

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

WRIT PETITION NO.8945 OF 2022

Mr. Sanjay Thakkar
Age : 47, Occu. Business,
R/o. Ashapura Builders Pvt. Ltd.
204, 2nd Floor, Triveni Apartment,
Opp. Kunjavihar Vadapav Centre,
Dombivali (East), Tal - Kalyan,
District - Thane

... Petitioner /
Orig. Defendant No.2

vs.

1. Bhojja Shantu Shetty
Age - 71 years, Occ : Business,
R/o. 506, Sarvoday Galaxy, B-2,
Kopar Station, Dombivali (West),
District - Thane.

2. Shri Vishnu Bhagwan Mhatre ... Respondents
Age: Adult, Occ: Business,
R/o. Bhagwankripa, R. No.9
1st Floor, Umeshnagar,
Dombivali (West),
District - Thane.

Mr. R. A. Naik i/b. Ms.Pooja Pilankar for Petitioner.

Mr. S. G. Deshmukh i/b. Ms. Priya Patil for Respondent No.1.

Mrs. Ayesha Baroodkar i/b. Mr. Nikhil Sansare for Respondent No.2.

CORAM : SANDEEP V. MARNE, J.

DATED : 25 JANUARY, 2023

JUDGMENT :-

1. Rule. Rule is made returnable forthwith. With the consent of parties taken up for final hearing.

2. By this Petition, Petitioner assails order dated 25th November 2021 passed by the District Judge-6, Kalyan allowing Appeal and setting aside order passed by the 2nd Joint Civil Court, Senior Division on 2nd January 2018 by which the Trial Court had rejected Plaintiff's application for striking out the defence of Defendant No.2. The net result of the order of District Court is that the defence of Defendant No.2 has been struck out.

3. Plaintiff / Respondent No.1 has instituted Special Civil Suit No.144 of 2016 against Vishnu Bhagwan Mhatre (respondent No.2) and Sanjay Thakkar (Petitioner) for enforcement of agreement of Sale dated 30th December 2015 executed in pursuance of compromise decree in RCC No.428 of 2014 and for amalgamation and allotment of Shop Nos.9 and 10 by Defendant No.2 to Plaintiff. Plaintiff apprehended Defendant No.2 creating third party rights in respect of shop Nos.9 and 10 and was therefore pressing for temporary injunction. In the application for temporary injunction, which was to be heard 26 October 2016, Defendant No.2 filed a pursis stating that he intended to keep the position of the suit property as it is till

disposal of Exh.5 application and that he shall not give possession thereof. On account of such a pursis being filed by Defendant No.2, hearing of application for temporary injunction was deferred. However, within two days on 28th October 2016, Defendant No.2 executed an agreement for sale in respect of shop No.9 in favour of third party. Since the undertaking given before the Trial Court was breached, Plaintiff filed application at Exh.32 for striking out the defence of Defendant No.2 under provisions of Order 39 Rule 11 of the Code of Civil Procedure, 1908 (“**Code**”). The Trial Court proceeded to reject the application vide its Order dated 2nd January 2018. Plaintiff filed Miscellaneous Civil Appeal No.10/2018 challenging the decision of the Trial Court and by the judgment and order dated 25th November 2021, which is impugned in the present Petition, the District Court proceeded to allow the appeal and set aside the order of the Trial Court by allowing Plaintiff's application for striking out the defence of Defendant No.2. Aggrieved by order of the District Judge-6, Petitioner / Defendant No.2 has filed the present Petition.

4. Appearing for Petitioner, the learned counsel would submit that there has been no violation on the part of

Defendant No.2 of the undertaking given in pursis dated 26th October 2016. He would submit in that pursis Defendant No.2 undertook not to part with possession of the Suit property. He would submit that even though the sale deed in respect of Shop No.9 was executed on 28th October 2016, possession thereof has not been parted by Defendant No.2 in favour of the purchaser. He would submit that the undertaking given in the pursis did not prevent Defendant No.2 entering into the sale deed. He would further submit that nonetheless Defendant No.2 issued notice to the purchaser for allotment of another shop in place of shop No.9 with a view to defend the application for striking of defence. He would submit that such a conduct on the part of Defendant No.2 would show his bonafides.

5. Mr.Naik would submit that the provisions of Order 39 Rule 11 of the Code are drastic in nature and the Court should not have passed order under that provision which would virtually result in the Suit of Plaintiff being allowed in absence of defence on the part of Defendant no.2. He would rely upon the judgment in ***Kavita Krishnamurthy Versus K. N. Krishnamurthy***¹. He also rely upon the judgment of this Court

¹ 2015 (1) Mh.L.J

in ***Ramavatar Surajmal Modi Versus Mulchand Surajmal Modi***².

