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

WRIT PETITION NO.9338 OF 2023

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Nathuram Balu Telo & Ors.

... Petitioners

V/s.

Manisha Ananda Ingwale

... Respondent

Mr. Drupad S. Patil with Ms. Srushti Chalke for the
petitioners.

Mr. Prajakt Arjunwadkar for the respondent.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 11, 2023

PC.:

1. The petitioners are original defendants in Regular Civil Suit No.178 of 2022 filed by the respondent for specific performance and injunction. According to the plaintiff, by agreement dated 27 April 1966 predecessor of the defendants handed over half portion of the suit property to the father of defendant No.4. According to the plaintiff, on 14 March 2014 predecessor of defendant Nos.1 and 2 executed agreement to sale of the suit property in plaintiff's favour. On 9 December 2022 the respondent filed Regular Civil Suit No.178 of 2022 seeking specific performance of the agreement. On 9 December 2022 the respondent (plaintiff) filed application for temporary injunction.

2. The Trial Court by order dated 23 December 2022 rejected

application for temporary injunction. On 6 May 2023 the Appellate Court partly allowed the application below Exhibit 5 and granted injunction against the petitioner from carrying out construction without permission from the competent authority.

3. On perusal of the application for temporary injunction, it appears that the plaintiff did not aver that defendant No.4 is carrying out construction without permission of the competent authority. Without such averment, the plaintiff did not have opportunity to meet such case of the plaintiff. The Trial Court while considering application under Order 39 Rule 1 of the Code of Civil Procedure, 1908 did not adjudicate on the relief of injunction restraining defendant from carrying out construction on the ground of lack of permission from the competent authority. However, it appears that during the course of arguments before the Appellate Authority in an appeal filed by the plaintiff, the Appellate Authority recorded a finding that defendant No.4 is carrying out construction without permission from the competent authority.

4. In my view, such approach on the part of the Appellate Court is contrary to the parameters laid down by the Apex Court in a celebrated judgment of the Apex Court in **Wander Ltd. v. Antox India (P) Ltd.** reported in (1990) Supp SCC 727. The Apex Court in the said judgment has held that appeal under Section 104 read with Order 43 Rule 1 of the Code of Civil Procedure, 1908 is essentially an appeal against exercise of discretion by the Trial Court. Unless perversity is pointed out, the Appellate Court in its limited jurisdiction while exercising power under Section 104 of

the Code of Civil Procedure, 1908 cannot interfere with such an order. Having laid down the scope of an appeal as far back as in 1990, the Appellate Court in 2023 has considered a factor which was not pleaded and opportunity to meet such fact is not granted to the opposite party for the first time records a finding of fact that the construction requires permission and such permission is not placed on record.

5. In my view, in the absence of specific pleading made in the application for temporary injunction and in the absence of adjudication on that point by the Trial Court, the Appellate Court for the first time could not have recorded such finding. Therefore, in my opinion, the impugned order restraining defendant No.4 from constructing over the property cannot be sustained. Hence, following order:

- a) Impugned order dated 6 May 2023 passed by the Ad-hoc District Judge-1, Kolhapur in Miscellaneous Civil Appeal No.3 of 2023 is quashed and set aside;
- b) However, it is made clear that the plaintiff is not precluded from seeking appropriate relief in the nature of temporary injunction, if available in law.

6. The writ petition stands disposed of in above terms. No costs.

(AMIT BORKAR, J.)