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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2034 OF 2020

1] Shri Kedu Ratan Aher

(Deceased, through his Legal Heir)

1-A) Uday Kedarnath Aher

..... Petitioner

V/s

1] Bhausaheb Bapurao Deshmukh (Deceased)

Through his legal heirs (Nos. 1 to 3)

1.1. Smt. Shalinibai Bhausaheb Deshmukh

and Others

..... Respondents.

Mr. Milind M. Sathaye for the Petitioner.

Mr. G.S. Godbole i/b Mr. Rahul Motkari for Respondent No.3.

CORAM: NITIN W. SAMBRE, J.

DATE : NOVEMBER 16, 2021.

P.C.

1] This Petition is by the Plaintiff to Regular Civil Suit No.100 of 2012 (old Special Civil Suit No.60 of 1994) pending on the file of 6th Joint Civil Judge, Senior Division, Nashik questioning the order dated 21.01.2020 passed by Ad-hoc District Judge-1, Nashik in Misc. Civil Appeal No.17 of 2019, thereby confirming the order passed by the learned Civil Judge below Exhibit-212.

2] Brief facts necessary for deciding the present Petition are as under:-

3] Petitioner instituted aforesaid suit for declaration, claiming that he became an owner by adverse possession and also for injunction. Application for temporary injunction came to be allowed on 24/2/1994, thereby restraining Respondents/Defendants from creating third party interest. In defiance of aforesaid injunction order, Defendant Nos. 1 to 3 entered into Development Agreement and also executed Power of Attorney in favour of Defendant No.5. As such, prayer for striking out defence of Defendant Nos. 1 to 3 pursuant to the provisions of Order 39 Rule 11 came to be allowed on 12/2/2009. The said order was confirmed upto this Court.

4] On 03/05/2002, Lakhan Karbhari Sonawane (the original Defendant No. 5), who is Respondent No.3 herein, was proceeded against under Order 39 Rule 2A of the Civil Procedure Court by alleging breach of injunction for which he came to be added as Defendant No.5.

5] An attempt on the part of Petitioner/Plaintiff in seeking deletion of Defendant No.5 was rejected and confirmed upto this Court in Writ Petition No.4945 of 2011 vide order dated 10/10/2011.

6] In the backdrop of general Power of Attorney executed by Defendant Nos. 1 to 3 on 23/4/2002 and Development Agreement of the very same date in favour of Defendant No.5 by Defendant Nos. 1 to 3, Application-Exhibit-212 dated 29/10/2012 was taken out, praying for striking out defence of Defendant No.5. The said prayer was rejected vide impugned order dated 10/12/2012 which was confirmed vide impugned order dated 21/1/2020 by the Ad-hoc District Judge-1 Nashik in Misc. Civil Appeal No.17 of 2019. As such, this Petition.

7] Mr. Sathaye, learned Counsel for the Petitioner would urge that order of injunction passed on 24/2/1994 by the learned Judge in the suit, thereby issuing ex parte injunction against Defendant Nos. 1 to 3 and order dated 6/12/2000, thereby restraining Defendant Nos. 1 to 3 from alienating the suit property are matter of record and not in dispute. None of the Defendants to the suit, till this date, has

questioned the said orders of injunction. Execution and registration of general Power of Attorney, so also of Development Agreement dated 23/4/2002 is not under dispute. As such, according to Mr. Sathaye, apart from Defendant Nos. 1 to 3 even Defendant No.5 himself acknowledged knowledge about aforesaid order of injunction. Once Defendant No.5 has accepted to have been impleaded as Defendant to the suit, order of injunction shall automatically apply to Defendant No.5. In the aforesaid backdrop, since defence of Defendant No. 1 to 3 was ordered to be struck off, having violated order of injunction, Defendant No.5 who is Respondent No.3 herein also ought to have been dealt with in a similar manner. According to Mr. Sathaye, attempt on the part of Defendant Nos. 1 to 3 in executing aforesaid documents is nothing less than showing complete disrespect/disregard to the order of civil court. He would further claim that transfer of immovable property i.e. execution and registration of Development Agreement and General Power of Attorney in violation of the order of injunction issued by the court of law, confers no right, title and interest in Defendant No.5 and Defendant No.5 cannot be allowed to reap advantages or benefits