6. *Per Contra*, Mr. Deshmukh the learned counsel appearing for Plaintiff/Respondent No.2 would oppose the Petition and support the order passed the District Court. He would submit that Petitioner / Defendant No.2 had specifically undertaken before the Trial Court to maintain the position of the suit property which includes Shop No.9 and that he breached the said undertaking by entering into sale deed in respect of Shop No.9 within two days from submission of pursis. He would submit that Petitioner / Defendant No.2 successfully prevented Plaintiff/Respondent No.2 from pressing application for temporary injunction and in the meantime created third party rights in respect of Shop no.9. Mr. Deshmukh, would therefore contend that this is a fit case where defence of Defendant No.2 was required to be struck out for wilful and deliberate conduct displayed by breach of undertaking given before the Trial Court.

7. Rival contentions of the parties now fall for my consideration.

² 2004 SCC OnLine Bom 44

8. Plaintiff has filed the Suit for enforcement of the agreement for sale deed dated 30th December 2015 under which Petitioner / Defendant no.2 agreed to allot shop admeasuring 709 carpet area. It appears that Plaintiff has been allotted Shop No.10 which admeasures only 560 square feet carpet area. This is a reason why plaintiff sought ambulation of Shop Nos.9 and 10 so as to receive agreed carpet area of 709 square feet. In his Suit, Plaintiff filed an application for a temporary injunction dated 9th August, 2016 to restrain Defendant no.2 from creating third party rights in respect of any of the commercial area located on the ground floor of the building, in order to secure his rights. That application came up for hearing on 26 October 2016. It appears that Defendant No.2 did not want the application to be heard on 26th October 2016. However, considering the anxiety and urgency expressed by plaintiff, Defendant No.2 filed pursis as follows;

“The matter is fixed on today’s board for hearing of Exh.5. The deft. No.2 intends to keep the position of suit property i.e. ground Floor as it is in condition till disposal of Exh.5 & shall not give possession.”

Thus, by filing pursis on 26th October 2016, Defendant No.2 successfully thwarted hearing and decision of application

for temporary injunction. However, immediately on 28th October 2016, he entered into sale deed in respect of Shop No.9 in favour of third party.

9. Careful perusal of wordings used in pursis dated 26th October 2016 would indicate that Defendant No.2 expressed his intention to keep position of the suit property (ground floor) “as it is in condition till disposal of Exh.5”.

10. This would mean that Defendant No.2 agreed to maintain status in respect of the entire ground floor which includes Shop No.9 as well. He further agreed not to hand over possession in respect thereof. It appears from the submissions of Mr. Naik that the second part of undertaking for not giving possession is fulfilled by Petitioner / Defendant No.2, However, the controversy is with regard to the first part of the undertaking. There can be no matter of doubt that Defendant No.2 undertook before the Trial Court to keep position of Shop No.9 as it is. Petitioner / Defendant No.2 was facing application for temporary injunction to restrain him from creating third party rights in respect of Shop No.9. He apprehended that the relief would be considered and possibly granted on 26th October

2016. To prevent that he filed pursis on 26th October 2016. The only conclusion that one can possibly draw is that the filing of pursis was a deliberate act of the part of defendant no. 2 to avoid any restraint order in respect of Shop No. 9. It is contended by Mr. Naik that only undertaking in the pursis was not to part with possession. I am unable to agree. Undertaking to keep position of ground floor “as it is in condition till disposal of Exh.5” would obviously mean maintenance of status quo in all respect, including non-creation of third party rights. I have therefore no hesitation in holding that the defendant no. 2 committed breach of undertaking by executing sale deed of shop no. 9 in favour of third party.

11. Having arrived at a conclusion that there has been breach of undertaking on part of Defendant No.2, the next issue is whether drastic measure of striking out defence of Defendant No.2 under provisions of Order 39 Rule 11 of the Code is warranted in the present case. Order 39 Rule 11 reads 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 default 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 default 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.”

Thus, commission of default of undertaking or breach thereof can invoke measures under Order 39 Rule 11. In the present case, there can be no matter of doubt that there has been default / breach of undertaking on the part of Defendant No.2.

12. Mr. Naik has relied upon the judgment of this Court ***Kavita Krishnamurthy*** (supra) in paragraph 6 thereof, this Court has held as under;

“6. Rule 11 provides for passing a drastic order of striking out the defence of the defendant or of dismissal of a suit. On plain reading of Rule 11, it is apparent that mere non-compliance or mere breach of the orders of the Court is not sufficient to pass a drastic order of striking out a defence or dismissal of the proceedings. What is required to be proved is something more than mere violation or breach. It is only in the case of wilful disobedience of the orders of the Court that the drastic power under Rule 11 can be exercised. While dealing with such prayer, it is open for the party against whom breach is alleged to show cause as to why the orders could not be complied with. Moreover, power under Rule 11 of Order XXXIX is a discretionary power. It is not necessary that in every case of wilful disobedience that the Court should exercise the power. In a case where the breach is of an order of custody of minor or access to minor, the Court has to keep in mind that in some cases the compliance with order depends on the

inclination of the child.”

