

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10685 OF 2019
WITH
INTERIM APPLICATION NO. 13847 OF 2023
WITH
INTERIM APPLICATION NO. 15940 OF 2023

Marubai Narayan Thakur & Ors. .. Petitioners
Versus
Neha Enterprises .. Respondent

WITH
WRIT PETITION NO. 10374 OF 2019
WITH
INTERIM APPLICATION NO. 13846 OF 2023
WITH
INTERIM APPLICATION NO. 15938 OF 2023

Marubai Narayan Thakur & Ors. .. Petitioners
Versus
Neha Enterprises .. Respondent

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- Mr. Narendra V. Walawalkar a/w Mr. Suresh Sabrad, Mr. Amey Sawant and Ms. Gracy Saldanha for Petitioners
 - Mr. Harsh Nishar a/w Ms. Vandana Bait for Petitioner No. 4 and Applicant in IA/15940/2023 & IA/15938/2023
 - Mr. Pradeep Dalvi a/w Mr. Amey Deshpande for Respondent
 - Mr. Tejesh Dande a/w Mr. Bharat Gadhavi for Applicant in IA/13847/2023 & IA/13846/2023

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 02, 2024

P. C.:

1. Heard Mr. Walawalkar, learned Senior Advocate for Petitioners;
Mr. Nishar, learned Advocate for Petitioner No. 4 and Applicant in

IA/15940/2023 & IA/15938/2023; Mr. Dalvi, learned Advocate for Respondent and Mr. Tejesh Dande for Applicant in IA/13847/2023 & IA/13846/2023.

2. Both Writ Petitions are disposed of by this common order. For convenience and reference, facts in Writ Petition No. 10685 of 2019 are referred to hereunder.

3. Writ Petition No. 10685 of 2019 takes exception to the order dated 18.10.2016 passed by the learned Civil Judge Senior Division, Panvel in Applications below Exhs. 1 and 12 in Special Darkhast No. 27/2011. By the said order, learned Trial Court has rejected the objection below Exh. 12 filed by the Petitioner praying for dismissing the Execution Application filed by the Respondent in view of the conduct of the Respondent of having not performed the terms of the consent agreement.

4. Briefly stated, the facts in the present Writ Petition are as under:-

4.1. Special Civil Suit No. 373/2006 was filed by Respondent (Org. Plaintiff) M/s. Neha Enterprises against Narayan Raghunath Thakur & four others being Defendants therein seeking specific performance of Agreements i.e. Memorandum of Understandings (MOUs) dated 25.12.2003 and 09.10.2004 executed between the parties. After filing

of the Suit, both parties compromised the Suit and filed Consent Terms which were taken on record resultantly drawing the Consent Decree dated 24.11.2006. There were certain terms and obligations stated in the Consent Terms i.e. Plaintiff shall pay to the Defendants a total amount of Rs. 37,50,000/- which would exclude Rs. 6,74,500/- already paid to the Defendants. The schedule for payment of the balance amount was enumerated in the Consent Terms whereby the payment was to be effected in three installments on the happening of certain incident / events which were the obligations to be executed by Defendants towards Plaintiff. There is no dispute with respect to the Consent Terms. The dispute between the parties, has however arisen thereafter. Though there are strict timeline given for the parties for effecting the balance payment of 50%, 40% and 10% at three different intervals on the happening of certain specific events, it is seen that substantial time passed thereafter. It is contended by Petitioner who is Defendant No. 2 before the Executing Court that in the interregnum, there was a novation of the compromise decree and the amounts stated therein arrived at between the parties and the parties entered into an Agreement dated 05.02.2008 whereby it was agreed by the Plaintiff to pay to the Defendants a sum of Rs. 50,00,000/- as and by way of increased consideration. In that regard, parties have also agreed to the new terms and had decided to file

compromise pursis dated 24.11.2006 in Court. Such are the averments made in the Objection Application before the Executing Court by the Defendants. Defendants filed Objection Application below Exh. 1 raising objection to the execution of the Consent Decree by Plaintiff on the ground that in view of the transaction amount having been increased and the new Agreement between the parties now been substituted in place of the Consent Terms, it was obligatory on the part of the Plaintiff to pay not only the balance amount but also the increased amount.

