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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4673 OF 2017
WITH
WRIT PETITION NO.4674 OF 2017

Nandkishor Rasiklal Agarwal & Anr. … Petitioners

V/s.

Multimodal Freight Systems Pvt. Ltd. & Anr. … Respondents

Mr. Girish Godbole, Senior Advocate with Mr. S.B. Rao i/by Ms. Gauri S. Rao for the petitioners.

Mr. Subhash A. Abhyankar with Ms. Anjali Neel Helekar and Ms. Anu C. Kaladharan for respondent No.1.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 30, 2023

P.C.:

1. Writ Petition No.4673 of 2017 arises out of order dated 16 July 2014 passed by the City Civil Court, Mumbai arising out of Notice of Motion No.3563 of 2012 in Suit No.5764 of 2007 filed under Order 39 Rule 2A of the Code of Civil Procedure, 1908 for initiating action against the vendor *inter alia* seeking a declaration that the agreement of conveyance dated 13 June 2011 executed by defendant No.2 in respect of two commercial tenements be declared as null and void.

2. Writ Petition No.4674 of 2017 arises out of order passed in Review Petition No.3 of 2015 rejecting review of order dated 16 July 2014.

3. Respondent No.1 filed Summary Suit No.2669 of 2007 against respondent No.2 herein in this Court for recovery of amount. He filed notice of motion for attachment of two commercial premises, D-301 and D-302 at Crystal Plaza, New Link Road, Andheri (West), Mumbai. On 11 December 2009 this Court disposed of the notice of motion by recording a statement on behalf of respondent No.2 herein that no further encumbrance would be created in respect of said two offices.

4. It is undisputed fact that office premises Nos.D-301 and D-302 were mortgaged by the respondent No.2 before filing of suit with Bombay Mercantile Cooperative Bank. On 15 September 2010 the loan of respondent No.2 was taken over by the United Bank of India.

5. On 28 April 2011 respondent No.2 approached petitioners for sale of the aforesaid commercial premises and, therefore, the petitioners agreed to purchase the same for consideration of Rs.1.11 crore. No objection certificate from the United Bank of India was sought. On 7 May 2011 mortgagee United Bank of India granted NOC to the original defendant (borrower). On 1 June 2011 the petitioners obtained search report which found no encumbrance in favour of the original plaintiff. On 3 June 2011 Crystal Plaza Premises Cooperative Society Limited granted no objection certificate to the defendant to transfer aforesaid units subject to clearing of all dues of the society and repayments of loan to the United Bank of India.

6. On 13 June 2011 two agreements for sale were executed by the original defendant in favour of the petitioners for Rs.54 lakh and Rs.57 lakh respectively. The consideration clause of both the agreements indicate that Rs.53.50 lakh out of Rs.54 lakh in the first agreement and Rs.56.50 lakh out of Rs.57 lakh in the second agreement were deposited with the United Bank of India.

7. On 15 October 2012 learned advocate for the original plaintiff sent a letter to the petitioner No.1 informing about order of this Court dated 11 December 2009 recording statement on behalf of original defendant. On 11 November 2012 petitioners replied the notice contending that they are bona fide purchasers for value without notice and were not aware about the pending litigation.

8. On 18 June 2014 due to enhancement of pecuniary jurisdiction of the City Civil Court, Summary Suit No.2669 of 2007 was transferred to the City Civil Court and renumbered as Summary Suit No.5764 of 2007.

9. On 14 December 2012 respondent No.1 herein filed contempt Notice of Motion No.3563 of 2012 which was replied by respondent No.2 by filing reply. On 16 July 2014 City Civil Court allowed the notice of motion by setting aside agreement for sale dated 13 June 2011.

10. On 3 December 2014 petitioners filed notice of motion seeking review of order dated 16 July 2014. By order dated 28

February 2017 the Trial Court rejected review application of the petitioners. The petitioners have, therefore, filed present two writ petitions.

11. Learned senior advocate for the petitioners relying on the judgment in the case of **Thomson Press (India) Ltd. v. Nanak Builders & Investors Pvt. Ltd. & Ors.** reported in (2013) 5 SCC 397 submitted that undisputedly the petitioners were not aware of the statement made on behalf of the original defendant. Considering subject matter of the suit which was for recovery of amount, at the most rights of the petitioners would be governed by ultimate decree passed in the summary suit. Moreover, without making petitioners party to the contempt notice, order cancelling conveyance in favour of the petitioners could not have been passed. He submitted that transfer of two commercial premises in breach of statement made before this Court is not void ab initio but purchasers of said property takes the bargain subject to rights of the plaintiff pending suit. Vendor of the sale is liable for the breach committed. However, considering the nature of suit and undisputed fact that the petitioners were not having knowledge of the order, the transaction with the petitioners needs to be protected.

