

AGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6277 OF 2024

Shivaji Jaywant Takalkar ... Petitioner
V/s.
Ravindra Lalchand Karnawat & Ors. ... Respondents

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Mr. Namitkumar Pansare i/by Mr. Drupad S. Patil for
the petitioner.

Mr. Prajakt Arjunwadkar for the respondents.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 13, 2024

P.C.:

1. **Rule.** By consent of learned counsel for the parties, rule is made returnable forthwith.
2. The present writ petition challenges the order passed by the Trial Court, whereby the petitioner's application under Order 39 Rule 11 of the Code of Civil Procedure, 1908, seeking to strike out the defense of Defendant No.5 (Respondent No.1) for failure to comply with the assurance/undertaking recorded by the Court, was rejected.
3. The facts material to the determination of the issue are as follows:

The suit property is Gat No. 351, admeasuring 0-H-52-R,

situated at Village Padali, Rajgurunagar, Khed, District Pune. Respondent Nos. 2 to 5 agreed to sell the suit property to the petitioner for a consideration of Rs. 1,25,000/-. In pursuance thereof, they executed a registered agreement to sell on 7th January 2005 in favor of the petitioner. Prior to the execution of the sale deed, permission from the Collector was required under the provisions of the Maharashtra Land Revenue Code, 1966, and the said process was ongoing. As per the petitioner, at the time of execution of the agreement to sell, Rs. 75,000/- was paid as earnest money, and an additional Rs. 1,03,000/- was paid for obtaining the necessary permission from the revenue authority for the sale deed's execution.

4. On 20th February 2019, the petitioner approached Respondent Nos. 2 to 5 for the specific performance of the agreement to sell. However, Respondent Nos. 2 to 5 evaded the execution of the conveyance. Consequently, the petitioner issued a legal notice on 2nd March 2019, demanding specific performance of the agreement dated 7th January 2005.

5. On 5th April 2019, the petitioner filed Regular Civil Suit No. 119 of 2019 for specific performance of the agreement to sell dated 7th January 2005. During the pendency of the said suit, Respondent Nos. 2 to 5 executed a registered sale deed on 7th April 2022 in favor of Respondent No.1. The petitioner subsequently filed an application to implead Respondent No.1 as a party-defendant. On 2nd July 2022, the petitioner filed an application for a temporary injunction against Respondent No.1, restraining him from creating third-party rights over the suit property. On 30th July 2022, Respondent No.1 filed his

written statement.

6. On 16th December 2022, the petitioner filed an application seeking a direction to Respondent No.1 to maintain the status quo concerning the suit property. On 2nd January 2023, the application for a temporary injunction was listed for hearing. Counsel for Respondent No.1 (Defendant No.5) sought an adjournment. However, when counsel for the petitioner prayed for ad-interim relief to maintain the status quo, counsel for Respondent No.1 made a statement that Respondent No.1 (Defendant No.5) did not intend to create any third-party interest in the suit property. The statement recorded by the Trial Court is as follows:

"02/01/2023

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Learned Advocate appearing for Defendant No.5 states that they do not intend to create any third-party interest in the suit property. Considering this submission and the reasons stated in the application, adjournment is granted. Order be noted.

Sd/- 2/1/2023

Noted.

Sd/- 2/1/2023

Sd/- Advocate for Plaintiff 2/1/2023"

7. The statement recorded on 2nd January 2023 by the Trial Court was neither withdrawn by Respondent No.1 nor modified by the Trial Court.

8. On 1st August 2023, Respondent No.1 filed an application under Exhibit-85, contending that the petitioner's application for a temporary injunction had become infructuous as Respondent No.1 had already sold the suit property.

9. Consequently, the petitioner filed an application under Order 39 Rule 11 of the Code of Civil Procedure, 1908, seeking to strike out the defense of Respondent No.1 (Defendant No.5) for breach of the undertaking. By the impugned order dated 11th January 2024, the Trial Court rejected the application. Hence, the present writ petition has been filed.

10. Learned counsel for the petitioner, relying on the judgment of this Court in *Sanjay Thakkar v. Bhojja Shantu Shetty & Anr.* (2023 (3) Mh.L.J. 281), submitted that Defendant No.5's act constituted a willful and deliberate breach of the undertaking given to the Trial Court. The Trial Court, therefore, erred in law by failing to exercise its jurisdiction under Order 39 Rule 11 of the Code of Civil Procedure, 1908. According to him, the solemn undertaking given by Defendant No.5, which was accepted by the Trial Court, remained in effect at the time of the sale deed's execution. In the absence of any legally permissible circumstances, the conduct of Defendant No.5 amounts to a willful and deliberate breach of the undertaking, as evidenced by the subsequent filing of a pursis before the Trial Court to have the injunction application declared infructuous.

11. In contrast, learned counsel for Respondent No.1, relying on the judgment of this Court in *Shaikh Samsul Hudda & Ors. v. M/s. Khayber Properties & Investment Pvt. Ltd.* (2003 (2) ALL MR 495), submitted that mere allegations of non-compliance with a court order do not mandate the initiation of penal proceedings unless the Court is satisfied that the breach was willful, deliberate, or intentional.

