

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 818 OF 2023
WITH
INTERIM APPLICATION NO.15840 OF 2023

Capt. Bhavan Singh Rawat

...Appellant/Applicant

Versus

Mrs. Rita Robin Wadhwani and Others

...Respondents

...

Mr. Pradeep Thorat a/w Mr. Deepak Y. Chitnis, Mr. Abhilesh Chitre,
Mr. Rehan G., Ms. Simran Jaggi i/by Ms. Sonali S. Dalvi, for
Appellant/Applicant.

Mr. Suresh Dhole a/w Mr. Pravin Mengane, for Respondents.

...

CORAM : SANDEEP V. MARNE, J.

DATE : OCTOBER 12, 2023.

ORAL JUDGMENT

1. Admit. With the consent of the learned counsels appearing for the parties, the appeal is taken up for hearing and disposal.
2. Challenge in the present Appeal is to the order dated 5 September 2023 passed by the City Civil Court by which Appellant/Plaintiff's Notice of Motion No.1614 of 2023 for temporary injunction has been rejected.
3. The case has a checkered history. The dispute is in respect of suit

premises bearing Flat No.A-3 admeasuring 730 Sq.Ft. situated at the ground floor of Building No.7 in Basant Co-operative Housing Society Ltd., Chembur, Mumbai 400071. Mohini Thadani is the owner of the flat, who granted a license in favour of the Appellant/Plaintiff on 20 April 1972. Defendants contend that the license was only for a period of 11 months and that Plaintiff failed to vacate the suit flat at the expiry of the tenure of license. The Owner therefore issued a notice to Plaintiff on 7 October 1980 calling him upon to vacate the suit flat. On account of failure of the Plaintiff to vacate the flat, the owner filed R.A.E. & R. Suit No.270/804 of 1981 against the Plaintiff before the Small Causes Court for arrears of rent and eviction. It appears that during pendency of that Suit, Consent Terms were filed by the parties initially on 8 October 1996, under which the Plaintiff agreed to vacate the suit flat by 31 May 1997 in lieu of provision of alternate accommodation to him on ownership basis by the owner. It appears that those Consent Terms were not acted upon which led to filing of Miscellaneous Application No.643 of 2001 by the owner. During pendency of those proceedings, modified Consent Terms were effected between the parties on 7 April 2005, under which the Plaintiff agreed to purchase the suit flat for consideration of Rs.13,75,000/- which was agreed to be paid to the Constituted Attorney of the

Defendants on or before 30 June 2005. It appears that the said agreed amount of Rs.13,75,000/- was not actually paid by Plaintiff to Constituted Attorney of the Defendants on or before the agreed date. There is serious dispute between the parties about who exactly was responsible for such non-payment. I need not go into that debate at this juncture.

4. In April-2007, Plaintiff filed Miscellaneous Notice No.258 of 2007 seeking a direction to the Defendants to execute Sale Deed in pursuance of the Consent Terms dated 7 April 2005. The said application was resisted by the Defendants accusing Plaintiff of violating the Consent Terms. The Small Causes Court passed order dated 10 March 2011 and rejected the Miscellaneous Application filed by the Plaintiff on the ground that the Plaintiff had defaulted in making payment as per the Consent Terms and therefore had no right to seek execution of the Sale Deed. While rejecting the Miscellaneous Application filed by the Plaintiff, the Small Causes Court granted liberty to the Defendants to pursue proceedings for execution of the decree.

5. The Plaintiff filed Appeal No.66 of 2011 before the Appellate Bench of the Small Causes Court, which was disposed of by Judgment and order dated 25 November 2016. Though the Appeal was dismissed, the

Appellate Bench of the Small Causes Court held that the Plaintiff could ask for specific performance by filing separate suit and not by filing execution application. Plaintiff has filed Writ Petition No.3592 of 2007 in this Court challenging the decision of the Appellate Bench of the Small Causes Court, which is pending.

6. The Defendants filed Execution Application No.310 of 2022 in the Small Causes Court for recovery of possession of the suit flat. Apprehending that the Plaintiff might be evicted from the flat towards execution of the decree by Small Causes Court and in pursuance of the liberty granted by the Appellate Bench, he filed Short Cause Suit No.685 of 2023 before the City Civil Court seeking specific performance of the Consent Terms dated 7 April 2005 and further seeking an injunction against the Defendants from dispossessing Plaintiff from the suit flat. In his suit, Plaintiff filed Notice of Motion No.1614 of 2023 seeking temporary injunction. The City Civil Court has proceeded to reject the Motion for temporary injunction by order dated 5 September 2023.

