

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.908 OF 2023
WITH
INTERIM APPLICATION NO.16842 OF 2023
IN
APPEAL FROM ORDER NO.908 OF 2023

Kanika Builders and DevelopersAppellant/Applicant
V/S

Rajkumar Bhagwandas Dulhani & Anr.Respondents

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Mr. Bhooshan R. Mandlik for the Appellant/Applicant.

Mr. S.R. Ganbavare a/w Mr. Kush M. Lahankar i/b Mr. Vikrant Desai for
Respondents.

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CORAM: SANDEEP V. MARNE, J.

DATE : OCTOBER 31, 2023.

P.C.:

1 By this Appeal, the Defendant No.1/Appellant challenges order dated 30 September 2023 passed by 2nd Joint Civil Judge Senior Division, Kolhapur allowing application-Exhibit-50 filed by the Plaintiff under provisions of Order XXXVIII, Rule 5 of the Code of Civil Procedure, 1908 (**the Code**) for attachment of properties of the Defendants and the order passed on 30 September 2023 on application at Exhibit-60 striking out the defence of the Defendant No.1/Appellant.

2 I have heard Mr. Mandlik, the learned Counsel appearing for the Defendant No.1/Appellant and Mr. Ganbavare, the learned Counsel appearing for the Plaintiff.

3 The Plaintiff has instituted Special Civil Suit No.215 of 2020 against the Defendants inter alia for recovering an amount of Rs.1,11,00,000/- due under the Development Agreement. Plaintiff filed application for temporary injunction at Exhibit-5 for directing the Defendants to furnish cash security. That application was rejected by the Trial Court against which the Plaintiff has instituted Miscellaneous Civil Appeal No.8 of 2022 before the District Court. The District Court passed an order on 30 March 2022 in Miscellaneous Civil Appeal No.8 of 2022 directing Defendant No.1/Appellant to furnish cash security in the form of bank guarantee for a sum of Rs.1,00,00,000/-. The Defendant No.1/ Appellant has filed Writ Petition in this Court challenging the order passed by the District Court. Since the Defendant No.1/Appellant failed to submit cash security as directed by the District Court, the Plaintiff made application under Order XXXVIII Rule 5 of the Code for attachment of his properties. By the order impugned in the present Appeal the Trial Court has directed that the properties bearing Flat Nos.A-401, A-402 and B-401 in the building Raya Lifestyle Apartment be attached. The Defendant No.1/ Appellant is aggrieved by the order dated 30 September 2023 has filed the present Appeal.

4 It is submitted on behalf of the Defendant No.1/Appellant that the order passed by the District Court is under challenge before this Court in Writ Petition No.11919 of 2022 and is yet to attain finality. That therefore the Trial Court could not have proceeded to pass an order of attachment under Order XXXVIII Rule 5 of the Code. It appears that Writ Petition

No.11919 of 2022 was moved before this Court on 13th October 2022 and the learned Counsel appearing for the Petitioner therein, after taking instructions from Defendant No.1/Appellant, did not press any interim relief in that Petition. He also sought time to comply with the order passed by the District Court. Therefore, mere pendency of Writ Petition No.11919 of 2022 would not act as a stay to the order passed by the District Court. In fact, despite seeking time from this Court to comply with the order of the District Court, the Defendant No.1/Appellant failed to furnish the cash security as directed by the District Court.

5 Mr. Mandlik would further submit that the order passed by the District Court on application at Exhibit-50 cannot be treated as an order passed under sub-rule 1 of Rule 5 of Order XXXVIII of the Code. He would submit that unless a specific order is passed under Order XXXVIII Rule 5(1) of the Code the order of attachment cannot be made under Order XXXVIII Rule 5 (4) of the Code. I am unable to agree. The District Court, by order dated 30 March 2022 has specifically directed the Defendant No.1/Appellant to furnish a cash security of amount of Rs.1,00,00,000/-. That order would be in the nature of an order passed under Order XXXVIII Rule 5(1) of the Code. Therefore, all the pre-conditions for passing an order of attachment were satisfied.

6 So far as the order passed by the Trial Court on application at Exhibit-60 striking out the defence of the Defendant No.1 is concerned,

I do not find any error in the order in view of admitted breach of the order passed by the District Court on 30 March 2022 on the part of Defendant No.1/ Applicant. Except raising technical plea, the Appellant/ Defendant No.1 has not been able to offer any cogent reasons for failure to comply with the order passed by the District Court on 30 March 2022. Considering the conduct of Defendant No.1/Appellant in seeking time before this Court to comply with the order and later failing to comply with the same, the Trial Court has rightly passed an order striking out the defence of the Defendant No.1/Appellant.

7 I, therefore, do not find that any patent error is committed by the Trial Court in passing the order dated 30 September 2023. The Appeal is devoid of merits and is dismissed without any order as to costs.

8 In view of the disposal of the Appeal from Order, the Interim Application is also disposed of accordingly.

(SANDEEP V. MARNE, J.)