12. Per contra, learned advocate for the respondent/original plaintiff submitted that the Trial Court was justified in setting aside the transaction as the transaction was in willful disobedience of the order passed by this Court recording statement on behalf of the original defendant. He submitted that the judgment in the case of **Thomson Press (India) Ltd.** (supra) is *per incurium* of the earlier judgment of coordinate Bench of two Judges in the case of **Surjit Singh v. Harbans Singh** reported in (1995) 6 SCC 50. According to him, appropriate course for the Supreme court before delivering judgment in the case of **Thomson Press (India) Ltd**. was to refer it to the Larger Bench by placing papers before the Chief Justice of India. In support of his submission, he relied on the judgment in the case of **Sundeep Kumar Bafna v. State of Maharashtra & Anr.** reported in (2014) 6 SCC 623 and **Pradeep Chandra Parija & Ors. v. Pramod Chandra Patnaik & Ors.** reported in (2002) 1 SCC 1.

13. Relying upon the judgment in **Prakash Gobindram Ahuja v. Ganesh Pandharinath Dhonde & Ors.** reported in 2016 (6) Bom. C.R. 262, he submitted that the transaction of sale in breach of order of Court is void. In support of his submission, he relied on the judgment in **Virendrabhai Devjibhai Patel v. Keshavbhai Makanbhai & Ors.** reported in (2018) 11 SCC 430, **Balwantbhai Somabhai Bhandari v. Hiralal Somabhai Contractor (Deceased) rep. By LRs and Ors.** reported in 2023 SCC OnLine SC 1139, **Delhi Development Authority v. Skipper Construction Co. (P) Ltd. & Anr.** reported in (1996) 4 SCC 622, **State Bank of India & Ors. v. Dr. Vijay Mallya** reported in 2022 (SC) 590.

14. Rival contentions fall for consideration. The crux of the issue involved in these writ petitions is whether execution of conveyance in breach of statement made by vendor in a summary suit for recovery of amount would necessarily make the transaction void ab initio. In my opinion, the judgment in the case of **Thomson**

Press (India) Ltd. (supra) lays down categorical proposition of law in paragraph 53 of the judgment which reads thus:

> "53. There is, therefore, little room for any doubt that the transfer of the suit property pendete lite is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the plaintiff in the pending suit. Although the above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent Court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent Court may issue in the suit against the vendor."

15. The Apex Court in **Thomson Press (India) Ltd.** (supra) has held that the party committing breach may doubtless incur the liability to be punished for breach committed but the sale itself may remain valid as between the parties to the transaction subject to any transaction which the competent Court may issue in a suit against the vendor.

16. At this stage, it is necessary to consider the law delineated by the Supreme Court in a recent judgment in **Balwantbhai Somabhai Bhandari** (supra). The Apex Court in paragraph 116 has summarized conclusions by deciding the issue as to whether the willful breach of assurance in the form of undertaking given by a Counsel would amount to civil contempt as defined under Section 2(b) of the Contempt of Courts Act, 1971. The Apex Court was also considering the issue as to whether the contempt Court has power to declare the contemptuous transaction as non-est or void. In the context of said issue, the Apex Court in paragraph 116 held as under:

> "116. We may summarise our final conclusion as under:
>
> (i) We hold that an assurance in the form of an undertaking given by a counsel/advocate on behalf of his client to the court; the willful breach or disobedience of the same would amount to "civil contempt" as defined under Section 2(b) of the Act 1971.
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> (ii) There exists a distinction between an undertaking given to a party to the lis and the undertaking given to a court. The undertaking given to a court attracts the provisions of the Act 1971 whereas an undertaking given to a party to the lis by way of an agreement of settlement or otherwise would not attract the provisions of the Act 1971. In the facts of the present case, we hold that the undertaking was given to the High Court and the breach or disobedience would definitely attract the provisions of the Act 1971.
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> (iii) Although the transfer of the suit property pendente lite may not be termed as void ab initio yet when the court is looking into such transfers in contempt proceedings the court can definitely declare such transactions to be void in order to maintain the majesty of law. Apart from punishing the contemnor, for his contumacious conduct, the majesty of law may demand that appropriate directions be issued by the court so that any advantage secured as a result of such contumacious conduct is completely nullified. This may include issue of directions either for reversal of the transactions by declaring such transactions to be void or passing appropriate directions to the concerned authorities to ensure that the contumacious conduct on the part of the contemnor does not continue to enure to the advantage of

the contemnor or any one claiming under him.

(iv) The beneficiaries of any contumacious transaction have no right or locus to be heard in the contempt proceedings on the ground that they are bona fide purchasers of the property for value without notice and therefore, are necessary parties. Contempt is between the court and the contemnor and no third party can involve itself into the same.