from such illegal transfer, even if Defendant No.5, at the relevant time, was not party to the proceedings. He would also draw support from judgment of this court in the matter of *Pralhad Jaganath Jawale and Ors. Vs. Sitabai Chander Nikam and Ors.* reported in **2011 (4) Mh.L.J 137** on the aforesaid issue. According to him, such transfer cannot be termed as transfer in the eyes of law, as same is in violation of the order of injunction. He would claim that both the courts below have committed an error and failed to appreciate very legal obligation of Defendant No.5. That being so, orders impugned are liable to be set aside, thereby allowing the Application-Exhibit-212, ordering striking out defence of Defendant No.5.

8] Countering aforesaid submissions, Mr. Godbole, learned Counsel for Respondents/Defendants would urge that Order 39 Rule 11 was inserted by Bombay Amendment, whereby provision is made for procedure to be adopted on parties defying orders of court and committing breach of undertaking to the Court. He would further claim that Defendant No.5, at no point of time, intentionally has engaged in defying orders of the Court. He would invite attention of this Court to the principle of *lis pendens*, so as to claim that, in case, if

suit is decreed, necessary consequences will follow. According to him, provision is draconian and as such, courts below have concurrently held that since nature of the provision is directory, same need not be exercised against Defendant No.5.

9] Mr. Godbole would further urge that even if development agreement is executed by Defendant Nos. 1 to 3 in favour of Defendant No.5 during operation of injunction order during pendency of suit still same will not operate as embargo on the right of Defendant No.5 to purchase the property. So as to substantiate his claim, he would draw support from the judgment of the Apex Court in the matter of *Thomson Press (India) Limited vs. Nanak Builders and Investors Private Limited and Others* reported in **AIR 2013 SC 2389**. Mr. Godbole as such would urge that, at the most, for violation of injunction order appropriate remedy can be taken recourse to, as has been observed by the Apex Court in the matter of *Thomson Press (India) Limited*, cited supra. However, that by itself will not annul the transaction/transfer made during pendency of the suit. According to him, such development agreement will be subject to right of parties to the suit to be adjudicated by the Civil Court.

9A. While countering aforesaid arguments, Counsel for Respondent No.1/original Petitioner would urge that provisions of Rule 11 of Order 39 which are inserted by way of Bombay Amendment read thus:-

“11. Procedure on parties defying orders 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 defaults 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 defaults 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.”

In this backdrop, he would urge that transfer of the property is made contrary to orders of injunction dated 24/2/1994, 6/12/2000 which have

attained finality till this date against the Respondents/Defendants, whereby Defendants are restrained from creating third party interest in relation to the suit property. Both the documents i.e. general Power of Attorney and Development Agreement speak of recitals about pendency of suit and as such, orders of injunction were very much made known to Defendant No.5. The violation of the orders of injunction referred to above by Defendant Nos. 1 to 3 and the order dated 12/2/2009 by the Court of Civil Judge, Senior Division, Nashik in exercise of powers under Order 39 Rule 11, directing striking out of defence is also not in dispute and the said order has attained finality before this Court in A.O. No.102 of 2010.

10] As far as the prayer of the Petitioner of striking out defence of Defendant No.5 is concerned, both the courts below while rejecting such prayer were sensitive to the Bombay Amendment to the Code of Civil Procedure i.e. Order 39 Rule 11.

11] The Court below observed that Bombay High Court in *Ramavtar Surajmal Modi vs. Mulchand Surajmal Modi* reported in **2004(2) Mh.L.J. page 1** has held that aforesaid provisions are directory in

nature and as such refused to exercise discretion thereby refusing to order striking of defence. Similarly, lower Appellate Court has observed that there is nothing on record to infer that Defendant No.5 has committed any act which has seriously prejudiced rights and interest of the Plaintiff/Petitioner or has undermined any order of the court. As such, lower Appellate Court refused to exercise powers under Order 39 Rule 11 in favour of the Petitioner.