5. Mr. Walawalkar, learned Senior Advocate appearing for Petitioners Defendants has drawn my attention to the Application filed the Plaintiff. It is at Exh. I, page Nos. 121-122 of the Petition. He would submit that in response to that Application, an Objection Application was filed by Defendants. In the first instance, Mr. Walawalkar would submit that considering that execution of the compromise decree is sought for by both the parties before the Executing Court, both parties will have to be looked at from the perspective of being a judgment debtor and no one party can claim to be a decree holder. He would so submit in view of the fact that according to Defendants despite the novation, the increased amount of compensation agreed has not been paid over to the Defendants. Hence the objection is raised in response to the Application by the

Defendants. In the objection raised, paragraph Nos. 16, 17 and 35 are relevant which read thus:-

“16. The Respondents state that the Applicant called the Respondents in her house and asked further time to complete the transaction. The Respondents state that after due discussion between the Applicant and the Respondents it was agreed between them that the Respondents will grant her one and half year time for completing the transaction and in return of that the Applicant shall pay them sum of Rs. 50,00,000/- (Rupees Fifty Lakh Only) as and by way of increased consideration of the plots. The Respondents state that it was further agreed between the Applicant and the Respondents that the time and payment will be the essence of the contract.

17. The Respondents state that it was agreed between the Applicant and the Respondents to substitute the agreement dated 09.10.2004 and compromise pursis dated 24.11.2006 by the new agreement dated 05.02.2008.

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35. The compromise decree has been substituted by new agreement dated 05.02.2008 hence this Hon'ble Court has no jurisdiction to try and entertain the present application.”

5.1. On the basis of the above case, it is contended by Defendants who are Petitioners before me that they raised a specific objection that the increased amount was not paid over to them. In order to support the above submissions, Mr. Walawalkar has drawn my attention to the averments made in paragraph No. 18 of the Objection Application wherein it has been stated by Defendants that Plaintiff had handed over two cheques bearing Nos. 296510 and 296511 dated 05.02.2008 and 15.02.2008 drawn on Shamrao Vithal Co-op. Bank, Vashi Branch for Rs. 2,00,000/- and ____ (amount which is not stated) to the Respondents. He would submit that these cheques were given for effecting the balance increased payment which was agreed upon by

the parties in view of the Agreement dated 05.02.2008. Such is the averment made in paragraph No. 18. Paragraph No. 19 takes the case of the Defendants further. It is contended by Defendants that over and apart from the compromise amount of Rs. 37,50,000/- as stated in the Consent Terms, it was in fact agreed between the parties that the additional increased amount of Rs. 50,00,000/- will be paid to the Defendants. It is also stated in the Objection Application that Plaintiff required at least six months time for effecting the increased payment and only thereafter the allotment of the plot would be effected by the Defendants on the name of the Plaintiff.

6. With the above case, Objection Application was considered by the learned Executing Court. Learned Executing Court however held that any adjustment of the claim can certainly be recorded by the Executing Court, however for that sake either the decree holder must acknowledge such an adjustment subsequent to the decree or the judgment debtor must present before the Executing Court adequate relevant documents pertaining to adjustment made under O. XXI, R. 2 of the CPC. Since mere averments are made in the Objection Application filed by Defendants, learned Executing Court held that provision of sub-clause 2(a) of Rule 2 of Order XXI preclude the Court from recording any such adjustment merely on the basis of averments made in the Application and which are not proved by way of any

writing between the parties or documentary evidence. Hence, the Executing Court rejected the objection filed by Defendants in response to the Application filed by the Plaintiff.

7. ***PER CONTRA***, Mr. Dalvi has made two specific submissions. According to him, Plaintiff has paid the entire amount of Rs. 37,50,000/- as agreed between the parties under the Consent Terms dated 24.11.2006. He would submit that such payment of Rs. 37,50,000/- was effected between 2002 and 2011 to the Defendants per se to the effect of Rs. 30,45,500/-. He would next submit that balance amount of Rs. 7,04,500/- has been deposited in the Executing Court. The next averment made by Mr. Dalvi is significant. He would submit that in the impugned order passed by the learned Executing Court, it is clearly recorded that the decree holder has denied the existence of novation i.e. subsequent agreement between the parties.

