

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.292 OF 2023
WITH
INTERIM APPLICATION NO.3690 OF 2023

Hakikullah Hafizullah Khan & Ors. ..Appellants
Versus
Mrs. Uma Harish Gambhir & Ors. ..Respondents

Mr. Vishal Kanade a/w Janhavee Joshi, Harshavardhan Khambete &
Akash Warang, for the Appellants.
Mr. Sandesh Patil i/by Divya Pawar - Patil, for Respondent Nos.1 &
2.

CORAM : SANDEEP V. MARNE, J.

DATE : 30th NOVEMBER, 2023

PC.

1. By this appeal, appellants challenge common order dated 31st January, 2023 passed by Civil Judge Senior Division, Thane on application Exh.36 in Special Civil Suit No.818 of 2022 and on application Exh.5 in Regular Civil Suit No.5 of 2023. Appellants also challenge the order dated 10th February, 2023 passed by Civil Judge Senior Division, Thane on application Exh.53 in Special Civil Suit No.818 of 2022.

2. Mr. Kanade, learned counsel appearing for appellants would submit that the appellants are not pressing challenge to the common order dated 31st January, 2023 passed on application at

Exh.36 in Special Civil Suit No.818 of 2022 and on application at Exh.5 in Regular Civil Suit No.5 of 2023. He would submit that scope of the present appeal is confined to the order dated 10th February, 2023 passed on application at Exh.53 by the Trial Court.

3. Thus, what is required to be examined in the present appeal is the correctness of order dated 10th February, 2023 passed by the Trial Court on application at Exh.53. By that order, the appellants are temporary restrained from carrying out any construction and development activity over the suit property or any portion thereof till final disposal of the suit.

4. It must be observed at the outset that by earlier order dated 31st January, 2023, the Trial Court had allowed application at Exh.36 filed by plaintiff in Special Civil Suit No.818 of 2022 and has restrained defendants therein from selling, transferring, dealing with, alienating or creating third party interest and from part with the possession of the suit property till final decision in the suit. After securing the order of injunction on application Exh.36 on 31st January, 2023 in Special Civil Suit No.818 of 2022, plaintiff therein moved another application dated 4th February, 2023 at Exh.53 to seek further temporary injunction for restraining defendant Nos.2, 3 and 5 to 24 from carrying out any construction and development over the suit property. The application was resisted by defendant Nos.16 to 24 by raising various objections including the objection of maintainability of the application. It was contended that the second

application was barred by the principles of constructive *res-judicata*. By the impugned order dated 10th February, 2023, the Trial Court has proceeded to allow application at Exh.53 and has restrained defendant Nos.2, 3 and 5 to 24 from carrying out any construction and development over the suit property till decision of the suit.

5. Mr. Kanade, the learned counsel appearing for the appellants would contend that second application filed at Exh.53 is clearly barred by the principles of constructive *res-judicata* that the factum of commencement of construction by defendant Nos.17 to 24 was already made known to the plaintiffs by way of averments made in plaint in RCS No.5 of 2023. That despite acquisition of the knowledge of the fact that the defendant Nos.17 to 24 were carrying out construction over the suit property, plaintiff consciously did not seek any relief while pressing their application at Exh.36. That therefore plaintiff actually gave up any right to claim temporary injunction in respect of carrying out construction by pressing application at Exh.36 which did not contain any prayer to restrain defendant Nos.17 to 24 from carrying out any construction over the suit property.

6. Mr. Kanade would further submit that the nature of construction that is undertaken by defendant Nos.17 to 24 would otherwise not change the nature of suit property. That the construction is in the nature of temporary shed, which can otherwise be removed in the event plaintiff succeeds in the suit.

That the Trial Court has not taken into consideration the nature of construction that is undertaken by defendant Nos.17 to 24. He would submit that instead of land being kept vacant and unused, defendant Nos.17 to 24 can be permitted to utilize the same during the pendency of the suit by constructing a storage shed therein. He would submit that defendant Nos.16 to 24 shall not claim any equities in respect of the temporary construction so put up by them in the event they fail in the suit.

7. Per contra, Mr. Patil, the learned counsel appearing for respondent Nos.1 and 2 (original plaintiff in SCS No.818 of 2022) would oppose the appeal and submit that since defendant Nos.16 to 24 have purchased the property with full knowledge of execution of agreement of sale in favour of plaintiff, the Trial Court has rightly granted order of injunction restraining them from carrying out construction over the suit property. That the plaintiff has paid total consideration of Rs.1,06,05,372/- out of consideration of Rs.1,11,00,000/- to defendant Nos.1 to 15, who sold the same land for meager consideration of Rs.30,00,000/- to defendant No.16, who in turn sold the land to defendant No.17 to 24 for consideration of Rs.1,05,00,000/-. He would submit that the factum of selling the property by defendant Nos.1 to 15 to defendant No.16 at throwaway price at Rs.30,00,000/- would speak volumes about real intention of defeating the lawful rights of plaintiff. He would submit that they cannot be allowed to carry out any construction with a view to create further complications. That since the appeal is

not pressed in respect of challenge to the common order dated 31st January, 2023 findings recorded by the Trial Court in that order would become final and binding between the parties. That considering findings recorded in the common order the Trial Court has rightly passed further order restraining defendant Nos.2, 3 & 5 to 24 from carrying out any construction in the suit property. He would pray for dismissal of the appeal.