12] It appears that both the Courts below committed an error of law apparent on the face of record in refusing to exercise power under Order 39 Rule 11 of the Code of Civil Procedure. The fact remains that Defendant Nos. 1 to 3 in defiance of the order of injunction have created third party interest in favour of Defendant No.5. The orders of injunction were within the knowledge of Defendant No.5 which can be inferred not only from recitals of general Power of Attorney and the Development Agreement but also from conduct of the parties. Once Defendant No.5 in view of aforesaid documents and having regard to the fact that he is impleaded as party-defendants, orders in suit are automatically made applicable to Defendant No.5 as he has stepped into the shoes of Defendant Nos. 1 to 3. As a consequence, orders of

injunction with equal force applies to Defendant No.5. Fact remains that neither Defendant No.5 nor Defendant Nos. 1 to 3 have questioned the orders of injunction. The order of striking out of the defence of Defendant Nos. 1 to 3 under Order 39 Rule 11 has been confirmed upto this Court. The defence which is not permitted to be raised by Defendant Nos. 1 to 3 cannot be permitted to be raised by Defendant No.5. Defendant No.5 cannot claim to have better case than Defendant Nos. 1 to 3. Having observed that Defendants have acted in defiance of the orders of injunction to the benefit of Defendant No.5, merely because relief claimed under Order 39 Rule 11 is discretionary and directory in nature that by itself does not give lever to the courts below not to exercise such powers. In the facts and circumstances of the present case viz defiance of orders of injunction by all the Defendants and order of striking down defence of Defendant Nos. 1 to 3 rather prompts this Court to treat Defendant No.5 similar to that of Defendant Nos. 1 to 3 in the matter of ordering striking of defence.

13] Mr. Sathaye, in my opinion, was justified in inviting attention of this Court to the observations of Division Bench of this Court in the

matter of *Keshrimal Jivji Shah and another vs. Bank of Maharashtra and others* reported in 2004(3) Mh.L.J. 893. This Court in the said judgment has held that if parties act in defiance of the orders of the Court particularly when the Court intends a particular state of suit property to exist, parties are not only bound to maintain the position as was directed but it has to be presumed to exist till court orders otherwise.

14] The Court further observed that principles of *lis pendens* are altogether on different footing and same have no applicability to the facts of the present case.

15] The Court in the matter of *Pralhad Jaganath Jawale* cited supra has rightly held that transfer of property in violation of injunction or prohibition issued by the court of law confers no right, title or interest in the transferee. Transferee cannot be allowed to reap advantage/benefit from such transfer particularly because he is not party to the proceedings in which order of injunction or other prohibitory directions or restraint came to be issued.

16] In the aforesaid backdrop, contention of Mr. Godbole that in spite of order of injunction even if transfer is effected i.e. by execution of Power of Attorney and Development Agreement, at the most parties can be held guilty for breach of the order of injunction in lieu of order of striking out defence cannot be accepted. By inserting Rule 11 to Order 39 by Bombay Amendment, an additional remedy is given to parties to the suit, particularly in this case to Plaintiff when violation of order of injunction is noticed so as to claim striking out defence.

17] In the aforesaid backdrop, observations made by both the Courts below, thereby refusing to exercise discretion as the provisions of Order 39 Rule 11 are directory in nature and not mandatory are without any legal basis as narrated in the aforesaid paras. Present one is a fit case in which the Courts below should have exercised discretion, thereby ordering striking out defence of Defendant No.5, particularly when he has acted contrary to the orders of injunction of which he was having knowledge. The Defendants to the suit have aggravated the suit cause, thereby not cancelling the documents during pendency of suit viz. Power of Attorney and Development

Agreement.

18] In that view of the matter, present Writ Petition needs to be allowed.

19] The order impugned passed by the Court of 6th Jt. Civil Judge, Senior Division, Nashik below Exhibit-212 in Special Civil Suit No.100 of 2012 on 10/12/2012 and order dated 21/1/2020 passed in Misc. Civil Appeal No.17 of 2019 by Ad-hoc District Judge-1, Nashik are hereby quashed and set aside. Application-Exhibit-212 stands allowed and it is ordered that defence of Defendant No.5 is struck off.

20] Writ Petition is accordingly disposed of.

(NITIN W. SAMBRE, J.)