8. *Prima facie*, it is seen that after the Application was filed by the Plaintiff merely seeking permission of the Executing Court to deposit the balance amount of Rs. 7,04,500/-, the Objection Application was filed by Defendants. What I see from the Application is that though substantial averments are made in paragraph Nos. 16 to 24 of the said Application about all subsequent events which transpired after execution of the Consent Terms in 2006 and upto 2011, no documentary evidence or material has been placed on record before

the Executing Court. In that view of the matter, the Executing Court is of the opinion that the entire objection raised by Defendants has to fail.

9. Mr. Walawalkar would submit that in view of the subsequent adjustment having taken place between the parties, a substantial opportunity should be given to the Defendants to prove their case of novation before the Executing Court. He would submit that opportunity should not be denied to Defendants who in view of novation between the parties are entitled to receive a much larger and further amount. In that view of the matter and after hearing Mr. Walawalkar and Mr. Dalvi, I am of the opinion that the impugned order though has been passed correctly on the premise that the parties have failed to place before the Executing Court the relevant documents / material evidence. However in view of the averments made in the Objection Application to the execution proceedings, one opportunity is required to be given to the Petitioners who are Defendants to file an appropriate Application before the Executing Court as available to them in law and place on record all such relevant material with respect to novation as also the details of the monies which have been received subsequently by them in the interregnum and their outstanding claim from the Plaintiff. If such Application is filed by the Petitioners / Defendants before the Executing Court, the

same shall be dealt with by the concerned Executing Court strictly in accordance with law and the provisions of O. XXI, R. 2 of the CPC after hearing the Plaintiff. Once again it is clarified that since this is a compromise decree and the effect of the compromise decree is being agitated by the parties, both parties are in the shoes of judgment debtors in the present case and both parties will have to plead their respective obligations as stated in the Consent Terms / Consent Decree dated 24.11.2006 and the adjustment, if any made thereafter, and if so proved by the Defendants. The learned Executing Court shall determine the Application of Defendants in accordance with law.

10. In view of the above observations and findings, order dated 18.10.2016 impugned in the present Petition is quashed and set aside. Order dated 10.11.2016 directing Court Commissioner to get the decree executed is directed to be held in abeyance. Necessary directions are passed hereinunder. The Application filed by Plaintiff seeking deposit of an amount of Rs. 7,04,500/- has already been allowed and the amount has already been deposited. Hence that Application gets worked out. In so far as the objection of Defendants i.e. Petitioners before me to the execution proceedings is concerned, as delineated herein above, Defendants are given one opportunity to file an appropriate Application in accordance with law in order to prove novation as also further adjustment of the total amount as agreed

between the parties relating to the increased consideration, strictly in accordance with law.

11. In view of this order, the Application which has been made by the Plaintiff under O. XXI, R. 2 of the CPC seeking execution of the decree through the Court Commissioner and which is allowed by the Executing Court by order dated 10.11.2016, it shall be deferred until the above Application is filed by the Defendants and subject to the decision in that Application. The said Application will be decided in accordance with law.

12. Mr. Walawalkar would submit that the Application shall be filed by the Defendants within a period of six weeks from today. Needless to state that if such Application is filed, opportunity is required to be given to the Plaintiff to rebut. Such opportunity shall be given to the Plaintiff. It is however clarified that if such an Application is made, the same shall be determined as expeditiously as possible and in any event within a period of six months from the date of filing of the Application.

13. It is clarified that the Court Commissioner which has been appointed by the Executing Court shall hold his hands until determination of the Application filed by the Defendants seeking the alleged adjustment of the total amount.

14. All contentions of both the parties are expressly kept open before the Executing Court.

15. In view of the above directions, both Writ Petitions i.e. Writ Petition Nos. 10685 of 2019 and 10374 of 2019 stand disposed. All Interim Applications i.e Interim Application Nos. 13847 of 2023, 15940 of 2023, 13846 of 2023 and 15938 of 2023 are accordingly disposed.

Amberkar

[MILIND N. JADHAV, J.]

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by RAVINDRA
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