7. I have heard Mr. Thorat, the learned counsel appearing for the Appellant. He would submit that the Consent Terms dated 7 April 2005 are nothing but a contract between the parties under the seal of approval of the

Court. That a suit for specific performance for enforcement of such consent terms is maintainable. He would submit that the Plaintiff was ready and willing to perform the contract and was prevented from making the payment on account of lack of clarity about the exact Defendant to whom the payment was required to be made in accordance with Consent Terms. He would further submit that the Plaintiff has been in settled possession of the suit flat since the year 1972 and during pendency of his suit for specific performance, his possession needs to be protected.

8. *Per contra*, Mr. Dhole the learned counsel appearing for Respondents would oppose the Appeal and support the order passed by the City Civil Court. He would submit that the suit as filed by the Plaintiff is barred under the provisions of Order 23 Rule 3A & 3B of the Code of Civil Procedure. He would submit that Plaintiff cannot file a separate suit to oppose execution of eviction decree of the Small Causes Court. He would further submit that it is only the Small Causes Court, which can determine validity of the Consent Terms and a separate suit questioning the correctness of Consent Terms is specifically barred under provisions of Order 23 Rule 3A r/w Section 96(3) of the Code of Civil Procedure. He would submit that on account of failure on the part of the Plaintiff to act as per the Consent Terms, a right is

created in favour of Defendants to seek execution of the Consent Decree, which envisages eviction of the Plaintiff from the suit flat. That having made an attempt before the Small Causes Court and Appellate Bench of the Small Causes Court for seeking specific performance of the Consent Terms, the Plaintiff cannot institute one more suit before the City Civil Court to stall execution of the decree. He would submit that absolute performance of Consent Terms must be ensured, and no conditions can be put for performance of the same. That as per the Consent Terms failure to make the payment automatically rendered possession of suit flat by Plaintiff unauthorised and he became liable to be evicted. That even if it is assumed that the suit is maintainable, the same is barred by limitation and the same has not been instituted within three years of execution of the Consent Terms dated 7 April 2005. He would further submit that the conduct of the Plaintiff has been such that he has been engaging the lawful owners in litigation for last several decades and for such conduct, the City Civil Court has rightly rejected discretionary relief of temporary injunction.

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

10. There is no dispute to the position that the Plaintiff has been in possession of the suit since 20 April 1972. The eviction proceedings initiated

by the landlords has resulted in filing of two Consent Terms on 8 October 1996 and 7 April 2005. Since the Consent Terms dated 8 October 1996 could not fructify, the parties executed another set of Consent Terms on 7 April 2005. For the purpose of the present controversy, the Consent Terms dated 7 April 2005 are relevant. Under the Consent Terms dated 7 April 2005, Plaintiff agreed to acquire ownership in the flat on payment of amount of Rs. 13,75,000/-. The amount was to be paid to the Constituted Attorney of the Defendants on or before 30 June 2005. As observed above, there is debate between the parties about who is responsible for non-fulfillment of the conditions agreed in the Consent Terms. While the Plaintiff contends that he was ready and willing to pay the amount of Rs.13,75,000/- and that there was confusion about the exact person to whom the payment could be made, the Defendants alleged that the Plaintiff never intended to pay the said amount and raised false pretexts for the purpose of avoiding the payment. This is something which needs to be decided at the trial of the suit.

11. So far as the issue of maintainability of Plaintiffs' suit is concerned, reliance is placed on provisions of Order 23 Rule 3A of the Code, which puts a bar on a suit for a declaration that the compromise on which a decree is based was not lawful. Mr. Thorat has contended that the Plaintiff has

not seeking any declaration in respect of the Consent Terms. On the contrary the suit is filed for specific performance of the said Consent Terms. In this regard Mr. Dhole, has also fairly accepted the position that Consent Terms are nothing but a contract between the parties superimposed with the seal of approval of the Court. In this regard Mr. Dhole has placed reliance on the Judgment of the Apex Court in **Pushpadevi Bhaghat (D) Through Lrs. Vs. Rajinder Singh & Ors.** AIR 2006 SC 2628, in which it is held in Para 17 as under:

17. The position that emerges from the amended provisions of Order 23 can be summed up thus:

- (i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.
- (ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1 Order 43.
- (iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A.
- (iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. ***This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court.*** The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the con-

sent decree on 21-8-2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by the second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code.

(emphasis supplied)

12. Mr. Thorat has also placed reliance on the Judgment of learned Single Judge of this Court in **Adelia Dos. Remedios Vs. Anand Giri Kini (deceased by Lrs)** 2006 (1) Mah LJ 627 in which this Court recognized the concept of a suit for specific performance of a Consent Decree. This Court held as under:

“12. The said prayers conjointly read with the pleadings of the plaint make it clear that the suit filed by the plaintiff was in fact the suit for the specific performance of the consent decree dated 7-9-1981. As a matter of fact, during the course of arguments, the learned Counsel for the respondents submitted that it was true that the ‘said agreement’ referred to in the prayer relates to the consent decree dated 7-9-1981. Thus, there is no dispute before me that the plaintiff has sought specific performance of the consent decree dated 7-9-1981....”

