

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 516 OF 2024
WITH
INTERIM APPLICATION NO. 10369 OF 2024

M/s. Jasa Lumbaji And Co. Thr. Partner Mr. ... Appellant
Hemant Mangilal Parmar
Versus
Kailas Rajaram Walekar ...Respondent

Mr. A.K. Chauhan a/w Rahul Chauhan with Mr. Jinay Jain for the
Appellant.
Mr. Kunal Mhaskar for Respondent.

CORAM : M.M. SATHAYE, J.
DATE : 25th NOVEMBER 2024

P.C. :

1. Heard learned counsel for the Appellants/original Defendants and learned counsel for the Respondent/Plaintiff.
2. The Appeal is filed challenging the Judgment and order dated 05.04.2024 passed below Exh.5 in Special Civil Suit No. 575 of 2023 by the 2nd Joint Civil Judge, Senior Division, Thane. By the said impugned order, the application filed by the Respondent/Plaintiff below Exh.5 is allowed, thereby restraining the Appellants/Defendants from dispossession or creating 3rd party interest in respect of suit property and the termination of MoU dated 02.11.2022 is stayed, till the decision of the suit.
3. Learned counsel for the Appellant has submitted that the

transaction is in respect of about 53 Acres of lands and for agreed consideration of different rates for different types of lands viz. Type A (suit property encroached and lost), Type B (encroachment free land which may or may not be in respect of the protected land) and Type C land (encroached lands which are falsely transferred in the name of tenant). He submits that under these transactions, he has only received Rs.74,06,000/-. He submits that the Respondent has not paid the amounts agreed and taken steps within time limit specified in the MoU. He further submits that the Respondent is illegally constructing on the part of the subject matter land and also selling the same. He submits that in such circumstances, the Appellants/Defendants had rightly terminated the MoU which should not have been stayed.

4. On the other hand, learned counsel for the Respondent invited this Court's attention to recitals in the MoU as well as registered Power of Attorney executed by the Appellant. He submitted that being transaction in respect of immovable property, unless the entire evidence about obligations/counter obligations is not considered, time cannot be considered as essence of contract at this stage. He further submitted that in furtherance of terms of MoU, infact for execution of agreement to sell of encroach-free land, the Respondent/Plaintiff had prepared a document and had paid stamp duty of 35 Lac. He submitted that payment of Rs.4,72,23,000/- by way of Demand Draft/cheques was kept ready and it was communicated to the Appellant but they did not complete the transaction about encroachment-free land. He submits that therefore, the Plaintiff was taking all necessary steps in furtherance of MoU. He submits that execution of basic documents is not disputed.

5. A contention is sought to be advanced by learned counsel for

the Appellants that the Respondent is illegally constructing on the subject matter property and selling the same which is occupied by third parties, for which the Appellant had filed Writ Petition No. 5359 of 2024 in this Court, in which Thane Municipal Corporation was directed to take appropriate legal action under order dated 01.07.2024. In reply, learned counsel for the Respondent submits that Thane Municipal Corporation has carried out necessary inquiry after the said order dated 01.07.2024 and has found that the Respondent has not carried out any illegal construction and he relies upon an order dated 29.07.2024 in support of his submission.

6. The scope of the present Appeal from Order cannot be enlarged to include the disputed questions of fact which has taken place after the impugned order is passed. Both, the order in Writ Petition No. 5359 of 2024 as well as order dated 29.07.2024 are passed after the impugned order is passed. In that view of the matter, it is not necessary for this Court to enter that controversy while deciding this Appeal from Order. If the Appellants are aggrieved by any action of the Respondent of alleged illegal construction and sale, appropriate application to the Trial Court for seeking necessary prayers can always be filed. It is not disputed that counter claim is already filed by the Appellants.

7. Learned counsel for the Respondent also submitted that after the impugned order, the Appellants have created 3rd party interest in respect of part of the suit property defying the injunction granted under the impugned order, for which necessary motion under Order XXXIX Rule 2-A of CPC has been filed, which is pending. These allegations of creating 3rd party interest after the impugned order, is disputed by the learned counsel for the Appellants. Once again, these facts being post

impugned order facts, it is not necessary for this Court to consider them in this Appeal from Order.

8. In the contentious facts and circumstances narrated above, I have considered the submissions and perused of impugned order.

9. The Trial Judge has considered and rightly so, that execution of MoU and Power of Attorney is not in dispute. Perusal of the MoU dated 02.11.2022 indicates that it is not a regular development agreement but certain specific terms and conditions are agreed between the parties considering peculiar nature of the suit property. The reply filed by the present Appellants to the Interim Injunction Application, indicates that in paragraph 9, it is clearly accepted that Rs.50 Lac were received as a part token amount upon execution of MoU and power of attorney and thereafter, in the month of June, 2023, the Appellants received further amount of Rs.50 Lac as remaining token amount. Involvement of third parties, either at the instance of Appellants or Respondent appear to be subject matter of pending applications/proceedings. From the MoU, the suit property clearly appears to be partially encroached with occupants/tenants etc. In such circumstances involved with the suit property (being immovable property), time can not be taken as 'essence of contract' at interim stage. The finding of the Trial Court about readiness and willingness shown by the Respondent, appears to be on the basis of record available before it. In such situation, the impugned order allowing the application, staying the termination of MoU as well as restraining the Appellant from creating 3rd party interest, cannot be faulted with or called perverse.

10. In that view of the matter, there is no merit in the Appeal, and the same is dismissed. In view of dismissal of the Appeal from Order, Interim Application is also dismissed.

11. At this stage, learned counsel for the Appellants seeks stay of this order so that the Appellant can challenge it further. Considering that the Appeal from Order is being dismissed, confirming the grant of injunction by Trial Court in April 2024, there is no 'operative order' that is being passed by this Court. Therefore, the request of stay is rejected.

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

(M.M. SATHAYE, J.)