

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 822 OF 2024

Shri. Brijlal Mehrumal Jagwani ...Appellant
Versus
Prashant Prabhakar Deshpande And Others ...Respondents

Mr. Saurabh Patil for the Appellant.

CORAM : M.M. SATHAYE, J.
DATE : 11th DECEMBER 2024

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P.C. :

1. Heard learned counsel for the Appellant.
2. This appeal is filed challenging the order dated 15.07.2024 passed by 12th Joint Civil Judge, Senior Division, Pune in Special Civil Suit No. 1093 of 2024 below Application Exh. 135.
3. At the outset, it is necessary to clarify that this application below Exh.135 was filed seeking orders under Order 39 Rule 11 and order 39 Rule 2-A of the Code of Civil Procedure, 1908 ('CPC' for short). The application is rejected under the impugned order.
4. Considering the provisions of Order 43 Rule 1(r) of the CPC as applicable under Bombay Amendment, the appeal cannot be considered for order under Order 39 Rule 2-A of CPC because breach is not held as proved. To that extent, the impugned order is not considered and the Appellant is at liberty to take out appropriate proceedings in that regard.

5. However, the appeal is maintainable so far as order passed under Order 39 Rule 11 of CPC is concerned. Under said provision, the Court is empowered to dismiss the proceedings or strike out defence in case of breach of undertaking or contravention of order passed.

6. In the present application, the Appellant has prayed for striking out defence of Respondent Nos. 1 and 3.

7. Learned counsel for the Appellant pointed out that Respondent Nos. 1 and 3 are in breach of order dated 20.12.2022 passed in Writ Petition No. 6912 of 2015 under which the statement recorded in paragraph 4 of earlier order dated 31.08.2017 in same petition, was directed to be maintained till disposal of the suit. The statement reads as under:

“4. Mr. Godbole, learned Sr. Counsel appearing for the Respondent No.1 states that the suit property stands transferred to the Balaji Co-operative Housing Society of which Respondent No.1 is the Chairman. On instructions Mr. Godbole states that the Respondent No.1 as the Chairman of the Balaji co-operative Housing Society states that any construction activity done on the Suit property would be subject to the result of this Petition and that the Respondent No.1 alongwith the Housing Society would claim no equities.”

[Emphasis supplied]

8. According to the Appellant, Respondent Nos. 1 and 3 are constructing on the suit property illegally, when the subject matter property is in Appellant's possession.

9. The statement reproduced above is continued during the pendency of the suit, under the order of this Court. Carrying out construction activity, *per se*, would not amount to breach of this

undertaking or the order. If equities are claimed or if it is disputed that the construction is not subject to the result of the suit, then the question of breach would arise.

10. Viewed in light of what is stated aforesaid, when the impugned order is perused, it is seen that the statement recorded before this Court is properly considered and it is rightly held that no case is made out under Order 39 Rule 11 of the CPC.

11. In that view of the matter, the impugned order does not suffer from any perversity or error apparent on the face of record. No interference is called for. The Appeal from Order is dismissed.

12. It is clarified that the Appellant is at liberty to adopt appropriate proceedings against rejection of application under Order 39 Rule 2-A of the CPC under the impugned order.

13. All concerned to act on duly authenticated or digitally signed copy of this order.

(M.M. SATHAYE, J.)