(emphasis supplied)

Therefore, *prima facie* it appears that the suit filed by the Plaintiff for specific performance of the Consent Decree would be maintainable.

13. Mr. Dhole has raised a strenuous contention that Plaintiff’s suit for specific performance of Consent Terms is barred by the law of limitation. This again is an issue which needs to be decided by the City Civil Court, as the Plaintiff was litigating before the Executing Court as late as till 25 November

2016. Based on the observations made by the Appellate Bench of the Small Causes Court that Plaintiff can file a substantive Civil Suit for specific performance of the Consent Terms, the present suit appears to have been filed. Therefore, the issue of limitation in filing the present suit is something which needs to be decided by the Trial Court while deciding the Suit. At this juncture, I am concerned with the limited issue as to whether the Plaintiff can be granted any temporary injunction during pendency of the suit.

14. Perusal of the order passed by the City Civil Court would indicate that the reason for rejection of temporary injunction is the finding recorded by the City Civil Court about stay of execution proceedings by City Civil Court in a suit for specific performance of the consent terms. It appears that the City Civil Court has arrived at a finding that by filing a suit for specific performance of Consent Terms, the execution of decree cannot be stayed. Thus, a doubt has been entertained by the City Civil Court about maintainability of the suit filed by the Plaintiff. As observed above, *prima facie* it appears that the suit filed by Plaintiff would be maintainable and is not barred under the provisions of Order 23 Rule 2A of the Code.

15. The Plaintiff agreed to make payment of Rs.13,75,000/- on or before 30 June 2005. Till date, he has not made any payment towards said

sum to the Defendants. Plaintiff cannot continue to occupy the suit flat by delaying the payment under the Consent Terms indefinitely. Therefore, while granting protection in favour of the Plaintiff in regard to the possession of the suit flat, condition of deposit of amount of Rs.13,75,000/- with interest needs to be imposed. If compound interest of 9% is applied to the figure of Rs.13,75,000/- with effect from 30 June 2005, the Plaintiff would be required to pay approximately an amount of Rs.64,86,040/-. In my view therefore, considering the fact that the Appellant has been in settled possession of the flat since 20 April 1972 and the parties themselves agreed to settle the disputes by selling a flat to Plaintiff No.1 for an amount of Rs.13,75,000/-, the Plaintiff can be permitted to retain the possession of the Flat during pendency of the suit subject to deposit of amount of Rs. 65 Lakhs in the City Civil Court.

16. Mr. Thorat would submit that, during the course of hearing of the Notice of Motion, two Pay Orders for the sum of Rs.13,75,000/- and Rs. 9,00,000/- have been deposited by Plaintiff in the City Civil Court. He would submit that the said two pay orders have not been encashed. Mr. Dhole would submit that those pay orders were deposited in the City Civil Court in an unauthorized manner without there being an order to that effect by the Court. In my view, since the Plaintiff is directed to make deposit of Rs.

65,00,000/-, and since the pay orders have not been encashed, those two pay orders for Rs.13,75,000/- & Rs.9,00,000/- can be returned to the Plaintiff.

17. The Appeal thus partly succeeds, and I proceed to pass the following Order:

- i) Order dated 5 September 2023 passed by the City Civil Court is set aside.
- ii) There shall be temporary injunction in favour of the Plaintiff in terms of prayer Clauses (a) and (b) of the Notice of Motion No.1614 of 2023 during pendency of the suit on condition of Plaintiff depositing an amount of Rs.65 Lakhs in the City Civil Court within a period of four weeks from today. Once the deposit is made, the City Civil Court shall invest the amount in interest bearing deposits.
- iii) If Plaintiff makes any default in deposit of amount of Rs.65 Lakhs within the stipulated time, the interim protection granted in his favour shall cease to operate.
- iv) The two pay Orders deposited by Plaintiff shall be returned to him.
- v) The hearing of suit is expedited, and the City Civil Court shall make an endeavour to decide the suit as expeditiously as possible, preferably within a period of two years from today.

18. With the above directions, the Appeal is disposed of. There shall be no orders as to costs. In view of disposal of Appeal, Interim Application stands disposed of.

Later:

19. After the order was pronounced, Mr. Dhole would request that the operation of this order be stayed for a period of six weeks. As observed in the Judgment, Appellant is in settled possession of the suit flat since 20 April 1972. Therefore, staying this Order may entail Plaintiff's eviction. The request for stay therefore cannot be granted and is rejected.

(SANDEEP V. MARNE, J.)