(v) The apology tendered should not be accepted as a matter of course and the court is not bound to accept the same. The apology may be unconditional, unqualified and bona fide, still if the conduct is serious, which has caused damage to the dignity of the institution, the same should not be accepted. There ought not to be a tendency by courts, to show compassion when disobedience of an undertaking or an order is with impunity and with total consciousness."

17. On consideration of clauses (iii) and (iv) which are relevant in the facts of the case, it is clear that the Court considering an application seeking invocation of its contempt jurisdiction has power to declare a conveyance as null and void to maintain majesty of law so that advantage secured as a result of such contumacious conduct is completely nullified. It is also laid down that the beneficiaries of any contumacious transaction have no right or locus to be heard in the contempt proceedings. However, it is necessary to consider in the facts of the case as to whether the transaction of execution of conveyance in favour of the petitioners is contumacious in the eyes of law.

18. To adjudicate the said issue, it is necessary to cull out facts relevant to decide the issue which are as under:

i) the suit where a statement was made was summary suit for recovery of amount;

ii) before filing of the suit, i.e. on 15 June 2008 and 27 December 2008, the vendor had already mortgaged both office premises in favour of a Bank to obtain loan;

iii) Mortgagee United Bank of India had granted no-objection certificate to the defendant to sale commercial premises in question;

iv) petitioners obtained search report before entering into transaction which do not show encumbrance in favour of the petitioners;

v) Crystal Plaza Premises Cooperative Society granted no objection to the defendant to transfer both units subject to clearing of society dues; and

vi) The consideration clause of both the agreements indicate that Rs.53.50 lakh out of Rs.54 lakh in the first agreement and Rs.56.50 lakh out of Rs.57 lakh in the second agreement were deposited with the United Bank of India.

19. Cumulative effect of the circumstances noted above indicate that on the date of filing of the suit, office premises in question were already mortgaged in favour of a Bank and mortgagee had granted no objection to sale the flat. Therefore, on the date of making of statement, the original plaintiff had limited rights over both office premises as both premises were already mortgaged with the Bank. This is apart from the fact that initial suit was for recovery of amount and whatever decree which was passed was only for recovery of amount. It is also undisputed that the petitioner had no notice of the statement made by the advocate for original defendant. Therefore, the conduct of the petitioners cannot be termed as contumacious as contemplated by clauses (iii) and (iv) of the judgment in the case of **Balwantbhai Somabhai Bhandari** (supra). Therefore, though the Court has power to set aside the transaction done in breach of statement made before this Court or in breach of order of injunction, in the facts of the case in absence of proof of contumacious conduct, the Trial Court was not justified in declaring the sale deed as null and void.

20. In so far as judgments in the case of **Sundeep Kumar Bafna**, **Delhi Development Authority** and **Pradeep Chandra Parija** (supra) are concerned, there can be no dispute about the legal proposition laid down by the Apex Court. However, this Court cannot hold judgment of the Supreme Court in **Thomson Press (India) Ltd.** (supra) as *per incurium*. This is because in **Thomson Press (India) Ltd.**, (supra), the Apex Court has referred the judgment in the case of **Surjeet Singh**. If the earlier judgment is noticed by the subsequent Bench, it is not open for this Court to hold that the subsequent coordinate Bench of the Apex Court has rendered judgment which can be termed as *per incurium*. Even otherwise, the Apex Court has consistently held that the judgment of the Apex Court should not be ignored by the High Court holding it to be *per incurium*.

21. In so far as rest of the judgments in **Delhi Development Authority**, **State Bank of India**, **State of Uttar Pradesh &**

Ors, **Virendrabhai Devjibhai Patel** (supra) are concerned, the Apex Court in the facts of the case initiated action against the respondent therein. However, as explained earlier since I have already recorded a finding that the transaction between original defendant and petitioners cannot be termed as contumacious, the judgments relied upon on behalf of the respondents are inapplicable in the facts of the case.

22. Therefore, in my opinion, it was open for the Trial Court to initiate appropriate action against vendor for breach of undertaking. However, the order of declaring transaction between original defendant and petitioners null and void cannot be sustained.

23. Therefore, in my opinion, it is open for the respondent No.1 to take out appropriate proceedings against original defendant (vendor) for breach of statement made by the original defendant.

24. For the reasons stated above, following order is passed:

a) The impugned judgment and order dated 16 July 2014 passed by the City Civil Court, Greater Mumbai in Notice of Motion No.3563 of 2012 in Summary Suit No.5764 of 2007 to the extent of clause (b) of the Notice of Motion declaring agreements dated 13 June 2011 as void ab initio is quashed and set aside;

b) It is made clear that it is open for the respondents to adopt appropriate proceedings against the vendor for breach of statement made before this Court as is permissible in law;

25. Both the writ petitions stand disposed of in above terms. No costs.

26. Ad-interim arrangement which was in force during pendency of the present writ petitions is continued for a period of four weeks from today.

(AMIT BORKAR, J.)