12. Learned counsel for Respondent No.1 further argued that, in the absence of a specific order restraining Respondent No.1 from creating third-party rights, the Trial Court was justified in rejecting the application under Order 39 Rule 11. Relying on the application under Exhibit-85, he submitted that the Trial Court was justified in dismissing the petitioner's application under Order 39 Rule 11 of the Code of Civil Procedure, 1908, and prayed for the dismissal of the writ petition.

13. Upon perusing the records, including the order dated 2nd January 2023, which contains the assurance given on behalf of Defendant No.5, it is evident that Defendant No.5, through his counsel, made a solemn statement before the Trial Court that no third-party interest would be created in the suit property. The said statement was clear and was not limited to a particular date. Therefore, the statement remained in force on the date of the sale deed's execution, i.e., 31st March 2023. Other than raising a technical plea that the statement recorded by the Court did not amount to an order, Defendant No.5 offered no valid justification for the execution of the sale deed in breach of the assurance given to

the Court. There is no dispute regarding the statement made on 2nd January 2023, nor of its knowledge by Defendant No.5. Further, no circumstances have been brought on record to demonstrate any compelling reasons that forced Defendant No.5 to execute the sale deed in contravention of the statement.

14. The purpose of Order 39 Rule 11 of the Code of Civil Procedure, 1908, is to preserve the sanctity of legal assurances and uphold the rule of law. Drawing an artificial distinction between the passing of an order and the recording of a statement/assurance not to create third-party interests, without sufficient explanation, would undermine the objective of Order 39 Rule 11 of the Code.

15. Moreover, Defendant No.5's subsequent conduct, as evidenced by the filing of a pursis on 1st August 2023, is significant. It suggests that the petitioner was not even aware of Defendant No.5's creation of third-party rights. Defendant No.5, by filing the pursis, indicated that the temporary injunction application had become infructuous due to the execution of the sale deed on 31st March 2023, further suggesting that Defendant No.5 had no intention of honoring the assurance given to the Court.

16. The approach of the Trial Court in rejecting the application under Order 39 Rule 11 on the ground that there was no explicit order directing Defendant No.5 to maintain the status quo or refrain from creating third-party interests is unsustainable. Once the Court records a statement in the

form of an assurance, such a party is obligated to abide by it unless explicitly relieved by the Court. There is no material difference, in the context of Order 39 Rule 11, between the recording of an assurance and an injunction order. In the absence of a reasonable explanation, Defendant No.5's conduct in creating third-party rights, in breach of the assurance given to the Court, constitutes willful and intentional disobedience of that assurance. Thus, the Trial Court erred in rejecting the application by holding that the petitioner had not established a prima facie breach of the undertaking.

17. The judgment in *Sanjay Thakkar (supra)* is directly applicable to the facts of the present case. In reliance upon a prior decision of this Court, this Court observed in paragraph 15 as follows:

"15. In the present case, there is a clear and willful breach of the undertaking provided to the trial court. It was a calculated act of deception by Defendant No. 2, who secured additional time from the court by submitting an undertaking in the form of a pursis and subsequently created third-party rights with respect to Shop No. 9. It cannot be argued that Defendant No. 2 coincidentally found a buyer for Shop No. 9 within two days. In fact, Defendant No. 2's own case is that the payments for Shop No. 9 were received by him prior to the filing of the pursis. This clearly indicates that Defendant No. 2 submitted the undertaking solely to avoid the issuance of a restraint order and, by taking advantage of the adjournment of the injunction application, proceeded to execute the sale deed."

18. In my view, the explanation provided by the defendants cannot be accepted as a justification for Defendant No. 5's conduct in creating third-party rights, particularly given that the nature of the suit was for specific performance of an agreement to sell.

19. The judgment in the case of *Shaikh Samsul Hudda (supra)* is inapplicable to the facts at hand, as I have already made a finding that Defendant No. 5's conduct was willful and intentional. In *Shaikh Samsul Hudda (supra)*, this Court held that mere non-compliance with an order is insufficient to initiate action under Order 39 Rule 11 of the Code of Civil Procedure, 1908, unless there is an element of willfulness, intention, or deliberateness on the part of the alleged contemnors.

20. Upon an overall assessment of the matter, I am satisfied that the disobedience by Defendant No. 5 was willful and intentional. The Trial Court was not justified in rejecting the application on the ground that, in the absence of a written order, action under Order 39 Rule 11 of the Code of Civil Procedure, 1908, could not be initiated. Accordingly, the following order is passed:

21. The Rule is made absolute in terms of prayer clauses (a) and (b).

22. The writ petition is accordingly disposed of in the above terms. There shall be no order as to costs.

23. At this stage, learned counsel for Respondent No. 1 seeks a stay on this order. However, in view of the reasons provided, no case for the grant of a stay has been made out. The request is therefore rejected.

(AMIT BORKAR, J.)