IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Appeal from Order No. 381 / 2021

Alongwith

Interim Application No. 3164 / 2021
in
Appeal from Order No. 381 / 2021

M/S. Suraj Estate Developers
Through its Partner,
Shri. Rajiv Chinubhai Parikh ... **Appellant**

Versus

Dilip Ashok Desai ... **Respondent**

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Mr. Surel S. Shah, Advocate for the Appellant.
Mr. Suryajeet P. Chavan i/by One Legal Bay LLP, Advocate for Respondent No.1.

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CORAM : SANDEEP K. SHINDE, J.
RESERVED ON : 22nd FEBRUARY, 2022.
PRONOUNCED ON : 28th FEBRUARY, 2022.

P.C.

1. In the Special Suit Appellant/ Plaintiff prayed for ;

(i) declaration that development contract dated 24th April, 2018 executed between the Plaintiff firm and the Defendant be declared void, reason being it is 'impossible to perform'.

(ii) perpetual injunction to restrain the Defendant from negotiating 38 Post Dated Cheques (PDC) and two security cheques bearing no. **599551** and **062772**.

(iii) to recover Rs. 1,49,08,749/- with interest @ 12% from the Defendant.

2. Pending suit, the application moved by the Appellant-Plaintiff below Exhibit-5 seeking, relief to restrain the Defendant from negotiating the 36 post dated cheques, was rejected by the learned trial Judge vide order dated 24th September, 2021. That order is challenged this appeal under Order-43, Rule-1 read with Section 104 of the Code of Civil Procedure.

3. Heard. Learned Counsel for the parties.

4. Factual Matrix :

Plaintiffs' case in brief is that vide Development Agreement dated 24th April, 2018, Plaintiffs had agreed to develop the Defendants' property, upon certain terms and conditions. In consideration whereof, Plaintiffs had agreed to pay Rs. 3,30,000,00/- to the Defendant and two flats. Accordingly, Plaintiffs paid Rs. 85,20,000/- to the Defendant up to 10th February, 2019. Assuring performance of agreement, Plaintiff No.1 drew 53 post dated cheques of Rs. 5,10,000/- each in favour of Defendant of dates between April, 2019 to March, 2023 towards the balance consideration of Rs. 2,44,80,000/-. In addition thereto, also drew two cheques of Rs. 50,000/- each, in the name of Defendant as a 'security' for allotting the flats in the suit property. Plaintiffs' case is, when Development Agreement was executed i.e. in April, 2018, the 'property' in question was falling in residential zone; however, the State of Maharashtra in its' Irrigation Department vide communication dated 10th July, 2019 classified the said property within the 'blue line' (flood line). As a result, the property in question classified in the preventive/ prohibited zone, of development. In consequence, the performance of the Development Agreement was rendered, 'impossible'. In the said circumstances, the Plaintiffs requested the Defendant, not to deposit remaining 36 Post Dated Cheques. Yet the Defendant presented some cheques for negotiation on due dates. Thus, Plaintiffs instructed Bank to stop the payment. Cheques were dishonoured. Whereafter, Defendant filed complaints under Section 138 of the Negotiable Instruments Act, 1881. In these circumstances, Plaintiffs brought the suit for the reliefs stated herein above and pending suit, moved an application to injunct the Defendant from negotiating 36 post dated cheques + two security deposit cheques.

5. The learned trial Judge declined the said relief on two grounds;

(i) Cheque being not a 'movable' or 'immovable property', provision of Order 39 Rule 1 and 2 of the CPC, has no application thereto and thus, temporary injunction cannot be granted; and

(ii) the temporary relief sought in effect would restrain the Defendant from prosecuting the Plaintiffs under Section 138 of Negotiable Instruments Act, which, cannot be granted in view of provision of Section 41(d) of the Specific Relief Act, 1963.

6. Question is whether impugned order calls for interference ? Answer is 'No'. Following are the reasons.

7. Correct to say that upon reading a plaint in whole, although the the plaint does not specifically pray for an injunction against the Defendant from prosecuting the remedy under Section 138 of N.I. Act, yet the fact remains, that the Defendant has already prosecuted the Plaintiffs under Section 138 of N.I. Act for dishonor of few posted cheques and further, order preventing to present the cheques for negotiation, would amount to preventing the Defendant from prosecuting remedy available under the law. It would counter, the express prohibition contained in provision of Section 41(d) of the Act of 1963.

8. Insofar as the reason that cheque being, not movable or immovable property and therefore Order 39 Rule 1 and 2 of CPC has no application, is concerned, it is to be noted that the main relief of declaration i.e. cancellation of Development Agreement has been sought under Section 31 and not under 34 of the Specific Relief Act, as understood by the learned trial Judge. That the relief, as to cancellation of instrument is founded upon the administration of protective justice for fear that inoperative instrument may be used by the Defendant against the Plaintiffs. Thus, in consideration of the facts and for all that reasons, no interference is called for in the impugned order.

9. The Appeal is dismissed.

10. At the request of Mr. Shah, learned Counsel for the Appellants, the ad-interim relief shall continue to operate for a period of four weeks from today.

(SANDEEP K. SHINDE, J.)

MOHAMMAD NAJEEB MOHAMMAD QAYYUM

Digitally signed by MOHAMMAD NAJEEB MOHAMMAD QAYYUM
Date: 2022.02.28 18:46:20 +0530