The facts in the case of ***Kavita Krishnamurthy*** (supra) are clearly distinguishable. In that case, there was no findings to the effect that due to over acts or the omission on part of the wife that the husband could not meet child or enjoy the company of the child and there was absence of a specific findings of wilful and deliberate disobedience of order by the wife. Further more, the case was relates to the custody of child where inclination of child to meet a parent is also one of the relevant factors. In the present case, there has been wilful breach of undertaking on the part of Defendant No.2. The judgment in ***Kavita Krishnamurthy*** (supra) is clearly distinguishable.

13. In ***Ramavatar Surajmal Modi*** (supra), this Court has held in paragraph 7 that provisions of Order 39 Rule 11 of the Code are discretionary and confers power on the Court to dismiss the Suit where default is by Plaintiff and to strike out defence is defaulter is Defendant. It is further held that the provision does not mandate the Court to do so in every case of default.

14. I had an occasion to deal with the issue of adoption of drastic measure of striking out defence of father due to his consistent breach of order of family court regarding custody of child, both before and after order of striking out defence in **Shardul Shamprasad Dev Vs. Manjiri Shardul Dev**, Writ Petition No.10758 of 2022 (Bench at Aurangabad) decided on 17th October 2022. Reliance was placed by the father on judgment of this court in **Kavita Krishnamuty** (supra) to escape the order of striking out defence. This court however upheld the order of striking out defence and held as under:

11. True it is that the order striking out defence is drastic one which should be avoided by the Courts. In normal circumstances, the Court would have recourse to such a drastic order only after it arrives at finding that there is something more than mere violation and that there is a willful breach of the order.

14. Reliance of Mr. Kulkarni on the judgment of this Court in **Kavita Krishnamurti** (supra) would be of little assistance to the petitioner as this Court has observed in that case that no specific finding of willful disobedience was recorded by the Family Court while passing the order of striking out defence. As against this, in the present case a specific finding has been recorded by the District Court to the effect that the petitioner has committed intentional disobedience of the interim orders passed by the Court.

15. Also of relevance is the fact that after passing order dated 21.09.2022 striking out the defence as well as after passing of the order dated 30.09.2022 rejecting application for recalling of that order, Petitioner has once again defaulted on grant of visitation rights in favour of the mother. In these circumstances, I do not feel that any error is committed by the District Court in passing the impugned orders.

Special Leave Petition challenging the judgment in **Shardul Shamprasad Dev** has been dismissed by the Supreme Court by order dated 25-11-2022.

15. In the present case wilful and deliberate breach of the undertaking given to the Trial Court is apparent. It was a deliberate act of subterfuge on the part of defendant No. 2 who bought time from court by submitting undertaking in the form of pursis and then created third party rights in respect of shop no. 9. It cannot be stated that the defendant no. 2 suddenly found a buyer for shop No. 9 within two days. In fact it is the case of defendant no. 2 that payments in respect of shop no. 9 were already received by him prior to filing of pursis. This essentially means that the defendant No. 2 submitted undertaking only for the purpose of avoidance of any restraint order and taking disadvantage of adjournment of injunction application, executed the sale deed.

16. Mr. Naik made strenuous efforts to urge before me that opportunity of defence be granted by imposing costs of defendant no. 2 for breach of undertaking. Considering the drastic nature of measure of striking out defence, I have

attempted this course of action as well. During the course of hearing, it transpired that in addition to non-handing over the requisite carpet area, Plaintiff / Defendant No.2 has also not paid rent as per the agreement since December 2015. With a view to give an opportunity to Petitioner / Defendant No.2, I put across Mr. Naik as to whether Petitioner / Defendant No.2 is willing to pay atleast part of unpaid rent. However, after taking instructions from representative of Defendant No.2 who is present in Court, Mr. Naik was not able to make any positive statement in that regard. Despite grant of opportunity defendant no. 2 to mitigate breach of undertaking on his part, he chose not to avail the same.

17. Considering the above conduct of Defendant no.2, I am of the view that this is a fit case where the District Court has rightly struck out the defence of Defendant No.2. Writ Petition is devoid of merits and the same is dismissed without any order as to costs. Rule is discharged.

(SANDEEP V. MARNE, J.)