8. I have considered the submissions canvassed by learned counsel for the parties.

9. It is seen that the original owners (defendant Nos.1 to 15) executed registered agreement for sale in favour of the plaintiff on 24th November, 2014. The Trial Court has recorded a finding that in pursuance of that registered agreement for sale, plaintiff has paid to defendant Nos.1 to 15, 95% of the amount of consideration. According to Mr. Sandesh Patil, out of the total amount of consideration of Rs.1,11,00,000/- amount of Rs.1,06,05,372/- has been paid by the plaintiff to defendants. This factum has weighed substantially on the mind of the Trial Court while passing common order dated 31st January, 2023. The order dated 31st January, 2023 has attained finality on account of non-pressing of the present appeal *qua* that order by the appellants.

10. The next issue is whether the plaintiff could have moved one more application at Exh.53 after passing of common order

dated 31st January, 2023. According to Mr. Kanade, the subsequent application at Exh.53 is barred by the principles of constructive *res-judicata*. The Trial Court has proceeded to entertain the application at Exh.53 by accepting contention raised by the plaintiff that the prayer for seeking temporary injunction to restrain defendants from carrying out construction was inadvertently left out in application at Exh.36 and admission to that effect is given by the plaintiff in paragraph 6 of the application at Exh.36. The fact that the plaintiff admits that there was an omission to include the prayer for restraining defendants from carrying out construction contains an implicit admission that it was possible for the plaintiff to include that prayer in the earlier application at Exh.36. This would also mean that the plaintiff had knowledge about construction activity undertaken by defendant Nos.16 to 24 at the time of filing of application at Exh.36. This further buttressed by a specific averment by defendant Nos.17 to 24 in their own Regular Civil Suit No.5 of 2023 wherein it was specifically averred in paragraph 7 that the plaintiffs therein were causing construction over the suit property. In that view of the matter, it cannot be stated that filing of application at Exh.53 is necessitated on account of occurrence of any subsequent event. Having consciously chosen not to seek any relief to restrain defendant Nos.16 to 24 from carrying out construction at the time of prosecution of application at Exh.36, it was impermissible for plaintiff to file one more application in short gap of four days at Exh.53. The order on application Exh.36 was passed

on 31st January, 2023 and four days later, plaintiff moved application at Exh.53 on 4th February, 2023. In my view, therefore, the subsequent application at Exh.53 would be barred by the principles of constructive *res-judicata*. Curiously, though objection of constructive *res-judicata* was specifically raised by defendant Nos.16 to 24 in their reply, the same has not been dealt with by the Trial Court while passing the impugned order dated 10th February, 2023.

11. Also of relevance is the nature of construction activity undertaken by defendant Nos.16 to 24. They have produced photographs of the construction activity, which apparently shows that a storage shed is being constructed at the suit site. The shed appears to be temporary in nature with use of MS Grill and AC Sheets. This is not a permanent construction of a building. In my view, therefore, since possession of defendant Nos.16 to 24 over the suit property is not disturbed in any manner, they can be permitted to put up a temporary construction of a storage shed during pendency of the suit. The same would not change the nature of property in any manner. The Trial Court, on the other hand, has arrived at an erroneous conclusion that permitting defendants to carry out construction would frustrate the claim of the plaintiff in the suit. In the event plaintiff succeeds in the suit, defendant Nos.16 to 24 can be directed to remove the temporary construction. They cannot claim any equity in such construction.

12. Accordingly, appeal succeeds. The order dated 10th

February, 2023 passed by the Joint Civil Judge Senior Division, Thane is set aside. Defendant Nos.16 to 24 are permitted to carry out construction of only storage shed of temporary nature on the suit property. Defendant Nos.16 to 24 shall not claim equities in such construction and undertake to remove the construction in the event plaintiff succeeds in the suit. They shall file an undertaking to that effect before the Trial Court within a period of two weeks from today.

13. With the above directions, the appeal is disposed of.

14. In view of disposal of appeal, pending interim application also stands disposed of.

15. After the order is pronounced, Mr. Patil, seeks stay of operation of the order for a period of eight weeks. There are multiple reasons why request for stay deserves rejection. Firstly, substantial portion of construction of temporary shed is already completed at the site. Secondly, the construction is purely of a temporary nature. Thirdly, this Court has put conditions for permitting such construction during pendency of the suit. Therefore the request for stay is rejected.

[SANDEEP V. MARNE, J.]