, in which the application came to be moved by invoking Order 26 Rule 10 of the CPC. The application is placed at Ex-D of the writ petition and, when perused, it means to convey that the document exhibited at Ex-41 being the sale deed on which the decree has been granted, contains some pages, which according to the present petitioners, are inserted subsequently and several other flaws in the said document are sought to be projected to depict that the said document is a fraudulent one. Paragraph Nos.3 to 6 of the application set out the defects in the document at Ex-41 and in paragraph No.8 what is stated is that the said flaws have come to the notice of the petitioners recently and, therefore, the application is moved, seeking appointment of the Commissioner to examine the said document.

3. The application was considered by learned District Judge and it was rejected albeit on a different reason that the suit was proceeded ex-parte and no written statement order passed by the Civil Judge, Senior Division, Sangli, was upheld by the High Court as well as the Hon'ble Supreme Court. In the wake of the aforesaid facts, learned Judge has recorded that even if Ex-41 was sent to the expert for examination and the expert rules in favour of the appellants, the appellants will not be in a position to prove the same, as they failed to file the written statement. In

any case, the attempt made by the appellants is not of any succor is the reasoning cited by the learned Judge while rejecting the application.

The learned Judge may not be correct on the said point, since on appointment of the Commissioner or a Commission for scientific investigation as contemplated in Order 26 Rule 10/10A of the CPC, the report of the Commissioner can be tendered before the court under the signature of the expert and the court shall make reference to the said report and in such a case, the burden does not lie upon the party to prove the contents, as it is the report of a third party, in the form of the Commissioner, whose opinion would be given due weightage by the court.

4. However, as far as the present application is concerned, it is moved at the appellate stage and apart from a bare statement to the effect about gross shortfalls in the said agreement, of which the specific performance was directed under the impugned decree, a statement is made that it has come to the appellants' knowledge lately and that is how the application is moved at the appellate stage. No reason is given by the appellants as to what prevented them from having access to the said document, which was the bone of contention and which was contested between the parties before the trial court. In the absence of a plausible explanation being offered demonstrating the due diligence on the part of the appellants in questioning the validity of the said document in any case, the application cannot be allowed at the

appellate stage. Though the learned Judge did not assign the said reason while rejecting the application and he rejected it on the ground that the evidence could not be taken into account as there was no written statement order passed and his defence was struck off. The said reasoning may not justify the passing of the order. Nonetheless, the application cannot be granted as there was no attempt made by the appellants to show due diligence on the part of the appellants to point out that the lacuna in the said document (Ex-41). In such circumstances, the impugned order cannot be faulted with and the writ petition is dismissed.

[SMT. BHARATI DANGRE, J.]