

Varsha

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL APPELLATE DIVISION
COMMERCIAL APPEAL (L)NO. 7786 OF 2022
IN
COMMERCIAL SUIT (L) NO. 2774 OF 2021
WITH
INTERIM APPLICATION NO. 3637 OF 2022
WITH
INTERIM APPLICATION NO. 3636 OF 2022
IN
COMMERCIAL APPEAL (L)NO. 7786 OF 2022**

Apurva Om Saraf & Anr

...Appellants

Versus

Marwin Construction & Ors

...Respondents

Mrs Lakshmi Murali, *i/b Lakshmi Murali & Associates, for the Appellants.*

Mr Vakhil Dhoka, *with Shushma Soni, i/b GM Legal, for Respondent No.1 in IA/3637/2022.*

Mr Piyush Shah, *with Dishang Shah, Chirag Unadkat, Karan Gandhi & Hetta Sagar, for Respondents Nos. 6 & 7.*

**CORAM G.S. Patel &
 Gauri Godse, JJ.**

DATED: 10th August 2022

PC:-

1. The Appeal is directed against an Order dated 21st April 2021. The Appellants were not parties to the suit. They have still not been joined.
2. The learned single Judge considered an ad interim application made by the Plaintiff. He found that there was a prima-facie case made out and after a reasoned order, granted relief that inter alia required Defendant No. 4, a director of Defendant No. 3, on a statement made by him for himself and on behalf of Defendant No. 3, to set aside an area of 7500 sq ft. Other reliefs were rejected.
3. The Appellants are two individuals who claim to be flat purchasers in the project in question. They say that they are aggrieved by the impugned order. They have also filed Interim Application seeking leave to Appeal, and seeking for a stay of the impugned Order. In a separate Interim Application, they seek an amendment. The prayer is incorrectly worded. The amendment that is sought is actually an amendment to the Appeal, not the Plaint.
4. Leaving aside the questions of leave to appeal, stay or amendment, we do not think this is appropriate for these two individuals to challenge the order directly in Appeal. The reason is simple. The learned single Judge never had an opportunity to consider the case sought to be canvassed by the Appellants. No application was ever made to him for impleadment or seeking protection of the Appellants' claimed rights. In essence, we are

asked to stay or upset the impugned judgment at the instance of two parties who were not before the learned single Judge and on grounds that were never placed or urged before the learned single Judge. There is no point in saying that the Appellants were not heard. They never sought impleadment in the suit and there was no question of the learned single Judge not hearing them.

5. Instead of appealing, they should have approached the learned single Judge. This is the liberty we now reserve to them.

6. We dismiss the Appeal with express liberty to the Appellants to file an appropriate Interim Application before the learned single Judge in the Suit, including a prayer for variation, modification, recall or stay of the order that is impugned before us.

7. All contentions on all sides are kept open.

8. The Appeal is disposed of in these terms. No costs.

(Gauri Godse, J)

(G. S. Patel, J)